NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 263

18 DECEMBER 2018

5 FEBRUARY 2019

RALEIGH
2020

CITE THIS VOLUME

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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

EMILY URQUHART AYSCUE, THOMAS MIZELL URQUHART, JR. AND BETSEY DERR URQUHART, PLAINTIFFS

v.

BURGES URQUHART GRIFFIN, JR. AND LOWGROUNDS LAND CO., LLC, DEFENDANTS

No. COA18-379

Filed 18 December 2018

1. Appeal and Error—interlocutory orders—substantial right—right to a jury trial—ultimate factual issue

An interlocutory order in a boundary dispute affected a substantial right and was immediately appealable where plaintiffs had demanded a jury trial and the trial court's order effectively mooted all of plaintiffs' claims by ruling on the ultimate factual issue of the location of the boundary line, without a jury trial.

2. Civil Procedure—motion for reconsideration—Rule 60(b)—surprise—conversion of motion in limine into bench trial

The trial court abused its discretion by denying plaintiffs' motion for reconsideration in a boundary dispute where it had improperly converted plaintiffs' motion in limine into a bench trial and decided the ultimate factual issue of the location of the boundary line. Because there was no notice or basis to know that the trial court would decide the location of the boundary line in the hearing calendared for the motion in limine (to consider plaintiffs' request that the court order the surveyor to disregard a certain map), the ruling constituted a surprise which ordinary prudence could not have guarded against under Civil Procedure Rule 60(b).

3. Trials—right to jury trial—on factual issues—waivers strictly construed

The trial court erred by determining the location of a boundary line without a jury trial where plaintiffs and defendants had both demanded a jury trial. The location of the boundary line was the ultimate factual issue in the action, and waivers of the right to a jury trial are strictly construed and not lightly inferred.

Appeal by plaintiffs from orders entered 1 December 2017 and 9 January 2018 by Judge Cy A. Grant in Bertie County Superior Court. Heard in the Court of Appeals 31 October 2018.

Batts, Batts & Bell, LLP, by Joseph G. McKellar and Joseph L. Bell, Jr., for plaintiff-appellant Emily Urquhart Ayscue.

Jones & Carter, P.A., by Ernest R. Carter, Jr. and Cecelia D. M. Jones, for defendant-appellees.

TYSON, Judge.

Emily Urquhart Ayscue ("Ayscue") appeals from an order determining the location of the boundary division line between her property and an adjoining tract. Ayscue also appeals from an order denying her Rule 60 motion for reconsideration. *See* N.C. Gen. Stat. § 1A-1, Rule 60 (2017).

I. Background

This case concerns a disputed boundary line between neighboring tracts of real property, both of which are located along a portion of the Roanoke River. Ayscue, Thomas Mizell Urquhart, Jr., and Betsey Derr Urquhart (collectively, "Plaintiffs") own one tract as tenants-in-common and an adjoining tract is owned by Lowgrounds Land Co., LLC ("Lowgrounds"), a North Carolina limited liability company. Burges Urquhart Griffin, Jr. is a member/manager of Lowgrounds. Plaintiffs and the individual defendant, Griffin, are family members.

Both Plaintiffs' and Defendants' tracts were originally portions of the estate of Burges Urquhart, who died in 1903. Plaintiffs and Griffin are descendants of Burges Urquhart. Upon Burges Urquhart's death, his real property was divided among his five children. Burges Urquhart's real property was divided through a plat map of the entire property prepared by surveyor, William Parker, and dated 5 December 1905 ("the Parker Plat"). The Parker Plat was filed in the Bertie County Registry and is recorded at Book 138, Page 183.

In 1965, L.T. Livermon, Jr., R.L.S., drew a new map of the Burges Urquhart tracts shown on the Parker Plat without re-surveying the property and recorded his map in the Bertie County Registry at Map Book 2, Page 106 ("the Livermon Map"). The 1965 Livermon Map includes an express disclaimer: "There was no error of closure calculated." It is unclear if the boundary lines of the respective tracts shown, including the subject properties, as depicted on the 1965 Livermon Map actually close.

In 2013, Plaintiffs hired surveyor Mark Pruden, R.L.S, to prepare a survey of the disputed boundary line as shown on the Parker Plat. Pruden conducted an initial survey and then a corrected version ("The Pruden Survey"). The Pruden Survey is recorded in the Bertie County Registry at Map Book 13, Page 820. The Pruden Survey displays the boundary line between the parties' properties lying between two points east of a pond called "Blue Hole." Pruden testified in a deposition that he had determined the boundary line of the respective tracts by using the same bearing as the boundary line on the 1905 Parker Plat. The Pruden Survey depicts the common boundary line of the respective properties as having the bearing of N 27°30'00" W, which is equivalent to the bearing of "S 27 ½ E" for the boundary line shown on the Parker Plat. The Pruden Survey does not depict the boundaries of all of Plaintiffs' and Defendants' properties, does not demonstrate any error of closure, and shows only the disputed boundary line and southern border of Plaintiffs' property. Pruden's testimony does not indicate he surveyed each of the parties' tracts in their entirety.

Defendants hired surveyor, Randy Nicholson, R.L.S., to map the location of the boundary line in late 2013. Nicholson's map ("the Nicholson Map") shows the purported boundary line as contended by Plaintiffs and Pruden. The Nicholson Map indicates and locates the actual boundary line as lying between two points situated west of the boundary line shown on the Pruden Survey and as contended by Plaintiffs.

On 26 February 2014, Plaintiffs filed a complaint alleging Defendants "came onto Plaintiffs' property without permission and cut down trees and other vegetation on approximately three and one half acres . . . of Plaintiffs' property near the boundary line between Plaintiffs' and Defendant Lowgrounds's property" shortly before April 2013.

Plaintiffs' complaint asserts claims for quiet title, trespass to land, and recovery of statutory double damages for "the value of the timber, shrubs, wood and trees injured, cut or removed from their [p]roperty" pursuant to N.C. Gen. Stat. § 1-539.1. Plaintiffs' complaint demands "a jury trial on all issues of fact to which they are so entitled."

Defendants filed their answer and asserted, in part, that the property Plaintiffs' alleged Defendants trespassed upon is actually owned by Lowgrounds. Defendants also demanded in their answer "a jury trial on all issues of fact to which they are so entitled."

On 11 March 2015, the trial court entered a consent order ("the Consent Order") to appoint surveyor Paul Toti, R.L.S., to "go upon the lands, find, mark and prepare a plat showing *where on the ground said boundary lines exist*" as shown on the Parker Plat. (Emphasis supplied). The Consent Order provides, in relevant part: "The parties agree that the survey, when completed may be used by the Court in determining the issues presented in the instant action."

On 1 July 2016, before Toti had completed his survey, Plaintiffs filed a motion *in limine* to request an order instructing Toti to disregard the Nicholson Map in preparing his survey. Plaintiffs argued the line depicted on the Nicholson Map, which Defendants contend is the correct line, was based upon incompetent evidence, which Toti should not have considered in conducting his survey.

Plaintiffs alleged that Toti presumed that the Nicholson Map was prepared by Nicholson after conducting an actual survey. Plaintiffs attached the deposition transcript of Nicholson to their motion *in limine* and argued Nicholson did not perform an "actual survey" to prepare his map, They assert Nicholson located and mapped the physical markings, stakes, and paint marks on trees that he had found and located in the field.

On 7 November 2016, the trial court entered an order concluding Plaintiffs' motion *in limine* was premature because Toti had not yet completed his survey, and dismissed their motion without prejudice. The trial court's order further stated: "THAT upon the filing of said Toti Survey, should plaintiffs' determine that their motion should then be heard, the Court will entertain plaintiffs' motion at that time."

After Toti had completed and presented his survey, Plaintiffs re-filed their motion *in limine* and the trial court held a hearing on 16 March 2017. At the hearing, the court heard the testimony of Thomas Mizell Urquhart, Jr., and Toti. At the conclusion of the hearing, without ruling upon Plaintiffs' motion *in limine*, the trial court orally rendered a ruling that the boundary line advocated by Defendants, as shown on the Nicholson Map, was the correct boundary line between the parties' properties.

The trial court entered a written order on 1 December 2017, determining the final division boundary line between the parties' properties

("the Division Order"). The trial court made, in part, the following findings of fact:

> 1. That pursuant to the Order of the court entered in this matter by consent of the parties, Paul J. Toti, obtained documents related to the assignment made in the Order from the records available at the Courthouse in Bertie County, including copies of the 1905 Parker Map as recorded in the office of the Register of Deeds of Bertie County . . . and other maps recorded in the office of the Register of Deeds of Bertie County prepared by Mark Pruden and Randolph Nicholson, both surveyors previously employed by the opposing parties in this matter.
>
> 2. That as a result of the research and the documents procured by Paul J. Toti, particularly relative to the order to conduct a survey of the real property shown on the 1905 Parker Map relative to the properties owned by the parties known as "No. 1 Gorden Land" and "No. 2 Gorden Land"(hereinafter the Property) and to go upon the lands and find, mark, and prepare a new plat showing where on the ground said boundary lines exist as depicted in the 1905 Parker Map, Paul J. Toti did go upon the lands and did, using his knowledge and skills as a registered land surveyor, *attempt to comply* with the Order by providing to the Court a map of his survey and he did file and submit to the Court such map of his survey of the subject Property, hereinafter termed Court Ordered Survey, showing thereon, in addition to exterior boundary lines of the whole tract as it currently exists, but also indicating thereon, two distinct sets of courses and distances which the parties, on maps filed by Pruden and Nicholson, have contended to be the correct division boundary between the properties of the parties[.] (Emphasis supplied).
>
> 3. That in the process of completing the work assigned by the Court, Toti was not able to re-create the 1905 map in large part because of deficiencies with certain portions of that map that omitted distances, courses, and other matters that would have provided clear and documented evidence of the division line in question, particularly his inability to locate the "warehouse" which was noted on the 1905 [Parker] map as a relevant physical monument for the division line in question.

4. That in the review of the Pruden maps and Nicholson maps, relative to the process, Toti indicated that while the Pruden maps were mathematically correct, they were not surveys of the relevant tracts and they did not attempt to "close" or otherwise graphically resolve the issues that were obvious from the deficiencies found in attempting to re-create on the ground the 1905 map as directed to him in the Court's prior order.

5. That Toti stated that in his professional opinion, the Nicholson map of the property of the Defendant, Lowgrounds Land Co., LLC, was a graphically correct representation of the 1905 map and the division line between the tracts identified thereon as "No. 1 Gorden Land" and "No. 2 Gorden Land", and that the monumentation that was found by Toti while in the act of surveying the properties on site, as noted on the Court Ordered Survey provided to the Court in this matter, and the "graphic" match of the 1905 map to his graphic representation on the Court Ordered Survey, lead to his conclusion that the line represented on the Court Ordered Survey with points marked "G" to "C" is the proper division line of the properties identified on the 1905 map as "No. 1 Gorden Land" and "No. 2 Gorden Land".

6. That Toti stated that in his professional opinion, after completion of the work necessary to prepare the Court Ordered [S]urvey provided to the Court in this matter, as a surveyor, he was bound to try to reconcile all of the evidence that was available and that based upon his review of the proceedings from which the 1905 map arose, the notations that appeared on such map, the use of the properties with regard to location of croplands and visible growth lines of trees where the properties had been timbered, *it was his opinion that the line he had marked as "G" to "C" reflected the intention of the predecessors in title to divide the tracts indicated thereon as "No. 1 Gorden Land" and "No. 2 Gorden Land" into two tracts of nearly equal acreage in spite of the fact that the current relative acreage of the tracts owned by the Plaintiffs and Defendant, Lowgrounds Land Co., LLC, are no longer equal.* (Emphasis supplied).

> 7. *That based upon the testimony and exhibits presented by Toti, the Court finds that the line which is marked "G" to "C" on the Court Ordered [S]urvey provided to the Court in this matter by the Court surveyor, is the division line between the properties of the Plaintiffs and the Defendants for purposes of this proceeding.* (Emphasis supplied).
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> . . .
>
> Based on the foregoing Findings of Fact, the Court concludes that it has jurisdiction to enter an order in this matter, and in the exercise of its judicial discretion, the Court concludes that the Court Ordered [S]urvey rendered to this Court in this matter by Paul Toti, which survey is incorporated herein by this reference, property reflects the properties directed to be surveyed by the prior Consent Order in this matter, and that the line marked thereon represented as lying between the points marked "G" to "C" is the division line between the properties of the Plaintiffs and the Defendants for purposes of this proceeding.

Also, based upon its findings of fact and the Toti Survey, the trial court decreed that the purported boundary line depicted on the Nicholson Map, which is the line advocated by Defendants, was the division line between the parties' properties.

Plaintiffs filed a Rule 60 motion for reconsideration of the trial court's Division Order determining the division line. *See* N.C. Gen. Stat. § 1A-1, Rule 60. In their motion for reconsideration, Plaintiffs contended the trial court improperly converted the hearing on their motion *in limine* into a bench trial without prior and proper notice. Plaintiffs' motion for reconsideration also asserted that the Division Order foreclosed a hearing on their motion *in limine* as well as a jury trial on the ultimate issues of fact and their remaining claims.

A hearing was conducted upon Plaintiffs' motion for reconsideration. On 9 January 2018, the trial court denied the motion for reconsideration. Ayscue filed notice of appeal of the trial court's order determining the final division line. All Plaintiffs, including Ayscue, filed notices of appeal of the trial court's order denying their motion for reconsideration. Only Ayscue filed an appellant brief with this Court.

II. Jurisdiction

[1] Ayscue contends the trial court's Division Order and order denying Plaintiffs' motion for reconsideration "have effectively mooted Plaintiffs' claims, disposed of all issues, and obviated the need for a jury trial, and thus these Orders operate as a final judgment." The orders appealed from do not expressly or directly address Plaintiffs' claims for quiet title, trespass to land, and associated claims for punitive and statutory double damages; however, Plaintiffs' claims asserted in their complaint are all premised upon Plaintiffs' allegations that Defendants' were trespassing and foresting, injuring, cutting, or removing timber, shrubs, woods, and trees upon Plaintiffs' property. The trial court did not certify the orders for immediate appeal. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017). As the trial court's orders did not expressly rule upon or dispose of Plaintiffs' claims, Ayscue's appeal is subject to challenge for being interlocutory. Defendants do not raise this issue in their brief nor have they filed a motion to dismiss Ayscue'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." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). Generally, there is no right to an immediate appeal of an interlocutory order. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

However, "immediate appeal is available from an interlocutory order . . . which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); *see also* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2017). In determining the appealability of interlocutory orders under the substantial right exception, we utilize a two-part test: (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." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5-6, 362 S.E.2d 812, 815 (1987). "The right to a jury trial is a substantial right of great significance." *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975), *disc. review denied*, 289 N.C. 140, 220 S.E.2d 798 (1976).

The trial court's Division Order has effectively mooted all of Plaintiff's claims because, under the boundary line established by the trial court, Defendants were not cutting trees nor trespassing on Plaintiffs' alleged side of the boundary. Many prior precedents of the Supreme Court of

North Carolina and this Court have recognized the issue of "[w]hat are the boundaries is a matter of law to be determined by the court from the description set out in the conveyance. Where those boundaries may be located on the ground is a factual question to be resolved by the jury." *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959); *see Chappell v. Donnelly*, 113 N.C. App. 626, 630, 439 S.E.2d 802, 805 (1994) (quoting *Batson*); *Young v. Young*, 76 N.C. App. 93, 95, 331 S.E.2d 769, 770 (1985) ("the question of what are the termini or boundaries presents a question of law for the court, while the question of where the boundaries or termini are located on the ground is generally a question of fact for the jury." (citations omitted)).

The trial court's Division Order showed it relied upon Toti's opinion that the line shown on the Nicholson Map and as advocated by Defendants is the correct boundary line. The Division Order effectively mooted all their claims and denied and deprived Plaintiffs' of their right to a jury trial on the factual issue of the "on the ground" location of the true boundary line. *See Batson*, 249 N.C. at 719, 107 S.E.2d at 563.

Even though the 16 March 2017 hearing was only noticed to be on Plaintiffs' motion *in limine*, the trial court did not rule on the motion *in limine* but instead ruled on the ultimate factual issue of the location of the boundary line, without a jury trial.

The trial court's orders effectively mooted and resolved all of Plaintiffs' claims and denied the demands in both Plaintiffs' complaint and Defendants' answer for a "jury trial on all issues of fact to which they are so entitled." Without immediate appellate review, Ayscue's substantial right to a jury trial on the critical preliminary issue of the location of the boundary line on the ground is prejudiced. *Batson*, 249 N.C. at 719, 107 S.E.2d at 563; *Mathias*, 27 N.C. App. at 560, 219 S.E.2d at 647; *J & B Slurry*, 88 N.C. App. at 5-6, 362 S.E.2d at 815. Ayscue's appeal is properly before this court. *See Dep't of Transportation v. Wolfe*, 116 N.C. App. 655, 656, 449 S.E.2d 11, 12 (1994) ("since the trial court denied defendant's request for a jury trial the order affects a substantial right and is, therefore, immediately appealable." (citations omitted)). In the exercise of our discretion and in the interests of judicial economy, we review Ayscue's appeal on the merits.

III. Standard of Review

With regards to the trial court's denial of Plaintiffs' motion for reconsideration, Plaintiffs' motion does not cite to any rule of civil procedure as providing the basis for the motion. This Court has previously treated motions for reconsideration as being asserted under Rule of

Civil Procedure 60(b). *See, e.g.*, *Henderson v. Wachovia Bank of N.C.*, 145 N.C. App. 621, 626-28, 551 S.E.2d 464, 468-70 (analyzing defendant's "motion for reconsideration" of default judgment as motion for relief under Rule 60(b)), *disc. review denied*, 354 N.C. 572, 558 S.E.2d 869 (2001). "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)).

We review *de novo* the issue of the trial court's Division Order denying Plaintiffs' right to a jury trial. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.").

IV. Analysis

A. *Notice*

[2] Ayscue argues the trial court improperly converted the noticed hearing on Plaintiffs' motion *in limine* into a bench trial and improperly decided the factual issue of the location on the ground of the disputed boundary line. Ayscue contends the motion for reconsideration should have been granted, in part, on this basis. We agree.

North Carolina Rule of Civil Procedure 60(b) provides, in relevant part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for [m]istake, inadvertence, *surprise*, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (emphasis supplied).

"The surprise contemplated by the statute is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against." *Endsley v. Supply Corp.*, 44 N.C. App. 308, 310, 261 S.E.2d 36, 38 (1979) (quoting *Townsend v. Coach Co.*, 231 N.C. 81, 85, 56 S.E.2d 39, 42 (1949)).

On 18 January 2017, Plaintiffs filed a notice of hearing solely for their motion *in limine*. The notice of hearing specifically indicates that the hearing was to be upon the same motion *in limine* that the superior court had denied without prejudice on 7 November 2016.

The transcript from the 16 March 2016 hearing on Plaintiffs' motion *in limine* shows Plaintiffs had no prior notice the trial court was effectively conducting a bench trial on the issue of the on the ground location

of the boundary line. Plaintiffs' counsel clarified at the beginning of the hearing that he and Defendants' counsel were there on Plaintiffs' motion *in limine*.

Plaintiffs' had no prior notice or basis to know the trial court was going to issue a ruling on the location of the boundary line until the end of the hearing when the trial court ruled the location of the boundary line was the line advocated by Defendants.

No party had moved or prompted the trial court to rule upon the factual issue of the location of the true boundary line on the ground, nor did the trial court indicate it intended to rule upon the location of the boundary line on the ground, until it did so at the end of the hearing. The hearing on Plaintiffs' motion was only calendared to consider Plaintiffs' motion *in limine*. This ruling by the trial court constitutes a surprise which "ordinary prudence could not have guarded against." *Endsley*, 44 N.C. App. at 310, 261 S.E.2d at 38 (citation omitted). Plaintiffs' motion for reconsideration should have been allowed.

B. *Right to Jury Trial*

[3] Ayscue also argues the trial court "erred by determining the location of the boundary line without a jury trial and by denying Plaintiffs' requests for a jury trial." We agree.

Article I, Section 25 of the North Carolina Constitution provides that, "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25. North Carolina Rule of Civil Procedure 38 specifies the method by which a party is required to assert the right to trial by jury in civil litigation:

> (b) Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.
>
> . . .
>
> (d) . . . A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 38 (2017).

According to Rule of Civil Procedure 39, "When trial by jury has been demanded . . . [t]he trial of all issues so demanded shall be by jury, unless . . . [t]he parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court . . . consent to trial by the court sitting without a jury[.]" N.C. Gen. Stat. § 1A-1, Rule 39. Here, it is undisputed Plaintiffs and Defendants both demanded a jury trial in their pleadings "on all issues of fact to which they are so entitled" in accordance with Rule 38.

Defendants argue the Consent Order, agreeing for the court to appoint Toti, constituted a waiver by Plaintiffs of their right to a jury trial on the issue of the location on the ground of the disputed boundary line. The Consent Order states, in relevant part: "the parties agree that the [Toti] survey, when completed, may be used by the Court in determining the issues presented in the instant action."

This language from the Consent Order does not amount to a waiver of Plaintiffs' right to jury trial.

> 'It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. There can be no presumption of a waiver of trial by jury where such a trial is provided for by law. Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver.'

Mathias, 27 N.C. App. at 560, 219 S.E.2d at 647 (quoting *In re Gilliland*, 248 N.C. 517, 522, 103 S.E.2d 807, 811 (1958)).

The Consent Order does not state that the trial court may use the Toti Survey to resolve all *factual* issues, nor does the Consent Order refer to the parties' rights to jury trial, or any waiver thereof. *See id.* The Consent Order does not include a stipulation that the boundary line determined by Toti would constitute the true boundary line for all purposes of Plaintiffs' action and Defendants' answer. *See, e.g.*, *Moore v. Richard West Farms, Inc.*, 113 N.C. App. 137, 142, 437 S.E.2d 529, 532 (1993) (affirming the trial court's order establishing a boundary line when the parties agreed to be bound by a survey prepared by an independent surveyor). We do not extend by implication the language of the Consent Order to hold Plaintiffs had waived their right to a jury trial. *See Mathias*, 27 N.C. App. at 560, 219 S.E.2d at 647.

The issue of the "on the ground" location of a disputed boundary line is a factual one for the jury. *Batson*, 249 N.C. at 719, 107 S.E.2d at 563. By issuing the Division Order, the trial court improperly removed the factual determination of the location of the boundary line on the ground from the jury. *See id.*, N.C. Gen. Stat. § 1A-1, Rule 39. The ruling of the trial court deprived Plaintiffs of their properly demanded and preserved right to trial by jury and constituted a surprise under North Carolina Rule of Civil Procedure 60(b).

Based upon the unfair surprise to Plaintiffs and the deprivation of the right to a jury trial, the trial court abused its discretion by denying Plaintiffs' Rule 60 motion for reconsideration. *See Davis*, 360 N.C. at 523, 631 S.E.2d at 118. The trial court's denial of Plaintiffs' Rule 60 motion is reversed, the Division Order is vacated, and the matter is remanded for further proceedings.

C. *Boundary Location is Issue of Fact*

In issuing the Division Order, the trial court exceeded the scope of the Toti Survey, and relied upon Toti's opinion testimony that the location of the line advocated by Defendants was the correct line. The Toti Survey shows both the boundary line advocated by Plaintiffs and the boundary line as advocated by Defendants. Toti testified that the boundary line as advocated by Plaintiffs is "mathematically correct," while the boundary advocated by Defendants is "graphically correct."

The Nicholson Map depicts a warehouse and landing that were also marked and shown on the 1905 Parker Plat. The Parker Plat shows the common boundary line of the respective tracts as lying between the warehouse and landing. Toti testified that when he conducted his survey he could not locate a warehouse and "[i]f there was ever a landing there I can't tell where it was." Defendants' surveyor, Nicholson, had testified he had found the remnants of the warehouse and the landing along the Roanoke River.

According to the trial court's findings of fact in the Division Order, the trial court decreed the line advocated by Defendants was the correct boundary line based upon Toti's expert opinion that "the intention of the predecessors in title to divide the tracts . . . into two tracts of nearly equal acreage in spite of the fact that the current relative acreage of the tracts . . . are no longer equal." The 1905 Parker Plat creating both tracts expressly shows Plaintiffs' tract, labelled "No. 2 Gorden Land," as consisting of 526 acres, and Defendants' tract, labelled "No. 1 Gorden Land," as consisting of 525 acres.

Based upon our holding to vacate the Division Order and remand to the trial court, we tender precedents that "[a] court-appointed surveyor may not offer his opinion as to the location of a disputed boundary line[.]" *Jones v. Arehart*, 125 N.C. App. 89, 93, 479 S.E.2d 254, 256 (1997) (citing *Carson v. Reid*, 76 N.C. App. 321, 323, 332 S.E.2d 497, 499 (1985), *aff'd*, 316 N.C. 189, 340 S.E.2d 109 (1986)).

V. Conclusion

The trial court improperly deprived Plaintiffs of their right to a jury trial on the factual issue of the physical location on the ground of the disputed boundary line. *See Batson*, 249 N.C. at 719, 107 S.E.2d at 563. The trial court's ruling on the location of the boundary line constituted unfair surprise, and the court further erred by denying Plaintiff's Rule 60 motion for reconsideration. *See Endsley*, 44 N.C. App. at 310, 261 S.E.2d at 38. The trial court's Division Order is vacated. In light of our holding, it is unnecessary to address Ayscue's remaining arguments and preservations of error.

This matter is remanded to the trial court for hearing upon Plaintiffs' motion *in limine* and for a jury trial on all matters so triable. *It is so ordered.*

VACATED IN PART, REVERSED IN PART AND REMANDED.

Judges CALABRIA and ZACHARY concur.

BANK OF AMERICA, N.A., PLAINTIFF
v.
PHILLIP McFARLAND, DEFENDANT

No. COA18-489

Filed 18 December 2018

1. Civil Procedure—summary judgment—no genuine issue of fact—initial burden

Plaintiff met its initial burden for obtaining summary judgment in an action to recover debt on a credit card account by showing that plaintiff had a valid contract and that defendant was in breach. Along with a verified complaint and motion for summary judgment, plaintiff admitted an affidavit from a corporate officer with personal knowledge of the status of defendant's account, along with records of defendant's account. Defendant's argument that the specter of fraud should have foreclosed the possibility of summary judgment was not presented below.

2. Civil Procedure—summary judgment—burden of responding

Defendant failed to meet his burden of production in responding to plaintiff's summary judgment motion in an action on a credit card account where he relied on the allegations and denials in his unverified answer. The record does not indicate that defendant filed any affidavits, verified pleadings, or verified answers to interrogatories opposing plaintiff's motion.

Appeal by Defendant from judgment entered 13 November 2017 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 1 November 2018.

Sessoms & Rogers, P.A., by Andrew E. Hoke, for the plaintiff-appellee.

Coleman, Gledhill, Hargrave, Merritt & Rainsford, P.C., by Cyrus Griswold, for defendant-appellant.

MURPHY, Judge.

Where, on a motion for summary judgment, the nonmovant fails to set forth specific facts rebutting the movant's showing that there is no genuine issue of material fact, a grant of summary judgment in favor of the movant is appropriate. Here, Plaintiff moved for summary

judgment and proved there was no genuine dispute as to any material fact. Defendant failed to set forth any specific facts rebutting Plaintiff's showing and therefore failed to meet his burden of production under Rule 56(e) of the North Carolina Rules of Civil Procedure. Therefore, the trial court's grant of summary judgment in favor of Plaintiff is affirmed.

BACKGROUND

On or about 10 July 1997, Defendant, Phillip McFarland, opened a credit card account with Plaintiff, Bank of America, N.A. Defendant agreed to repay the debt he incurred on his credit card account and did so until 2015, when he disputed three charges on his account totaling $23,700.00. All three disputed charges arose out of access checks drafted from Defendant's credit card account with Plaintiff: the first was for $1,900.00; the second was for $18,400.00; and the third was for $3,400.00. Defendant alleged the three access checks were the result of fraudulent activity and disputed the charges. Plaintiff investigated the charges and determined they were not the result of fraud—evinced by the $3,400.00 credit to Defendant's account on 20 November 2015 for "Fraud Dispute" which was subsequently offset by a $3,400.00 debit drafted against his account on 11 December 2015.

As of the commencement of this action on 17 November 2016, Defendant's account had an unpaid balance of $22,756.91, and Defendant had not made any payment since 15 December 2015. Plaintiff sued for breach of contract in Durham County District Court and sought to recover the outstanding balance of the account. Defendant was served with the Complaint on 3 May 2017 and filed an unverified Answer on 16 May 2017.

On 31 October 2017, Plaintiff filed a Motion for Summary Judgment with a number of exhibits, including discovery requests and responses, account statements from Defendant's credit card, and copies of the access checks Defendant claimed were fraudulent. Defendant did not serve a response to Plaintiff's Motion for Summary Judgment and chose not to testify or proffer any documents during the 13 November 2017 summary judgment hearing in the Durham County District Court. After hearing the parties' arguments, the trial court granted summary judgment for the Plaintiff, and Defendant filed timely notice of appeal.

ANALYSIS

We review decisions to grant or deny summary judgment de novo, considering "the matter anew and freely substitut[ing our] own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33,

669 S.E.2d 290, 294 (2008). Summary judgment is appropriate "where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Orient Point Assocs. v. Plemmons*, 68 N.C. App. 472, 473, 315 S.E.2d 366, 367 (1984). "Once the movant demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial." *Id.* Here, the trial court did not err in granting summary judgment for Plaintiff, as Defendant failed to set forth specific facts showing a genuine issue of fact remained for trial.

A. Plaintiff met its initial burden of production under Rule 56(c)

[1] Plaintiff, as the party moving for summary judgment, bore the initial burden of showing there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (2017). Plaintiff's Complaint set out a breach of contract claim against Defendant stemming from his failure to "make periodic payments" as required by the parties' credit agreement. To prove a prima facie breach of contract claim, a plaintiff must show the "(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 satisfied its initial burden of proving there was no genuine issue of material fact by showing the parties had a valid contract and Defendant was in breach.

A party moving for summary judgment has met its burden under Rule 56(c) where that party has "submitted its verified complaint including an itemized statement of the account, defendant's answers to interrogatories," and the affidavit of an employee with knowledge of the underlying debt. *U.S. Steel Corp. v. Lassiter*, 28 N.C. App. 406, 408, 221 S.E.2d 92, 94 (1976). Along with its verified Complaint and Motion for Summary Judgment, Plaintiff submitted an affidavit from a corporate officer with personal knowledge of the status of Defendant's account and records showing that: (1) the parties had a valid contract; (2) Defendant breached that contract by ceasing payments after 15 December 2015; and (3) Defendant owed an outstanding balance of $22,756.91 on his credit account with Plaintiff at the time this action was commenced.[1]

1. Plaintiff also attached Defendant's discovery responses to its summary judgment motion. However, those responses are unverified in violation of the North Carolina Rules of Civil Procedure. N.C.G.S. §1A-1, Rule 33(a) (2017) ("[e]ach interrogatory shall be answered . . . under oath, unless it is objected to[.]"). As such, we do not consider them.

Therefore, the trial court correctly determined Plaintiff met its initial burden of proof as a movant under Rule 56(c).

Defendant argues Plaintiff's "moving papers affirmatively disclose an actual dispute" because the amount of damages is uncertain and that he was not in breach at all because the balance due is entirely attributable to fraudulent access checks drafted from his credit account. Defendant further argues the account statements included in Plaintiff's Motion for Summary Judgment allow a reasonable mind to infer that Defendant does not owe the full $22,756.91 Plaintiff seeks in this action. To this end, Defendant argues three access checks drafted from his account may have been fraudulently signed, and this specter of fraud should foreclose the possibility of summary judgment. However, this argument was not presented below, and is therefore not preserved for our review. *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348, 712 S.E.2d 328, 332, *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011) ("Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.").

Plaintiff met its initial burden under Rule 56(c) by presenting evidence that the parties had a contract and Defendant was in breach. Consequently, the burden shifted to Defendant to demonstrate a genuine issue of fact remained for trial.

B. Defendant failed to meet his burden of production under Rule 56(e)

[2] Defendant failed to meet his burden of production under Rule 56(e) because he failed to respond to Plaintiff's filings, instead resting on the allegations and denials included in his unverified answer. A party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading[,]" but "must set forth specific facts showing that there is a genuine issue for trial," either by affidavit, sworn or certified documents, or verified answers to interrogatories. N.C.G.S. § 1A-1, Rule 56(e) (2017). The record does not indicate that Defendant filed any affidavits, verified pleadings, or verified answers to interrogatories opposing Plaintiff's Motion for Summary Judgment, and Defendant does not present an argument to the contrary in his brief.

Defendant cites a single case where a party survived summary judgment without submitting a verified complaint or affidavit opposing summary judgment. *See Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). However, that decision was predicated on the Supreme Court's finding

that the movant had not met its initial burden of production under Rule 56(c). *Id.* at 706, 190 S.E.2d at 194. Here, Plaintiff met its initial burden of production, as is discussed above; thus, the holding and reasoning from *Page* is inapposite to this case and has no bearing on our decision. Defendant failed to meet his burden of production under Rule 56(e).

CONCLUSION

Where, on a motion for summary judgment, the nonmovant fails to set forth specific facts rebutting the movant's showing that there was no genuine issue of material fact, a grant of summary judgment in favor of the movant is appropriate. Here, Defendant failed to meet his burden of production under Rule 56(e).

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

BANK OF AMERICA, N.A., PLAINTIFF
v.
GARY W. SCHMITT AND MAY L. SCHMITT, DEFENDANTS

No. COA18-222

Filed 18 December 2018

1. Mortgages and Deeds of Trust—terms—interpretation—question of law—not jury question

The trial court erred by submitting the interpretation of the terms of a deed of trust to the jury. The interpretation of deed language was a question of law for the court to decide.

2. Mortgages and Deeds of Trust—terms—interpretation—parties' intent—property to be encumbered

The provisions of a deed of trust were sufficient to determine the parties' intent—to encumber two tracts of land—as a matter of law where the deed of trust described the property to be encumbered in three ways: by referencing a description of the second tract, by referencing the tax parcel identification numbers for both tracts, and by referencing the address of the first tract.

3. Reformation of Instruments—mutual mistake—property encumbered by deed of trust—evidence of mistake

The trial court properly denied defendant mortgagors' counterclaim for reformation of a deed of trust where defendants failed to present evidence that a mutual mistake caused a second tract of land to be encumbered by the deed of trust.

Appeal by Plaintiff from judgment entered 22 June 2017 and order entered 12 September 2017 by Judge Robert C. Ervin in Macon County Superior Court. Heard in the Court of Appeals 19 September 2018.

Brian M. Rowlson and Michael C. Griffin for the Plaintiff.

Sloan & VanHook, PLLC, by Stuart Sloan, for the Defendant.

DILLON, Judge.

Plaintiff Bank of America, N.A. ("BANA"), appeals from the trial court's judgment entering a jury verdict construing the terms of a deed of trust encumbering property owned by Defendants Gary W. Schmitt and Mary L. Schmitt (together, "the Schmitts"), and from the trial court's subsequent order denying BANA's four post-trial motions. BANA argues that the trial court erred by allowing the jury to construe the deed of trust. After careful review, we vacate the trial court's judgment and remand in part, and find no error in part.

I. Background

The Schmitts own 35.47 acres of real property in Macon County (the "Property"). The Property is comprised of two contiguous tracts: Tract B (18.14 acres) and Tract C (17.33 acres). The Schmitt's primary residence is located on Tract B.

In 2001, the Schmitts obtained a construction loan to build their house on Tract B. In 2007, the Schmitts refinanced their loan from BANA, secured by a deed of trust. This deed of trust described the property to be encumbered by the physical address of Tract B, but further by the tax parcel identification number and full legal description for Tract C.

In 2008, the Schmitts refinanced the existing debt with a new loan from BANA secured by a new deed of trust (the "2008 Deed of Trust"). It is this 2008 Deed of Trust which is the subject-matter of this appeal.

The 2008 Deed of Trust described the property to be encumbered by the physical street address for Tract B, but further by the tax parcel

identification numbers for both Tract B and Tract C, as well as by the legal description of Tract C alone.[1]

In 2015, BANA filed this action seeking a declaratory judgment and, alternatively, reformation against the Schmitts with respect to the 2008 Deed of Trust, alleging that it encumbered, or was intended to encumber, both Tract B and Tract C. The Schmitts counterclaimed for reformation, contending that the parties *intended* for the 2008 Deed of Trust to encumber Tract B only, where their home is located.

The trial court referred the meaning of the terms of the 2008 Deed of Trust as well as the reformation claims to the jury. The jury found that the terms of the 2008 Deed of Trust only encumbered Tract C and that neither party was entitled to reformation. The trial court entered judgment based on the jury verdict, holding that the 2008 Deed of Trust encumbered only Tract C and dismissed the parties' respective reformation claims with prejudice.

BANA subsequently filed a motion for judgment notwithstanding the verdict, a motion for a new trial, a motion to amend judgment, and a motion to amend its complaint to conform to the evidence. The trial court denied all post-trial motions.

BANA timely appealed from the trial court's judgment and from its subsequent order denying all post-trial motions.

II. Analysis

We conclude that interpretation of the 2008 Deed of Trust was properly a question of law for the court, not the jury. And, as a matter of law, we conclude that the description in the 2008 Deed of Trust is sufficient to encumber both Tract B and Tract C. Whether either party was entitled to reformation of the 2008 Deed of Trust was properly a question of fact, and we find no error with respect to the jury's determination that neither party was entitled to reformation. Accordingly, we vacate the judgment and remand with instructions to enter judgment declaring that the 2008 Deed of Trust encumbers both Tract B and Tract C.

A. Construction of the Deed

[1] BANA contends that the trial court erred in submitting the interpretation of the terms of the 2008 Deed of Trust to the jury. We agree. The

1. The Schmitts initially took title to Tracts B and C as tenants in common with James Derek Taylor. Thereafter, Taylor conveyed his one-half interest in Tracts B and C to the Schmitts by two separate deeds.

interpretation of the deed language is a question of law for the court to resolve. And, for the reasons stated below, we conclude that the language in the Deed of Trust evinces an intent to encumber both Tract B and Tract C.

The construction of the terms of a deed, including the question of the property the deed is intended to cover, has historically been a question of law for the court, not for the jury.[2] *See Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E.2d 603, 606 (1950). In 1968, our General Assembly enacted a statute instructing that "the effect of the instrument [shall be determined] on the basis of the intent of the parties as it appears from all of the provisions of the instrument." N.C. Gen. Stat. Ann. § 39-1.1 (2017). Our General Assembly also instructed that the determination shall be made by "the courts" as it has been done historically. *Id.* We have held that, by including the phrase "the courts" in Section 39-1.1, the General Assembly did not intend to change "the traditional rule that it is the judge's role to determine the intent of the parties" in order to interpret the language in a deed. *Mason-Reel v. Simpson*, 100 N.C. App. 651, 654, 397 S.E.2d 755, 756 (1990).

In the present case, the location and/or boundaries of the land represented by Tracts B and C are not in dispute. Rather, the issue presented is whether the terms of the 2008 Deed of Trust encumbers Tract B, Tract C, or both. Accordingly, the trial court erred by charging the jury to interpret the description contained in the 2008 Deed of Trust.

[2] Turning to the 2008 Deed of Trust, the instrument describes the property to be encumbered in three places. First, the 2008 Deed of Trust describes the property to be encumbered by referencing a description of Tract C only, as contained in a prior recorded deed. Second, the 2008 Deed of Trust describes the property to be encumbered by reference to the tax parcel identification numbers for both Tract B (0541877) and Tract C (0537896). Lastly, the 2008 Deed of Trust describes the property to be encumbered by reference to the address of Tract B only. Specifically, the 2008 Deed of Trust describes the encumbered property as follows:

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2. The Schmitts' contend in their brief that, where extrinsic evidence is used to resolve an ambiguity, "the question of the parties' intention becomes one of fact." *Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992). We note, though, that in *Runyon*, our Supreme Court further explained in the very next sentence that "the determination of the parties' intention is not for the jury but is the responsibility of the judge in construing and interpreting the meaning of the instrument." *Id.*

> Borrower irrevocably grants and conveys to Trustee and Trustee's successors and assigns, in trust, with power of sale, the following described property located in the County of Macon
>
> [Legal description for Tract C]
>
> Parcel ID Number: 0541877 & 0537896
>
> which currently has the address of 322 Cheyenne Drive, Highlands, North Carolina[.]

Also within the four corners of the Deed of Trust is a statement that it is a "Single Family – Fannie Mae/Freddie Mac UNIFORM INSTRUMENT" and a covenant that "Borrower shall occupy, establish, and use the Property as Borrower's principal residence[.]" While the jury determined that the 2008 Deed of Trust only encumbers Tract C, which is a vacant lot, and not Tract B, containing the Schmitts' home, these provisions in the 2008 Deed of Trust evince an intent that their home also be subject to the lien.

We conclude that the provisions contained in the four corners of the 2008 Deed of Trust are sufficient to determine the parties' intent as a matter of law. Based on the provisions, we conclude that the parties intended that the 2008 Deed of Trust encumber both Tract B and Tract C. Referencing both tax parcel numbers is evidence that the intention was to encumber two different tracts. And even though the legal description referenced is that of Tract C only, the reference to the address for Tract B and the provisions indicating that the collateral include the tract where the Schmitts lived is evidence of the intention that Tract B also be included.

In reaching our conclusion, we are persuaded by a 2011 unpublished decision from our Court interpreting a deed of trust with language almost identical to that contained in the 2008 Deed of Trust. *GMAC Mortg., LLC, v. Miller*, 216 N.C. App. 416, 716 S.E.2d 876, 2011 WL 4920645 (2011). In the 2011 *Miller* case, the plaintiff sought a declaratory judgment to determine which property was encumbered by a deed of trust. *Id.* at *4. The defendant-borrower owned two adjacent parcels, Tract I and Tract II, with his home located on Tract I. The deed of trust in question described the property to be encumbered *both* by reference to a description of Tract II as contained in a prior recorded document *and* separately by reference to the tax parcel number for Tract I, where the home was located. *Id.* at *3. Like the 2008 Deed of Trust, the deed of trust stated that it was a "single family Fannie Mae/Freddie Mac uniform

instrument" and contained a covenant that "Borrower shall occupy, establish, and use the Property as Borrower's principal residence[.]" *Id.* at *4-5. We held that the "trial court properly concluded that the parties intended for [the deed of trust] to encumber both Tract I and Tract II based upon the four corners of the document." *Id.* at *5. We noted that the two descriptions did not conflict with one another but rather "identify the entirety of Tract I and Tract II as the property encumbered by the [deed of trust]." *Id.* at *4. While *Miller* is not binding as an unpublished case, we adopt its reasoning here.

B. Reformation

[3] We now turn to the parties' respective claims for reformation.

BANA's claim that the 2008 Deed of Trust be reformed to include both Tract B and Tract C is moot, as we have determined that the language in the 2008 Deed of Trust already evinces an intent to encumber both Tract B and Tract C.

The Schmitts, however, also requested that the trial court reform the 2008 Deed of Trust, but to expressly include only Tract B, where their home is located. They now argue on appeal that the trial court erred by denying their counterclaim for reformation. We disagree.

A written instrument, though it may describe one property, may be reformed to reflect the true intent of the parties where a movant can show "(1) the existence of a mutual mistake of fact, and (2) a resultant failure of the document as executed to reflect the parties' intent." *Sudds v. Gillian*, 152 N.C. App. 659, 662, 568 S.E.2d 214, 217 (2002). A mutual mistake exists where each party was mistaken as to the meaning of a material fact or term such that the resulting written instrument does not embody the parties' actual agreement. *Metro. Prop. & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997). It is well-settled law in North Carolina that reformation of a written instrument due to mutual mistake of the parties requires clear, strong, and convincing evidence. *Textile Ins. Co. v. Lambeth*, 250 N.C. 1, 11, 108 S.E.2d 36, 42 (1959).

We note here that it was *the jury* who was charged to determine whether the Schmitts had proven their case for reformation and that the jury found that the Schmitts did not meet their burden. We note further that the Schmitts make no argument as to whether their reformation was a matter for the jury or for the trial judge to decide, and neither party briefs this point. There is case law, however, which suggests that the reformation of a deed or deed of trust is equitable in nature and is

a question for the court. *See Inland Harbor v. St. Joseph*, 366 N.C. 376, 376, 759 S.E.2d 80, 81 (2012) (describing the claim to reform a deed as one for "judicial reformation"); *Nationstar v. Dean*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 WL 4440344 (2018) (discussing a claim for "judicial reformation" based on mutual mistake).

In either case, we conclude as a matter of law that the Schmitts failed to prove by clear, strong, and convincing evidence that a *mutual* mistake was made to include a description of Tract C in the 2008 Deed of Trust. BANA had both tracts appraised in 2008 when underwriting the Schmitts' request to refinance their loan. BANA also drafted the 2008 Deed of Trust to include two separate parcel numbers, a strong indication that BANA understood the loan was to be secured by two separate tracts. The Schmitts offered no clear, strong, convincing evidence to show that BANA understood that Tract B was the only collateral securing the loan. A claim for reformation requires a showing that *both* parties understood the terms of the deed to encumber something different than what was actually referenced in the instrument. And to the extent that the issue of reformation was one for the jury, there certainly was evidence from which the jury could find that the Schmitts failed to meet their burden.

III. Conclusion

Interpretation of the terms of the 2008 Deed of Trust is a question for the court to decide. Therefore, we hold that the trial court erred in submitting the issue to the jury. We conclude that the language in the 2008 Deed of Trust is sufficient as a matter of law to evince an intent to encumber both Tract B and Tract C. We also conclude that the Schmitts failed to meet their burden to succeed on their claim to reform the 2008 Deed of Trust to encumber Tract B only.

We vacate the trial court's judgment with respect to BANA's declaratory judgment claim and remand for entry of judgment declaring that the 2008 Deed of Trust encumbers both Tract B and Tract C.

We affirm the trial court's judgment in favor of BANA with respect to the Schmitts' claim for reformation.

VACATED AND REMANDED IN PART, AFFIRMED IN PART.

Judges ELMORE and DAVIS concur.

BETH DESMOND, PLAINTIFF
v.
THE NEWS AND OBSERVER PUBLISHING COMPANY,
McCLATCHY NEWSPAPERS, INC. AND MANDY LOCKE, DEFENDANTS

No. COA18-411

Filed 18 December 2018

1. Libel and Slander—newspaper articles—public official—actual malice

In a defamation suit filed by a State Bureau of Investigation agent against a newspaper and reporter involving a series of articles questioning the agent's ballistics testimony in two murder trials, sufficient evidence was presented to show defendants acted with actual malice (i.e., with knowledge that statements were false or with reckless disregard whether the statements were false or not). Plaintiff presented voluminous evidence that defendants made misrepresentations to elicit certain opinions from experts, took statements from some of those sources out of context, and published without waiting for the results of an independent examination of the bullets at issue.

2. Evidence—defamation—lab firearms analysis—interim report of national accreditation board

In a defamation suit filed by a State Bureau of Investigation agent against a newspaper and reporter involving a series of articles questioning the agent's ballistics testimony in two murder trials, the trial court did not err by excluding an interim inspection report issued by a national accreditation board after the challenged articles were published and which recommended further investigation of the lab as a result of the content of those articles. The interim report was not relevant to the defamation action because it could not have any bearing on the reporter's state of mind when drafting her articles which preceded it, nor did it specifically address plaintiff's work.

3. Libel and Slander—jury instructions—material falsity—newspaper articles—attribution to third parties

In a defamation suit filed by a State Bureau of Investigation agent against a newspaper and reporter involving a series of articles questioning the agent's ballistics testimony in two murder trials, defendants were not entitled to their proposed jury instruction that falsity should be measured by the truth of the underlying statement and not the truth of quoted statements attributed to third parties.

Defendants sought opinions of experts in order to lend credibility to the articles, and attributions of statements that were deliberately altered or taken out of context could be defamatory where there were material changes to the meaning of the statements made.

4. Libel and Slander—jury instructions—material falsity—standard of proof

In a defamation suit filed by a State Bureau of Investigation agent against a newspaper and reporter involving a series of articles questioning the agent's ballistics testimony in two murder trials, the trial court did not err by instructing the jury according to pattern jury instructions that the standard of proof for determining material falsity was by preponderance of the evidence. North Carolina has never adopted a "clear and convincing evidence" standard for material falsity and therefore the jury was not misled or misinformed by the instructions as given.

5. Libel and Slander—jury instructions—punitive damages—statutory aggravating factors

In a defamation suit filed by a State Bureau of Investigation agent against a newspaper and reporter involving a series of articles questioning the agent's ballistics testimony in two murder trials, the trial court did not err in instructing the jury according to pattern jury instructions for punitive damages. Although defendants argued the jury should have been instructed it must find at least one of the three aggravating factors listed in N.C.G.S. § 1D-15 (fraud, malice, or willful or wanton conduct), the instructions in their entirety set forth the law correctly, including that a finding of actual malice in the liability phase of the trial was sufficient to support punitive damages.

Appeal by defendants The News and Observer Publishing Company and Mandy Locke from order and judgment and order entered 18 November 2016 and order entered 30 January 2017 by Judge A. Graham Shirley in Superior Court, Wake County. Heard in the Court of Appeals 5 September 2018.

DeMent Askew, LLP, by James T. Johnson and Chynna T. Smith, for plaintiff-appellee.

The Bussian Law Firm, PLLC, by John A. Bussian, for defendant-appellants The News and Observer Publishing Company and Mandy Locke.

Essex Richards, P.A., by Jonathan E. Buchan, for amici curiae.

STROUD, Judge.

Plaintiff filed a complaint alleging that in 2010 defendants published a series of defamatory articles entitled "Agent's Secrets[;]" "[t]he purpose of the Series was to report alleged problems with the SBI [, the State Bureau of Investigation], including the SBI's work, policies, and practices." Plaintiff was a special agent in firearms examination employed by the SBI, and the articles criticized and questioned her work in two murder cases. Plaintiff brought this action claiming defamation and ultimately prevailed before the jury.

Defendants The News and Observer Publishing Company ("N&O") and Mandy Locke[1] appeal the order and judgment entered upon the jury verdict determining they had defamed plaintiff and awarding compensatory and punitive damages and a subsequent order denying their motion for judgment notwithstanding the verdict ("JNOV") or in the alternative, motion for a new trial.[2] Defendants argue the trial court should have granted their motion for JNOV because plaintiff failed to prove the defamatory statements were made with actual malice. Defendants also argue the trial court erred by excluding evidence of a report issued after the articles were published which they claim tends to prove the truth of the statements in the articles. Defendants further challenge portions of the jury instructions. We affirm the orders.

I. Amici Curiae Brief

Several news organizations ("Amici") submitted an amici curiae brief to support defendants. Amici emphasize that "[t]his case presents an issue of critical importance to all North Carolina journalists: the proper application of the constitutional 'actual malice' standard to allegedly defamatory speech about a public official." We agree this case presents issues of critical importance not just to journalists but to all citizens and residents of North Carolina and to our court system. Amici are correct that "[t]he operation of the criminal justice system is a matter of

1. McClatchy Newspapers, Inc. is not a party to this appeal, and thus "defendants" refers only to defendants N&O and Locke.

2. Defendants' notice of appeal also appeals from "[t]he 'Judicial Review of Punitive Damages Award and Order Reducing Amount of Punitive Damages'" and other "rulings and orders[,]" but substantively on appeal defendants' arguments concern the order and judgment entered upon the jury verdict and the order denying defendants' JNOV.

utmost public significance." The United States Supreme Court has long recognized "the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty man go free.' 397 U.S. at 372[.]" *Yates v. Aiken*, 484 U.S. 211, 214, 98 L. Ed. 2d 546, 552 (1988).

Amici contend that if the jury's verdict here stands, it will cause "intolerable self-censorship" prohibited by the First Amendment and "[t]he verdict in this case is particularly dangerous because its crippling size will weigh on the shoulders of all North Carolina news organizations." (Quotation marks omitted.) Amici argue that speech critical of public officials should be almost entirely unrestrained, particularly in areas such as this, of the utmost public concern, to aid in both public safety and justice to the accused. Amici quote Justice Black in his concurrence in the seminal case of *New York Times Co. v. Sullivan*, wherein he and Justice Douglas expressed their belief that regardless of malice, under the Constitution "the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials." 376 U.S. 254, 293, 11 L. Ed. 2d 686, 716 (1964) (Black, J., concurring). But the United States Supreme Court has consistently recognized that as important as free debate regarding matters of public interest is, there is a countervailing interest as well -- "the individual's right to protection of his own good name":

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. *See New York Times Co. v. Sullivan*, *supra*, at 293, 84 S.Ct., at 733 (Black, J., concurring); *Garrison v. Louisiana*, 379 U.S., at 80, 85 S.Ct., at 218 (1964) (Douglas, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S., at 170, 87 S.Ct., at 1999 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm

> inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name
>
> > "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (concurring opinion).

Gertz v. Welch, 418 U.S. 323, 341, 41 L. Ed. 2d 789, 806 (1974).

Plaintiff is a public official, and the articles published by defendants addressed issues of public concern, so she was required to prove her case to the very highest of standards: she could

> recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.

Id. at 342, 41 L. Ed. 2d at 807. Despite Amici's contentions otherwise, after a careful examination of the testimony, documentary evidence, and arguments presented by the parties, we conclude that plaintiff's evidence was sufficient to meet the high standard of the *New York Times* test. *See generally id.*

II. Background

This case arises from a defamation suit brought by plaintiff after defendants published articles in The N&O about plaintiff's work as a

special agent for the SBI in examining firearms. As an employee of the SBI, plaintiff was a public official, and she had testified at two murder trials -- both arising out of the death of Christopher Foggs -- about the bullet fragments and casings found at the scene of the shooting. *See Desmond v. News & Observer Publ'g Co.*, 241 N.C. App. 10, 13–14, 772 S.E.2d 128, 133 (2015) ("*Desmond I*"). The articles were about plaintiff's work and testimony in the two cases. *Id.* at 14-15, 772 S.E.2d at 133. We described the factual background of the two underlying criminal trials where plaintiff testified and the articles in the prior appeal in this case:

> I. Factual Background
>
> The alleged defamation arose out of defendants' newspaper articles regarding plaintiff's testimony in two criminal trials. Both of the criminal defendants in those cases appealed their convictions to this Court, and we will first review briefly the facts of those underlying cases, as previously described by this Court.
>
> A. Underlying Criminal Cases
>
> In Pitt County, North Carolina, during the afternoon of 19 April 2005, Loretta Strong and several of her female cousins and friends (collectively, the "Haddock girls") were socializing in a vacant lot across the street from the home of Strong's grandmother, Lossie Haddock. Vonzeil Adams drove by the lot with a group of her girlfriends. A verbal altercation arose between the two groups of women. Adams was angry with the Haddock girls because Adams's sister had complained to Adams that the Haddock girls had assaulted the sister in the presence of Adams's children. During the exchange, Adams said she would return and that she had something for the Haddock girls.
>
> Later that afternoon, some of the Haddock girls drove by Adams's house where another verbal altercation occurred. The Haddock girls returned to and congregated on Lossie Haddock's porch.
>
> Around 6:00 p.m. or 7:00 p.m., Adams traveled to Lossie Haddock's house in a reddish Chevrolet Caprice driven by her boyfriend,

> Jemaul Green. Adams's sister and several girlfriends were in the car as well. A car full of Adams's girlfriends followed shortly behind. Green parked the car across from Lossie Haddock's house. Adams exited the vehicle and walked toward the house, exchanging words with the women on the porch. The other women exited the vehicle, but stayed behind Adams. Strong stepped off the porch and began to approach Adams, but stopped before she reached the street.
>
> Adams stopped in the middle of the road. She then exclaimed that someone should get a firearm and shoot the Haddock girls. Green exited the vehicle and fired a gun into the air. Green then pointed the gun in the direction of Lossie Haddock's house and fired several shots. Jasmine Cox, who was on the porch, began running into the house after she saw Green point the gun in the air. She was the first person to get into the house, and testified that, after she got in, she heard more gunfire following the first shots.
>
> Ten-year-old Christopher Foggs, who had been playing in the area, was found face down next to the Haddock house. When he was turned over, a gunshot wound to his chest was discovered. He died from the wound at the hospital later that evening.

State v. Adams, 212 N.C. App. 235, 713 S.E.2d 251, slip op. at 2–4 (2011) (unpublished). Police never recovered a gun.

On 25 April 2005, a grand jury indicted Green for first-degree murder, among other charges. *State v. Green*, 187 N.C. App. 510, 653 S.E.2d 256, slip op. at 1 (2007) (unpublished), *appeal dismissed and disc. review denied*, 362 N.C. 240, 660 S.E.2d 489 (2008). During the summer 2006 trial, plaintiff, a North Carolina State Bureau of Investigation ("SBI") forensic firearms examiner, opined to a scientific certainty that eight cartridge cases, which were found at the site of the shooting, were all fired from the same gun, a High Point 9 millimeter semiautomatic pistol. Plaintiff further opined that two bullets, which

were found at the site of shooting, were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol, but that she could not conclusively determine whether the bullets were fired from the same gun. On voir dire, plaintiff testified she was absolutely certain as to her findings. In a lab report, plaintiff stated that the two bullets "exhibit class characteristics that are consistent with ammunition components that are fired by firearms that are manufactured by or known as: Hi-point (Model C)."

At trial, Green testified that, during the confrontation, a person shot a gun at him. He testified that he shot back at the person but that the person ran away. On 2 August 2006, a jury found Green guilty of second-degree murder, among other offenses.

A grand jury also indicted Adams for first-degree murder, among other charges. During the spring 2010 trial, plaintiff gave the same opinion about the cartridge cases and bullets. A jury found Adams guilty of voluntary manslaughter, under an aiding-and-abetting theory, among other offenses.

During Adams's trial, her lawyer, David Sutton, arranged for Frederick Whitehurst, who had previously worked as a forensic chemist in a Federal Bureau of Investigation ("FBI") crime laboratory, to take photographs of the two bullets butt-to-butt with his microscope.

B. Newspaper Articles

In March 2010, Locke, an investigative reporter for N&O, became interested in the *Green* and *Adams* cases. Locke interviewed plaintiff; Sutton; Whitehurst; Liam Hendrikse, a firearms forensic scientist; Stephen Bunch, a firearms forensic scientist and former FBI scientist; William Tobin, a forensic material scientist and metallurgist; Adina Schwartz, a professor at the John Jay College of Criminal Justice; Clark Everett, the Pitt County district attorney during the *Green* and *Adams* cases; and Jerry Richardson, the SBI laboratory director.

On 14 August 2010, N&O published an article written by Locke and Joseph Neff, which was entitled, "SBI relies on bullet analysis critics deride as unreliable." In the 14 August article, Locke and Neff are highly critical of plaintiff's bullet analysis and testimony in the *Green*

and *Adams* cases and include one of Whitehurst's photographs of the two bullets. In September or October 2010, Everett engaged Bunch to conduct an outside examination of the eight cartridge cases and two bullets. Bunch agreed with plaintiff that the eight cartridge cases were fired from the same firearm. Bunch also concluded that it is likely, but not certain, that the two bullets were fired from the same type of gun, a High Point 9 millimeter semi-automatic pistol. Bunch further concluded that the two bullets could have been fired from the same gun. On 31 December 2010, N&O published a follow-up article, written by Locke and Neff, which was entitled "Report backs SBI ballistics." In the 31 December article, Locke and Neff discussed Bunch's results but emphasized that, unlike plaintiff, Bunch refused to ascribe absolute certainty to his finding that the two bullets were likely fired from the same type of gun.

II. Procedural Background

On 1 September 2011, plaintiff brought libel claims against N&O, McClatchy, N&O's parent company, Locke, Neff, John Drescher, N&O's executive editor, and Steve Riley, N&O's senior editor of investigations, among other defendants who were later dismissed from this action. On 27 June 2013, plaintiff filed her first amended complaint. On or about 22 January 2014, plaintiff moved to amend her first amended complaint. On 27 January 2014, N&O, McClatchy, Locke, Neff, Drescher, and Riley moved for summary judgment. On or about 5 March 2014, the trial court allowed plaintiff's motion, and plaintiff filed her second amended complaint. On 14 March 2014, the trial court granted Neff, Drescher, and Riley's motion for summary judgment but denied N&O, McClatchy, and Locke's motion for summary judgment. On 4 April 2014, defendants gave timely notice of appeal.

Id. at 12–15, 772 S.E.2d at 132–34 (citations, quotation marks, ellipses, and brackets omitted).

In *Desmond I*, defendants argued "that the trial court erred by denying their motion for summary judgment as to plaintiff's libel claims." *Id.* at 16, 772 S.E.2d at 134. This Court then analyzed each of the sixteen statements plaintiff alleged as defamatory from the defendants' articles

and ultimately determined the trial court had properly granted summary judgment as to ten of the statements and should have denied the summary judgment motion as to six of the statements; we remanded to the trial court for the case to proceed with plaintiff's claims based upon those six statements. *See id.* at 18-31, 772 S.E.2d 135-43.

The jury trial began on 26 September 2016. Plaintiff called over a dozen witnesses and presented over 100 exhibits; defendants called two witnesses, one of whom was defendant Locke, and presented fewer than 20 exhibits. On 17 October 2016 the trial court instructed the jury, and on 18 October 2016 the jury reached a verdict. The verdict form included a separate determination for each of the six statements. The six statements were:

1. "Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted."

2. " 'This is a big red flag for the whole unit,' said William Tobin, former chief metallurgist for the FBI who has testified about potential problems in firearms analysis. 'This is as bad as it can be. It raises the question of whether she did an analysis at all.' "

3. "The independent analysts say the widths of the lands and the grooves on the two bullets are starkly different, which would make it impossible to have the same number."

4. " 'You don't even need to measure to see this doesn't add up,' said Hendrikse, the firearms analyst from Toronto. 'It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice.' "

5. "Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different."

6. "Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm."

The first five statements are from articles written by defendant Locke and plaintiff's claims are against both defendants; the sixth statement is from an article written by Joseph Neff, defendants' other witness, and plaintiff's claim is only against defendant N&O.

The jury found each of the six statements to be materially false and found for each statement "by strong, clear and convincing evidence that

at the time of publication, defendant Mandy Locke either knew [the statement] was materially false or had serious doubts as to whether [the statement] was true." The jury awarded plaintiff $1.5 million in "presumed damages" from both defendants based upon Statements 1 through 5; $11,500 in "actual damages" from defendant N&O only as to statement 6; $75,000 in "punitive damages" from defendant Locke; and $7.5 million in punitive damages from defendant N&O.[3]

Defendants moved for JNOV or, in the alternative, for a new trial. On 30 January 2017, the trial court entered an amended order denying the motion. Defendants appeal the order and judgment entered upon the jury verdict and the order denying their motion for JNOV.

III. Actual Malice

[1] Defendants first contend that plaintiff "failed to prove constitutional actual malice[,]" (original in all caps), and "this Court should direct the entry of judgment in favor of The Newspaper Defendants notwithstanding the verdict."

A. Standard of Review

> The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.

Springs v. City of Charlotte, 209 N.C. App. 271, 274–75, 704 S.E.2d 319, 322–23 (2011) (citation and quotation marks omitted).

As explained in *Desmond I*,

> In order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person. This statement must be a statement of fact, not opinion, but "an individual cannot preface an otherwise defamatory

3. Pursuant to North Carolina General Statute §1D-50, the trial court reduced the punitive damages award against defendant N&O to approximately $4.5 million.

statement with 'in my opinion' and claim immunity from liability."

> Whether a statement constitutes fact or opinion is a question of law for the trial court to decide. Like all questions of law, it is subject to de novo review on appeal. In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically, we consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor of the article.

The court must view the words within their full context.

Moreover,

> where the plaintiff is a public official and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was made with actual malice—*that is, with knowledge that it was false or with reckless disregard of whether it was false or not.* The rule requiring public officials to prove actual malice is based on First Amendment principles and reflects the Court's consideration of our national commitment to robust and wide-open debate of public issues.
>
> . . . .
>
> It is important to acknowledge that evidence of personal hostility does not constitute evidence of actual malice. Additionally, reckless disregard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Plaintiff stipulates that she is a public official.

Desmond I, 241 N.C. App. at 16–17, 772 S.E.2d at 135 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted).

In addition,

> [t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged. The meaning of terms such as "actual malice"--and, more particularly, "reckless disregard"--however, is not readily captured in one infallible definition. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. Moreover, such elucidation is particularly important in the area of free speech for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech--the more elusive the standard, the less protection it affords. Most fundamentally, the rule is premised on the recognition that judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'
>
> There is little doubt that public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the New York Times rule, and the strongest possible case for independent review. As Madison observed in 1800, just nine years after ratification of the First Amendment:
>
> > Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

> This value must be protected with special vigilance. When a candidate enters the political arena, he or she must expect that the debate will sometimes be rough and personal, and cannot "cry Foul!" when an opponent or an industrious reporter attempts to demonstrate that he or she lacks the sterling integrity trumpeted in campaign literature and speeches. Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.
>
> We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. The standard is a subjective one --there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. In a case such as this involving the reporting of a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.
>
> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, the reviewing court must examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect.

Harte-Hanks Communications, *Inc. v. Connaughton*, 491 U.S. 657, 685–89, 105 L. Ed. 2d 562, 587-89 (1989) (citations, quotation marks, and brackets omitted).

B. Analysis

The question before this Court is "whether, upon examination of all the evidence in the light most favorable to . . . [plaintiff], and . . . [plaintiff] being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of . . . [plaintiff]," *Springs*, 209 N.C. App. at 274–75, 704 S.E.2d at 323, there was "clear and convincing proof of 'actual malice[;]' " *Harte-Hanks*, 491 U.S. at 686, 105 L. Ed. 2d at 588, *i.e.*, evidence that defendants published the statements at issue "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Desmond I*, 241 N.C. App. at 17, 772 S.E.2d at 135.

Plaintiff presented many days of testimony and evidence regarding defendant Locke's investigation, her interviews with various people, drafting of the articles, and communications between defendant Locke and other employees of defendant N&O. Defendant N&O directs our attention to the testimony of defendant Locke, the reporter who wrote most of the statements at issue. Defendants contend that because defendant "Locke testified, without contradiction, that she believed the first Five Statements to be substantially true when she wrote them" "[t]he record evidence fell well short of establishing, with the requisite convincing clarity, that The Newspaper Defendants published the Six Statements with actual knowledge that they were materially false or despite having entertained serious doubts about their truth." But the jury determines the credibility and weight of the evidence, and the jury is not required to accept the testimony of any witness. *See Penley v. Penley*, 314 N.C. 1, 18, 332 S.E.2d 51, 61 (1985) ("The resolution of conflicts in the evidence, the credibility of witnesses, and the weight to be given any evidence is for the jury."). The jury is not required to accept testimony of the author of the statements that she actually believed the statements to be substantially true. *See generally id.* The United States Supreme Court has determined that a defamation defendant cannot "automatically insure a favorable verdict by testifying" that she believed the statements to be true:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is

> based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant v. Thompson, 390 U.S. 727, 732, 20 L. Ed. 2d 262, 267-68 (1968).

Defendant relies heavily on the Fourth Circuit case of *Ryan v. Brooks*, where the Court noted, "In two cases in which the evidence of malice was found to be sufficient, by contrast, the facts indicated strongly that the challenged allegations had been completely fabricated by the writer." 634 F.2d 726, 734 (4th Cir. 1980). Ultimately the Court in *Ryan* concluded there was not sufficient evidence of actual malice:

> [W]e think the evidence in this case was insufficient to bring John Brooks' actions within those outer limits of reckless conduct marked out in Supreme Court cases. Assuming that the use of the words "extortion" and "false vouchers" rendered the sentence false and defamatory, there is clearly no evidence that Brooks knew they were false. The only question is whether he actually doubted their accuracy but left them unchanged, without further investigation. There is nothing in the record to indicate that Brooks had any such doubts. He relied on two secondary sources which he had used in the past and which have an excellent reputation. He had no reason to doubt the accuracy of their accounts of Ryan's *Observer* interview. The reliability of the third source, the internal Management Report of AT&T, is more questionable, but Brooks used nothing from it that was not also found in his other sources. It simply served to corroborate the existence of the false vouchering system reported in *Business Week*. Even if the three sources together should have tipped Brooks to the existence of a dispute between Ryan and Southern Bell executives, as Ryan argues they must have, he would still have no reason to suspect that the *Times* and *Business Week* had not reported Ryan's statements accurately.
>
> Clearly it would have been better journalistic practice to have verified the accuracy of these secondary sources by reading the original account in the *Charlotte Observer*. But we cannot say that the failure to do so amounted to

> more than mere negligence. We recognize that the book was not "hot news," and a more thorough investigation should be expected in these circumstances than in the preparation of a news story under deadline pressure. Nevertheless, the sentence was such a small part of the whole work that the author might understandably feel three sources to be sufficient. Certainly where there was no reason to doubt the accuracy of the sources used, the failure to investigate further, even if time was available, cannot amount to reckless conduct.
>
> Nor can the fact that Brooks changed the words of his sources create a jury issue on the question of malice. The historian's job is not to copy statements exactly as written in a secondary source, but to interpret and rework them into the whole. Though "extorted" was an unfortunate choice of words because of its criminal connotations, it does also mean simply "obtained by force." Since Ryan's testimony indicated that the contributions to the fund were not entirely voluntary, the word was not really off the mark. In *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L. Ed. 2d 45 (1971), the Court considered a defamation claim arising from a magazine writer's omission of the word "alleged" when citing a report of a certain incident of police brutality. The Court reasoned that omission of the word was perhaps due to a misconception, but was nevertheless an interpretation drawn from the report as a whole; to permit the malice issue to go to the jury because of it would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact. We think this reasoning applies here, and would not find proof of malice in Brooks' use of slightly stronger language than his source's.

Id. at 732–33 (citations and quotation marks omitted).

Ryan addressed actual malice based upon the plaintiff's claim that the defendant fabricated the story, but the evidence showed that the reporter had relied upon sources with excellent reputations whom he had used in the past. *See id.* There was no evidence that the reporter had any doubts or reason to believe the information was inaccurate. *See id.* Even if he could have conducted a more thorough investigation, under the circumstances, his failure to do so was not reckless. *See id.* But here, plaintiff presented evidence that defendants, on multiple

occasions, took the statements of some sources out of context, and thus ultimately published articles that were not in line with what the sources actually said.

Again, there is no single definition of "actual malice" in defamation cases since defamation cases depend heavily on the unique facts of each case: "only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards." *Harte-Hanks*, 491 U.S. at 686, 105 L. Ed. 2d at 587-88. We thus turn to the evidence and plaintiff's theory of the case. Plaintiff contended that defendants decided in advance what the story would be, and when defendant Locke's investigation failed to support the story as planned, they intentionally proceeded with the story anyway. Defendants knew that an independent examination of the bullets was pending but published the article on the planned schedule without waiting for the results. Although *all* of the experts defendant Locke consulted told her they could not give any opinion based only on pictures, and some told her they were not even qualified to give an opinion on plaintiff's work, still defendants attributed the six statements criticizing plaintiff's work to these experts. And the results of Stephan Bunch's independent examination of the bullets ultimately supported plaintiff's examination. Consistent with our obligation to independently review the evidence to determine if there was "clear and convincing proof of 'actual malice[;]' " *id.* at 686, 105 L. Ed. 2d at 588, *i.e.*, evidence that defendants published the statements at issue "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not[,]" *Desmond I*, 241 N.C. App. at 17, 772 S.E.2d at 135, we will briefly summarize a small part of the extensive evidence supporting plaintiff's claim.

During the time defendant N&O was developing the "Agent's Secret" series which would "[show] how practices by the State Bureau of Investigation have led to wrongful convictions[,]" (quotation marks omitted), defendant Locke had learned about attorney David Sutton's "concerns about the firearms performance of Agent Desmond[.]" Sutton represented the defendant, Vonzeil Adams, in her murder trial. At Sutton's request, Fred Whitehurst, a former FBI chemist, looked at two bullet fragments from the scene of the crime under a microscope and photographed them. Sutton filed a motion for mistrial based upon Whitehurst's photographs.

Sutton alleged in his motion that the photographs "clearly show that the 'lands and grooves' in Q-9 and Q-10 [,the two bullet fragments,] are distinctly dissimilar" and that the photographs "were sent to William Tobin, formerly of the FBI laboratory for analysis." Sutton went on to

state that Tobin "says 'preliminary' based upon a photograph sent by Whitehurst there is ample reason to question whether the class characteristics in Q-9 and Q-10 are the same." Sutton alleged "[u]pon information and belief" that "Q-10 does not have even the five lands and grooves [plaintiff] testified were present." Sutton requested a mistrial based upon "denial of exculpatory evidence pursuant to *United States v. Brady* and what appears to be factually incorrect testimony as well." The motion for mistrial was denied.

Defendant Locke discussed the case with Sutton and began to put the story together, and in her first draft she used a quote from Sutton: "[Plaintiff] just made it up. She made it up because she could, and prosecutors needed her to. It's that simple." Plaintiff's theory was that defendant Locke had decided at this point "That's what she wanted the story to be[;]" but what she wanted the story to be was simply a contention from a defense attorney – not an impartial source and not an expert. And this accusation—that plaintiff "just made it up" – was perhaps the worst accusation possible against any witness, but particularly an agent of the SBI laboratory whose credibility is paramount when testifying regarding evidence in a murder trial. The accusation was that plaintiff fabricated the evidence in her report, perjured herself in her testimony in a murder trial, and intentionally or recklessly contributed to a possible wrongful conviction of an innocent person, with the logical corollary that the actual murderer would remain free to commit more crimes. But to produce the article defendant Locke needed experts in firearm analysis to substantiate Sutton's claim that plaintiff "just made it up." Thus, defendant Locke contacted various experts seeking opinions on plaintiff's work in the Adams case.

As part of defendant Locke's investigation she contacted Tobin, the expert from Sutton's motion for mistrial; Tobin was a "former chief metallurgist for the FBI." Statement 2 was attributed to Tobin. Plaintiff presented evidence that Locke misrepresented information regarding the bullet fragments to Tobin to elicit statements critical of her work for the article and to bring into question whether the class characteristics in the two bullet fragments were the same, but merely raising a question was not what defendants Locke and N&O wanted for the series, they wanted wrongdoing by the SBI which led to a wrongful conviction.

After discussions and a series of emails about the case with defendant Locke, Tobin clarified *in writing* the limitations of his comments to defendant Locke. On 3 August 2010, prior to publication of the first article on 8 August 2010, Tobin sent an email to defendant Locke stating, in part:

> *I don't do F/TM examinations, and most particularly don't render opinions from photographs in an area in which I don't function.* I only testify as a scientist objecting to the lack of a scientific foundation for testimonies of individualization (specific source attribution), and report on the opinion of my [rather distinguished] colleagues who also strenuously disagree with the conclusions rendered by F/TM examiners. The science doesn't support such conclusions.
>
> I never testify [(sic)] to the possible fact of a match, only as to the lack of scientific (and statistical) foundation for inferences of individualization.

(Emphasis added.) Despite Tobin's specific notification he did not "render opinions from photographs in an area in which I don't function," defendants published the article including statements attributed to Tobin. Instead of presenting Tobin's opinions on the validity of individualization in general, the article represented that Tobin had specifically analyzed plaintiff's work. Statements 1 and 2 directly criticize plaintiff's work in the Adams case, even suggesting complete incompetence ("experts who have studied the photographs question whether Desmond knows anything about the discipline") or intentional falsification of evidence ("some suspect she falsified the evidence to offer prosecutors the answers they wanted.").

Plaintiff's attorney accurately summarized the evidence regarding Tobin to the jury,

> With regards to Tobin, you know, they rely a lot on Bill Tobin, but you recall his testimony that he may have said this is bad as it can be. He may have said -- he may have used those words, and those words appear in her notes, Mandy Locke's notes. Okay? He may have said it raises a question about whether she did an analysis at all. But he made it very clear that anything he would have said with regards to that was in response to Locke asking him how mistakes generally are made, or asking him to hypothetically assume that an independent analysis in fact determined Desmond was wrong.
>
> He did not tell her that he questioned whether or not Desmond had done analysis -- analysis at all. And when asked if he ever stated to Locke that he questioned whether Desmond knew anything about the discipline,

> you recall his testimony. "First of all, I continued to advise Locke that I have no basis to make any claims of this particular examiner's work, I have none. I have no. I didn't know who she or he was. I had no experience with the work product, so I have no basis to make any statements regarding a specific examiner's proficiency. It's not even a field of which I normally will deal anyway. This is such a foreign statement. I would not be in a basis to claim that somebody doesn't know anything about an area in which I don't even deal, in which I don't even perform, that I don't even operate. It's like we're on two different planets as far as how that conversation went."

On 17 August 2010, Tobin contacted Jerry Richardson, SBI Assistant Director[4] "to apologize[.]" Richardson described Tobin's comments in an email:

> Bill Tobin, FBI Chief Metallurgist, who is quoted from Saturday's article contacted me earlier today, He wanted to apologize to Beth Desmond, the SBI Firearms Section and me for the manner in which his comments were portrayed in Firearms article. He advises that he only answered questions from the reporter in general terms and actually was not aware of the circumstances of any of the cases and has no knowledge of Desmond's work. Tobin advises that his quotes are from three different questions and appears to have been combined from a series of "What ifs." He further wanted us to know that he is **not** one of the independent experts that is mentioned in the article.

(Emphasis in original.)

Plaintiff presented evidence of many emails and conversations between Tobin and defendant Locke, and Tobin testified in his deposition about the specific statements attributed to him:

> Q. If I understand your answer correctly, your comment, This is as bad as it can be, or It doesn't get any worse than this, was assuming that it was determined that a mistake or an error had been made; is that fair to say?
>
> A. Yes, I would also remind, should remind somebody, that that was out of context. In context I was also implying

4. Title as noted by Mr. Richardson on the signature line of his email.

that what I just said is true with regard to the practice of firearms identification, but one needs to put that also in a systemic context because what I believe we had already discussed, if in fact an error had been made, how it crept through the system through what should have been some systemic peer reviews, supervisory reviews of the crime lab, itself, as well.

So in other words, even if an error existed, it should have been detected somewhere along the normal system of reviews before it's admitted or before it's released from the agency. So that was in the context in which I said it doesn't get any worse than that, if in fact an error was made. Again, that's the subjunctive, the caveat or disclaimer, then, comma, then this is it doesn't get any worse than the easiest of the three types of an error creeping all the way through the system. That what I was meaning by it doesn't get any worse than this.

Again, I was not referring to a specific examiner or a specific case. I was just discussing general errors as Type 1, Type 2, and Type 3 errors and the presumed system of checks and balances and error quality control process that should exist in the system. Does that make any sense?

Q. It does. So is it fair to say that your comment of either, This is as bad as it could be or It doesn't get any worse than this, that you may have made to Mandy Locke was not referring to Beth Desmond's work in this case?

A. Correct.

Q. In any of your conversations with Ms. Locke, did you state to Ms. Locke that you questioned whether Beth Desmond knew anything at all about the discipline of firearms examination?

A. First of all, *I continue to advise Fred and Mandy that I have no basis to make any claims of this particular examiner's work. I have none. I have no, I didn't know who she or he was. I had no experience with her work product, so I have no basis to make any statements regarding a specific examiner's proficiency.*

It's not even a field in which I normally will deal anyway. So on numerous levels I had no basis to make

any claim about someone's proficiency. So I don't recall making any statement that she doesn't' know anything about firearms or whatever you, firearms identification. I don't recall making that statement.

If I did, it would have been included in the universe or the entire same pool, it's known as, entire possible events leading up to an error if on occurred, if one had occurred, but I don't recall making that statement.

Q. So is it fair to summarize your answer by saying you don't recall making any statement like that, but if you had made a statement like that, the only way you could have possibly made a statement like that is if in response to the assumption that a mistake had, in fact, been made and you were laying that out as one possibility along with a lot of other possibilities as the cause of the mistake.

A. *Yes, but that is such a foreign statement. I would not be in a basis to claim that somebody doesn't know anything about an area in which I don't even deal, in which I don't even perform, that I don't even operate.*

So again, I continually admonish – well, not, I *continually reminded Fred and Mandy that I can only present generic assessments of errors*, what types of errors and systematic issues from my experiences, both as a scientists and also as a[] forensic examiner inside, behind the blue wall. I can only address these areas generically.

So I would not have any basis at all to make any statement about someone's proficiency in an area outside of metallurgy material science and possibly legally, in the legal community. *But I would not make such a statement. That's not, I have no basis to make that statement.*

Q. In any of your conversations with Ms. Locke, did you ever tell Ms. Locke that you suspected that Beth Desmond falsified evidence to offer prosecutors the answer they wanted?

A. *No. Again, I have no basis. There is not, that is so inconsistent on numerous levels for me to make that statement, so I did not make that statement.*

Q. In any of your conversations with Ms. Locke did you ever tell Ms. Locke that you questioned whether Beth Desmond had done an analysis at all?

> A. I'll say if you take out the two words Beth and Desmond, yes. I do recall including that in the -- that's called drylabbing -- take the name out and I concluded that, included that in the possible universe of explanations as to what could have occurred if an error had, in fact, been made.
>
> *But I did not specifically indicate that Beth Desmond committed an error. Again, over and over I told anyone with whom I was interacting, I have no basis to judge her work product or her proficiency.*

(Emphasis added.)

After Tobin's initial response that he could not give an opinion on plaintiff's work, defendant Locke began seeking another expert who could support Sutton's claim of fabrication of evidence. Adina Schwartz, "a professor at the John Jay College of Criminal Justice[,]" *Desmond I*, 241 N.C. App. at 14, 772 S.E.2d at 133, was in contact with many involved with the questions regarding the bullets and at one point she sent an email to numerous parties stating,

> Dear All,
>
> I apologize for any misleading impressions I created by the e-mail I sent yesterday. First, the State has NOT conceded that any error was committed. Second, a definitive statement that the bullets came from two guns can't be made on the basis of Fred's photographs or, indeed, any photos. To reach a definite conclusion as to the class characteristics on the two bullets, the bullets themselves will need to be examined.

Plaintiff also summarized the evidence regarding Schwartz to the jury,

> "Question, would you have ever told Mandy Locke that you suspected that Beth Desmond had falsified her reports?"
>
> "Answer, no. That is not something I would have said, chiefly because I don't have access to Ms. Desmond's mind. To say 'falsified' would have been that she did something, deliberately lied. How could I know without having access to her mind."
>
> Later on, "Question, did you ever -- would you have ever told Mandy Locke that the widths of the lands and grooves impressions on the bullets that Beth Desmond

> examined were starkly different, and therefore it's impossible for the bullets to have the same number of land and groove impressions?"
>
> "Answer, I could only have said, I might have said that Liam had that opinion, or that Fred had that opinion, or possibly if Bill Tobin had got involved, that they had that opinion. I'm not competent to have such an opinion. I wasn't then, and I am not now, I have never been competent to have such an opinion."

Liam, from the email, refers to Liam Hendrikse. Hendrikse is "a firearms forensic scientist[.]" *Id.* As summarized by plaintiff's attorney to the jury,

> Here you have Hendrikse to Locke, 'The fact remains that unless I physically examine them, I won't know if NCSBI are correct or not." Where was that in the article? "Did they ever employ an independent examiner to get a second opinion?" That was an e-mail. So obviously Hendrikse at this point is saying, you know, what's the status with the second -- with the second exam. And almost like, why are you still contacting me?
>
> And the e-mail from Locke to Hendrikse. This is an interesting one. This is the one that -- that – that was obtained from Liam Hendrikse, and the News and Observer never had a copy, didn't provide us a copy. "Thanks for that" – "Liam, thanks for that. That's what I suspected." And this was in response to Liam Hendrikse asking her have they hired somebody else.
>
> "They hired a guy and run through a million hoops to physically get the bullets sent. The DA has dragged his feet per pressure from the SBI. They are avoiding scrutiny."

But defendant Locke failed to mention to Hendrikse that a second examination of the bullets was going to be conducted, but it would not be complete before the planned date for the series to run.

Statement 4 was specifically attributed to Hendrikse, and he asked defendant Locke in an email for a retraction because his statements were misrepresented in the series:

> Hope all is well down in NC. Just had a quick question after speaking with several professional colleagues. I've been having trouble with the context of the quotes that are attributed to me and I was wondering if a retraction was possible.

> The two quotes that I have real issues with are the following:
>
> 1. "The chances of a gun not matching a bullet recovered from the crime scene when it involves an American gun is highly likely. Our days of speaking with such certainly should be over."
>
> *The first part of that was misinterpreted.* We were speaking on the phone about Class Characteristics, not Individual Characteristics. We spoke about how Agent Desmond arrived at determining that the bullet was fired from a Hi-Point. I mentioned that it is usually very difficult to narrow down the possible makes of gun, to just one when analyzing the Class Characteristics of a bullet. *The quote makes it seem like I'm saying it's unlikely that you can link a bullet to the individual gun that fired it. This is wrong, and in a nutshell makes me appear to be a lunatic. The existence of such a quote have longer-term ramifications with respect to my career and credentials.*
>
> The latter part of that quote doesn't really say anything without that first part.
>
> 2. The only benefit I can extend is that she accidentally measured the same bullet twice.
>
> *I feel that this is unfair to both agent Desmond and to myself. Both verbally, and in writing, I stated that I couldn't tell you if she was right or wrong unless I examined the items.*

(Emphasis added.)

Among other experts defendant Locke consulted was Steven Bunch, "a firearms forensic scientist and former SBI scientist[,]" *id.*; defendant Locke testified Bunch was a source for Statement 1, along with Tobin and Hendrikse. Plaintiff's counsel accurately summarized his testimony to the jury:

> He testified that he conditioned any comments made on the Whitehurst photographs actually depicting the -- the rifling -- he conditioned any comments he made regarding the photographs on the photographs actually accurately depicting the -- the characteristics on the bullets themselves. And he never passed judgment on Desmond's work.

Plaintiff further contended that when the SBI became aware of the questions regarding the bullets, Richardson sent Whitehurst an email regarding the photographs, noting they were not accurate:

> So this is the e-mail from Richardson, Jerry Richardson, head of the crime lab to Fred Whitehurst. And you'll see down at the bottom here he's talking about the issues. "We have noted a number of issues associated with the photos. These issues include photographs [sic] not properly oriented, improper side lighting, unknown microscope magnification, focus, and the use of what appears to be tweezers or other metal objects to handle the evidence during photography which could alter the evidence." Well, what does -- what does Mandy Locke say? In the e-mail she turns that around and says that to her sources, "The photographer had the fragments propped up on metal tweezers but said he didn't handle the bullets with them. The SBI leadership is saying that the metal-to-metal contact likely corrupted the evidence."

Plaintiff contended that instead of informing the experts she was aware of the potential deficiencies of the photographs, defendant Locke sought to use the information to support her theory that the SBI was trying to hide the truth. Plaintiff presented evidence of a series of emails between defendant Locke and the experts at the end of July. In one email to Bunch, defendant Locke stated, "And not surprisingly, instead of addressing a grave mistake, the SBI leadership is trying to discredit the photos you and others saw of those bullet fragments[.]" But *no one* had ever determined that any "grave mistake" had happened.

Finally, just before publication of the series, defendant Locke met with plaintiff. The recorded conversation between the two was a trial exhibit. Plaintiff explained her analysis and how she came to her conclusions. Plaintiff explained why the pictures did not accurately show grooves on the bullets and noted that the markings she relied upon were not even visible in the pictures. At the end of the interview, plaintiff asked defendant Locke if she understood and if she had clarified everything; Locke said that she had.

After meeting with plaintiff, defendant Locke emailed Hendrikse stating, "I'm trying to find a way to believe her. Her confidence was really surprising. She said she has no interest in doing the analysis again because her work was so good she didn't make errors." But the recorded exchange shows that, although she was confident of her work, plaintiff actually wanted another examination of the bullets:

> MS. LOCKE: Beth the[y]'re going to send these bullets off . . . what if you're wrong?
>
> MS. DESMOND: This is what we've been asking them to do. Mr. Whitehurst has, about a month and a half, maybe two months ago, called and asked if we wanted them back, if we wanted to reexamine them. And we said no because we're confident in our work.
>
> I know that I did my job and I testified as to my findings regarding that. *Of course, we would like for it to be sent to any other qualified firearms examiner. We have been asking for it. They said that they had done it a month ago, a month and a half ago*. And Jerry Richardson, Mr. Richardson, has called and . . . inquired and they still haven't sent them anywhere. All right. I am -- I have -- *I'm wanting someone to look at them. That's fine with me.*

(Emphasis added.)

In addition to evidence regarding the plan for the series of articles and the schedule for publication, plaintiff also presented evidence of internal email communications about the article between defendant Locke and other employees of defendant N&O. The emails tended to show defendants were more concerned with writing a highly critical and inflammatory article about the SBI and plaintiff than the accuracy of the article. For example, defendant Locke emailed the photographer working on the series team, Shawn Rocco, apologizing for the tight publication deadline. Rocco replied,

> hmmm, how to say this nicely . . . . shut up. We're all in this together.
>
> concentrate on writing the best damn piece you've ever done. I want you to compel our readers to gather pitchforks and torches.
>
> because shit like this has got to change.
>
> i'm infuriated that robin [Pendergraff] still keeps a job. t'aint nothing new in state gov, I know, but I'm pissed nonetheless.[5]

Defendants argue their emails simply express their commitment to investigative journalism, the need to report to the public, and their responsibility to hold the SBI lab accountable for defective work in the

5. Robin Pendergraft was Director of the SBI.

investigation and prosecution of a murder. Viewed in the light most favorable to defendants, the emails could be interpreted as defendants contend. But we must view the emails in the light most favorable to plaintiff and resolve all conflicts in her favor, *see Springs*, 209 N.C. App. at 274–75, 704 S.E.2d at 323, and in this light, the internal emails, combined with the evidence of misrepresentations regarding the pictures of the bullet fragments to elicit certain opinions from the experts and the lack of information provided to those experts regarding the fact that no mistake had ever been identified, tended to show that the primary objective of defendants was sensationalism rather than truth.

The evidence we have noted is just a brief sampling of some of the evidence supporting plaintiff's theory; the record on appeal is twelve volumes and the supplement to the record is over 8,500 pages. Overall, plaintiff presented evidence that defendants decided that they would publish an article, in August, revealing that plaintiff falsified evidence. In addition, defendants claimed the SBI had ignored questions about whether the bullet analysis was correct and sought to cover up any problems or investigation into any potential error. Defendant Locke's research for the series did not support the proposed premise but ultimately showed that none of the experts defendant Locke consulted would give any opinion based upon the photographs, and none of the experts had any personal knowledge of plaintiff's work and could give any opinion about it. Just before publication, defendant Locke knew that the independent analysis would be done by Bunch – but it would not be done in time for the article deadline -- and if she waited for the analysis, it was possible that it may confirm that plaintiff's work was correct, thus eliminating the premise of the entire article. Instead of waiting for the independent analysis, defendants published the series, including the Six Statements, knowing that the experts consulted had actually not given any opinion of plaintiff's work and had told her repeatedly that they could not give any opinion based upon pictures.

The law gives defendants much leeway in reporting about public figures in matters of public concern, requiring a showing of actual malice which is knowledge that the publication was false or a reckless disregard for the truth. *Desmond I*, 241 N.C. App. at 17, 772 S.E.2d at 135. Further protecting defendants from liability, the law allows for reasonable interpretations by reporters, even if the interpretation is wrong. *See generally Ryan*, 634 F.2d 732-33. But there is a limit, and here plaintiff presented substantial and voluminous evidence that defendants exceeded that limit. The jury could have believed defendants' evidence and returned a verdict in their favor, but they considered plaintiff's evidence to be more

convincing and credible. Where plaintiff has met the high standards of proof required in a defamation case regarding a public figure, this Court has no authority to second-guess the jury's credibility determinations or to weigh the evidence more favorably to defendants.

"[U]pon examination of all the evidence in the light most favorable to . . . [plaintiff], and . . . [plaintiff] being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of . . . [plaintiff]," *Springs*, 209 N.C. App. at 274–75, 704 S.E.2d at 323, there was "clear and convincing proof of 'actual malice[;]' " *Harte-Hanks*, *Inc.*, 491 U.S. at 686, 105 L. Ed. 2d at 588, *i.e.*, evidence that defendants published the statements at issue "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Desmond I*, 241 N.C. App. at 17, 772 S.E.2d at 135. Upon our independent examination of the entire record, we have determined that "the evidence in the record . . . is sufficient to support a finding of actual malice[.]" *Harte-Hanks*, *Inc.*, 491 U.S. 657, 685, 105 L. Ed. 2d 562, 587. This argument is overruled.

IV. Exclusion of Evidence

[2] Defendants next contend that the trial court erred in excluding a 7 December 2010 "INTERIM INSPECTION REPORT" from the American Society of Crime Laboratory Directors/Laboratory Accreditation Board ("ASCLD/LAB"). The report addressed the "limited scope interim inspection for the North Carolina State Bureau of Investigation (SBI) Crime Laboratory" conducted on October 26 through 28, 2010. The inspection was done "because ASCLD/LAB became aware of information suggesting serious negligence or misconduct substantially affecting the integrity of forensic result, or noncompliance with accreditation standards by an accredited laboratory." The report addressed "three separate forensic disciplines[:]" serology, controlled substances, and firearms. Serology and controlled substances are not relevant to this case, but the firearms section addresses the ASCLD/LAB investigation initiated based upon "State v. Green (2006)" and specifically references that "[a] News and Observer article published August 27, 2010 called into question the firearms work in this case."

Plaintiff filed a motion in limine to exclude the report based on Rules of Evidence 401, 402, and 403. Plaintiff argued the report was irrelevant because it was published *after* the articles and failed to address plaintiff's work which was the subject of the statements. Plaintiff also argued the report should be excluded because the report "would unfairly prejudice . . . [plaintiff] and would needlessly confuse and mislead the jury."

The trial court agreed with plaintiff and stated in an order:

> The ASCLD-Lab report was prepared after the article in question and was not relied upon by Ms. Locke or any of the experts with whom she spoke. Moreover, as the report does not go to the accuracy of Ms. Desmond's conclusions, the Court finds that, at best, the proposed evidence is of very limited relevance and to the extent it has any probative value, that probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Therefore, the Court, in its discretion, will exclude said evidence.

But defendants argue that the ASCLD report is relevant because the substance of the ASCLD report "contradict[ed plaintiff's] laboratory conclusions and report." In other words, defendants contend the report was relevant because it showed the truth of the articles' statements about plaintiff's work. Defendants contend that

> [p]ost-publication evidence is no less probative on the substantial truth question. The RESTATEMENT articulates the black-letter rule: "[I]f the defamatory matter is true, it is immaterial that the person who publishes it believes it to be false; it is enough that it turns out to be true." RESTATEMENT (2D) OF TORTS § 581A cmt. h, (emphasis added). Federal and state courts have applied that rule. Writing for the Seventh Circuit, for example, Judge Posner explained:
>
> > [I]t makes no difference that the true facts were unknown until the trial. A person does not have a legally protected right to a reputation based on the concealment of the truth. This is implicit in the rule that truth—not just known truth . . .—is a complete defense to defamation.

In reviewing these evidentiary rulings under Rule 401, we give great deference to the trial court's determination, but our standard of review is more stringent than abuse of discretion:

> Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C–1, Rule 401 (2003). . . . 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). Furthermore,

> Under Rule 403, "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.G.S. § 8C-1, Rule 403 (2013).
>
> > We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.

State v. Triplett, 368 N.C. 172, 178, 775 S.E.2d 805, 808-09 (2015) (citation and quotation marks omitted).

Further, regarding the standard of review, defendants contend that the trial court's rulings excluding the report were not "run-of-the-mill evidentiary decisions[, but rather t]hey undermined The Newspaper Defendants' ability--guaranteed by the First Amendment--to offer evidence relevant to the substantial truth of the Six Statements." But even if we assume defendants properly raised and preserved a constitutional argument meriting *de novo* review, we still conclude defendants do not prevail on this issue. *See generally Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015) ("[O]ur review of the constitutional questions presented is de novo.").

Here, defendants mischaracterize the trial court's rationale in excluding the evidence. The trial court did not simply rule that because the report was published after the articles it was irrelevant for any purpose; it actually ruled that the report could not have been relevant to defendant Locke's state of mind when preparing the articles since it was not available then *and* it was not relevant to the truth of the matter because the report does not address plaintiff's work: "The ASCLD-Lab report was prepared after the article in question and *was not relied upon by Ms. Locke* or any of the experts with whom she spoke. Moreover, as the report *does not go to the accuracy of Ms. Desmond's conclusions*, the Court finds that, at best, the proposed evidence if of very limited relevance[.]"

Defendants proffered the report as evidence, and we have read it; despite defendants' insistence that the report demonstrated the truth of the articles, that is simply not what the report does, as the trial court noted. For example, defendants argue that "[t]he Report was particularly relevant as to Statement One: 'Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.' " But the report mentions no "[i]ndependent firearms experts" who may have viewed the photographs, and there was no suggestion that plaintiff "falsified" evidence.

The report did recommend that "[t]he laboratory should further investigate the testimony of the firearms analyst" "to ensure that the testimony is consistent with the examinations performed, training received and the examination documentation present."[6] Even under the most generous consideration, the report does not demonstrate the substantial truth of the six statements or the articles generally. The report does not address whether plaintiff's work was deficient -- the issue raised in the articles -- nor does it come to any conclusions regarding the bullets themselves. The most critical statement in the report is that plaintiff failed to include proper documentation of her work in the file, but the report does not address the accuracy of the actual work. We agree with the trial court that the report did not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015).

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6. Another report was done by ASCLD/LAB in August of 2011 and concluded the issues raised were resolved.

Furthermore, we agree with the trial court even if the report arguably has some relevance -- perhaps that sloppy record-keeping may indicate sloppy work as well – "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The report was an *interim* report and recommended further investigation; that investigation was done. On 5 November, 2010, an independent firearms examiner, Bunch, examined the bullets and confirmed that plaintiff's analysis was accurate. The trial court's exclusion of the report was "the result of a reasoned decision." *Triplett*, 368 N.C. at 178, 775 S.E.2d at 809.

Defendants also argue that in proving the truth of their statements they offered the report, "among other things[.]" But defendants' brief does not identify any "other things" they offered to prove truth. Defendants have not demonstrated how the trial court "undermined" defendants' ability to present evidence of the truth of the statements by excluding the report. The report addresses laboratory practices and recommends further action, but made no conclusions about plaintiff's work which was the subject of the articles. Defendants have not noted any other evidence they sought to present regarding the truth of the statements which was excluded. Defendants were not impeded in the presentation of their defense of truth. We conclude the trial court did not err in excluding the evidence under Rule 401 or Rule 403 and did not prevent defendants from presenting evidence of truth of the statements. This argument is overruled.

V. Jury Instructions

Last, defendants challenge "errors and omissions in the jury instructions in both the liability and punitive damages phases" and argue that the improper jury instructions "deprived The Newspaper Defendants of First Amendment protections." (Original in all caps.) Defendants contest three portions of the jury instructions.

A. Standard of Review

> A trial court's jury instructions are sufficient if they present the law of the case in such a manner as to leave no reasonable cause for believing that the jury was misled or misinformed. A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. When a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance.

> Arguments challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. A trial court's failure to submit a requested instruction to the jury is harmless unless defendant can show he was prejudiced thereby.

State v. Pendergraft, 238 N.C. App. 516, 532, 767 S.E.2d 674, 685 (2014), *aff'd per curiam*, 368 N.C. 314, 776 S.E.2d 679 (2015) (citations, quotation marks, and brackets omitted).

B. Attribution

[3] Defendants contend "[t]he jury should have been instructed that falsity must be measured by the truth of the underlying statement, not the truth of the attribution." Defendants argue that their proposed instruction

> on material falsity that correctly focused on the truth of the underlying statement, not solely on the accuracy of the attribution to a particular source: "If you find that the underlying facts reported by a challenged Statement are substantially true, separate and apart from the attribution to a cited or quoted source or sources, you should find that Plaintiff has not carried her burden of proving material falsity." (R p 1824).
>
> The Superior Court refused to give that instruction. Instead, over The Newspaper Defendants' objection (R pp 1826-29; T pp 1866-82), the Court instructed the jury:
>
> > The attribution of statements, opinions or beliefs to a person or persons may constitute libel if the attribution is materially false, or put another way, if it is not substantially true. The question is whether the statements, opinions or beliefs of the individuals that were reported as being held or expressed by the individuals were actually expressed by those individuals."

In *Desmond I*, we addressed whether the statements regarding opinions of experts, viewed in the light most favorable to plaintiff for purposes of summary judgment, 241 N.C. App. at 16, 772 S.E.2d at 134, could be defamatory, and we determined that they could:

> In this case, which involves mostly Locke's reports of opinions of experts regarding Desmond's work, fact and opinion are difficult to separate. Some of the allegedly

> defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express. In some instances, the evidence indicates that Locke asked the experts a hypothetical question, and they answered on the assumption that the facts of the hypothetical question were true, while the facts were actually false and Locke either knew the facts were false or she asked the question with reckless disregard for the actual facts. The experts' opinions were then stated in the article as opinions which the experts gave about Desmond's actual work, instead of in response to a hypothetical question. Thus, the statements, even as opinions, "imply a false assertion of fact" and may be actionable under *Milkovich*. *See id.* at 19, 111 L. Ed. 2d at 18.

Id. at 21, 772 S.E.2d at 137. The description of the evidence in *Desmond I* was based upon the forecast of evidence for summary judgment, but the evidence presented at trial, some of which is noted in this opinion, was consistent with the description in *Desmond I*. *See generally id*.

Defendants argue that the attribution of the statements to experts is not "the 'sting' " of the defamatory meaning and contend that only the underlying statement can be libelous, so the jury should have considered the evidence only as to the truth or falsity of the underlying assertion of fact, not the truth or falsity of the attribution. Certainly, the truth or falsity of the underlying statements is important, but in this case, all of the evidence tends to show that the statements are in fact false. Independent analysis of the bullets ultimately confirmed plaintiff's conclusions. Thus, defendants focus on whether the evidence shows that they intentionally misrepresented the opinions of the various experts.

Reporters use quotes from a source to "add authority to the statement and credibility to the author's work. Quotations allow the reader to form his or her own conclusions and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of her subject." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511, 115 L. Ed. 2d 447, 469 (1991). The United States Supreme Court explained how quotations, or attribution to a source, can be defamatory:

> A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it

> attributes an untrue factual assertion to the speaker. An example would be a fabricated quotation of a public official admitting he had been convicted of a serious crime when in fact he had not.
>
> Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold.

Id.[7]

Here, some of the statements are quotations, while others are attributed generally to "[i]ndependent firearms experts" or "analysts[.]" Plaintiff claims defendant Locke intentionally misrepresented what the experts had said about her work. The Supreme Court has held that "a deliberate alteration of the words uttered" may be defamatory if it materially changes the meaning of the statement:

> Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. Put another way, the statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced. Our definition of actual malice relies upon this historical understanding.
>
> We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, 376 U.S., at 279–280, 84 S.Ct., at 725–726 and *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S., at 342, 94 S.Ct., at 3008, unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.

Id. at 517, 115 L. Ed. 2d at 470, 472-73 (citations and quotation marks).

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7. Though in *Masson* analysis focused on "whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak[,]" the same analysis would apply to attributions to a third-party source, as in this case. 501 U.S. 496, 513, 115 L. Ed. 2d 447, 470 (1991).

Furthermore, defendants' entire purpose in seeking review of plaintiff's work by experts was to provide an authoritative, and therefore damaging, criticism of plaintiff's work. Firearms analysis is a specialized technical field and most people do have adequate knowledge of this type of work to understand plaintiff's work or to determine if her work was defective; the very reason defendants consulted experts as part of the research for the articles was to give the articles credibility. If defendant Locke had asked a person with no expertise or status in the field of firearms analysis to give an opinion about plaintiff's work, that person's opinion would not be meaningful or useful to the readers of the article, and it may not even be defamatory to plaintiff simply because of the lack of expertise and knowledge of the person giving the opinion. For example, if we substitute random people with no knowledge or expertise in firearm analysis into the statements in place of the references to experts, it is obvious that without the attribution to experts in the field, the statements would have little or no meaning. The statements are close to nonsense if they are attributed to people with no expertise:

(1) "[Several people at Starbucks] who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted."

(2) " 'This is a big red flag for the whole unit,' said . . . [another man on the street]. 'This is as bad as it can be. It raises the question of whether she did an analysis at all.' "

(3) "[Several people who live in Virginia] say the widths of the lands and the grooves on the two bullets are starkly different, which would make it impossible to have the same number."

(4) " 'You don't even need to measure to see this doesn't add up,' said [another random person who saw the photos]. 'It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice.' "

(5) "[Some other people at the grocery store] say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different."

(6) "[Some other people] who viewed the photographs, including . . . [an accountant], said the bullets could not have been fired from the same firearm.

Without attribution to experts in the relevant field, the statements have "a different effect on the mind of the reader." *Id.* at 517, 115 L. Ed.

2d at 470, 472. Reporters seek experts to provide analysis and opinions on topics beyond the knowledge of those untrained in the discipline addressed in an article precisely *because* only an expert's opinion will be meaningful. Without information from the experts to explain firearms analysis, the meaning and significance of "lands and the grooves[,]" the proper methods of testing, the photographs of the bullet fragments would be meaningless to the average reader of the articles. Therefore, the trial court correctly instructed the jury regarding attribution of the statements. This argument is overruled.

C. Standard of Proof of Material Falsity

[4] Defendants next contend "[t]he jury should have been instructed that a public-official defamation plaintiff must prove material falsity by clear and convincing evidence" rather than the preponderance of the evidence standard the trial court used. The jury answered two sub-issues as to each statement: (1) whether by the greater weight of the evidence" the statement "was materially false" and (2) whether, "by strong, clear and convincing evidence" the statement was made with actual malice.

The United States Supreme Court has not required that material falsity be shown by clear and convincing evidence: "There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. We express no view on this issue." *Harte-Hanks*, 491 U.S. at 661 n.2, 105 L. Ed. 2d 562, 572 n.2 (citations omitted). Plaintiff notes,

> It should be emphasized that most jurisdictions have not directly addressed the issue (arguably because they do not see any reason to change existing law), so in those jurisdictions, the longstanding law of instructing as to preponderance of the evidence on the issue of falsity remains. North Carolina falls into this category. Regardless, it certainly is not error for the trial court to have used the pattern jury instruction that is an appropriate and accurate statement of the law.

North Carolina has never adopted a standard of "clear and convincing evidence" and thus we do not conclude "the jury was misled or misinformed" when it did not receive that instruction. *Pendergraft*, 238 N.C. App. at 532, 767 S.E.2d at 685. This argument is overruled.

D. Punitive Damages

[5] Last, defendants contend the trial court erred in the jury instructions on punitive damages because the instructions did not require the

"jurors to find the existence of one of the required statutory aggravating factors." Defendants argue that the jury should have been instructed that it must find at least one of the three aggravating factors required by North Carolina General Statute § 1D-15.

North Carolina General Statute § 1D-15 provides:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

N.C. Gen. Stat. § 1D-15(a) (2015). Under North Carolina General Statute § 1D-15(b), "[t]he claimant" also "must prove the existence of an aggravating factor by clear and convincing evidence[;]" this is the same standard for proof of actual malice in the liability phase of the trial. N.C. Gen. Stat. § 1D-15(b) (2015); *see generally Harte-Hanks*, 491 U.S. at 686, 105 L. Ed. 2d at 588.

Chapter 1D of the General Statutes also specifically defines "[m]alice" and "[w]illful or wanton conduct" for purposes of punitive damages:

> (5) "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.
>
> . . . .
>
> (7) "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence.

N.C. Gen. Stat. § 1D-5 (2015).

On appeal, defendants attempt to distinguish the "malice" and "willful or wanton" behavior as required by North Carolina General Statute § 1D-5 from the standards required in the liability phase of the trial, which included that the jury must find that defendants "either knew the statement[s were] materially false or acted with reckless disregard of

whether the statement[s were] materially false." But on this issue, the trial court instructed in accord with the pattern jury instructions.

Both parties submitted numerous written requests for jury instructions in the liability and punitive damages phases of the trial. The trial court used portions of the special instructions requested by defendants, such as the instructions regarding rational interpretation, but the instructions primarily followed the North Carolina Pattern Jury Instructions, "the preferred method of jury instruction[.]" *See In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984) ("[T]he trial court undertook to set out the two issues pursuant to our Pattern Jury Instructions, N.C.P.I. – Civil, 860.00, 860.25 (1975). We have previously observed that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions."). The pattern jury instructions include an extensive discussion of the variants of instructions needed in different types of defamation cases – per se or per quod—and different types of plaintiffs – private figure or public figure or official.[8] *See generally* N.C.P.I. – Civil 806.40-806.85. The pattern instructions as used by the trial court were written in 2008, *see generally id.*, and thus were written after the definitions of "[m]alice" and "[w]illful or wanton conduct" were added in North Carolina General Statute § 1D-5 in 1995. *See generally* N.C. Gen. Stat. § 1D-5 (2015) History.

Yet, despite these statutory definitions, the pattern instructions direct that a finding of actual malice in the liability phase of a defamation trial regarding a public official or figure is sufficient to support an award for punitive damages.[9] N.C.P.I. – Civil 806.40 ("[O]nce a public figure plaintiff proves liability under the actual malice standard, that plaintiff will be able to seek presumed and punitive damages without proving an additional damages fault standard[.]"). Thus, under

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8. "Under current U.S. Supreme Court jurisprudence, however, in the case of a public figure or public official, the element of publication with actual malice must be proven, not only to establish liability, but also to recover presumed and punitive damages. Thus, in a defamation case actionable *per se*, once a public figure plaintiff proves liability under the actual malice standard, that plaintiff will be able to seek presumed and punitive damages without proving an additional damages fault standard and, if proof of actual damage in the form of pecuniary damages or actual harm damages is presented, may seek such damages as well." N.C.P.I. – Civil 806.40 (footnote omitted). "The trial judge must, as a matter of law, determine the classification of a particular defamation claim for both common law and constitutional purposes. Once such classification has been determined, differing fault levels for both liability and damages apply." *Id.* (footnote omitted).

9. In contrast, "Notwithstanding, with regard to punitive damages, a private figure/private matter plaintiff seeking such damages currently must also satisfy the following statutory provisions: N.C. Gen. Stat. § 1D-15." N.C.P.I. – Civil 806.40.

North Carolina's current law, punitive damages would be supported by the jury's determination during the liability phase. When we consider the instructions as a whole, we are satisfied that the jury was not misled and considered punitive damages under the correct standards. As part of the instructions in the liability phase of the trial, the jury had to determine, "by clear, strong, and convincing evidence that" defendants "either knew the statement was materially false or acted with reckless disregard of whether the statement was materially false. Reckless disregard means that, at the time of the publication, the Defendants had serious doubts as to whether the statement was true."

Even if the instructions on punitive damages could have been worded differently, the instructions as a whole set forth the law correctly. Defendants have not shown that the jury was misinformed or misled by the instructions as given. *See Floyd v. McGill*, 156 N.C. App. 29, 40-41, 575 S.E.2d 789, 797 (2003) ("On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." (citation, quotation marks, and ellipses omitted)). We hold that the trial court properly instructed the jury on punitive damages under North Carolina General Statute § 1D-15.

VI. Conclusion

We conclude that plaintiff submitted clear and convincing evidence of actual malice, and the trial court properly denied defendant's motion for judgment notwithstanding the verdict. The trial court did not abuse its discretion by excluding defendants' proffered report. The jury instructions, as a whole, properly instructed the jury such that it was correctly informed of the law and not misled.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

DOE v. DOE

[263 N.C. App. 68 (2018)]

JOHN DOE, BY AND THROUGH HIS GUARDIAN AD LITEM, ET AL., PLAINTIFFS
v.
JOHN DOE, ET AL., DEFENDANTS

No. COA17-1368

Filed 18 December 2018

1. Appeal and Error—standing—N.C.G.S. § 1-72.1—access to sealed court file

A newspaper was not required to intervene in a civil negligence case to seek relief under N.C.G.S. § 1-72.1 for public access to a sealed court file and had standing to appeal the trial court's order sealing the entire case file.

2. Appeal and Error—timeliness—access to sealed court file—late appeal—writ of certiorari

In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1, the Court of Appeals agreed that the newspaper's notice of appeal was not timely filed but granted certiorari to review the appeal because the newspaper could not have filed notice of appeal earlier than it did, since the orders sealing the file were themselves sealed, and the newspaper acted in good faith by filing notice of appeal within days of becoming aware of the orders sealing the file.

3. Appeal and Error—access to sealed court file—standard of review—de novo

In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1 and in which the newspaper asserted multiple constitutional claims, the Court of Appeals determined that the correct standard of review on appeal was de novo.

4. Constitutional Law—state constitution—civil court records—qualified right of access

Pursuant to Article I, Section 18 of the North Carolina Constitution and *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449 (1999), a newspaper has a presumptive, qualified right of access to a civil court file, but the right may be limited when there are compelling countervailing public interests that require court records to be sealed. In such cases, trial courts are required to make findings of fact specific enough to allow appellate review of the determination to limit public access.

5. Constitutional Law—access to court records—compelling State interests—identity of juvenile parties—sufficiency of protection

In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1, the Court of Appeals determined that the protection of the identities of juvenile parties, while a compelling State interest, is insufficient to justify sealing an entire court file, including names of attorneys, names of defendants, and any orders sealing the file. This interest can be adequately served by using pseudonyms or initials and redacting names and specific identifying information.

6. Constitutional Law—access to court records—protection of criminal defendant—right to be free from undue publicity

In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1, the Court of Appeals determined that protecting a criminal defendant's right to a trial free from undue pre-trial publicity is not sufficient to justify sealing an entire *civil* court file (in this case, involving a civil negligence claim based on a pending criminal prosecution in another state). Even if on remand defendants demonstrate a compelling need to protect certain information during the criminal prosecution, the trial court's permanent sealing of the civil court file exceeds any allowable protection, since a defendant's interest in a fair trial ends with the conclusion of the prosecution.

7. Constitutional Law—access to court records—protection of innocent third parties—embarrassment—economic loss

In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1, the trial court erred by basing its decision to permanently seal the entire court file on the need to protect innocent third parties from trauma, embarrassment, and economic damage that public scrutiny could bring, since the risk of reputational harm, without more, does not trigger a compelling State interest outweighing the constitutional right of public access to court records.

8. Constitutional Law—public access to court records—documents subject to sealing—categories

In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1, the Court of Appeals analyzed multiple categories of documents or information to determine to what extent the information could be sealed or redacted in order

to protect compelling State interests such as the need to protect identities of juvenile parties or to protect a criminal defendant's right to a fair trial. In any unsealed portion of the file, juvenile names and other specific identifying information must be redacted, and pseudonyms or initials used. Judicial opinions and orders should not be sealed, but may be redacted as necessary. The parties' confidential settlement agreement requires additional analysis, since the presumptive right to public access to court files must be balanced with the important public interests of promoting the settlement of litigation and freedom of contract. The trial court was directed on remand to consider multiple factors before deciding whether portions of or the entire agreement should remain sealed.

9. Damages and Remedies—N.C.G.S. § 1-72.1—erroneously sealed court file—appropriate remedy

In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1, where the Court of Appeals determined that the trial court erroneously ordered the permanent sealing of the entire court file, the Court balanced the procedure in section 1-72.1 with its constitutional authority in concluding the appropriate remedy was to order the unsealing of the file, subject to redactions necessary to protect the identities of the juvenile parties and potentially the right of the criminal defendant to have a fair trial without undue pre-trial publicity.

Appeal by DB North Carolina Holdings, Inc. d/b/a/ The Fayetteville Observer from orders entered 22 November 2016, 14 December 2016, and 2 August 2017 by Judge William R. Pittman in Superior Court, Cumberland County. Heard in the Court of Appeals 22 August 2018.

No brief filed for plaintiffs.

Player McLean, LLP, by James A. McLean, III; and McCoy Wiggins Cleveland & McLean PLLC, by Richard M. Wiggins; and Beaver, Courie, Sternlicht, Hearp & Broadfoot, P.A., by H. Gerald Beaver and David T. Courie, Sr., for defendants-appellees.

Essex Richards, P.A., by Jonathan E. Buchan, Natalie D. Potter, and Caitlin H. Walton; and by John J. Korzen, for appellant DB North Carolina Holdings, Inc. d/b/a The Fayetteville Observer.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, for amici curiae.

STROUD, Judge.

Appellant DB North Carolina Holdings, Inc. d/b/a/ The Fayetteville Observer ("Newspaper") appeals from the trial court's orders permanently sealing the entire court file and denying its motion for access. Newspaper contends that the trial court's orders sealing this file were unconstitutional under the First Amendment to the United States Constitution and Article I, Section 18 of the North Carolina Constitution because they did not apply available alternatives to sealing the entire file and this measure was not narrowly tailored. We agree that the orders sealing an entire court file, even including the date of filing and names of counsel, guardians *ad litem* and the trial court, are overbroad. The public, including Newspaper, has a presumptive right of access to court files under the North Carolina and United States Constitutions as well as North Carolina's Public Records Act. The trial court was correct in concluding there is a compelling public interest in protecting juvenile plaintiffs, who were victims of sexual abuse, but this interest cannot justify sealing the entire file permanently; the documents in the file can be redacted to protect the identities of the juveniles. We vacate the trial court's sealing orders, reverse the trial court's order denying Newspaper's motion for access, and remand for the trial court to hold a hearing to consider the proper extent of redaction and sealing as discussed below and to enter an new order opening the file with these limited redactions.

I. Background

The court file sealed by the trial court involves a lawsuit based upon "allegations of sexual abuse committed against minors" by one of the defendants. On 22 November 2016, the same day the complaint was filed, the trial court entered a Temporary Order to Seal the court file entirely.[1] On 14 December 2016, the trial court approved a settlement of the minor plaintiffs' claims and entered an Order to Seal which permanently sealed the file, and the case was voluntarily dismissed. On 3 July 2017, Newspaper filed a motion to intervene and for access to court records under N.C. Gen. Stat. § 1-72.1, "for the limited purpose of seeking to have [the trial court] enter an order unsealing the court file in this case and granting [Newspaper] and the public access to this file." Because the underlying file is sealed in its entirety, our background is

1. The Temporary Sealing order was signed and filed on 1 December, 2016, *nunc pro tunc* to 22 November 2016.

brief and predominantly based on the undisputed "facts" as set out in Newspaper's motion.[2] Newspaper's motion stated:

> [Newspaper] is informed and believes that this case involves civil claims for negligence and has been sealed in its entirety, apparently from its inception in November, 2016. [Newspaper] has sought access to this file through requests to the Cumberland County Clerk of Court and has been informed that the entire case file is sealed by order of a Superior Court Judge.
>
> At the current time, there are no documents in this file which are available for public review. . . .
>
> There is no motion for public review in the file seeking the sealing of the file, no order in the public file directing that the entire file, or any portion thereof, be sealed from public view, and no findings of fact or law available for public review suggesting the basis for initially sealing the file or for keeping it sealed. The public file does not reflect whether the file was sealed at the request of the plaintiff or of the defendant, with the consent of all parties, over the objection of a party, or *sua sponte*. The file does not reflect the names of counsel for plaintiff or defendant.
>
> Movant understands that this sealed civil action likely involves civil claims that relate to, or parallel, charges asserted in a criminal action currently pending in the state trial courts of South Carolina. That criminal case has been the subject of substantial public interest and attention over the past nine months. At the outset of that criminal case, the South Carolina trial court entered an order on September 19, 2016 (file-stamped October 6, 2016) prohibiting various trial participants, including the alleged victims and their family members, from making any extrajudicial statements about the case. That order, which also effectively sealed the contents of the court file, was dissolved by a June 5, 2017 order upon the motion of *The Fayetteville Observer*. The court files in the South Carolina criminal case are now open for public inspection.

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2. We have reviewed the court file *in camera*, and the Newspaper's factual allegations are accurate.

> For the reasons set forth below, [Newspaper], pursuant to the First Amendment to the United States Constitution, the North Carolina Constitution, Article I, § 18, and N.C.G.S. § 7A-109, seeks access to the above-described court records maintained by the Cumberland County Clerk of Court. [Newspaper] respectfully asks this Court to unseal this court file and to direct the Clerk of Court to promptly make them available to [Newspaper] and to the public.

On 2 August 2017, the trial court entered an order denying Newspaper's motion. Newspaper filed notice of appeal to this Court from the trial court's December 2016 order sealing the file, any prior sealing orders, and from the order denying its motion for access.

II. Motion to Dismiss

Defendants filed a motion to partially dismiss Newspaper's appeal,[3] arguing:

> The Court of Appeals should both deny [Newspaper]'s current motion, *in toto*, and dismiss all of [Newspaper]'s appeal except as to its statutory motion for access, in that (1) [Newspaper] was not a specifically aggrieved party concerning these matters, and, therefore, did not have standing to appeal the same; (2) even if [Newspaper] had such standing, which is denied, [Newspaper]'s notice of appeal is untimely and, therefore, this Court is without jurisdiction to address the same and (3) the Order Denying Access is quite detailed and specific and it is both unnecessary and in contravention of the Trial Court's *Virmani* analysis to grant [Newspaper]'s attorneys even limited access.

Newspaper filed its response to defendants' motion on 8 February 2018, and this Court referred the motion to the panel assigned to hear this appeal.

a. Standing

[1] Defendants note that Newspaper did not seek to intervene but only sought access to the court file under N.C. Gen. Stat. § 1-72.1. Defendants argue that Newspaper has only a "general interest" in the case, the same

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3. Plaintiffs John Doe 15, John Doe 16, and John Doe 17, and their respective Guardians *ad Litem* did not appeal the trial court's orders and have not appeared in this appeal.

as any member of the general public may have, but is not a "specifically aggrieved" party with standing to appeal the order sealing the file. Defendants compare this case to *In re Duke Energy Corp.*, 234 N.C. App. 20, 760 S.E.2d 740 (2014), where "NC WARN, the self proclaimed public watchdog group, sought to intervene in [an] investigative proceeding and 'assist' the Utilities Commission in keeping this alleged impropriety from increasing the energy costs for all North Carolina ratepayers." Defendants concede this case is "not directly on point" but argue it is instructive. But *In re Duke Energy Corp.* is simply not applicable in this context. First, it addressed a motion to intervene. Newspaper concedes that it was not seeking to intervene and the trial court did not address intervention. In addition, this Court discussed NC WARN's status as an "aggrieved party" under N.C. Gen. Stat. § 62-90, which addresses the right of appeal from a ruling by the North Carolina Utilities Commission. *Id.* at 36, 760 S.E.2d at 750. Here, Newspaper's claim to access was filed under N.C. Gen. Stat. § 1-72.1, a statute which sets forth the procedure for obtaining access to a sealed court file.

In *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999), the plaintiff physician sued a hospital regarding its suspension of his medical staff privileges. The Charlotte Observer filed a motion to intervene in the case and sought access to sealed medical peer review committee records. *Id.* at 457, 515 S.E.2d at 682. Regarding the claim for intervention, the North Carolina Supreme Court concluded that The Charlotte Observer's interest in the civil case was "only indirect or contingent" and therefore not subject to intervention as a matter of right under N.C. R. Civ. P. 24(a) and that the trial court had not erred in denying permissive intervention under Rule 24. *Id.* at 460, 515 S.E.2d at 683. The Supreme Court concluded that "the *Observer* had alternative means of obtaining a full and timely review of the issue it sought to raise without being allowed to intervene as a party and unduly delay the adjudication of the rights of the original parties." *Id.* at 462, 515 S.E.2d at 684.

Soon after *Virmani*, in 2002, our General Assembly enacted N.C. Gen. Stat. § 1-72.1 which "establish[ed] a civil procedure for hearing and determining claims of access to documents and to testimony in civil judicial proceedings and shall not be deemed or construed to limit, expand, change or otherwise preempt any provisions of the substantive law that define or declare the rights and restrictions with respect to claims of access." N.C. Gen. Stat. § 1-72.1(f) (2017). The statute does not require a person or entity seeking access to a court file or judicial proceeding to be a party to the case or to have any particularized interest in the case. N.C. Gen. Stat. § 1-72.1(a). It provides that "*[a]ny person*

asserting a right of access to a civil judicial proceeding or to a judicial record" may file a motion and that "[t]he motion shall not constitute a request to intervene under the provisions of Rule 24 of the Rules of Civil Procedure and shall instead be governed by the procedure set forth in this statute." *Id.* (emphasis added).

Newspaper was not required to intervene in the case to seek relief under N.C. Gen. Stat. 1-72.1 and has standing to appeal the trial court's orders sealing the case file. *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 184 N.C. App. 110, 120, 645 S.E.2d 857, 863 (2007) ("[N.C. Gen. Stat. § 1-72.1] plainly and unambiguously applies to any person asserting a right of access to a civil judicial proceeding or to a judicial record." (brackets and quotation marks omitted)). Defendants' motion to dismiss based on standing is denied.

b. Timeliness of Appeal

[2] Defendants argue this Court has no jurisdiction to consider this appeal because Newspaper did not file its Notice of Appeal of the 14 December 2016 Order and the "prior orders sealing the matter" until 10 August 2017. Since the notice of appeal was not filed within 30 days of the entry of the sealing orders, defendants claim it was untimely. Newspaper responds that it is impossible to appeal from an order in a sealed file since it had no actual or constructive notice of the order until 2 August 2017; notice of appeal was filed eight days later. Newspaper points out that that "[t]hese orders were maintained in a sealed fashion in an anonymous case file, with no record notice to the public of their existence." Newspaper also notes that "[t]he sealing of the file in its entirety, keeping secret the names of all parties and even the names of their counsel of record in the civil action, made it exceedingly difficult for [Newspaper] to even comply with the requirement of N.C.G.S. § 1-72.1(a) that any motion for access to a civil judicial proceeding shall be served upon 'all parties to the proceeding' in accordance with Rule 5 of the N.C. Rules of Civil Procedure."

Newspaper filed its motion for access on 3 July 2017. The trial court heard the motion on 2 August 2017 and entered an order denying Newspaper's motion on the same day. Only then did Newspaper learn that the trial court's final order sealing the file had been entered on 14 December 2016, and the trial court's 2 August 2017 order incorporated by reference and relied in part upon both the Temporary Order to Seal entered on 22 November 2016 and the final Order to Seal entered on 14 December 2016—although those orders remained sealed. The trial court specifically provided, "The findings of fact and conclusions

of law contained in its previously entered *orders* to seal are adopted and incorporated by reference." (Emphasis added.) The trial court also determined that "[t]he public policies found herein, as well as those incorporated by reference, substantially outweigh the public's right of access to the file in this matter."

Generally, non-parties have no right of appeal from an order. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("A careful reading of Rule 3 reveals that its various subsections afford no avenue of appeal to either entities or persons who are nonparties to a civil action."). But N.C. Gen. Stat § 1-72.1 establishes a procedure which allows non-parties to request access to court files and specifically grants a right of appeal to the non-party petitioning for access:

> The court shall rule on the motion after consideration of such facts, legal authority, and argument as the movant and any other party to the action desire to present. *The court shall issue a written ruling on the motion that shall contain a statement of reasons for the ruling sufficiently specific to permit appellate review*. The order may also specify any conditions or limitations on the movant's right of access that the court determines to be warranted under the facts and applicable law.

N.C. Gen. Stat. § 1-72.1(c) (emphasis added).

Here, Newspaper timely filed notice of appeal from the 2 August 2017 order but did not, and could not have, filed timely notice of appeal from the 14 December 2016 Order to Seal or the 22 November 2016 Temporary Order to Seal, since both orders were in the sealed file. Newspaper has therefore requested that we issue a writ of certiorari under NC Rule of Appellate Procedure 21(a) to allow review of the 14 December 2016 order and any "prior orders sealing this matter."

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1).

Newspaper had a right of appeal under N.C. Gen. Stat. § 1-72.1 and lost that right by failing to timely appeal the December 2016 Order to Seal and the November 2016 Temporary Order to Seal. But under these unusual circumstances, Newspaper could not possibly have timely filed a notice of appeal from orders in a sealed file—which Newspaper's counsel still have not seen—any sooner than it did, and Newspaper acted in good faith. If we were not to grant review by certiorari as to the 22 November 2016 and 14 December 2016 orders, we would render the sealed orders unreviewable, but N.C. Gen. Stat. § 1-72.1 contemplates appellate review of this type of order. Indeed, it is crucial that appellate review be available for a *sealed* court order. "Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible." *Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014). In our discretion, we therefore allow defendants' motion in part and dismiss Newspaper's appeal from the trial court's orders entered 14 December 2016 and 22 November 2016, but we also allow Newspaper's motion for certiorari to review both orders. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner.").

III. Right of Access to Court File

On appeal, Newspaper argues that the orders sealing the entire file in this civil action are unconstitutional because "(1) they do not apply available alternatives to sealing the entire file, and (2) they are not narrowly tailored to accomplish their stated purpose." (Original in all caps.) N.C. Gen. Stat. § 1-72.1 governs the procedure of this case, but "shall not be deemed or constructed to limit, expand, change or otherwise preempt any provisions of the substantive law that define or declare the rights and restrictions with respect to claims of access." N.C. Gen. Stat. § 1-72.1(f).

a. Standard of Review

[3] Newspaper argues that our standard of review is *de novo* as its claim is based on constitutional rights. Defendants contend we must review the trial court's order for an abuse of discretion. Newspaper has asserted a claim under the procedural statute N.C. Gen. Stat. § 1-72.1, and the substantive bases for the claim are the North Carolina Constitution, the United States Constitution, and N.C. Gen. Stat. § 7A-109. "The distinction between the rights afforded by the first amendment and those afforded by the common law is significant. A first amendment right of access can be denied only by proof of a compelling governmental interest and proof

that the denial is narrowly tailored to serve that interest." *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (citations and quotation marks omitted).[4] "In contrast, under the common law the decision to grant or deny access is left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* (citations and quotation marks omitted).[5]

In *In re Search Warrants of Cooper*, 200 N.C. App. 180, 683 S.E.2d 418 (2009), this Court applied different standards of review based upon each substantive basis for the plaintiffs' claim requesting unsealing of search warrants in a murder investigation. The court first analyzed the plaintiffs' claim to access to sealed records under the Public Records Act for abuse of discretion. *Id.* at 186, 683 S.E.2d at 423. "Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records." *Id.* "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." *Id.* (citation and quotation marks omitted). But this Court applied *de novo* review to the plaintiffs' claims under the North Carolina and United States Constitutions, although the opinion does not expressly identify the standard of review. *See id.* at 188-91, 683 S.E.2d at 425-26.

The only case which has addressed a claim under N.C. Gen. Stat. § 1-72.1 since its enactment by the General Assembly in 2002 is *Beaufort County Board of Education v. Beaufort County Board of Commissioners*, 184 N.C. App. 110, 115, 645 S.E.2d 857, 860 (2007). Although the procedural posture of that case was different, the court based its standard of review upon the constitutional claim asserted:

> It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated. We review this issue *de novo*.

Id. at 115, 645 S.E.2d at 860 (citation and quotation marks omitted).

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4. Although the federal cases cited in this opinion address the First Amendment right of access, we find these cases to be persuasive authority as applied to the open courts provision of the North Carolina Constitution. N.C. Const. art. I, § 18. In addition, Newspaper's claim was based upon both the state and federal constitutions and they provide essentially the same protection in this context.

5. North Carolina also recognizes a common law right of access, in addition to the constitutional rights and the statutory right under N.C. Gen. Stat. § 7A-109, but Newspaper's claims rely primarily upon its state and federal constitutional rights.

Because Newspaper's right to access to court records is based upon the United States and North Carolina Constitutions, Newspaper presented this argument to the trial court, and the trial court's orders also addressed the constitutional rights of access, we review the trial court's orders *de novo*.[6] "The word *de novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (citations and quotation marks omitted).

b. Qualified Right of Access to Civil Court Records under Article I, Section 18

[4] We have been unable to find any other case in North Carolina in which the entire court file, including the court orders sealing the file, has been sealed. This level of protection from public access is unprecedented in North Carolina and has occurred in only very few cases throughout the United States. Even in cases dealing with highly sensitive matters such as national security, only specific portions of files are sealed or documents are redacted as needed, instead of sealing the entire file.

> Litigation about trade secrets regularly is conducted in public; the district court seals only the *secrets* (and writes an opinion omitting secret details); no one would dream of saying that every dispute about trade secrets must be litigated in private. Even disputes about claims of national security are litigated in the open. Briefs in the *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L. Ed. 2d 822 (1971), and the hydrogen bomb plans case, *United States v. Progressive, Inc.*, 467 F.Supp. 990, rehearing denied, 486 F.Supp. 5 (W.D.Wis.), appeal dismissed, 610 F.2d 819 (7th Cir.1979), were available to the press, although sealed appendices discussed in detail the documents for which protection was sought.

Union Oil Co. of California v. Leavell, 220 F.3d 562, 567 (7th Cir. 2000).

North Carolina's Supreme Court set forth the qualified right of access to court files and proceedings under the North Carolina Constitution in *Virmani*, 350 N.C. 449, 515 S.E.2d 675. The trial court entered an order sealing various documents in the file and closing the courtroom

6. Defendants note in their brief that although Newspaper's motion relied on several theories, Newspaper "proceeded at the hearing ONLY on its constitutional claims."

proceedings, based upon N.C. Gen. Stat. § 131E-95, which protects the confidentiality of "proceedings of a medical review committee, the records and materials it produces and the materials it considers[.]" *Id.* at 463, 515 S.E.2d 685 (quoting N.C. Gen. Stat. § 131E-95(b) (1997)). The Charlotte Observer filed a motion for access to the documents and to open the courtroom proceedings; the trial court denied the motion and the Observer appealed. *Id.* at 456, 515 S.E.2d at 681.

The North Carolina Supreme Court first determined that the Observer had no "North Carolina common law right of public access" to the information or proceedings because that right was supplanted by the statute specifically governing medical review committee records and proceedings, N.C. Gen. Stat. § 131E-95. *Id.* at 473, 515 S.E.2d at 692. The Court then addressed the Observer's claim under the North Carolina Constitution and held that the public has a qualified right of access to court proceedings under Article I, Section 18 of the North Carolina Constitution:

> We now hold that the open courts provision of Article I, Section 18 of the North Carolina Constitution guarantees a *qualified* constitutional right on the part of the public to attend civil court proceedings. . . .
>
> The qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. Thus, although the public has a qualified right of access to civil court proceedings and records, the trial court may limit this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest. In performing this analysis, the trial court must consider alternatives to closure. Unless such an overriding interest exists, the civil court proceedings and records will be open to the public. Where the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access.

Id. at 476-77, 515 S.E.2d 693 (citations omitted).

The Supreme Court affirmed the trial court's order in *Virmani*, which had sealed only the confidential portions of the records as provided by N.C. Gen. Stat. §131E-95 and noted that in the factual situation of *Virmani*, the General Assembly had "determined that this right of access is outweighed by the compelling countervailing governmental interest in protecting the confidentiality of the medical peer review process." *Id.* at 477, 515 S.E.2d 693 ("The General Assembly has recognized the public's compelling interest in such confidentiality by enacting N.C.G.S. § 131E-95 and making the confidentiality of medical peer review investigations part of our state's public policy.").

Therefore, under *Virmani*, Newspaper has a qualified right of access to the court file, as the trial court's orders recognized, but this right may be limited "when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest." *Id.* at 476, 515 S.E.2d 693. But the trial court is required to "consider alternatives to closure. Unless such an overriding interest exists, the civil court proceedings and records will be open to the public." *Id.* The trial court is also required to "make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access." *Id.* at 476-77, 515 S.E.2d 693.

IV. Sealing Orders

a. Procedural Background

The trial court's sealing orders were entered based upon motions from both plaintiffs and defendants. Since the entire file and even the sealing order we are reviewing were sealed, we first note we cannot analyze the trial court's orders on appeal and explain the legal basis for our ruling without some references to dates, motions filed, and the legal bases alleged by the parties for sealing the file, and these are details from the sealed file. We also cannot analyze the legal conclusions of the orders sealing the file—which were also sealed—without stating what those conclusions are. Since we conclude that the orders sealing the file must be reversed and the matter remanded for further action, we will include the procedural facts and dates as necessary and the conclusions of law and legal rationale as stated by the trial court's order, but we will not include any factual allegations from the complaint not already revealed in the Newspaper's motion or the trial court's 2 August 2017 order.

The initial complaint was filed by one of the minor plaintiffs on 22 November 2016. At the same time, plaintiff filed a motion for a temporary restraining order, a motion for expedited discovery, and a motion for an order sealing the file. Plaintiff requested that all filings and documents be under seal or maintained as confidential pending clarification by the court in South Carolina of the intended scope of its order prohibiting extrajudicial statements and release of documents ("South Carolina gag order").[7]

On the same day, the trial court entered a Temporary Order to Seal sealing the file and set an additional hearing to take place no later than 14 December 2016. Defendants also filed a Motion to Seal, and their motion was based upon the South Carolina gag order and the need to protect the identities of the minor plaintiffs but also stated the additional concerns of protecting defendants whose conduct was "merely passive" and preventing injury to the reputations of various persons and entities. The trial court held another hearing on the motions to seal on 14 December 2016 and entered the Order to Seal. Also on 14 December 2016, the trial court heard the plaintiffs' Motion for Approval of Settlement for the Benefit of Minors and Dismissal and entered an order approving the settlement.

b. 2016 Sealing Orders

In both the 22 November and 14 December 2016 sealing orders, the trial court noted there is a qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 of the North Carolina Constitution, but the trial court noted this right is not absolute and is subject to reasonable limitations in the interest of the fair administration of justice or for other compelling public purposes. The trial court then made findings of fact regarding the complaint, noting that the claims involved sexual abuse of minors and there is a strong and compelling public interest in protecting the identity of the minor plaintiffs. Besides protection of the identity of the minor plaintiffs, the trial court noted the pending criminal prosecution in South Carolina. The trial court found that one of the defendants here, also the defendant in the criminal prosecution in South Carolina, ("criminal defendant") has a right to a fair

7. Newspaper's motion described the South Carolina gag order: "At the outset of that criminal case, the South Carolina trial court entered an order on September 19, 2016 (file-stamped October 6, 2016) prohibiting various trial participants, including the alleged victims and their family members, from making any extrajudicial statements about the case. That order, which also effectively sealed the contents of the court file, was dissolved by a June 5, 2017 order upon the motion of *The Fayetteville Observer*."

trial by an impartial jury, free from the influence of prejudicial pre-trial publicity, under the North and South Carolina Constitutions and the United States Constitution. The trial court found there is a strong and compelling countervailing public interest which outweighs the public's interest in access to the court file based upon the defendant's right to a fair trial, due to the proximity of Cumberland County to the South Carolina county in which the criminal prosecution was pending and the shared public policy of both states to provide a fair trial. The court noted that it had considered alternatives to sealing the court files and found no suitable alternative to sealing the entire proceedings and court file. The orders decreed that the entire court file, including any future filings, be immediately sealed and kept confidential and that any court proceedings including hearings, depositions, recordings, or transcripts shall be "extremely confidential" and kept under seal. The orders directed that the case be cataloged with pseudonyms for all parties and that the docket entries protect the identities of the parties pending "additional guidance" from the trial court.[8]

We note that the trial court's November 2016 and December 2016 orders did *not* make any finding or conclusion based upon the defendants' alleged interest in protecting the defendants whose conduct was "merely passive" or preventing injury to the reputations of various other persons and entities. The trial court relied *only* upon (1) the public interest in protecting the identity of minor victims of sexual abuse, and (2) the public interest that the criminal defendant receive a fair trial free from unduly prejudicial pre-trial publicity.

V. Analysis

a. August 2017 Order denying Motion for Access

The trial court's order denying Newspaper's motion for "access to civil judicial proceedings and records previously placed under seal" made basic procedural findings and then, based upon the sealed records, briefs, and arguments, made these findings:

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8. The substantive provisions of the 22 November 2016 Temporary Order to Seal and the 14 December 2016 Order to Seal are the same; in fact, they are nearly identical other than the recitation of the procedural posture of the case in the first paragraph of each order. We address the final December 2016 order specifically, but the same analysis would apply to the 22 November 2016 order. We would not address the Temporary Order to Seal at all, since it was superseded by the December order, but we address it because the trial court specifically incorporated it by reference into the Order denying Newspaper's motion for access.

1. The entire file of this action was sealed by order of the Court on December 14, 2016.

2. In its order and in prior orders sealing the matter, the Court made findings of fact and conclusions of law which became part of the sealed file.

3. The matter was voluntarily dismissed upon settlements with the minor plaintiffs which were approved by the Court.

4. This case involves allegations of sexual abuse committed against minors.

5. The identifying characteristics of the minor plaintiffs are inextricably interwoven throughout the pleadings and ancillary documents, including the Court-approved settlements.

6 Identifying characteristics of innocent third parties are inextricably interwoven throughout the pleadings and ancillary documents, including the Court approved settlements.

7. The Court has carefully considered whether there may be suitable alternatives to sealing this matter, and can find none.

The court ultimately denied Newspaper's motion for access to the file and concluded as a matter of law:

1. The findings of fact and conclusions of law contained in its previously entered orders to seal are adopted and incorporated by reference.

2. Unsealing these proceedings presents a substantial and foreseeable risk that the identities of the minor plaintiffs and innocent third parties will become known.

3. Unsealing these proceedings presents a substantial and foreseeable risk that the minor plaintiffs and innocent third parties will be subject to further harm including suffering, embarrassment, emotional distress and psychological trauma.

4. The protection of victims of sexual abuse is a compelling State interest.

5. The protection of juveniles is a compelling State interest.

6. The shielding of victims, particularly juvenile victims, from the trauma and embarrassment of public scrutiny is a compelling State interest.

7. The protection of innocent third parties from the trauma and embarrassment of public scrutiny is a compelling State interest.

8. The protection of innocent third parties from significant economic damage is a compelling State interest.

9. The encouragement of victims of sexual abuse to seek help from the Court is a compelling State interest.

10. The disclosure of the sealed material would be harmful to each of the above compelling State interests.

11. The disclosure of the sealed material would compound the harm already suffered by the minor plaintiffs.

12. This State's public policy encouraging settlement of civil disputes would be harmed by disclosure of the sealed material.

13. There are no suitable alternatives to sealing the matter.

14. The fragile character and unique rights essential to the recovery of minor victims of sexual abuse substantially outweigh the public's right to access the file in this matter.

15. The public polices found herein, as well as those incorporated by reference, substantially outweigh the public's right to access to the file in this matter.

16. The limitation of the public's right to court proceedings and records is necessary to protect the countervailing public interests in this matter and to prevent injustice.

The trial court explicitly based the August 2017 order upon two compelling State interests: (1) the public interest in protecting the identity of minor victims of sexual abuse, and (2) "[t]he protection of innocent third parties from trauma and embarrassment of public scrutiny"

and "significant economic damage." *Only* through incorporating by reference the 2016 orders, the 2017 order also based upon the public interest that the criminal defendant receive a fair trial free from prejudicial pre-trial publicity.

We therefore must consider whether the three stated "compelling State interests" are sufficient to overcome the Newspaper's right under the North Carolina and United States Constitutions to access the court records sealed by the two orders. In addition, we will consider each type of document and information in the file which must be sealed to accomplish protection of the particular state interest. *See Doe v. Pub. Citizen*, 749 F.3d at 266 ("When presented with a sealing request, our right-of-access jurisprudence requires that a district court first determine the source of the right of access with respect to each document, because only then can it accurately weigh the competing interests at stake." (citation and quotation marks omitted)).

b. Protection of juvenile plaintiffs' identities

[5] The trial court made several conclusions regarding the need for protection of the juvenile plaintiffs, including, "The fragile character and unique rights essential to the recovery of minor victims of sexual abuse substantially outweigh the public's right to access the file in this matter." Certainly, the protection of the *identities* of juvenile victims of sexual abuse is a well-established compelling state interest, and North Carolina law specifically protects the identities of juvenile victims of sexual abuse in many situations. Even N.C. Gen. Stat. § 1-72-1 specifically excludes "juvenile proceedings or court records of juvenile proceedings conducted pursuant to Chapters 7A, 7B, 90, or any other Chapter of the General Statutes dealing with juvenile proceedings." N.C. Gen. Stat. § 1-72.1(f). Newspaper, defendants, and *amici* all agree that the identities of the juvenile plaintiffs should be protected, but the issue here is whether sealing the *entire file* is necessary to protect the identities of the juveniles.

The General Assembly has given guidance on how to protect juvenile victims of abuse. At the trial court level, the juvenile hearings may be closed under N.C. Gen. Stat. § 7B-801.[9] N.C. Gen. Stat. § 7B-302

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9. Before closing a hearing to the public in an abuse, neglect, or dependency proceeding, the trial court must consider "the circumstances of the case, including, but not limited to, the following factors:

(1) The nature of the allegations against the juvenile's parent, guardian, custodian or caretaker;

specifically addresses the confidentiality of records in juvenile matters. In appeals of juvenile proceedings under Chapter 7B to this Court, the identity of minors is protected by redaction of names, using pseudonyms or initials, and redaction of specific identifying information in any public filings and in the opinions issued by our appellate courts.[10] In documents related to criminal proceedings, protecting the identities of minor victims of sexual abuse in documents is normally accomplished by redacting the names and other specific identifying information of the minors and use of pseudonyms. In criminal trials, the trial court may use methods such as having a child victim testify remotely and appearing before the court by closed circuit television monitor to protect the child from trauma from being in the courtroom with the defendant, but before using this procedure, the trial court must determine that the "child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence." N.C. Gen. Stat. § 15A-1225.1(b)(1) (2017); *see also State v. Jackson*, 216 N.C. App. 238, 241, 717 S.E.2d 35, 38 (2011) ("One policy area that often arises in the constitutional context is the protection of youth by using witness 'shielding' procedures to balance the need for child sex crime victims' testimony against the risk of engendering further emotional distress. The Supreme Court has deemed the interest in safeguarding child abuse victims from further trauma and embarrassment to be a compelling one

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(2) The age and maturity of the juvenile;

(3) The benefit to the juvenile of confidentiality;

(4) The benefit to the juvenile of an open hearing; and

(5) The extent to which the confidentiality afforded the juvenile's record pursuant to G.S. 132-1.4(l) and G.S. 7B-2901 will be compromised by an open hearing.

(b) No hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open." N.C. Gen. Stat. § 7B-801 (2017).

10. Rule 3.1 of the North Carolina Rules of Appellate Procedure provides that in appeals arising from "termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect," "the identity of involved persons under the age of eighteen at the time of the proceedings in the trial division (covered juveniles) shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings. If the parties desire to use pseudonyms, they shall stipulate in the record on appeal to the pseudonym to be used for each covered juvenile. Courts of the appellate division are not bound by the stipulation, and case captions will utilize initials. Further, the addresses and social security numbers of all covered juveniles shall be excluded from all filings and documents, exhibits, appendixes, and arguments. In cases subject to this rule, the first document filed in the appellate courts and the record on appeal shall contain the notice required by Rule 9(a)." N.C. R. App. P. 3.1.

that, depending on the necessities of the case, may outweigh a defendant's right to face his accusers in court." (citation omitted)).

But the trial court's sealing orders go far beyond the usual statutory protections granted to juvenile victims of sexual abuse in juvenile or criminal proceedings. The interest in protecting the juvenile victims in those cases is exactly the same as in this case, but our General Assembly has balanced that interest with the need for public access to court records and proceedings and has established the extent of protection to be granted.

Defendants argue on appeal that redaction of the documents and use of pseudonyms will not protect the juveniles "from the psychological harm of having their very personal allegations, whether or not attributed to them, BLASTED into the public domain[,]" because Newspaper "is a news organization" whose "business model is to collect news and disseminate it" for a profit and it is simply seeking "salacious allegations" for this purpose.[11] There is no doubt that having facts of their civil cases reported in the media may be upsetting to the juvenile plaintiffs, but we still cannot distinguish their situation from those of the many juvenile victims of sexual abuse in North Carolina who are involved in criminal or juvenile proceedings arising from abuse. Their identities are protected, but the identities of their abusers and facts of the allegations are not. And we also note it is *defendants*—including the criminal defendant who allegedly sexually abused the juvenile plaintiffs—making this strident plea to protect the juvenile plaintiffs; *plaintiffs* did not appear or file a brief in this appeal.

We hold that sealing of the *entire* file, even including names of attorneys, names of defendants, and sealing orders, cannot be justified by the interest in protecting the juvenile plaintiffs. The trial court should—and did—use pseudonyms for the juvenile plaintiffs, and on remand should redact specific identifying information from any documents which include this information. But many documents in the file do not include the juvenile plaintiff's names or any other identifying information, so sealing of those documents cannot be justified by this interest.

c. Protection of criminal defendant's right to a fair trial

[6] The trial court's order denying Newspaper's access also relied upon protection of a criminal defendant's right to a fair trial free of undue

11. Defendants later note their intent is not "to denigrate [Newspaper] or its business practices[.]"

pre-trial publicity, at least indirectly, since this interest was only included by incorporating the prior sealing orders. In a general sense, this is also a well-recognized constitutional interest. *See State v. Jerrett*, 309 N.C. 239, 251, 307 S.E.2d 339, 345 (1983) ("In *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L. Ed. 2d 600 (1966), the United States Supreme Court held that due process mandates that criminal defendants receive a trial by an impartial jury free from outside influences. The Court also held that where there is a reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial, the trial court should remove the case to another county not so permeated with publicity. In *State v. Boykin*, 291 N.C. 264, 229 S.E.2d 914 (1976), we adopted this test and held that it applied not only to cases involving pretrial publicity by the media, but also to cases where the prejudice alleged is attributable to word-of-mouth publicity." (quotation marks omitted)). But the cases addressing the right to fair trial arise from orders entered in the actual criminal prosecution, such as the motion for change of venue in *Jerrett*. *Id*. We cannot find any case which has addressed sealing of a *civil* court file in one state based upon a pending criminal prosecution in another state.

Although defendants' brief stresses the need to protect the identities of the juvenile plaintiffs, their brief makes *no* mention of any compelling interest in protecting the criminal defendant's right to a fair trial in South Carolina and cites no case to support this right. And unlike Newspaper, defendants had access to the 2016 sealing orders which noted this interest, but they did not defend it on appeal. The record also indicates that although the South Carolina court had entered a "gag order" in the criminal prosecution, that order was later dissolved.[12] The trial court made no findings of fact regarding how this civil case in North Carolina would create "undue pretrial publicity" in the South Carolina criminal matter other than geographic proximity. Normally, the South Carolina court handling the criminal prosecution would be in the best position to address this issue. We also recognize that some of this information is likely already a matter of public record in the South Carolina criminal prosecution or has been publicly disclosed by other persons not parties to this case. If the information has already been disclosed, there is no valid justification for additional protection. And even if on remand defendants can demonstrate a compelling need to continue to seal certain information in this case to protect the criminal defendant's rights in South Carolina, protecting the criminal defendant's right to a fair

12. Plaintiff's Motion for Entry of Confidentiality and Protective Order was intended primarily to comply with the South Carolina gag order in the criminal prosecution, as they did not want to interfere with the prosecution, but they reserved the right to move to unseal the file after the prosecution concluded.

trial cannot justify completely and permanently sealing an entire case file. Even if some level of protection is needed during investigation or while the case is pending, once the criminal prosecution has concluded, this interest no longer exists. *See Cooper*, 200 N.C. App. at 187-88, 683 S.E.2d at 424 ("The trial court found that the release of information contained in the search warrants and attendant papers would undermine the ongoing homicide investigation and the potential success of it. In the sealing order, the trial court found that the sealing *for a limited time period* was necessary to ensure the interests of maintaining the State's right to prosecute a defendant, of protecting a defendant's right to a fair trial, and preserving the integrity of an ongoing or future investigation." (emphasis added)). The trial court erred to the extent it *permanently* sealed any portion of the file based only upon a need to protect the right of the criminal defendant in a South Carolina criminal proceeding.

On remand, the trial court shall determine the status of the South Carolina criminal prosecution; if it is still pending, and the criminal defendant claims any need for consideration of this interest, the trial court may consider if there is still any need for measures to protect the criminal defendant's right to a fair trial. If the trial court determines that any portion of the file must be sealed or redacted for the protection of the criminal defendant's right to a fair trial, the trial court shall also address in its order when and how those portions of the file will be unsealed. But once the prosecution has concluded, a defendant's interest in a fair trial no longer needs protection.

d. Protection of innocent third parties from embarrassment or economic loss

[7] The trial court's order denying Newspaper's motion is also based upon these conclusions:

> 7. The protection of innocent third parties from the trauma and embarrassment of public scrutiny is a compelling State interest.
>
> 8. The protection of innocent third parties from significant economic damage is a compelling State interest.

We note that the trial court did not base the November or December 2016 orders sealing the file on this "third party" interest, but the order denying Newspaper's motion relies in part on this interest.[13] Unlike the

13. We have not examined whether the trial court erred by basing its denial of Newspaper's motion to unseal in part on a ground that was not part of the orders sealing the file initially. Newspaper was unable to address this issue on appeal because the sealing

well-established interests in protecting the identities of juvenile victims of sexual abuse and in protecting a criminal defendant's right to a fair trial, an interest in protecting third parties from "trauma and embarrassment" or "economic damage" has not been recognized as a compelling state interest outweighing the constitutional right of public access to the records of our courts. We have been unable to find any North Carolina case recognizing a compelling state interest in protection of "innocent third parties" from embarrassment, economic loss, or trauma based solely upon disclosure of embarrassing information such as the allegations in this case.[14] The Fourth Circuit Court of Appeals has addressed this type of interest and found no cases which recognized "reputational harm to be a compelling interest sufficient to defeat the public's First Amendment right of access[:]"

> A corporation very well may desire that the allegations lodged against it in the course of litigation be kept from public view to protect its corporate image, but the First Amendment right of access does not yield to such an interest. The interests that courts have found sufficiently compelling to justify closure under the First Amendment include a defendant's right to a fair trial before an impartial jury, protecting the privacy rights of trial participants such as victims or witnesses, and risks to national security. Adjudicating claims that carry the potential for embarrassing or injurious revelations about a corporation's image, by contrast, are part of the day-to-day operations of federal courts. But whether in the context of products liability claims, securities litigation, employment matters, or consumer fraud cases, the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company. A corporation may possess a strong interest in preserving the confidentiality of its proprietary and trade-secret information, which in turn may justify

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orders were sealed and it could not have discovered this potential issue. We express no opinion on whether the trial court erred in its order denying access by relying upon an interest which was not part of the basis for the sealing orders.

14. We recognize that protection of third parties may be a factor in sealing *portions* of court files or proceedings in cases involving confidential information, such as medical information protected by various state and federal statutes. We are addressing only "trauma" or "economic loss" of third parties which may arise from disclosure of "embarrassing" information in a court proceeding which is not protected by any specific statutes.

> partial sealing of court records. We are unaware, however, of any case in which a court has found a company's bare allegation of reputational harm to be a compelling interest sufficient to defeat the public's First Amendment right of access. Conversely, every case we have located has reached the opposite result under the less demanding common-law standard. *See*, *e.g.*, *Procter & Gamble Co. v. Bankers Trust Co*., 78 F.3d 219, 225 (6th Cir.1996) ("commercial self-interest" does not to qualify as a legitimate ground for keeping documents under seal); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir.1991) (harm to a "company's public image" alone cannot rebut the common-law presumption of access); *Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury*, 912 F.2d 897, 900 (7th Cir.1990) (information that "may impair [a corporation's] standing with its customers" insufficient to justify closure); *Littlejohn*, 851 F.2d at 685 (a corporation's "desire to preserve corporate reputation" is insufficient overcome common-law right of access); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1570–71 (11th Cir.1985) (per curiam) ("harm [to] the company's reputation" is insufficient to outweigh common-law right of access).

Doe v. Pub. Citizen, 749 F.3d at 269-70 (citations omitted).

"Adjudicating claims that carry the potential for embarrassing or injurious revelations about" parties, witnesses, or "a corporation's image" is "part of the day-to-day operations of" the North Carolina courts as well. *Id.* at 269. We understand why the corporate defendants, individual defendants, and others who are not parties to the lawsuit would be embarrassed by some of the factual allegations of the plaintiffs' complaint. We also recognize that defendants did not have, and will not have, any opportunity to refute those allegations in the court proceeding itself, since the case has been resolved. But their situation is no different than that of the parties or third parties in the cases noted by the Fourth Circuit Court of Appeals in *Doe v. Public Citizen*. *Id.* at 269-70. The "public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company[]" or individuals associated with a criminal defendant. *Id.* at 269. Thus, the trial court erred to the extent it relied upon the interest of protection of the defendants or innocent third parties from embarrassment, trauma, or economic loss in sealing any portion of the court file.

VI. Documents or Information Subject to Sealing

a. Categories of Information in Court File

[8] Since we have determined that the interest in protecting the identities of the juvenile plaintiffs justifies some level of protection of information in the court file, and the right of the criminal defendant to a fair trial *may* justify some temporary level of protection, we must now consider the particular information or documents subject to sealing or redaction. We begin with the presumptive right of access to civil proceedings and documents filed therein. N.C. Const. art. I, § 18. In the North Carolina cases addressing sealing of records, the cases all deal with certain types of records in a court file, such as search warrants, *Cooper*, 200 N.C. App. 180, 683 S.E.2d 418; or medical peer review records, *Virmani*, 350 N.C. 449, 515 S.E.2d 675; none have addressed sealing an entire file. We will follow the framework set out by the Fourth Circuit Court of Appeals in *Doe v. Public Citizen*. There, the court noted the "categories of documents" entirely sealed by the District Court's order on appeal and addressed each one:

> (1) the pleadings and attachments thereto; (2) the motions, related briefing, and exhibits supporting (i) Company Doe's motion for a preliminary injunction, (ii) the Commission's motion to dismiss, (iii) Company Doe's motion to amend its complaint, and (iv) the parties' cross-motions for summary judgment; and (3) the amended pleadings as well as numerous other residual matters. None of these sealed documents appear on the public docket. Further, in addition to these materials, the district court released its memorandum opinion on the public docket with redactions to virtually all of the facts, the court's analysis, and the evidence supporting its decision.

Doe v. Pub. Citizen, 749 F.3d at 266-67.

Here, the documents in the file include: summonses for each defendant; Civil Action Coversheets; Complaint and Motion for Immediate Injunctive Relief; Amended Complaint and Motion for Immediate Injunctive Relief; Plaintiff's Motion for Expedited Discovery; Notice of hearing for injunctive relief and expedited discovery; Plaintiff's Motion for Entry of Confidentiality and Protective Order; Defendants' Motion to Seal; Applications and Orders for Guardians Ad Litem for each juvenile plaintiff; an affidavit; the Temporary Order to Seal dated 1 December 2016; the Order to Seal dated 14 December 2016; the AOC Civil File Folder marked 16 CVS 8021; and CD recordings of court proceedings from

22 November 2016 and 14 December 2016. We will address the extent of protection needed for each type of document or information separately.

i. Complaints and Motions

The complaint and amended complaint include the most factual allegations, including the identities of the juvenile plaintiffs and information which could make them identifiable. As we have discussed, these documents can be redacted to protect the identities of the juvenile plaintiffs and to remove any specific identifying information.

We note that the trial court determined that "[t]he identifying characteristics of the minor plaintiffs are inextricably interwoven throughout the pleadings and ancillary documents, including the Court-approved settlements[,]" and that "[i]dentifying characteristics of innocent third parties are inextricably interwoven throughout the pleadings and ancillary documents, including the Court approved settlements." We agree that "identifying characteristics" of "innocent third parties" are "interwoven" throughout the pleadings and other documents, but as we have determined, any interest in protection of third parties does not outweigh the presumptive interest of the public in access to court files. And the "identifying characteristics" of the juvenile plaintiffs as described in the documents can be redacted, just as is routinely done in juvenile cases and criminal prosecutions. We agree redaction would be more difficult if the trial court were trying to protect *both* the identities of the minor plaintiffs and to prevent "embarrassment" or "economic damage" to the defendants and multiple third parties, but it is much easier to redact the documents without regard to the defendants or third parties. For example, the affidavit dated 22 November 2016 addresses actions of defendants and third parties but does not compromise the identity of the juvenile plaintiffs, so there is no compelling public interest to justify sealing the affidavit.

Unless on remand the trial court identifies a compelling need for redaction of any other information based upon protecting the criminal defendant's right to a fair trial and makes findings of fact supporting that need, the complaints should not be sealed. On remand, the trial court shall redact from all of the documents in the court file the names of the juvenile plaintiffs and any other specific identifying information such as physical descriptions, ages, addresses, or names of immediate family members. The pseudonyms used for the juvenile plaintiffs in the case caption shall remain. And, as all parties acknowledged during oral argument, there is no reason in this case to seal the names of counsel, the guardians *ad litem*, or the trial court; this information poses no risk of

revealing the juvenile plaintiffs' identities or compromising the criminal defendant's right to a fair trial.

The Applications for Appointment of Guardians ad Litem do not include any factual allegations which could justify sealing. The names of the juvenile plaintiffs should be redacted from each application, but the applications should not be sealed. The Motion for Entry of Confidentiality and Protective Order filed by plaintiffs and the Motion to Seal filed by defendants do not include any information which would compromise the identities of the juvenile plaintiffs or even the criminal defendant's right to a fair trial. They include names of the defendants, but we have determined that the names of the defendants should not be sealed. These Motions should not be sealed.

ii. Court Orders

The file includes orders appointing Guardians *ad Litem* for each juvenile plaintiff, the Trial Court's Temporary Order to seal, and the Order to Seal. We have been unable to find any other North Carolina case in which a court has sealed its own sealing orders, but the Fourth Circuit Court of appeals addressed a District Court's order ruling on a summary judgment motion and held that the "First Amendment right of access extends" to judicial orders:

> The public has an interest in learning not only the evidence and records filed in connection with summary judgment proceedings but also the district court's decision ruling on a summary judgment motion and the grounds supporting its decision. Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492, 95 S.Ct. 1029, 43 L. Ed. 2d 328 (1975) ("[O]fficial records and documents open to the public are the basic data of governmental operations."); *Mueller v. Raemisch*, 740 F.3d 1128, 1135–36 (7th Cir.2014) ("Secrecy makes it difficult for the public (including the bar) to understand the grounds and motivations of a decision, why the case was brought (and fought), and what exactly was at stake in it."); *United States v. Mentzos*, 462 F.3d 830, 843 n. 4 (8th Cir.2006) (denying motion to file opinion under seal because "decisions of the court are a matter of public record"); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir.2000) ("[I]t should go without saying that the judge's opinions and orders belong in the

> public domain."); *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir.1995) (observing that public monitoring of the courts "is not possible without access to ... documents that are used in the performance of Article III functions").

Doe v. Pub. Citizen, 749 F.3d at 267.

Although this Court is not bound by the opinions of the Fourth Circuit or other federal courts, we agree that "it should go without saying that the judge's opinions and orders belong in the public domain." *Union Oil*, 220 F.3d at 568. In addition, we have reviewed the Temporary Sealing Order and Sealing Order, and neither includes the juvenile plaintiffs' names or any specific identifying information. The orders include the names of the guardians *ad litem* and defendants in the case caption and the trial judge issuing the orders, but sealing of these names cannot be justified by any compelling public interest. The Orders appointing guardians *ad litem* include the names of juveniles, but those can easily be redacted. The trial court erred in sealing its own orders. On remand, all orders shall be unsealed, and the orders Appointing guardians *ad litem* redacted to protect the identities of the juveniles.

iii. Minor Settlement and Confidentiality Agreement

We will address the Confidential Settlement Agreement separately, since the interests involved as to the Agreement are different and mere redaction of the names and identifying information of the juvenile plaintiffs may not be sufficient. North Carolina courts recognize that settlement of litigation is an important public interest:

> Our judicial system has a strong preference for settlement over litigation. Courts are generally indifferent to the nature of the parties' agreement; *why* or *how* the case is settled is of little concern.

Ehrenhaus v. Baker, 216 N.C. App. 59, 72, 717 S.E.2d 9, 19 (2011). Confidential settlement agreements are also enforced by our courts, but the public interest in settlement of litigation and freedom of contract must be balanced with the presumptive right of public access to court proceedings.

In *France v. France*, 209 N.C. App. 406, 705 S.E.2d 399 (2011), a husband and wife entered into a Separation and Property Settlement Agreement which included a confidentiality provision and provision that in the event of litigation between them "requires disclosure of any of the terms of the Agreement," the parties would "use their best efforts so that any reference to the terms of the Agreement and the Agreement

itself will be filed under seal, with prior notice to the other party." *Id.* at 407-08, 705 S.E.2d at 402 (brackets omitted). Litigation regarding an alleged breach of the agreement ensued, and two "media movants," a newspaper and television station, moved for access to the courtroom proceedings in the case. *Id.* at 409, 705 S.E.2d at 403. The trial court entered an order allowing public access to the courtroom proceedings and the husband appealed. *Id.*[15]

This court held that an agreement between the parties which required "automatic and complete closure of the proceedings" was "in violation of public policy—the qualified public right of access to civil court proceedings guaranteed by Article I, Section 18" and in violation of the Public Records Act:

> In his argument concerning his right to contract, Plaintiff states that unless a contract is contrary to public policy or prohibited by statute, the freedom to contract requires that it be enforced. We hold that if the Agreement requires automatic and complete closure of the proceedings in this matter, then the Agreement *is* in violation of public policy—the qualified public right of access to civil court proceedings guaranteed by Article I, Section 18. Were we to adopt Plaintiff's position, any civil proceeding could be closed to the public merely because any party involved executed a contract with a confidentiality clause similar to that contained in the Agreement in this matter. Plaintiff's right to contract is in no way violated; we merely hold that Plaintiff cannot, by contract, circumvent established public policy—the qualified public right of access to civil court proceedings. Plaintiff must show some independent countervailing public policy concern sufficient to outweigh the qualified right of access to civil court proceedings.
>
> Plaintiff's position would also render meaningless provisions of the Public Records Act, N.C. Gen. Stat. § 132 1 (1995). Further, the contract states that Plaintiff and Defendant will use their best efforts so that any reference to the terms of the Agreement and the Agreement itself will be filed under seal. The Agreement contains

15. The procedural history of *France v. France* is complex; there were two appeals and three orders regarding the media movants' motion, but this portion of the opinion is instructive for purposes of this case.

> nothing requiring either Plaintiff or Defendant to use best efforts to obtain a closed proceeding.

Id. at 415, 705 S.E.2d at 407 (citation, quotation marks, and brackets omitted).

This Court affirmed the trial court's order opening the courtroom proceedings, holding:

> [T]he trial court was correct to determine whether proceedings should be closed based upon the nature of the evidence to be admitted and the facts of this specific case. Evidence otherwise appropriate for open court may not be sealed merely because an agreement is involved that purports to render the contents of that agreement confidential. Certain kinds of evidence may be such that the public policy factors in favor of confidentiality outweigh the public policy factors supporting free access of the public to public records and proceedings.
>
> By contrast, our appellate courts have ruled for the disclosure of traditionally confidential records pursuant to the Public Records Act. *See*, *e.g.*, *Carter–Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp.*, 178 N.C.App. 621, 628, 633 S.E.2d 682, 687 (2006) (contracts between public hospitals and HMOs may be required to be disclosed excepting parts of contracts that contain "competitive health care information"); *see also*, *Womack Newspapers*, *Inc. v. Town of Kitty Hawk*, 181 N.C.App. 1, 14, 639 S.E.2d 96, 104–05 (2007) (files and work product of city attorney may be required to be disclosed pursuant to the Public Records Act). Plaintiff points to no statutory support for any contention that the Agreement should be excepted from the Public Records Act, and we find none.

Id. at 415-16, 705 S.E.2d at 407-08 (citations omitted).

The Confidential Settlement Agreement here also includes provisions regarding sealing the court file, but a court file "may not be sealed merely because an agreement is involved that purports to render the contents of that agreement confidential." *Id.* at 415-16, 705 S.E.2d at 407. In many cases, the parties may wish to keep many types of sensitive information secret, but if the parties are using our courts for resolution of their dispute, documents filed with the court are presumptively available to the public.

> Calling a settlement confidential does not make it a trade secret, any more than calling an executive's salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination). Many a litigant would prefer that the subject of the case—how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on—be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Union Oil, 220 F.3d at 567-68 (citations omitted).

On remand, the trial court should consider whether the Confidential Settlement Agreement within the court file should remain sealed, considering the subject matter of the Agreement and "the facts of this specific case." The "public policy factors in favor of confidentiality" as to the Agreement include the protection of the identity of the juvenile plaintiffs, but may also include the public policy factors of encouraging settlement of litigation and freedom of contract. At least, the trial court should redact specific identifying information as discussed above, but the trial court may determine that other portions of the Agreement or even the entire Confidential Settlement Agreement should remain sealed. Since the parties to the case, the Newspaper, and other parties interested in the Confidential Settlement Agreement have not had the opportunity to address these particular issues before the trial court, on remand, the trial court shall hold a hearing so that all of those parties may be heard before entering an order addressing the extent of access to the Confidentiality Agreement and any redactions needed.

iv. Recordings of 22 November 2016 and 14 December 2016 Hearings

On remand, the trial court shall review the recordings and determine if any portion of the recording reveals the identities of the juvenile plaintiffs or other specific identifying information, just as for the documents discussed above. The trial court shall unseal the recordings, with any redactions necessary to protect the compelling public interests discussed above.

VII. Remedy Under N.C. Gen. Stat. § 1-72.1

[9] Since we have determined that the trial court's order was not narrowly tailored and that it is possible to unseal substantial portions of the file without harming the interests of the juveniles or the criminal defendant's interest in a fair trial, we must consider the appropriate remedy under N.C. Gen. Stat. § 1-72.1. Subsection (e) of N.C. Gen. Stat. § 1-72.1 addresses procedure when an order is appealed:

> A ruling on a motion made pursuant to this section may be the subject of an immediate interlocutory appeal by the movant or any party to the proceeding. Notice of appeal must be given in writing, filed with the court, and served on all parties no later than 10 days after entry of the court's ruling. If notice of appeal is timely given and given before further proceedings are held in the court that might be affected by appellate review of the matter, the court, on its own motion or on the motion of the movant or any party, shall consider whether to stay any proceedings that could be affected by appellate review of the court's ruling on the motion. If notice of appeal is timely given but is given only after further proceedings in the trial court that could be affected by appellate review of the ruling on a motion made pursuant to this section, or if a request for stay of proceedings is made and is denied, then the sole relief that shall be available on any appeal in the event the appellate court determines that the ruling of the trial court was erroneous shall be reversal of the trial court's ruling on the motion and remand for rehearing or retrial. On appeal the court may determine that a ruling of the trial court sealing a document or restricting access to proceedings or refusing to unseal documents or open proceedings was erroneously entered, but it may not retroactively order the

> unsealing of documents or the opening of testimony that was sealed or closed by the trial court's order.

N.C. Gen. Stat. § 1-72.1(e).

N.C. Gen. Stat. § 1-72.1 specifically addresses potential remedies in *interlocutory* appeals and limits the remedy on appeal of an interlocutory order to reversal of the sealing order and "remand for rehearing or retrial" in two situations: 1. Notice of appeal is given "after further proceedings in the trial court that could be affected by appellate review of the ruling on a motion made pursuant to this section"[;] or, 2. Notice of appeal is given and "request for stay of proceedings is made and is denied." *Id.*

In both situations, the underlying case is still pending when the order to seal is subject to an interlocutory appeal. The last sentence of subsection (e) is: "On appeal the court may determine that a ruling of the trial court sealing a document or restricting access to proceedings or refusing to unseal documents or open proceedings was erroneously entered, *but it may not retroactively order the unsealing of documents or the opening of testimony that was sealed or closed by the trial court's order*." *Id.* (emphasis added). If the last sentence of subsection (e) is read to apply to an appeal from a *final order*, and not just interlocutory appeals, it would effectively eliminate any remedy in a case already fully resolved.

Read in context, subsection (e) of the statute addresses only interlocutory appeals so it does not apply to the procedural posture of this case: an appeal from a final order. Here, the underlying proceeding was resolved entirely before the motion to unseal was filed, the order entered, and notice of appeal was given, so the proceeding cannot be "affected by appellate review" of the orders sealing the file, and we cannot remand for "rehearing or retrial" of the case, which has been settled. N.C. Gen. Stat. §1-72.1(e) addresses remedies for interlocutory appeals only, so it does not limit the remedy in this case.

N.C. Gen. Stat. §1-72.1 is entitled "Procedure to assert right of access" and was enacted after *Virmani*—which was decided when there was no statute addressing a procedure to assert the right of access—to establish a procedure for a non-party to a case to assert the right, without need to "intervene under the provisions of Rule 24 of the Rules of Civil Procedure" or to be a party to the underlying action. N.C. Gen. Stat. §1-72.1 (a).

> The cardinal principle of statutory construction is that the intent of the legislature is controlling. To ascertain

> our General Assembly's legislative intent, we look at the phraseology of the statute as well as the nature and purpose of the act and the consequences which would follow its construction one way or the other. We will not adopt an interpretation that would result in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act. Finally, whenever possible, we will construe a statute so as to avoid absurd consequences.

Few v. Hammack Enter., Inc., 132 N.C. App. 291, 295-96, 511 S.E.2d 665, 669 (1999) (citations, quotation marks, and brackets omitted).

Since the underlying proceeding has been finally resolved and will not be affected by our review of the sealing order, and we have determined that the order was erroneously entered, the only possible remedy is to order the unsealing of the file with redactions and limitations as discussed above. If we interpreted N.C. Gen. Stat. § 1-72.1 to remove the authority of this court to order unsealing of documents erroneously sealed, this interpretation would leave a successful litigant with no remedy for a violation of its constitutional rights. This interpretation "would result in injustice," and N.C. Gen. Stat. § 1-72.1 "may reasonably be otherwise consistently construed with the intent of the act." *Id.* at 295-96, 511 S.E.2d at 669. Subsection (f) provides that § 1-72.1 is "*intended* to establish a *civil procedure* for hearing and determining claims of access to documents and to testimony in civil judicial proceedings and *shall not be deemed or constructed to limit, expand, change, or otherwise preempt any provisions of the substantive law that define or declare the rights and restrictions with respect to claims of access*." N.C. Gen. Stat. § 1-72.1(f) (emphasis added). Because N.C. Gen. Stat. § 1-72-1 is a procedural statute which does not limit or change any substantive law – including the qualified right of public access to court files under the North Carolina and United States Constitutions—we must construe it in a manner which preserves the duty of the appellate courts to provide a remedy in an appeal from a final order, especially where a constitutional issue is raised.

In addition, the Constitution of North Carolina expressly vests in our Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. art. IV, § 13, cl. 2. If we interpreted N.C. Gen. Stat. § 1-72.1 as a procedural rule eliminating the authority of the Appellate Division to provide a remedy for a violation of constitutional rights by ordering unsealing of documents erroneously sealed, it would conflict with the North Carolina Constitution. Since the

only remedy possible in this case is to order unsealing of documents in the case file, with redactions as necessary to protect the identities of the juveniles (and the possibility of additional temporary protection of the criminal defendant's right to a fair trial on remand), our duty under the North Carolina Constitution is to order that the documents be unsealed and redacted.

VIII. Conclusion

We vacate the trial court's 22 November 2016 and 14 December 2016 orders and reverse the Order denying Newspaper's motion for access to the court file and remand for a hearing for the trial court to enter a new order. On remand, the trial court shall immediately unseal the names of all defendants, counsel for all parties, and the guardians *ad litem* for the juvenile plaintiffs to facilitate proper notification to all parties regarding the proceedings on remand and service of any documents filed. All parties shall use pseudonyms for the juvenile plaintiffs and shall not include any specific identifying information of the juvenile plaintiffs in any motions, notices, or other documents filed with the trial court on remand. After proper notice, the trial court shall hold a hearing on remand and all parties to the lawsuit as well as Newspaper shall have the opportunity to present evidence and arguments limited to the proper scope of the redactions or other limitations of public access to the trial court file. At the minimum, the trial court shall redact the names and other specific identifying information regarding the juvenile plaintiffs as noted above in all documents and recordings but may make other redactions consistent with this opinion. The trial court shall consider whether the Confidential Settlement Agreement should remain sealed in its entirety or if it should be unsealed with redactions. At the hearing on remand, *if* the criminal defendant requests any additional protection based upon his right to a fair trial, the trial court shall also consider the status of the South Carolina criminal prosecution, including information already made public in or related to that proceeding, and determine if any additional information in the file must be redacted or sealed to protect the interest of the criminal defendant in a fair trial.[16] If the trial court orders any redaction or sealing based upon the interest of the criminal defendant in a fair trial, it shall make findings of fact supporting the order and shall also address when and how that information shall be unsealed. On remand, the trial court shall not redact or seal any

16. It is possible criminal defendant has abandoned this argument since defendants did not mention this interest on appeal. Criminal defendant must request consideration on remand if he wants the trial court to consider this interest.

document or recording for the purpose of protecting defendants or third parties from embarrassment, trauma, or economic damage.

REVERSED AND REMANDED.

Judges ZACHARY and MURPHY concur.

TRACIE LEE GILMARTIN, PLAINTIFF
v.
MICHAEL THOMAS GILMARTIN, DEFENDANT

No. COA18-466

Filed 18 December 2018

1. Appeal and Error—record—partial transcription—insufficient

The husband in an alimony case waived issues on appeal regarding the sufficiency of the evidence to support the trial court's findings where he provided only a portion of the transcript and left out portions relevant to his appeal.

2. Appeal and Error—record—partial transcription—insufficient

The amount and duration of an alimony award was affirmed where the sufficiency of the evidence could not be reviewed due to an incomplete transcript. The trial court made findings on many of the relevant factors and is assumed to have made findings on all of the factors for which evidence was presented.

3. Divorce—alimony—pleadings—lack of provocation

The trial court did not err in an alimony action by finding that defendant husband committed marital fault even though the wife did not allege a lack of provocation. Defendant's argument was treated on appeal as a Rule 12(b)(6) motion to dismiss for failure to state a claim, and denial of such a motion is not properly presented in an appeal from a judgment on the merits.

4. Divorce—alimony—sexual activity—condonation

The trial court did not err in an alimony action by not finding that the wife condoned the husband's illicit sexual behavior. Although the wife was aware of two affairs in 2008 and the parties remained together, almost all of the findings regarding fault addressed sexual indignities (an addiction to pornography and online communications with women), not illicit sexual behavior. The evidence

and findings showed that the husband was deceiving his wife regarding these activities.

Judge BERGER concurring in the result only.

Appeal by defendant from order entered 6 December 2017 by Judge Robert Trivette in District Court, Pasquotank County. Heard in the Court of Appeals 17 October 2018.

Michael P. Sanders, P.C., by Michael P. Sanders, for plaintiff-appellee.

Frank P. Hiner, IV and Brett A. Lewis, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a permanent alimony order. Because defendant has failed to provide a complete record for review on appeal, we affirm the trial court's order on the issues which this Court cannot review without the missing transcript. As to defendant's remaining issue regarding marital fault, we affirm.

I. Background

On 28 June 2016, plaintiff-wife filed a complaint against defendant-husband alleging that the parties married in 2006, had one child, and separated in June of 2016. Wife sought child custody, child support, post-separation support, alimony, equitable distrbution, and an injunction to protect certain assets. Husband answered Wife's complaint alleging several affirmative defenses and also counterclaiming for child custody, child support, and equitable distribution ("ED").

On 27 March 2017, the trial court entered an order addressing child custody, child support, postseparation support, and uninsured medical expenses; this order is not at issue on appeal. On 6 December 2017, the trial court entered an alimony order which requires Husband to pay Wife $1,100 a month for 48 months. Husband appeals the alimony order.

II. Record on Appeal

[1] Husband first contends "the trial court committed reversible error when it concluded as a matter of law that [Wife] was entitled to alimony and ordered that [Husband] pay [Wife] alimony[.]" (Original in all caps.) Husband raises four sub-arguments based upon findings of fact and conclusions of law regarding Wife's status as dependent spouse, judicial notice of financial affidavits, and sufficiency of the evidence

regarding the parties' accustomed standard of living during the marriage. Husband also challenges numerous findings of fact as unsupported by the evidence.

Since Husband's arguments are based upon the sufficiency of the evidence to support the trial court's findings regarding various financial aspects of the case, we must determine whether there was sufficient financial evidence to support the findings.

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.
>
> An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272–73 (2013) (citations and quotation marks omitted).

But our record on appeal includes only a portion of the trial transcript, so we cannot review any issues of sufficiency of the evidence. Husband has waived these issues on appeal by providing only a portion of the transcript and leaving out portions relevant to his appeal. It is clear from the transcript that the claims for ED and alimony were heard on the same day. The trial started with the ED claim and then the trial court heard the alimony portion of the case.

Our transcript on appeal begins with page 1 -- but in middle of the hearing -- as the court reporter apparently transcribed only part of the hearing. The transcript begins with Wife's attorney explaining, "I have a witness here under subpoena, and *he's had to sleep through the E.D.* so if I can go ahead and call him and try to get him out of here." (Emphasis added.) The witness gave brief testimony and was released. Later, during the testimony and arguments, there were references to the ED portion of the hearing that had just transpired. For example, Wife's testimony includes the following questions and answers:

> Q. You testified *during the ED portion of this* that you have three children; is that correct?

A. Yes.

. . . .

Q. Did you hear those *numbers I read to Mr. Gilmartin earlier* about net profits for the business off of the tax returns?

A. Yes.

. . . .

Q. And *I know we went through this in ED*, but I'm going to ask you again, did you invest some or all of the retirement monies that you took out into Bottomline?

A. Yes.

(Emphasis added.) At the end of the hearing, *Husband's* attorney began his closing argument, "May it please The Court and Mr. Sanders. Your Honor, *addressing equitable distribution first*." (Emphasis added.) Thus, it is clear that the trial court heard the claims of ED and alimony at the same hearing, but Husband provided only the second portion of the transcript. And most of Husband's challenges to the findings of fact as unsupported are based upon the lack of financial evidence that would quite logically have been included in the ED portion of the trial, which may be why it was not repeated in the alimony portion of the trial.

Husband, citing to pages 1-108 of the transcript, the entire transcript but for the closing arguments, argues, "No financial affidavit was introduced for [Wife] at trial and, in fact, no exhibits were introduced at the alimony hearing." But pages 1-108 are *only* the alimony portion of the hearing, so we have no way of knowing what exhibits were introduced or what discussion, if any, occurred about the financial affidavit during the equitable distribution phase. Husband may not have intended to misrepresent the record before the trial court to this Court, but because a substantial portion of the transcript particularly relevant to his argument on appeal is missing, we cannot review the sufficiency of the evidence.

It is the duty of the appellant to ensure this Court has everything needed for a proper review of his issues on appeal. *See State v. Davis*, 191 N.C. App. 535, 539, 664 S.E.2d 21, 24 (2008) ("We note that State's exhibit 18, the videotaped interview of K.T., was not included as an exhibit to the record on appeal and was not recorded on the trial transcript. It is the duty of the appellant to ensure that all documents and exhibits necessary for an appellate court to consider his assignments of error are

part of the record or exhibits."). Further, "[a]n appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Accordingly, we affirm the trial court's order as to these issues on appeal. *See King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001) ("Plaintiffs also argue the trial court erred in entering findings of facts and conclusions of law concerning damages to Plaintiffs' property that were not supported by the evidence. *Because Plaintiffs have failed to include a transcript of evidence from the hearing in this matter or any evidence which would enable this Court to determine whether the trial court's findings of fact are supported by competent evidence, we overrule this assignment of error.* Accordingly, the trial court's findings of fact and conclusions of law concerning damages to Plaintiffs' property are affirmed. (emphasis added) (citation and quotation marks omitted)).

III. Alimony Factors

[2] Husband next challenges the amount and duration of the alimony award. Husband contends that

> the trial court committed reversible error when it ordered defendant to pay plaintiff alimony in the sum of $1,100.00 per month for forty-eight months when the court did not have sufficient competent evidence to order alimony in any amount and the court failed to provide a factual basis for the duration of alimony?

(Original in all caps.) Again, due to the incomplete transcript, we cannot review the sufficiency of the evidence. The order on appeal has findings of fact on some of the alimony factors enumerated in North Carolina General Statute § 50-16.3A(b), and we must assume they are supported by the evidence. And since findings for a particular factor are only required if evidence was presented on that factor, we must also assume the trial court made findings addressing all of the factors for which evidence was presented. *See generally* N.C. Gen. Stat. § 50-16.3A(b-c) (2017) (noting as to the 16 factors the trial "court shall make a specific finding of fact on each of the" "relevant factors" in subsection (b) only "if evidence is offered on that factor"). The trial court made findings of fact regarding many of the factors, including "marital misconduct[,]" "relative earnings[,]" "ages" of the parties, "amount and sources" of income, "duration of the marriage[,]" and "standard of living of the spouses established during the marriage[.]" The trial court also concluded, "The award of alimony is equitable *considering all relevant factors*, including those set forth in NCGS Section 50-16.3A(b)" and "[t]he relevant factors

support alimony in the amount designated and for the designated duration." (Emphasis added.) Again, "[a]n appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *Williams*, 274 N.C. at 333, 163 S.E.2d at 357. And again, we affirm. *See King*, 146 N.C. App. at 445-46, 552 S.E.2d at 265.

IV. Marital Fault

[3] Husband also contends, "the trial court committed reversible error when it found that [Husband] committed marital fault even though [Wife] failed to allege a lack of provocation, [Wife] condoned defendant's behavior and plaintiff, in her complaint, failed to allege the nature of the 'indignities' she suffered during the marriage." (Original in all caps.) Because marital fault concerns only alimony and is not dependent upon the financial circumstances of the parties, and we have that portion of the transcript, we are able to review these issues on appeal.

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

One of the factors that a trial court must take into account in awarding alimony, when relevant, is marital misconduct. N.C. Gen. Stat. § 50–16.3A(b)(1) (2011). Marital misconduct includes indignities rendering the condition of the other spouse intolerable and life burdensome during the marriage and on or before the date of separation.

> Our courts have declined to specifically define indignities, preferring instead to examine the facts on a case by case basis. Indignities consist of a course of conduct or repeated treatment over a period of time including behavior such as unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement.

Dechkovskaia v. Dechkovskaia, 232 N.C. App. 350, 356, 754 S.E.2d 831, 836 (2014) (citations, quotation marks, brackets, and footnote omitted).

A. Sufficiency of Allegations in Complaint

Citing *Dechkovskaia*, Husband argues Wife "must allege a lack of provocation as to the cause of [Husband's] alleged marital conduct[.]" (Original in all caps). In other words, Husband contends that Wife must specifically allege that she did *not* do anything to provoke Husband to use pornography and solicit women online, presumably every time he did this over the years, despite the fact that he hid his actions from her. Husband also contends Wife failed to properly allege in her complaint "the nature of the 'indignities' she suffered[.]" (Original in all caps.)

Wife's claim was based upon North Carolina General Statute § 50-16.3A, and she alleged Husband had engaged in "marital misconduct," specifically "[i]llict sexual behavior" and "[i]ndignities" as enumerated in North Carolina General Statute § 50-16.1A(3). *See* N.C. Gen. Stat. § 50-16.1A(3) (2015). Wife also included specific factual allegations about the nature of the indignities: "including but not limited to the repeated and addictive use of pornography and the use of social media sites for dating and flirting with other women." Although Husband did not file a Rule 12(b)(6) motion to dismiss the alimony claim, and his brief does not rely upon Rule 12(b)(6), his argument is that Wife's claim for alimony based upon indignities should be dismissed for failure to state a claim because *her complaint failed* to allege provocation and identify the indignities with enough detail. *See generally* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015) (noting a party may make a motion to dismiss a claim for "[f]ailure to state a claim upon which relief can be granted"). Thus, as it is the substance of defendant's argument, we treat his objection as a Rule 12(b)(6) motion to dismiss for failure to state a claim.

In *Shingledecker v. Shingledecker* the defendant-husband made a motion to dismiss the plaintiff-wife's claim for divorce from bed and board based upon "constructive abandonment, cruel and barbarous treatment and indignities" for failure to state a claim for relief because she had "failed to allege that the actions were perpetrated without adequate provocation." 103 N.C. App. 783, 784–86, 407 S.E.2d 590-91 (1991). This Court noted the ancient cases supporting the defendant-husband's argument regarding provocation, but held that his motion to dismiss was not properly presented on appeal:

> To be sure, defendant's contention was supported by cases decided prior to the enactment of the North Carolina Rules of Civil Procedure at G.S. § 1A-1. *See*, *e.g.*, *Brooks*

v. Brooks, 226 N.C. 280, 284, 37 S.E.2d 909, 912 (1946) (stating that the failure of a complaint seeking a divorce from bed and board on the grounds of abandonment to allege "lack of adequate provocation" is a fatal defect); *Ollis v. Ollis*, 241 N.C. 709, 711, 86 S.E.2d 420, 421 (1955) (In alleging cruel and barbarous treatment, it is not enough for the wife to allege the husband has been abusive and violent towards her, that she has been made to fear for her safety. She must go further and allege specific acts and conduct on the part of the husband. She must also set forth what, if anything, she did to start or feed the fire of discord. The omission of such allegations] is fatal. *Id.*); *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964) (One who bases a claim for alimony without divorce on the ground of indignities is required "not only to set out with particularity those acts which constituted such indignities but also to show that those acts were without adequate provocation." *Id.* at 187, 139 S.E.2d at 222. An omission to make the necessary allegations is fatal. *McDowell v. McDowell*, 243 N.C. 286, 288, 90 S.E.2d 544, 545 (1955)).

Following the enactment of the Rules of Civil Procedure in 1967, this court in *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E.2d 755, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986), specifically addressed the propriety of appealing motions of this type. There, we fashioned the following rule of procedural law:

> Where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss.

Id. at N.C. App. at 682-83, 340 S.E.2d at 758-759.

Inasmuch as we find *Concrete Service Corp.* to be controlling on this issue, we conclude that defendant's motion to dismiss is not properly presented by this appeal.

Id. at 786–87, 407 S.E.2d at 591 (quotation marks, ellipses, and brackets omitted). Although *Shingledecker* addressed a claim for divorce from bed and board instead of alimony, the law regarding lack of provocation is the same, and Husband's argument that Wife's claim should be dismissed is the same. *See id.* at 784-87, 407 S.E.2d at 590-91. In accord with

Shingledecker, Husband's motion to dismiss "is not properly presented by this appeal." *Id.* at 787, 407 S.E.2d 591. This argument is overruled.

B. Condonation

[4] Husband next contends "the trial court erred when it did not find that [Wife] condoned the [Husband's] illicit sexual behavior." (Original in all caps.) Whether marital misconduct has been condoned is a question of fact. *See generally Gordon v. Gordon*, 88 N.C. 45, 50 (1883) ("For even if these facts are not of themselves sufficient, they are of such a character as to revive the transactions occurring before the separation, and obliterate the condonation arising from the return of the petitioner to the house of the defendant."). Again,

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.
>
> An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly, 228 N.C. App. at 601, 747 S.E.2d at 272–73 (2013) (citations and quotation marks omitted).

The North Carolina Pattern Jury Instructions succinctly and accurately summarize the law regarding condonation:

> In order to condone or forgive marital misconduct, a spouse must know that such marital misconduct occurred. This means that before marital misconduct can be forgiven, the spouse must have actual knowledge of the marital misconduct or have knowledge of facts which would satisfy a reasonably prudent person that the marital misconduct had been committed. Mere suspicion without facts or knowledge to support such suspicion will not suffice. In addition, it must appear that a spouse not only knew of the marital misconduct, but also accepted it as true.
>
> A spouse condones or forgives marital misconduct when he voluntarily elects to [continue] [resume] the

> marital relationship with the spouse who has committed marital misconduct. [Continuation] [Resumption] of the marital relationship means voluntary [continuation] [renewal] of the husband and wife relationship, as shown by the totality of the circumstances.
>
> [Evidence that the plaintiff and defendant engaged in sexual intercourse after the [plaintiff] [defendant] forgave his spouse for act(s) of marital misconduct is not required.]
>
> [Evidence of voluntary sexual intercourse between the plaintiff and the defendant after the [plaintiff] [defendant] has actual knowledge of the adultery of his spouse, or has knowledge of facts which would satisfy a reasonably prudent person that his spouse had committed adultery, is considered evidence of a spouse's forgiveness of adultery on the part of the offending spouse, and should be considered with all the other facts and circumstances in evidence].
>
> Forgiveness may be express or implied. Express forgiveness is when a [husband] [wife] states to his spouse who has committed marital misconduct, "I forgive you for (state alleged marital misconduct)" or similar words to that effect.
>
> Forgiveness is implied when a husband and wife [continue] [resume] the marital relationship after a spouse has knowledge of marital misconduct by his spouse. [However, forgiveness is not implied simply because spouses live in the same residence.] [Isolated incidents of sexual intercourse between the parties do not constitute resumption of marital relations.]

N.C.P.I. – Civil 815.71 (footnotes omitted).

The trial court's findings relevant to marital fault and condonation, or the lack thereof, were as follows:

> 23. Throughout the course of the parties' marriage the defendant was addicted to pornography. The plaintiff discovered this issue early in the marriage and she told the defendant it bothered her. The defendant exchanged pornographic photos with others, including a nude picture of the plaintiff which was sent to a co-worker at the Coast Guard base without the plaintiff's knowledge or consent,

and solicited sexual encounters with others on the internet. He also left a digital trail of pornographic websites on computers and tablets accessible to the children.

24. The defendant visited and used social media sites for flirting and dating and setting up encounters with other women. Throughout the marriage the defendant repeatedly sought out online sexual encounters with other women and saw other women for sexual reasons. He admits having two affairs during the course of the marriage, one of which was with an exotic dancer and other with the teacher of one of the plaintiff's children.

25. The plaintiff confronted the defendant about his use of pornography and online sexual solicitations during the marriage, to no avail. The defendant's conduct continued. When confronted, the defendant would at first deny his conduct, then become angry and defensive and accuse the plaintiff of being nosey. He would then become contrite and say he was sorry. At one point the defendant agreed to go to counseling for his addiction to pornography but he stopped attending after a short time. At times the plaintiff believed the defendant had changed his ways but he never did and this pattern repeated itself throughout the marriage.

26. The defendant's conduct, including his addiction to pornography, his affairs and his constant solicitations of other women had a devastating effect upon the plaintiff. At one point she thought she was going to have a nervous breakdown and she began to see a therapist, which she continues to do through the present. The plaintiff felt guilty about what was happening in her marriage and. the defendant's actions devastated her self-esteem.

27. Just prior to the parties' separation their relationship appeared to the plaintiff to be on an upswing and they had sexual relations about a month prior to the separation. However, at this time the defendant was deceiving the plaintiff.

28. On the date of separation, the parties argued over whether the defendant would attend a middle school graduation for one of the children. This led to a larger argument. Then, with no other forewarning, the defendant

told the plaintiff that he hated her and that their marriage was over.

Husband does not contest the findings of fact, but rather argues that the trial court erred in also failing to make "a finding of condonation on the part of" Wife. Husband contends that because Wife was aware of his illicit sexual behavior -- the two affairs in 2008 -- but the parties remained together and had intercourse after 2008, including approximately a month before separation, the trial court erred when it failed to make a finding of condonation of his illicit sexual behavior. *See generally* N.C. Gen. Stat. § 50-16.1A(3)(a) (defining "[i]llicit sexual behavior" as "acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse"). But Husband fails to note almost all of the findings of fact regarding fault address indignities, not illicit sexual behavior. The order mentions the 2008 affairs specifically only once, in the last sentence of finding 24. The findings focus mostly on Husband's addiction to pornography and communications with women online, noting that these were problems "throughout the marriage." Even if we assume the trial court tacitly found Wife had condoned Husband's illicit sexual behavior in 2008, the marital fault of indignities remains.

Husband's argument fails to recognize that he had the burden of proof of condonation for *both* illicit sexual behavior *and* indignities, and these are separate and independent grounds for marital fault.[1] *See* N.C. Gen. Stat. § 50-16.1A(3). Even if the affairs in 2008 were condoned as Husband contends, he did not show condonation of indignities.

In *Earles v. Earles*, the plaintiff-wife had alleged both abandonment and indignities as marital faults. 26 N.C. App. 559, 562-63, 216 S.E.2d 739, 742 (1975). The defendant-husband argued that the trial court erred by not instructing the jury on the issue of condonation of abandonment, and this Court determined that the trial court did not need to instruct on condonation of abandonment because the defendant did not present any evidence of condonation of this marital fault; all of his evidence of condonation related to the indignities. *Id.* at 563, 216 S.E.2d at 743. Here, the trial court's findings of fault are based upon the indignities, and Husband has not directed us to any evidence of condonation of his addictive use

1. The North Carolina Pattern Jury Instructions point out that each type of marital misconduct for which evidence is presented must be addressed separately. *See* N.C.P.I. – Civil 815.71 n.5. The instruction on condonation notes that "[t]o avoid confusion in the event it is contended that more than one type of marital misconduct has been condoned, it may be necessary to specify with particularity the types of marital misconduct involved and to submit a separate sub-issue as to each." *Id.*

of pornography and seeking other women on social media websites. Instead, the evidence and findings show just the opposite: Husband was deceiving Wife regarding his continuing use of pornography and online sexual solicitations. Whenever Wife discovered what Husband was doing and objected, he would first deny and then acknowledge his actions and promise to stop. The fact that Husband and Wife continued to live together and even have sexual relations would not condone these indignities, since Wife would have had to have full knowledge of Husband's continuing pornography use and online solicitations to condone these actions, and a spouse can conduct marital fault

> only with knowledge of what there is to forgive. Suspicion that the other spouse has committed a matrimonial offense like adultery will not make continued cohabitation amount to condonation. The accused must demonstrate that the complaining spouse had actual knowledge of the marital offense or had facts which would satisfy a reasonably prudent person that the offense had been committed. In addition, it must appear that the complaining spouse not only knew of the marital misconduct, but also accepted it as true. Moreover where the accused spouse is guilty of several acts of marital misconduct and the complaining spouse knows of only one of them, the complaining spouse has condoned only the known misconduct. A spouse might forgive certain acts of adultery with certain people, for example, but not forgive others.

N.C.P.I. – Civil 815.71 n.9 (quotation marks, ellipses, and brackets, and parenthesis omitted) (citing 6 *Lee's* § 6.19(B)).

Husband argues that trial court's finding that he "was deceiving" Wife "does not make sense" because he had admitted his illicit sexual behavior in 2008 to Wife and several years passed before they separated. But the deception the trial court found related to the indignities, not the illicit sexual behavior. Even if Wife condoned the 2008 affairs, Wife could not have condoned Husband's continuing "use of pornography and online sexual solicitations" because Husband "deceiv[ed]" her into believing he had ceased the behavior. Husband does not contend that Wife had full knowledge at all times of his continuing pornography use and online solicitations nor that she ever acquiesced to his actions. Wife testified about finding pornography on their home computer, iPad, and cell phone, where their children could be exposed to it, and the oldest child did see it. Wife also testified about finding that Husband was

"[r]egistering on dating sites. Searching for sex on Craig's List. Other women exchanging photos." Wife was upset about these findings and felt "[h]orrible." When Wife confronted Husband about the pornography and on-line solicitations,

> [h]e would admit to it after I would find it out, but then he would be angry because I was playing detective according to him, trying to find him doing things that were wrong. And we would have a disagreement and then it would come down to, you know, he was sorry and he wasn't going to do it again. But then it came down to he couldn't not do it again. So it became — it was a problem.
>
> Q. So you would confront him and his first reaction would be to become angry?
>
> A. No, he would just deny it. He would just deny it.

The evidence and findings indicate that Husband denied the indignities, and when Wife confronted him with proof, he would admit what he had done and agree to counseling, but then he stopped the counseling and continued the misconduct, and "[a]t times the plaintiff believed the defendant had changed his ways but he never did and this pattern repeated itself throughout the marriage." The trial court further found that Husband "lied to and deceived" Wife "throughout the marriage[.]" The evidence supports the trial court's findings of fact regarding indignities, and the trial court did not make any findings regarding condonation of the indignities because Husband did not present any evidence that Wife ever had sufficient knowledge of his actions to condone them. When Wife did become aware of Husband's actions, she objected and asked him to stop, but he continued his behavior surreptitiously. This argument is overruled.

V. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judge DILLON concurs.

Judge BERGER concurs in the result only.

GYGER v. CLEMENT

[263 N.C. App. 118 (2018)]

EVE GYGER, PLAINTIFF
v.
QUINTIN CLEMENT, DEFENDANT

No. COA18-244

Filed 18 December 2018

1. Evidence—affidavit—Rule 60—registration of foreign support order—affidavit not notarized

The trial court did not err by denying plaintiff's motions for relief from an order vacating the registration of her Swiss support order where plaintiff did not attend the Rule 60 hearing, but attempted to introduce through counsel an affidavit that was not notarized. Since plaintiff's purported affidavit was not notarized, it lacked proper certification, could not be used, and the trial court properly excluded it.

2. Appeal and Error—preservation of issues—insufficient argument

The Court of Appeals did not address an argument on appeal where the plaintiff alleged error in a one-paragraph brief and cited no case law or other authorities.

3. Child Custody and Support—foreign support order—contested registration—misleading information—address

Plaintiff did not argue below that a notice of a hearing to contest a Swiss support order contained materially misleading information and it was not addressed on appeal. The trial court did not abuse its discretion by determining that the notice of the hearing was sent to the correct location; both the U.S. Office of Child Support Enforcement and the N.C. Department of Health and Human Services provide that notice in international support cases should be sent to the respective country or state agency, not sent directly to the individual parties. The Guilford County Child Support Enforcement Agency mailed the notice of hearing to the Swiss Central Authority.

4. Child Custody and Support—support—Rule 60 motion—jurisdiction

The trial court did not err by denying plaintiff's Rule 60(b)(4) motion in an action involving a Swiss support judgment where the trial court possessed jurisdiction by statute. Although the issue was not raised below, questions concerning subject matter jurisdiction may be raised for the first time on appeal.

5. Child Custody and Support—foreign support order—equities —Rule 60(b)(6)—notice

The trial court did not err by denying plaintiff's Rule 60(b)(6) motion in an action to enforce a Swiss child support order. Plaintiff ordered that the trial court's vacation of the registration order was inequitable because she never received notice of the hearing. Plaintiff had executed a limited power of attorney granting the N.C. Child Support Enforcement Agency the authority to represent her.

Judge MURPHY concurring in result only.

Appeal by plaintiff from orders entered 30 November 2017 and 2 January 2018 by Judge Lora C. Cubbage in Guilford County District Court. Heard in the Court of Appeals 3 October 2018.

George Daly for plaintiff-appellant.

Coltrane & Overfield, PLLC, by Wendy M. Enochs, for defendant-appellee.

ZACHARY, Judge.

Plaintiff-Mother Eve Gyger appeals from the trial court's order denying her Rule 60 motions for relief from an order vacating the registration of her foreign support order. For the reasons explained below, we affirm the trial court's ruling.

Factual and Procedural History

Between 1997 and 1999, Plaintiff-Mother and Defendant-Father were involved in a romantic relationship while living in North Carolina. The parties had two children born in May 2000 in Geneva, Switzerland. On 24 October 2007, Plaintiff-Mother, through the children's guardian, initiated an action in the Court of First Instance, Third Chamber, Republic and Canton of Geneva against Defendant-Father to establish paternity and child support. Defendant-Father did not appear in person or through counsel. On 14 December 2009, the Swiss court entered judgment against Defendant-Father on both counts.

In May 2014, the Swiss Central Authority for International Maintenance Matters, on behalf of Plaintiff-Mother and the minor children, applied to register and enforce the Swiss support order with the North Carolina Department of Health and Human Services, Office of Child Support Enforcement. The application and supporting documentation

sent from Switzerland included a limited power of attorney authorizing the North Carolina Child Support Enforcement Agency, as the central authority of the debtor's country of residence,

> to represent the [Plaintiff-Mother] in dealings with all authorities and before all courts, to accept payments, to bring or respond to civil and criminal proceedings, to make use of any legal remedies, to reach settlements, and to waive or acknowledge claims. [The North Carolina Child Support Enforcement] Agency is authorised to grant substitute powers of attorney to other authorities or persons.

The application also included copies of court documents written in French, the official language of the Swiss court, as well as English translations certified by a Swiss court translator.

The Guilford County Clerk of Court registered the Swiss support order for enforcement on 13 June 2016. Defendant-Father was served with a Notice of Registration of Foreign Support Order on 20 June 2016, and on 1 July 2016, Defendant-Father timely filed a Request for Hearing to "vacate the registration, to contest the remedies being sought or the amount of the alleged arrears pursuant to N.C. Gen. Stat. § 52C-6-607." The IV-D Attorney[1] for the Guilford County Child Support Enforcement Agency notified Plaintiff-Mother of the hearing with a notice for "Hearing to Register Foreign Support Order" mailed on 14 July 2016, care of the Swiss Central Authority for Maintenance Matters Section for Private International Law at its address in Bern, Switzerland.

On 2 September 2016, a hearing was conducted in Guilford County District Court before the Honorable Lawrence McSwain. The trial court vacated the registration of the foreign support order pursuant to N.C. Gen. Stat. §§ 52C-6-607(a)(1) and 52C-7-706(b)(3) and dismissed the action, finding that the court file lacked any evidence that Defendant-Father had been provided with proper notice of the proceedings in Switzerland and an opportunity to be heard, and further, that Defendant did not submit to the jurisdiction of Switzerland.

On 26 July 2017, Plaintiff-Mother filed a Motion for Relief from the trial court's order pursuant to N.C. Gen. Stat. § 1A-1, Rules 60(b)(1), (2),

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1. The IV-D attorney represents the interests of the people of the State of North Carolina in court proceedings regarding, *inter alia*, the establishment of paternity as well as the establishment and enforcement of child support obligations, and provides service under Title IV-D of the Social Security Act. *See* 42 U.S.C. §§ 651-69b (2016).

(4), and (6), and thereafter filed two amended motions.[2] The trial court conducted a hearing on Plaintiff-Mother's 60(b) motions on 6 October 2017. Plaintiff-Mother did not appear at the hearing, but attempted through counsel to introduce two affidavits and the transcript of a deposition of Defendant-Father. The trial court admitted the deposition and transcript into evidence, but excluded the affidavits. The trial court excluded the first affidavit, an "Affidavit of Eve Gyger" purportedly signed by Plaintiff-Mother, because it was not notarized, and Plaintiff-Mother was not present to be examined. The second affidavit, an "Affidavit of Translation" containing English translations by a French translator professing to demonstrate that certain translations of the Swiss court's file were erroneous, was not admitted because the translator was not present in court and a third-party translation may not be substituted for the original translation provided by the Swiss court. In addition, Leilani Morange, Plaintiff-Mother's caseworker with the Guilford County Child Support Enforcement Agency, testified that it was her office's procedure to send all correspondence to plaintiffs in interstate and international child support enforcement cases to the agency that initiated the action on behalf of the plaintiff.

By orders entered 30 November 2017 and 2 January 2018, the trial court denied Plaintiff-Mother's motions for relief from judgment under Rules 60(b)(1), (2), (4), and (6). Plaintiff-Mother timely appealed.

Background

In order to simplify and streamline the procedures by which, *inter alia*, a child support order rendered in another jurisdiction could be enforced, the General Assembly adopted the Uniform Interstate Family Support Act. *See* 42 U.S.C. § 666 (2017); N.C. Gen. Stat. §§ 52C-1-100 to 52C-9-902 (2017). A support order is:

> a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or a foreign country for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or

2. The Second Amended Motion for Relief from Final Order, the only motion for relief contained in the record on appeal, listed in its caption bases for relief under Rules 60(b)(2), (4), and (6). However, in the body of the motion, Appellant argued Rule 60(b)(1) but not Rule 60(b)(2). The trial court addressed Rules 60(b)(1) and (2) in its order. Appellant's brief to this Court addressed only Rules 60(b)(1),(4), and (6). As a result, Appellant abandoned any appeal based on Rule 60(b)(2). *See* N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

> reimbursement for financial assistance provided to an individual obligee in place of child support.

Id. § 52C-1-101(21). "A support order . . . issued in another state or a foreign support order may be registered in this State for enforcement." *Id.* § 52C-6-601. A foreign support order is a support order of a foreign tribunal authorized to issue such orders. *See id.* § 52C-1-101(3b), (3c). A foreign country "means a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and . . . has been declared under the law of the United States to be a foreign reciprocating country." *Id.* § 52C-1-101(3a)(a). Federal law allows the United States Secretaries of State and Health and Human Services to declare any foreign country to be a foreign reciprocating country "if the foreign country has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the United States," provided that such procedures conform with standards prescribed by law. 42 U.S.C. § 659a(a)(1) (2017).

On 31 August 2004, a child support reciprocity agreement between Switzerland and the United States was entered into and Switzerland was declared a foreign reciprocating country. *See* Agreement Between the Government of the United States of America and the Government of the Swiss Confederation for the Enforcement of Maintenance (Support) Obligations, Switz.-U.S, Aug. 31, 2004, T.I.A.S. No. 04-930.1, [https://perma.cc/C8TX-K8SU]. Regarding recognition and enforcement of maintenance decisions, the agreement states:

> 1. Maintenance decisions, including maintenance decisions arising from a determination of parentage, from the Requesting Party [here, Switzerland] shall be recognized and enforced in the Requested Party [here, North Carolina] to the extent that the facts in the case support recognition and enforcement under the applicable laws and procedures of the Requested Party.
>
> 2. Maintenance decisions made after the failure of the respondent to appear shall be considered as decisions under paragraph 1 if it is demonstrated that notice had been given and the opportunity to be heard had been satisfied in a way to satisfy the standards of [North Carolina].

Id. art. 7. The agreement requires that the "Requesting Party," in this case Switzerland, transmit the application for enforcement with the requisite supporting documentation, including the decision of the local tribunal,

to the North Carolina Child Support Enforcement Agency as the responsible public body of the Department of Health and Human Services, Office of Child Support Enforcement. *See id.* art. 4, cl. 3. However, for a foreign decision or order to be recognized and enforced, the application shall include "evidence that the respondent has appeared in the proceedings or has been given notice and an opportunity to appear." *Id.* art. 4, cl. 5(b).

Once a requesting party registers a foreign support order for enforcement pursuant to N.C. Gen. Stat. § 52C-6-602, the non-registering party, the individual from whom support is being sought, must be notified of the registration of the support order and informed of the opportunity to contest the validity or enforcement of the order within twenty days after receiving notice. *Id.* § 52C-6-605. "A party contesting the validity or enforcement of a registered support order or seeking to vacate the registration has the burden of proving" at least one of several enumerated defenses, including that "[t]he issuing tribunal lacked personal jurisdiction over the contesting party." *Id.* § 52C-6-607(a)(1).

Rule 60(b) Motions for Relief from Judgment

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), Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final . . . order . . . for the following reasons: (1) [m]istake, inadvertence, surprise, or excusable neglect; . . . (4) [t]he judgment is void; [or] (6) [a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rules 60(b)(1), (4), (6) (2017). "The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed." *Harris v. Harris*, 162 N.C. App. 511, 513, 591 S.E.2d 560, 561 (2004).

A Rule 60(b) motion "is addressed to the sound discretion of the trial court, and will be disturbed on appeal only upon a showing of an abuse of that discretion. The trial court's findings of fact are conclusive on appeal if there is any competent evidence in the record to support them." *Brown v. Cavit Sci., Inc.*, 230 N.C. App. 460, 463, 749 S.E.2d 904, 907 (2013) (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (internal quotation marks omitted). However, motions pursuant to Rule 60(b) may not be used as a substitute for appeal to correct errors of law. *Davis v. Davis*,

360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). In addition, our Supreme Court has directed that the discretionary ruling of a lower court should not be disturbed on appeal unless it "probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982).

"Although the decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court's discretion, what constitutes excusable neglect is a question of law which is fully reviewable on appeal." *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884 (citation and internal quotation marks omitted), *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). "A Rule 60(b)(1) motion must be made within a reasonable time, and the movant must show both the existence of one of the stated grounds for relief, and a meritorious defense." *Id.* at 686, 366 S.E.2d at 884 (citation and internal quotation marks omitted).

Discussion

I. Rule 60(b)(1)

Plaintiff-Mother argues that the trial court erred in denying her motion for relief from judgment pursuant to Rule 60(b)(1) because the trial court: 1) refused to admit the "Affidavit of Eve Gyger," 2) refused to admit the "Affidavit of Translation," and 3) proceeded with the hearing despite the lack of proper notice to Plaintiff-Mother. These arguments are without merit, and we address each in turn.

1. Affidavit of Eve Gyger

[1] Although Plaintiff-Mother failed to attend the Rule 60(b) hearing, she attempted through counsel to introduce an affidavit that was not notarized, but purportedly bore her signature. Attached to the affidavit were other documents, including third-party statements and documents that Plaintiff-Mother allegedly obtained from the Swiss court. Plaintiff-Mother contended that these documents were excluded from the record submitted by the Swiss authorities, which constituted mistake and excusable neglect. The trial court refused to admit the affidavit and attached documents into evidence because the "Plaintiff's signature was not notarized and she was not present in Court to be examined."

On appeal, Plaintiff-Mother argues that the affidavit should have been admitted pursuant to N.C. Gen. Stat. § 52C-3-315(b) (2017), which states that "[a]n affidavit . . . which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this State." Plaintiff-Mother's argument is unavailing.

An affidavit is "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (8th ed. 2004). More than a century ago, our Supreme Court declared:

> The essential requisites [of an affidavit] are, apart from the title in some cases, that *there shall be an oath administered by an officer authorized by law to administer it, and that what the affiant states under such oath shall be reduced to writing before such officer*. The signing or subscribing of the name of the affiant to the writing is not generally essential to its validity; it is not, unless some statutory regulation requires it, as is sometimes the case. *It must be certified by the officer before whom the oath was taken before it can be used for legal purposes; indeed, it is not complete or operative until this is done.* The certificate, usually called the *jurat*, is essential, not as part of the affidavit, but as official evidence that the oath was taken before a proper officer. The object of such an instrument is to obtain the sworn statement of facts in writing of the affiant in such official and authoritative shape, as that it may be used for any lawful purpose, either in or out of courts of justice. The signature of the affiant can in no sense add to or give force to what is sworn, and what is sworn is made to appear authoritatively by the certificate of the officer.

Alford v. McCormac, 90 N.C. 151, 152-53 (1884) (some emphases added).

Because Plaintiff-Mother's purported affidavit was not notarized, it lacked proper certification and could not be used for legal purposes. Therefore, the trial court was correct to exclude it from evidence.

2. Affidavit of Translation

[2] At the Rule 60(b) hearing, Plaintiff-Mother's counsel also attempted to introduce into evidence the affidavit of a private-party translator, who was not present to testify, to show alleged errors and discrepancies in the official English translation of the Swiss court documents. The trial court found that "Plaintiff cannot substitute a third party translation for the original translation provided by the Swiss authorities." The trial court further found that "the original translation supports the Order [denying registration of the foreign support order]."

Plaintiff-Mother alleges error to the trial court's ruling in a one-paragraph argument in her brief, and cites no case law or other authorities to support her assertions. It is not the job of this Court to create an argument for an appellant. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); N.C.R. App. P 28(b)(6). Therefore, we will not address this argument.

3. Notice of Hearing

[3] Plaintiff-Mother argues that the notice of hearing informing her of Defendant-Father's intention to contest the registration of the support order contained materially misleading information and violated Rule 5 of the North Carolina Rules of Civil Procedure, in that it was not sent to her last known address.

Regarding materially misleading information, Plaintiff-Mother argues that the notice stated that a "hearing to register foreign support order" was scheduled for 2 September 2016. The support order had already been registered and the hearing was actually to "contest the validity or enforcement of a registered support order" as provided under N.C. Gen. Stat. § 52C-6-606. However, Plaintiff-Mother never raised this issue below and we will not address it for the first time on appeal. *See State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) ("This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court.").

Concerning Plaintiff-Mother's contention that the notice of hearing was sent to the wrong location, the trial court found:

> Plaintiff contends the September 27, 2016 Order is void because she did not receive proper notice prior to the September 2, 2016 hearing. *No credible evidence supports this contention*. Defendant's evidence shows and the Court finds that the policy and procedures of the North Carolina Guilford County Child Support Enforcement agency in an interstate case are to send correspondence to a plaintiff to the same agency that initiated the action on behalf of the plaintiff. The Court further finds that Plaintiff signed a power of attorney to give the agency authority to work on Plaintiff's behalf to obtain child support for the minor children. A Notice of Hearing was sent to Plaintiff on July 12, 2016 to Eve Gyger c/o SZ Section for Private Int Law, Central Authority for Maintenance Matter, Bundesrain 20, Bern Switzerland. SZ Section for Private Int Law is the agency that initiated the action on behalf of the Plaintiff.

. . . .

> Plaintiff received proper notice of the hearing scheduled for September 2, 2016. The September 27, 2016 Order of the Honorable Judge Lawrence McSwain is not void.

(Emphasis added).

Our statutes provide that "[i]f the party has no attorney of record, service shall be made upon the party . . . [b]y mailing a copy to the party at the party's last known address or, if no address is known, by filing it with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 5(b)(2)b (2016). However, Plaintiff-Mother was not an unrepresented party. This action, as the trial court correctly noted, was initiated by the Swiss Central Authority, and Plaintiff-Mother executed a limited power of attorney granting the North Carolina Child Support Enforcement Agency the authority "to represent [her] in dealings with all authorities and before all courts[.]"[3]

A IV-D agent of the Guilford County Child Support Enforcement Agency testified that it was her office's policy in international child support cases to send all communications and correspondence directly to the agency initiating the support request. The IV-D attorney informed Plaintiff-Mother, in accordance with federal and state agency policy, of the scheduled hearing to contest the registration of the foreign support order by mailing the notice of hearing to the Swiss Central Authority in Bern, Switzerland. *See* A Caseworker's Guide to Processing Cases with Switzerland, Office of Child Support Enforcement, 8 (2009), [https://perma.cc/VK97-4XBC] ("All correspondence to Switzerland must be sent to the Swiss Central Authority in Bern[ ] . . . ."); Child Support Services Manual: Intergovernmental, N.C. Dep't of Health and Human Serv., 41, [https://perma.cc/W96L-8L3N] ("When a hearing [contesting the registration of a foreign support order] is scheduled, notice of the date, time, and location of the hearing must be provided to the initiating state immediately.").

"Correspondence" is the "[i]nterchange of written communications." *Correspondence*, *Black's Law Dictionary* (5th ed. 1979). Plaintiff's counsel argues that this "correspondence" should have been served directly on the party in accordance with Rule 5 of the Rules of Civil Procedure,

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3. While Plaintiff-Mother was not an unrepresented party, we note, "[n]o attorney/client relationship shall be considered to have been created between the attorney who represents the child support enforcement agency and any person by virtue of the action of the attorney in providing the services required." N.C. Gen. Stat. § 110-130.1(c) (2016).

which provides for service upon an unrepresented party by delivering or mailing a copy to the party. N.C. Gen. Stat. § 1A-1, Rule 5(b)(2). In this case, we are bound to follow federal law.

The governments of the United States and Switzerland entered into a treaty concerning the registration and enforcement of foreign support orders between our two countries. A treaty is federal law and "equivalent to an act of [Congress]." *Foster v. Neilson*, 27 U.S. 253, 314, 7 L. Ed. 415, 436 (1829), o*verruled on other grounds by United States v. Percheman*, 32 U.S. 51, 8 L. Ed. 604 (1833). Federal law is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Whenever state and federal law conflict, "state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 147 L. Ed. 2d 352, 361 (2000).

North Carolina is bound to follow the Agreement between the United States and Switzerland. The Agreement provides that documents should be sent to the "Central Authority or other designated public body" of each party. *See* Agreement, art. 4, cl. 3. Both the U.S. Office of Child Support Enforcement and the North Carolina Department of Health and Human Services provide that correspondence in international foreign support cases should be sent to the respective country or state agency, not sent directly to the individual parties. Accordingly, the trial court did not abuse its discretion in making the determination that the notice of hearing was sent to the correct location, and that Plaintiff received proper notice, and thus we affirm that finding.

II. Rule 60(b)(4)

[4] Next, Plaintiff-Mother argues that her Rule 60(b)(4) motion was erroneously denied because the order vacating the registration of the foreign support order was void for failure to comply with the requirements of N.C. Gen. Stat. § 52C-6-606(c) (2017). Plaintiff-Mother argues this error divested jurisdiction from the trial court that granted the order vacating the registration of the foreign support order. However, Plaintiff-Mother never raised this argument before the trial court, a fact she concedes in her reply brief to this Court. Nevertheless, given that questions concerning subject matter jurisdiction may properly be raised for the first time on appeal, *Federated Fin. Corp. of Am. v. Jenkins*, 215 N.C. App. 330, 334, 719 S.E.2d 48, 51 (2011), we will address Plaintiff-Mother's argument.

A trial court may only grant a Rule 60(b)(4) motion where the underlying judgment is void. *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992). "A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Id.* The district courts of North Carolina are granted jurisdiction over matters proceeding under the Uniform Interstate Family Support Act. *See* N.C. Gen. Stat. § 52C-1-102 (2017).

Here, it is evident that the trial court possessed jurisdiction by statute. Accordingly, the trial court did not err in denying Plaintiff-Mother's Rule 60(b)(4) motion.

III. Rule 60(b)(6)

[5] Finally, Plaintiff-Mother argues that her Rule 60(b)(6) motion was erroneously denied because Plaintiff-Mother never received notice of the hearing to contest the registration order, rendering the trial court's order vacating the registration of her foreign support order inequitable. We disagree.

A trial court cannot set aside a judgment or order pursuant to Rule 60(b)(6) without a showing: (1) that extraordinary circumstances exist, and (2) that justice demands relief. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987). The determination of whether to grant relief under Rule 60(b)(6) is equitable in nature and within the trial court's discretion. *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 499-500, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

As discussed above, Plaintiff-Mother executed a limited power of attorney granting the North Carolina Child Support Enforcement Agency the authority "to represent [her] in dealings with all authorities and before all courts." The Guilford County Child Support Enforcement Agency followed established federal and state agency procedure in sending notice to parties in an interstate case. Thus, competent evidence exists in the record to support the trial court's discretionary ruling denying Plaintiff-Mother's Rule 60(b)(6) motion. Further, Plaintiff-Mother failed to show that extraordinary circumstances exist or that justice demands relief, and Plaintiff-Mother lacks a meritorious defense in that neither of the affidavits were admissible into evidence. Accordingly, the trial court did not err by denying Plaintiff-Mother's Rule 60(b)(6) motion.

Conclusion

The trial court did not err in denying Plaintiff-Mother's Rule 60(b) motions for relief from the order vacating the registration of her foreign support order. Therefore, we affirm the trial court's ruling.

AFFIRMED.

Judge STROUD concurs.

Judge MURPHY concurs in result only.

DIANE GAIL HOWE; WILLIAM BUTLER BAILEY, TRUSTEE OF THE WILLIAM BUTLER BAILEY REVOCABLE TRUST AGREEMENT DATED MAY 25, 2011; WILLIAM T. BAILEY AND WIFE, ALLISON ANN BAILEY; WILLIAM B. BAILEY, AND WIFE, CATHERINE E. BAILEY; JOHN C. BEGENY, III; JACK D. CALLISHER AND WIFE, KATHRYN K. CALLISHER; WEIQUN CHEN AND WIFE, YAN SUN AND QICHUAN CHEN (UNMARRIED); MARTIN E. FRAZIER AND WIFE, BARBARA M. FRAZIER; GILBERT R. GRISHAM AND WIFE, JAE YOUN GRISHAM; JOSEPH TREVOR HARGIS; ELENA HOPPER; GLORIA A. PEIRSOL-MARINO AND HUSBAND, CHARLES J. MARINO; FABRICE MEUNIER; ROBERT OLIVA AND WIFE, SHEILA K. OLIVA; PHAN INVESTMENTS, LLC; TARA PREZIOSO; KENNETH E. RICKARD; JONATHAN M. SCHADE; KIMMY YANG AND WIFE, ELIZABETH YANG; MICHAEL YANG AND WIFE, SUSANA YANG, PLAINTIFFS

v.

THE LINKS CLUB CONDOMINIUM ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION; FCP FUND III TRUST, A MARYLAND REAL ESTATE INVESTMENT TRUST BY THOMAS A. CARR, AUTHORIZED TRUSTEE; LINKS RALEIGH, LLC, A DELAWARE LIMITED LIABILITY COMPANY AND GREENS AT TRYON, LLC, A DELAWARE LIMITED LIABILITY COMPANY; NASON KHOMASSI; ALEX CATHCART AND BRYAN M. KANE, DEFENDANTS

No. COA18-150

Filed 18 December 2018

1. Associations—condominium—termination agreement—not binding on association

Plaintiff minority owners in a condominium complex failed to state a claim for breach of contract by the condominium association where their complaint did not establish that a termination agreement was binding on the association. The agreement was executed only by the LLC that owned more than 80% of the units (not the association), and the association's apparent performance of the agreement was mere compliance with its statutory obligations under the Condominium Act.

2. Associations—condominium—breach of statutory obligations —method of determining sale price—termination agreement

Plaintiff minority owners in a condominium complex failed to state a claim for breach of statutory obligations against the condominium association where, assuming that N.C.G.S. § 47C-2-118 implied a private right of action, the statute did not set out a particular method by which a condominium's sale price must be determined and did not impose a duty upon associations to abide by the provisions of termination agreements.

3. Unfair Trade Practices—in or affecting commerce—single market participant—condominium association

Plaintiff minority owners in a condominium complex failed to state a claim for unfair trade practices for defendants' conduct in allegedly orchestrating the minority owners' forced relinquishment of their property for a price below market value. Plaintiffs' allegations did not relate to business activities in or affecting commerce because defendants' allegedly unfair and deceptive conduct occurred within the condominium association—a single market participant.

4. Fiduciary Relationship—condominium association—termination and sale of condominium—fiduciary duties imposed by statute

Plaintiff minority owners in a condominium complex stated a claim for breach of fiduciary duty against the condominium association where the association had statutorily imposed fiduciary duties (pursuant to N.C.G.S. § 47C-2-118(e)) to the unit owners as trustee in the sale of the condominium, and where plaintiffs alleged that the association breached its duty by arranging a forced sale for an inadequate price and failing to have an independent appraiser generate an unbiased allocation appraisal, among other things.

5. Corporations—veil piercing—condominium association—termination of condominium

Plaintiff minority owners in a condominium complex stated a claim for breach of fiduciary duty against defendants through the doctrine of piercing the corporate veil, where plaintiffs alleged that defendants dominated and controlled the condominium association during its termination and sale, arranged a forced sale for an inadequate price, and failed to have an independent appraiser generate an unbiased allocation appraisal, among other things.

6. Jurisdiction—personal—specific—control of out-of-state trust —acts complained of

An individual defendant was subject to specific jurisdiction in North Carolina where plaintiffs alleged that he operated and controlled an out-of-state real estate investment trust (another defendant) whose actions gave rise to the controversy and defendant put forth no evidence to the contrary.

Appeal by plaintiffs from order entered 14 November 2017 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiffs-appellants.

Parker Poe Adams & Bernstein LLP, by Kevin L. Chignell and Collier R. Marsh, for defendants-appellees The Links Club Condominium Association, Inc., Nason Khomassi, Alex Cathcart, and Bryan M. Kane.

Shanahan McDougal, PLLC, by John E. Branch III, Kieran J. Shanahan, Tonya B. Powell, and Jeffrey M. Kelly, for defendants-appellees FCP Fund III Trust, Thomas A. Carr, Links Raleigh, LLC, and Greens at Tryon, LLC.

ZACHARY, Judge.

Plaintiffs, minority unit owners in a condominium complex, appeal from the trial court's order granting defendants' motions to dismiss plaintiffs' claims for breach of contract, breach of statutory obligations, breach of fiduciary duty, piercing the corporate veil, and unfair and deceptive trade practices. We reverse the trial court's dismissal of plaintiffs' claims for breach of fiduciary duty and piercing the corporate veil, but affirm as to the trial court's dismissal of the claims for breach of contract, breach of statutory obligations, and unfair and deceptive trade practices.

Background

I. The North Carolina Condominium Act

The instant dispute arose in the context of Chapter 47C of the North Carolina General Statutes ("the Condominium Act"), which provides, *inter alia*, a process by which condominium unit owners may terminate and sell a condominium development. Pursuant thereto, "a

condominium may be terminated only by agreement of unit owners of units to which at least eighty percent (80%) of the votes in the association are allocated, or any larger percentage the declaration specifies." N.C. Gen. Stat. § 47C-2-118(a) (2017). The "agreement to terminate must be evidenced by the execution of a termination agreement . . . in the same manner as a deed, by the requisite number of unit owners." N.C. Gen. Stat. § 47C-2-118(b). In addition, the termination agreement "must be recorded in every county in which a portion of the condominium is situated, and is effective only upon recordation." *Id.*

In the event that "any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale." N.C. Gen. Stat. § 47C-2-118(e). "[T]he minimum terms of the sale" must also be set forth in the termination agreement. N.C. Gen. Stat. § 47C-2-118(c). "Proceeds of the sale must be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (h)." N.C. Gen. Stat. § 47C-2-118(e). Subsection (h) provides, in relevant part:

> (1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market value of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which twenty-five percent (25%) of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

N.C. Gen. Stat. § 47C-2-118(h)(1).

II. Termination and Sale of the Links Club Condominium

On 25 April 2001, the Links Club Condominium ("the Condominium") was created by recording a Declaration of Covenants, Conditions, and Restrictions in the Wake County Register of Deeds. At the same time, Links Club Condominium Association ("the Association") was created pursuant to the Condominium Act "to manage the Condominium on

behalf of all of the condominium unit owners." As of September 2009, there were 264 units within the Condominium. By July 2016, close to eighty percent of the Condominium units were owned by affiliated entities known as the Fairway Apartments, LLC, "which collectively operated a portion of the Condominium as an apartment complex." The remaining units were owned by individual unit owners, some of whom are the plaintiffs in the instant case (hereafter "minority owners" or "plaintiffs").

On 26 July 2016, defendant FCP Fund III Trust ("FCP Fund"), a Maryland real estate investment trust operated by defendant Thomas A. Carr, formed defendant Links Raleigh, LLC. Plaintiffs allege that before FCP Fund formed Links Raleigh, FCP Fund had "arranged for or contracted with Fairway Apartments to purchase their units in the Condominium" and "intended to purchase, through Links Raleigh or some other entity under its control, the units owned by Fairway Apartments" as well as "additional units until it owned 80 percent of the units in the Condominium."

Plaintiffs allege that on 31 August 2016, defendant Alex Cathcart, "in furtherance of FCP Fund's plan, acting as a representative of Links Raleigh, and with proxies provided by Fairway Apartments, conducted a special meeting of the Association[.]" At that meeting, all members of the Association's Board of Directors were removed, and the number of Directors was reduced to three. Defendants Cathcart, FCP employee Nason Khomassi, and Senior Vice-President of FCP Bryan M. Kane were elected as the new members of the Association's Board of Directors.

By 28 February 2017, Links Raleigh had purchased 212 of the 264 Condominium units, giving it an 80.3% ownership interest. At that point, Links Raleigh, under the control of FCP Fund, had obtained a sufficient ownership interest to terminate the Condominium pursuant to N.C. Gen. Stat. § 47C-2-118. Accordingly, also on 28 February 2017, Links Raleigh sent a letter to the owners of the remaining units alerting them that it intended to terminate the Condominium and that upon termination, "all 264 units and common elements . . . will be sold to an entity owned and controlled by an affiliate of Links Raleigh, LLC and converted into a rental apartment community." Links Raleigh "offered . . . to permit owners to remain at the Links as [tenants], and . . . offered to honor existing third party leases by unit owners, so long as they were at market rates and terms."

On 17 May 2017, in accordance with the provisions of N.C. Gen. Stat. § 47C-2-118(b), Links Raleigh prepared and recorded a Plan

of Termination of Condominium and Agreement ("Termination Agreement"). In addition to memorializing the termination, the Termination Agreement set forth various provisions concerning the sale and valuation of the Condominium. Particularly, Section 2 of the Termination Agreement provided, in pertinent part, that:

> The Association shall offer to sell the Property for a price of not less than $26,000,000.00 Twenty-Six Million Dollars, or for the Appraised Value (as that value is determined by the method set forth in Section 6), whichever is greater, and may contract for sale of the Property to any qualified purchaser, on commercially reasonable terms, for any amount in excess of $26,000,000.00 (Twenty-Six Million Dollars).

As referenced above, Section 6, titled "Determination Of Value Of the Property As A Whole," provided that "[t]he Association shall contract with one or more independent appraisers licensed in the state of North Carolina to determine the fair market value of the Property as a whole . . . ." Section 5 governed the "Determination Of Respective Interests" subsequent to sale, and provided, *inter alia*, that "the respective interests of the unit owners, for purposes of distribution of the net proceeds of the sale of the Property" shall be determined by an allocation appraisal—that is, an appraisal "of the fair market value of the units, limited common elements, and common element interests, immediately before the termination" as provided for under N.C. Gen. Stat. § 47C-2-118(h).

In accordance with N.C. Gen. Stat. § 47C-2-118(h) and Section 5 of the Termination Agreement, on 2 May 2017 Links Raleigh hired a third-party appraiser to independently and separately value each of the 51 units still owned by the minority owners ("Owners Appraisal"). A separate, limited appraisal of the independent values of some of the units owned by Links Raleigh was also conducted ("Links Raleigh Appraisal"). Collectively, both appraisals constituted the Allocation Appraisal—i.e., the appraisal of "the fair market value of the units, limited common elements, and common element interests, immediately before termination"—for purposes of distributing the net sale proceeds pursuant to N.C. Gen. Stat. § 47C-2-118(h) and Section 5 of the Termination Agreement. Together, the Allocation Appraisal values totaled $27,080,000.00. Pursuant to Section 5 of the Termination Agreement, the Allocation Appraisal was to be used "only for purposes of distribution of the net proceeds of the sale of the Property."

The Association, however, never secured an appraisal of the fair market value of the Condominium as a whole, as required by Sections

2 and 6 of the Termination Agreement. Instead, on 31 May 2017, the Association sold the Condominium to Greens at Tryon, LLC—another company wholly owned by FCP Fund—for the Allocation Appraisal values: $27,080,000.00. Plaintiffs contend that the value reflected in the Allocation Appraisals was not an accurate measure of the value of the Condominium as a whole, and that the Association therefore contracted to sell their property for a wholly inadequate price.

The Association then distributed to the minority owners their portion of the sales proceeds according to the Allocation Appraisal values. Plaintiffs contend, however, that in addition to failing to secure a second appraisal of the fair market value of the Condominium as a whole, Links Raleigh had only selected a sample of its units for inclusion in the Allocation Appraisal. Plaintiffs allege that the units selected "were not occupied by tenants; had been prepared for re-leasing, and, therefore, were, in a general sense, in better condition tha[n] other units owned by Links Raleigh having the same or similar size." According to plaintiffs, the biased selection of Links Raleigh units for appraisal skewed the distribution of the ultimate sales proceeds—which plaintiffs maintain was already inadequate—by "inflat[ing] the value of the units owned by Links Raleigh, and therefore, increas[ing] the pro rata share of the purchase price of the entire Condominium allocable to Links Raleigh."

Plaintiffs filed suit against defendants on 5 June 2017 for (1) failing to obtain a fair market value appraisal and instead selling the Condominium for the amount reflected in the Allocation Appraisals—which plaintiffs maintain was an insufficient price and well below the Condominium's fair market value; and (2) manipulating the Links Raleigh Appraisal in order to reduce the amount of the sales proceeds distributed to plaintiffs. Plaintiffs asserted two counts of breach of fiduciary duty against the Association and two counts of unfair trade practices against all defendants. Plaintiffs then filed an amended complaint on 18 August 2017, adding counts of breach of contract and breach of statutory obligations against the Association. Though stated as an independent claim, plaintiffs also sought to pierce the corporate veil of the Association as an additional remedy on the claims for breach of contract, breach of statutory obligations, and breach of fiduciary duties.

On 7 September 2017, the Association and its directors Khomassi, Kane, and Cathcart filed a motion to dismiss plaintiffs' complaint pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. FCP Fund, along with Carr, Links Raleigh, and Greens at Tryon, filed a motion to dismiss pursuant to Rules 12(b)(1), (2) and (6) on 20 September 2017.

On 14 November 2017, the trial court entered an order granting both motions to dismiss plaintiffs' complaint entirely. The trial court's order does not contain findings of fact or conclusions of law, nor does it indicate the specific grounds upon which its dismissal was based. The order instead provides only that "having reviewed and considered the pleadings, the applicable statutes, case law, and other materials, and having heard oral arguments of counsel for all parties, the Court GRANTS Defendants' Motions to Dismiss and hereby dismisses all of Plaintiffs' claims with prejudice." Plaintiffs filed notice of appeal on 29 November 2017.

Standard of Review

"In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citation and quotation marks omitted).

> Dismissal is proper . . . when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Id. at 784, 618 S.E.2d at 204 (citations and quotation marks omitted). Otherwise, it is error for a trial court to grant a defendant's motion to dismiss "if the complaint, liberally construed, shows no insurmountable bar to recovery." *Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984). "The effect of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint by presenting the question of whether the complaint's allegations are sufficient to state a claim upon which relief can be granted under *any* recognized legal theory." *Woolard v. Davenport*, 166 N.C. App. 129, 133, 601 S.E.2d 319, 322 (2004) (emphasis added) (citation omitted). Thus, when a defendant files a motion to dismiss, the issue for the court "is not whether [the] plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim." *Brown v. Lumbermens Mut. Casualty Co.*, 90 N.C. App. 464, 471, 369 S.E.2d 367, 371 (1988), *aff'd in part and rev'd in part*, 326 N.C. 387, 390 S.E.2d 150 (1990).

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context

confronting the court." *Parker v. Town of Erwin*, 243 N.C. App. 84, 95, 776 S.E.2d 710, 720 (2015). When the defendant "makes a motion to dismiss without submitting any opposing evidence," *id.* at 96, 776 S.E.2d at 720, then "the allegations of the [plaintiff's] complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Id.* at 96, 776 S.E.2d at 721. "The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction." *Id.*

Discussion

Plaintiffs do not dispute that Links Raleigh—of which FCP Fund was the sole member—had the authority to terminate the Condominium upon obtaining an 80% ownership interest therein, or that the Association—of which FCP employees elected themselves the sole directors—was thereafter empowered to sell the entire Condominium to Greens at Tryon—of which FCP Fund was the sole member. Rather, the thrust of plaintiffs' complaint is that defendants illicitly orchestrated the minority owners' forced relinquishment of their property for a price below market value so that FCP Fund could purchase those units at a below-market rate. Moreover, plaintiffs allege that the purposeful selection bias in the Links Raleigh Appraisal further diminished plaintiffs' respective shares of the already inadequate sales price.

In their complaint, plaintiffs assert that the Association's actions in effectuating the sale and distributing the proceeds constituted a breach of its contractual obligations under the Termination Agreement (Count One), a breach of its statutory obligations under the Condominium Act (Count Two), and a breach of its fiduciary duties owed to plaintiffs (Counts Three and Four). Further, plaintiffs seek to pierce the corporate veil of the Association (Count Five) as to the above Counts in order to also recover from defendants FCP Fund, Carr, Links Raleigh, Greens at Tryon, Khomassi, Cathcart, and Kane. Lastly, plaintiffs allege that all defendants committed an unfair trade practice in violation of N.C. Gen. Stat. § 75-1.1 (Counts Six and Seven).

I. Count One: Breach of Termination Agreement Against the Association

[1] We first address the legal sufficiency of Count One of plaintiffs' complaint for breach of contractual obligations under the Termination Agreement against the Association.

"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) (citation omitted).

Thus, in any breach of contract action, "the complaint must allege the existence of a contract between [the] plaintiff and [the] defendant, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to [the] plaintiff from such breach." *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977) (citation, quotation marks, and emphasis omitted).

In order for a valid contract to exist between two parties,

> an offer and acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms.

Yeager v. Dobbins, 252 N.C. 824, 828, 114 S.E.2d 820, 823-24 (1960) (citations and quotation marks omitted). Additionally, as a matter of law, a non-party to a contract "cannot be held liable for any breach that may have occurred." *Canady v. Mann*, 107 N.C. App. 252, 259, 419 S.E.2d 597, 601 (1992), *disc. review improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993).

In the instant case, the substance of plaintiffs' breach of contract claim is that the Association breached the provisions of the Termination Agreement when it neglected to secure an independent appraisal of the fair market value of the Condominium as a whole and instead used the sum of the Allocation Appraisal values to determine the purchase price for the Condominium.

Pertaining to the element of breach, plaintiffs' complaint contains the following allegations:

> 69. . . . Section 2 of the Termination Agreement provided:
>
> > The Association shall offer to sell the Property for a price of not less than $26,000,000.00 Twenty-Six Million Dollars, or for the Appraised Value (as that value is determined by the method set forth in Section 6), whichever is greater, and may contract for sale of the Property to any qualified purchaser, on commercially reasonable terms, for any amount in excess of $26,000,000.00 (Twenty-Six Million Dollars).

70. Section 5 of the Termination Agreement provided for an appraisal to permit the allocation of the net proceeds among the various unit owners, [and] in particular, provid[ed]:

> . . . The appraisal of the fair market value of the units, limited common elements, and common element interests, immediately before termination, shall be used only for purposes of distribution of the net proceeds of the sale of the Property.

71. Section 6 of the Termination Agreement provided for the appraisal to be used as part of establishing the sale price for the entire condominium, providing:

> The Association shall contract with one or more independent appraisers . . . to determine the fair market value of the Property as a whole . . . .

. . . .

73. Although . . . the specific language of Section 5 of the Termination Agreement[] provide[s] that the Allocation Appraisal shall be used only for purposes of distribution of the net proceeds of the sale of the Property, the Association used the sum of the Allocation Appraisal values as the amount to be paid by Greens at Tryon for the entire Condominium.

74. Use of the Allocation Appraisal values as the purchase price (and the amount to be allocated to each unit) is in violation of the specific provisions of Section 5 of the Termination Agreement.

75. The Association did not have an independent appraiser determine the fair market value of the Condominium as a whole, as required by Section 6 of the Termination Agreement.

76. Because the Association did not have an independent appraiser determine the fair market value of the Condominium as a whole, its sale of the entire Condominium, for the sum of the Allocation Appraisal values, violated the requirements of Section 2 of the Termination Agreement.

Defendants, on the other hand, construe Section 2 of the Termination Agreement as simply providing that the Condominium was to be sold "for any amount in excess of $26,000,000.00[.]" Because the Association ultimately sold the Condominium for $27,080,000.00, defendants maintain that there was no breach of the Termination Agreement and that the trial court therefore properly dismissed Count One of plaintiffs' complaint. However, Section 6 of the Termination Agreement required the Association to obtain an appraisal of the fair market value of the Condominium as a whole, and Section 5 provided that the Allocation Appraisal was to be used "only for purposes of distribution of the net proceeds of the sale of the" Condominium. Thus, when construed as true, plaintiffs' allegations are adequate to allege a breach of the Termination Agreement, notwithstanding defendants' references to the latter clause contained in Section 2. *See Woolard*, 166 N.C. App. at 134, 601 S.E.2d at 323.

More fundamentally, however, defendants argue that the trial court properly dismissed plaintiffs' claim for breach of contract because "neither [plaintiffs] nor the Association executed the Termination Agreement" or were parties thereto. Nevertheless, plaintiffs maintain that dismissal was improper because the Termination Agreement is "by its form and style a contract" that is binding upon the Association, and that plaintiffs have standing to enforce its provisions against the Association because they were the intended third-party beneficiaries thereof.

We agree with defendants that, despite having adequately alleged a breach of the terms of the Termination Agreement, the trial court properly dismissed plaintiffs' claim for breach of contract against the Association. Absent from the complaint are allegations setting forth the other necessary element of plaintiffs' breach of contract claim—that is, that the Termination Agreement constituted a binding contract to which the *Association* was in fact a party. The Termination Agreement explicitly states that it was "made . . . by Links Raleigh" only. The Association did not execute the Termination Agreement, nor is the Association named as a party thereto. The particular breaches for which plaintiffs' complaint seeks to hold the Association liable are preceded by a declaration that only "Links Raleigh, being the owners of more than eighty (80) percent of the condominium units within the Links Club Condominiums . . . hereby agrees as follows[.]"[1]

1. This language is in accordance with the requirements of N.C. Gen. Stat. § 47C-2-118, which directs that a termination agreement shall be executed "by the requisite number of unit owners"—i.e., in the instant case, Links Raleigh, as the eighty-percent owners, rather than *between* the requisite number of owners and some other entity, such as the Association. N.C. Gen. Stat. § 47C-2-118(b).

In seeking to hold the Association liable as a party to the Termination Agreement, plaintiffs' complaint only contains the following allegations:

> 63. On May 17, 2017, Links Raleigh, as the owner of more than eighty (80) percent of the units within the Condominium, executed [the Termination Agreement] . . . .
>
> . . . .
>
> 77. . . . [T]he Association breached its contractual and other obligations by failing to comply with the specific requirements of the Termination Agreement.

Beyond the conclusory statement in paragraph 77 that the Association had "contractual and other obligations" under the Termination Agreement, plaintiffs' complaint is devoid of allegations that the Association was a party to, or otherwise bound by, the Termination Agreement, thereby rendering the Association liable for a breach of its terms.

Nevertheless, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that [the] plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Snyder v. Freeman*, 300 N.C. 204, 209, 266 S.E.2d 593, 597 (1980) (citation, quotation marks, and emphasis omitted). Thus, in the instant case, the question is not whether plaintiffs have affirmatively alleged the Association to be a party to the Termination Agreement, but whether the complaint alleges facts which, if true, would be sufficient to establish the same. *See id.* ("The question is, then, whether under any set of facts which [the] plaintiff may be able to prove relevant to the agreement on which she relies, there is some legal theory available by which she can establish liability against [the] defendants . . . .").

In the instant case, while the complaint and attached documents reveal that the Termination Agreement does not name the Association as a party and that the Association did not otherwise manifest an assent to its terms via signature, we note that the facts alleged in plaintiffs' complaint do permit the possibility that the Association had nonetheless manifested an assent to the Termination Agreement by virtue of beginning performance thereunder. *See*, *e.g.*, *id.* at 218, 266 S.E.2d at 602 ("Acceptance by conduct is a valid acceptance." (citations omitted)); *Burden Pallet Co. v. Ryder Truck Rental, Inc.*, 49 N.C. App. 286, 289, 271 S.E.2d 96, 97 (1980) ("The object of a signature to a contract is to show assent, but the signing of a written contract is not necessarily essential to its validity. Assent may be shown in other ways, such as acts or conduct . . . ." (citations omitted)), *disc. review denied*, 301

N.C. 722, 276 S.E.2d 282 (1981). Here, plaintiffs' complaint contains allegations that the Association performed in accordance with the provisions of the Termination Agreement. In particular, the Association secured the Allocation Appraisal, effectuated the Condominium's sale, and held title to the units as trustee for all of the unit owners, all of which the Association was compelled to do pursuant to the terms of the Termination Agreement.

The Association's performance, however, was limited to those acts which it was statutorily required to discharge pursuant to the Condominium Act. *See*, *e.g.*, N.C. Gen. Stat. § 47C-2-118(e) (providing, *inter alia*, that "[t]he association, on behalf of the unit owners, may contract for the sale of real estate in the condominium"; "[i]f any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units"; and "[p]roceeds of the sale must be distributed to unit owners and lienholders as their interests may appear [pursuant to the Allocation Appraisal] as provided in subsection (h)").

Plaintiffs' complaint is devoid of facts establishing that the Association performed any act specifically in furtherance of the Termination Agreement above and beyond that which it was required to do by statute. In fact, the only provisions of the Termination Agreement beyond the purview of the Condominium Act are those provisions which plaintiffs allege the Association to have breached. Thus, the allegations reveal that the Association's conduct in the instant case represented an abidance by the statutory obligations under the Condominium Act, rather than indicating an assent to be independently bound by the Termination Agreement.

We are unable to divine any additional theories, and plaintiffs have proffered none, that would otherwise establish that the Association had assented to be bound by the terms of the Termination Agreement above and beyond the scope of its statutory duties under N.C. Gen. Stat. § 47C-2-118. Accordingly, even when taken as true, we conclude that the allegations in plaintiffs' complaint are insufficient to establish that the Termination Agreement constituted a valid contract between the Association and Links Raleigh.

Because we conclude that plaintiffs' complaint fails to establish that the Termination Agreement was a valid contract binding on the Association, the trial court did not err in granting defendants' motions to dismiss this claim. Moreover, we need not address the issue of whether plaintiffs had standing to sue for breach of the Termination Agreement as the alleged intended third-party beneficiaries thereof.

II. Count Two: Breach of Statutory Obligations Against the Association

[2] In Count Two of their amended complaint, plaintiffs allege that "[t]he Association is statutorily obligated, pursuant to the provisions of N.C.G.S. § 47C-2-118, to comply with the provisions of the Termination Agreement; and to comply with the provisions of that statute, and by failing to so comply, violated N.C.G.S. § 47C-2-118." Further, while N.C. Gen. Stat. § 47C-2-118 does not provide for a private right of action that would allow plaintiffs to assert a breach of statutory obligations claim against the Association, plaintiffs contend that "[t]he language, structure and context of the act imply that unit owners have a private right of action for violation of the act."

We need not determine whether N.C. Gen. Stat. § 47C-2-118 implies a private right of action. Even assuming that it does, the allegations in plaintiffs' complaint do not support their claim for breach of statutory obligations.

First, plaintiffs do not identify any particular provision of N.C. Gen. Stat. § 47C-2-118 that the Association has violated. The only indication of a specific statutory violation is found in paragraph 73 of the complaint, which alleges that "[a]lthough the *structure* of the Condominium Act . . . provide[s] that the Allocation Appraisal shall be used only for purposes of distribution of the net proceeds of the sale of the Property, the Association used the sum of the Allocation Appraisal values as the amount to be paid . . . for the entire Condominium." (First emphasis added). However, the text of N.C. Gen. Stat. § 47C-2-118 does not delineate any particular method by which a condominium's sale price must be determined. *See Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) ("Statutory interpretation properly begins with an examination of the plain words of the statute." (citation omitted)).

Moreover, notwithstanding the admittedly logical "structure" proposed by plaintiffs, the only provision contained in N.C. Gen. Stat. § 47C-2-118 that addresses the use of an appraisal is Subsection (h), which merely requires that an appraisal be obtained of the "fair market value of [the owners'] units, limited common elements, and common elements interests" for the sole purpose of establishing how the sale proceeds are to be allocated among unit owners. N.C. Gen. Stat. § 47C-2-118(h)(1). The General Assembly's explicit inclusion of a requirement that a particular appraisal be obtained in order to determine the appropriate allocation of proceeds suggests that its exclusion of any prescribed mechanism for establishing a condominium's ultimate sale price was intentional. *See Mangum v. Raleigh Bd. of Adjustment*, 196 N.C. App. 249, 255, 674

S.E.2d 742, 747 (2009) ("One of the long-standing rules of interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another." (citations omitted)). Indeed, N.C. Gen. Stat. § 47C-2-118 explicitly provides that "the association has all powers necessary and appropriate to effect the sale." N.C. Gen. Stat. § 47C-2-118(e). Absent a specific statutory provision limiting those powers, there is no support for plaintiffs' contention that the Association violated its obligations under N.C. Gen. Stat. § 47C-2-118 when it failed to obtain a separate appraisal and instead used the Allocation Appraisal as the basis for the Condominium's sale price. *Cf. Correll*, 332 N.C. at 145, 418 S.E.2d at 235 ("If our General Assembly had intended to require that applicants own their primary places of residence before receiving the advantage of the contiguous property exclusion contained in N.C.G.S. § 108A-55, we must assume that it would have included plain language to that effect in the other plain language of the statute." (citation omitted)).

Next, plaintiffs attempt to circumvent the absence of a statutory requirement governing the sale price of a condominium terminated under the Act by arguing that N.C. Gen. Stat. § 47C-2-118 nevertheless required the Association "to comply with the provisions of the Termination Agreement[,]" which *did* contain such a requirement. Thus, because the Association did not sell the Condominium in a manner consonant with the procedures provided in the Termination Agreement, plaintiffs maintain that it was error for the trial court to dismiss Count Two of their complaint for breach of statutory obligations. However, this contention is likewise unsupported by law.

Again, plaintiffs do not identify the provision of N.C. Gen. Stat. § 47C-2-118 that they allege requires a condominium association to abide by the terms of a termination agreement. Subsection (b) addresses execution of a termination agreement, but provides only that "[a]n agreement to terminate must be evidenced by the execution of a termination agreement . . . *by the requisite number of unit owners*." N.C. Gen. Stat. § 47C-2-118(b) (emphasis added). Subsection (c) does provide that "[i]f, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement must set forth the minimum terms of the sale." N.C. Gen. Stat. § 47C-2-118(c). However, when read in conjunction with the requirements of Subsection (b) that (1) "[a] termination agreement and all ratifications thereof must be recorded . . . and is effective only upon recordation[,]" and (2) a termination agreement "must specify a date after which the agreement will be void unless recorded before that date[,]" it appears that the purpose

of setting forth the minimum terms of the sale under Subsection (c) is not to hold a condominium association liable with respect thereto, but instead to provide the public with adequate notice of the transaction. *Cf. Hill v. Pinelawn Mem'l Park, Inc.*, 304 N.C. 159, 163, 282 S.E.2d 779, 782 (1981) ("The purpose of [our recording] statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles." (citations omitted)). Quite plainly, N.C. Gen. Stat. § 47C-2-118 imposes no explicit statutory duty upon a condominium association to abide by the provisions that the requisite number of unit owners have specified in a termination agreement. This Court cannot require otherwise, however provident doing so might be. *Fagundes v. Ammons Dev. Grp., Inc.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 533 ("We lack the authority to change the law on the ground that it might make good policy sense to do so."), *disc. review denied*, 370 N.C. 66, 803 S.E.2d 626 (2017).

Accordingly, we conclude that the trial court did not err by dismissing Count Two of plaintiffs' complaint for breach of statutory obligations against the Association, in that the allegations of plaintiffs' complaint are insufficient to state a claim upon which relief can be granted.

III. Counts Six and Seven: Unfair Trade Practices Against All Defendants

[3] We next address plaintiffs' argument that the trial court erred in dismissing Counts Six and Seven of the amended complaint for unfair trade practices in violation of N.C. Gen. Stat. § 75-1.1. Defendants contend that the trial court properly dismissed plaintiffs' unfair trade practices claims against all defendants because the allegations in plaintiffs' complaint "do not relate to business activities that were in or affecting commerce." We agree.

"The elements of a claim for unfair and deceptive practices in violation of G.S. § 75-1.1 are: (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff . . . ." *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998) (citation and quotation marks omitted), *disc. review improvidently allowed*, 351 N.C. 41, 519 S.E.2d 314 (1999). In analyzing the second element of "in or affecting commerce," our Supreme Court has explained that "our General Assembly sought to prohibit unfair or deceptive conduct in interactions between different market participants. The General Assembly did not intend for the Act to regulate purely internal business operations[,]" or "to intrude into the internal operations of a single market participant." *White v. Thompson*, 364 N.C. 47, 47-48, 53, 691 S.E.2d

676, 676, 680 (2010). Accordingly, "any unfair or deceptive conduct contained solely within a single [market participant] is not covered by the Act." *Id.* at 53, 691 S.E.2d at 680.

In the instant case, the alleged unfair and deceptive conduct on the part of defendants all occurred within the Condominium Association of which plaintiffs were members. While plaintiffs maintain that defendants' acts went "well beyond the internal operations of the Association" and "involve[d] interactions with and affecting the public," they do not identify any particular member of the public—beyond the members of the Association itself—affected by defendants' conduct. Rather, each of the acts of which plaintiffs complain involved the "internal conduct of individuals within a single market participant"—that is, the Association. *Id.*

Because defendants "unfairly and deceptively interacted only with" fellow members of the Condominium Association, plaintiffs cannot establish that defendants' actions were "in or affecting commerce." *Id.* at 54, 691 S.E.2d at 680. Accordingly, the allegations contained in Counts Six and Seven of plaintiffs' amended complaint fall outside of the scope of N.C. Gen. Stat. § 75-1.1, and the trial court therefore properly granted defendants' motions to dismiss those claims.

IV. Counts Three and Four: Breach of Fiduciary Duty Against the Association

[4] Finally, after establishing that the law does not support plaintiffs' claims for breach of contract, breach of statutory obligations, and unfair trade practices, we nevertheless agree with plaintiffs that they have stated a claim for breach of fiduciary duty against the Association.

a. Fiduciary Relationship

It is axiomatic that "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted).

> [T]here are two types of fiduciary relationships: (1) those that arise from legal relations such as attorney and client, broker and client . . . , partners, principal and agent, trustee and cestui que trust, and (2) those that exist as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other.

S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (citation and internal quotation marks

omitted). For example, it is well established "that the trustee of a trust has a fiduciary obligation to the beneficiary of the trust." *Melvin v. Home Fed. Savings & Loan Ass'n*, 125 N.C. App. 660, 664, 482 S.E.2d 6, 8, *disc. review denied*, 346 N.C. 281, 487 S.E.2d 551 (1997).

By asserting that a fiduciary relationship existed between plaintiffs and the Association, plaintiffs have not, as defendants contend, attempted to hold the Association liable pursuant to N.C. Gen. Stat. § 55A-8-30 (2017), which defendants note "vests the fiduciary duty obligations of a nonprofit corporation like the Association in its Board of Directors." Rather, Counts Three and Four of plaintiffs' complaint explicitly reference N.C. Gen. Stat. § 47C-2-118, and implicitly reference Subsection (e), by alleging that "[t]he Association, by virtue of its position as Trustee for all of the unit owners, owed a fiduciary duty, to each and every one of the unit owners" in effectuating the Condominium's sale.

Indeed, N.C. Gen. Stat. § 47C-2-118(e) explicitly provides that when a condominium is terminated pursuant thereto and is thereafter to be sold, title to all of the units "vests in *the association* as *trustee* for the holders of all interests in the units." N.C. Gen. Stat. § 47C-2-118(e) (emphasis added). Moreover, an association's independent status as a fiduciary is further evidenced by N.C. Gen. Stat. § 47C-3-119—quite aptly titled "Association as Trustee"—which provides that "[w]ith respect to a third person dealing with the association in the association's capacity as a trustee under G.S. 47C-2-118 following termination . . . , the existence of trust powers and their proper exercise by the association may be assumed without inquiry." N.C. Gen. Stat. § 47C-3-119 (2017). The Condominium Act thus makes clear that an association will separately and independently owe certain fiduciary duties as trustee in the sale of a condominium pursuant to N.C. Gen. Stat. § 47C-2-118. This statutorily imposed fiduciary relationship is the basis of plaintiff's complaint.[2] Accordingly, plaintiffs have adequately alleged the existence of a fiduciary relationship between themselves and the Association so as to survive dismissal.

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2. We also note that even absent the specific statutory language implicating the Association as "trustee," upon agreement by the majority owner to terminate the Condominium, plaintiffs were divested of any and all power to participate in negotiations for the sale of their property, and were left instead to the will of the Association. *See Lockerman v. South River Elec. Membership Corp.*, ___ N.C. App. ___, ___, 794 S.E.2d 346, 352 (2016) ("[W]hen one party figuratively holds all the cards—all the financial power or technical information, . . . North Carolina courts [have] found that the special circumstance of a fiduciary relationship has arisen." (citation and quotation marks omitted)).

b. Breach

Having determined that plaintiffs sufficiently pleaded a fiduciary relationship, we next examine whether plaintiffs have adequately alleged facts necessary to establish a breach of the Association's duties associated therewith.

As our Supreme Court has stated, "one of the most fundamental duties of [a] trustee throughout [a] trust relationship is to maintain complete loyalty to the interests of his [beneficiaries]." *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967). Trustees may "never paramount their personal interest over the interest of those for whom they have assumed to act." *Miller v. McLean*, 252 N.C. 171, 174, 113 S.E.2d 359, 362 (1960) (citations omitted). For instance, "[i]t is a well established principle, that a trustee cannot buy at his own sale. He cannot be vendor and vendee at the same time of trust property[.]" *Wachovia Bank & Trust Co.*, 269 N.C. at 713, 153 S.E.2d at 458 (citation and quotation marks omitted). The North Carolina Uniform Trust Code also illustrates that a trustee's sale of trust property is "rebuttably presumed to be affected by a conflict of interest if the trustee enters into the transaction with[,]" *inter alia*, an "officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee;" or "[a]ny other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment." N.C. Gen. Stat. § 36C-8-802(c)(3)&(4) (2017).

> The reasons for the loyalty rule are evident. A man cannot serve two masters. *He cannot fairly act for his interest and the interest of others in the same transaction.* Consciously or unconsciously, he will favor one side or the other, and where placed in this position of temptation, there is always the danger that he will yield to the call of self-interest.

Wachovia Bank & Trust Co., 269 N.C. at 715, 153 S.E.2d at 459-60 (emphasis added).

There are, however, "rare and justifiable exceptions" when a self-interested transaction might not run afoul of a trustee's fiduciary duties, including where it is found that "(1) complete disclosure of all facts was made by the trustee, (2) the sale . . . materially promote[d] the best interests of the trust and its beneficiaries, and (3) there [were] no other purchasers willing to pay the same or a greater price[.]" *Id.* at 715, 153 S.E.2d at 460. In other words, where a trustee is alleged to have made a

self-interested transaction involving property held in trust in breach of its fiduciary duties, the trustee must be able to demonstrate that it nevertheless "affirmatively put forth real and good faith endeavors to find the most advantageous purchaser and that there [were] no other available purchasers willing to pay the same price[.]" *Id.* at 716, 153 S.E.2d at 460. "This precaution must be taken, not because there is fraud[,]" *id.*, but because "[t]he trustee, because of his fiduciary relationship, is skating on the thin and slippery ice of presumed fraud, which he must rebut by proof that no fraud was committed and no undue influence . . . exerted[,]" *id.* at 715, 153 S.E.2d at 460.

In the instant case, plaintiffs alleged in their complaint that "[t]he Association breached its fiduciary duty to Plaintiffs by arranging for, approving, and proceeding with the forced sale of the entire Condominium to FCP Fund (through its subsidiary, Greens at Tryon), for an inadequate price[,]" and "by failing to have an independent appraiser generate the Allocation Appraisal, ensure that the appraisal used was without bias, and distribute it within the time frame specified by N.C.G.S. Section 47C-2-118." Plaintiffs additionally set forth various particular allegations, including the following:

> 80. [T]he Links Raleigh Appraisal was deficient in that Williams Appraisers, Inc. only looked at a subset of the units owned by Links Raleigh, with those units having been selected by Links Raleigh. On information and belief, the units made available . . . for inspection were not occupied by tenants; had been prepared for re-leasing, and, therefore, were, in a general sense, in better condition tha[n] other units owned by Links Raleigh having the same or similar size. This selection bias creates a persistent appraisal bias which inflates the value of the units owned by Links Raleigh, and therefore, increased the pro rata share of the purchase price of the entire Condominium allocable to Links Raleigh. . . .
>
> . . . .
>
> 88. The Association could and should have attempted to fulfill its duty to each and every one of the unit owners by listing and exposing the Condominium for sale; by offering the same to potential third party apartment complex owners for a price no less than that determined by an independent third party appraisal, or by otherwise acting in a way

> consistent with attempting to maximize the sales price for the benefit of all unit owners.
>
> . . . .
>
> 90. On information and belief, [the Association's Board Members] Khomassi; Cathcart and Kane each also had a financial interest in completing the transaction resulting in the sale of the entire Condominium to Greens at Tryon; and the Association was similarly prioritizing their interests by proceeding with the sale to Greens at Tryon.
>
> . . . .
>
> 99. Although N.C.G.S. Section 47C-2-118 provides that the Allocation Appraisal shall be distributed to the unit owners, who shall then have thirty (30) days to object to the same; Links Raleigh distributed the Other Owners Appraisal on May 2, 2017, and the Association proceeded with the closing on May 31, 2017; not allowing the unit owners thirty (30) days to object.
>
> 100. The Association did not distribute the Links Raleigh Appraisal to the Other Owners, although it apparently used the same (with the Other Owners Appraisal) as the Allocation Appraisal.

We conclude that these allegations are more than sufficient to withstand defendants' motions to dismiss plaintiffs' breach of fiduciary duty claims against the Association. The trial court thus erred when it dismissed Counts Three and Four of plaintiffs' complaint for breach of fiduciary duty against the Association.

c. Veil Piercing

[5] Likewise, the amended complaint alleges appropriate facts and circumstances sufficient to withstand dismissal of veil piercing as a potential remedy on plaintiffs' breach of fiduciary duty claims.[3]

"Piercing the corporate veil . . . allows a plaintiff to impose legal liability for a corporation's obligations . . . upon some other company or individual that controls and dominates the corporation." *Green*, 367 N.C. at 145, 749 S.E.2d at 270 (citation omitted). "It is well recognized that

3. We need not examine plaintiffs' "claims" for veil piercing as to the other counts, as those counts were properly dismissed. *See Green v. Freeman*, 367 N.C. 136, 146, 749 S.E.2d 262, 271 (2013).

courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (citation omitted).

The Supreme Court has explained that "[e]vidence upon which [our courts] have relied to justify piercing the corporate veil includes inadequate capitalization, noncompliance with corporate formalities, lack of a separate corporate identity, excessive fragmentation, siphoning of funds by the dominant shareholder, nonfunctioning officers and directors, and absence of corporate records." *Green*, 367 N.C. at 145, 749 S.E.2d at 270 (citation omitted). Ultimately, "[t]he aggrieved party must show that the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State." *Id.* (citation and quotation marks omitted).

The circumstances pleaded in plaintiffs' complaint demonstrate that the instant case is one in which it would be appropriate to pierce the corporate veil, and the allegations are sufficient to survive defendants' motions to dismiss. Plaintiffs alleged that the Association was entirely dominated by FCP Fund, through its subsidiary Links Raleigh. The Association's Board was fully composed of FCP personnel Khomassi, Cathcart, and Kane. Moreover, it appears that the Association is wholly *un*capitalized, in that the Termination Agreement provided for dissolution of the Association upon sale of the Condominium and distribution of the net proceeds, according to statute. A judgment against the Association would be indexed in the name of the Condominium and the Association; yet, upon termination, all of the Association's assets were presumably distributed amongst the unit owners—over eighty percent of which to defendants—and any preexisting lienholders. *See* N.C. Gen. Stat. §§ 47C-2-118(g), 47C-3-117(d) (2017). It would be inequitable to allow dominant shareholders to shield themselves from liability through use of a corporate entity, the dissolution of which was intended from the outset of their course of action.

Next, because the allegations, if true, are sufficient to allow a fact finder to determine "that the corporate identity should be disregarded" in the present case, "the next inquiry is whether [the] noncorporate defendant[s] may be held liable for [their] personal actions as an officer or director." *Green*, 367 N.C. at 145, 749 S.E.2d at 270. Plaintiffs' complaint must contain allegations sufficient to establish three elements:

> (1) Control, not mere majority or complete stock control, *but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked* so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and *unjust act in contravention of a plaintiff's legal rights*; and
>
> (3) The aforesaid control and breach of duty must *proximately cause the injury or unjust loss* complained of.

Id. at 145-46, 749 S.E.2d at 270 (emphases added) (citation, quotation marks, and alteration omitted).

Plaintiffs' complaint contains the following allegations relevant to piercing the corporate veil of the Association in order to hold defendants FCP Fund, Carr, Links Raleigh, Greens at Tryon, Khomassi, Cathcart, and Kane personally liable for the Association's alleged breaches of fiduciary duty:

> 22. On information and belief, Defendant Thomas A. Carr . . . is an Authorized Trustee for FCP Fund . . . . On further information and belief, the acts of FCP Fund, complained herein, were at the direction, and under the control of Carr.
>
> . . . .
>
> 25. On information and belief, Defendant Nason Khomassi . . . has been, since prior to August 31, 2016, employed by [FCP] . . . . On further information and belief, Khomassi has been, since August 31, 2016, a member of the Board of Directors of the Association; and the President of the Association.
>
> 26. On information and belief, Defendant Alex Cathcart . . . has been, since prior to August 31, 2016, employed by [FCP] . . . . On further information and belief, Cathcart has been, since August 31, 2016, a member of the Board of

Directors of the Association; and the Vice-President and Secretary of the Association.

27. On information and belief, Defendant Bryan M. Kane . . . has been, since prior to August 31, 2016, Senior Vice-President—Acquisitions for [FCP] . . . . On further information and belief, Kane has been, since August 31, 2016, a member of the Board of Directors of the Association; and the Treasurer of the Association.

28. On information and belief, FCP Fund is the sole member of both Links Raleigh and Greens at Tryon.

. . . .

38. On July 26, 2016, FCP Fund caused Links Raleigh to be formed by recording Articles of Incorporation with the Delaware Secretary of State.

. . . .

39. On information and belief, prior to July 26, 2016, FCP Fund had, either directly or through an entity that it controlled, arranged for or contracted with Fairway Apartments to purchase their units in the Condominium.

. . . .

41. FCP Fund intended to purchase 80 percent of the units in the Condominium through Links Raleigh (or some other entity under its control) so that it could, acting through the unit purchasing entity, terminate the Condominium . . . .

42. FCP Fund intended to terminate the Condominium so that the entire Condominium would be available for purchase; and so that it, acting through Links Raleigh, or some other entity under its control, could purchase the entire Condominium at a below market price[.]

. . . .

44. FCP Fund and its Trustee intended to ensure that it, acting through Links Raleigh, or another entity under its control, would purchase the entire Condominium, by having Links Raleigh . . . use its majority of the voting interests in the condominium to elect a compliant board, who would have the Association contract to sell the entire Condominium to an entity under FCP Fund's control.

45. FCP Fund and its Trustee intended to use its control over the Board of the Association to secure, as a purchase price for an entity under its control, a non-market price for the entire condominium, and terms otherwise favorable to it.

46. On August 31, 2016, Cathcart, in furtherance of FCP Fund's plan, acting as a representative of Links Raleigh, and with proxies provided by Fairway Apartments, conducted a special meeting of the Association, at which time: (a) all of the then current Directors of the Board were removed; (b) the number of authorized Directors was reduced to three (3); and (c) Khomassi[,] Cathcart and Kane were elected as the Directors of the reduced Association Board.

. . . .

65. On May 31, 2017, the Association, acting on behalf through its Board, Khomassi, Cathcart and Kane, and on behalf of FCP Fund III and the other Defendants, sold the entire Condominium to Greens at Tryon for $27,080,000.00[.]

. . . .

75. The Association did not have an independent appraiser determine the fair market value of the Condominium as a whole, as required by Section 6 of the Termination Agreement.

. . . .

111. The Association was operated as a mere instrumentality or alter ego of FCP Fund; Carr; Links Raleigh; Greens at Tryon; Khomassi[,] Cathcart and Kane, who collectively exercised such complete domination and control of the Association that it had no independent will or identity.

112. FCP Fund; Carr; Links Raleigh; Greens at Tryon; Khomassi; Cathcart and Kane used their domination of the Association to perpetuate a series of wrongs, including the forced sale of the units owned by Plaintiffs, to FCP Fund, through its wholly owned subsidiary Greens at Tryon, for an inadequate price, and in an improper percentage amount, in violation of the Association's fiduciary duties.

Taken as a whole and viewed in the light most favorable to plaintiffs, we conclude that the above allegations, together with those setting forth a breach of fiduciary duty, allege domination and control sufficient to establish a theory of liability upon which to hold defendants FCP Fund, Carr, Links Raleigh, Greens at Tryon, Khomassi, Cathcart, and Kane personally liable for the Association's alleged breaches of fiduciary duty. Plaintiffs are entitled to offer evidence to support the appropriateness of that remedy. *Brown*, 90 N.C. App. at 471, 369 S.E.2d at 371.

As plaintiffs' complaint demonstrates no insurmountable bar to piercing the corporate veil on Counts Three and Four of plaintiffs' complaint, we conclude that the trial court erred to the extent that it dismissed the same.

d. Personal Jurisdiction

[6] Lastly, defendants FCP Fund, Carr, Links Raleigh, and Greens at Tryon's motion to dismiss also cited Rule 12(b)(2), maintaining that plaintiffs' complaint failed to allege sufficient facts to support the proper exercise of personal jurisdiction over defendant Carr, an out-of-state resident, by a Court of this State. On appeal, defendants argue that "[plaintiffs] failed to establish personal jurisdiction over defendant Thomas Carr and have failed to preserve its appeal of that determination by the trial court." Accordingly, defendants maintain that this Court must "affirm dismissal of the [complaint] against Carr pursuant to Rule 12(b)(2)." However, the trial court's order reveals no such determination, nor does the transcript of the hearing indicate the same.

It is axiomatic that "[a]bsent a request by the parties," the trial court need not include findings of fact or conclusions of law in its order on a motion to dismiss under Rule 12(b)(2). *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 423-24, 324 S.E.2d 909, 912, *disc. review denied*, 313 N.C. 602, 330 S.E.2d 611 (1985). Here, neither party requested that the trial court include specific findings in its order. The trial court granted defendants' motions to dismiss by entering a general, one-sentence order, thereby tasking this Court with determining whether the trial court's dismissal should be upheld under any of the grounds alleged. *Cf. Helm v. Appalachian State Univ.*, 194 N.C. App. 239, 250, 670 S.E.2d 571, 578 (2008) (holding that a trial court need not provide "conclusions of law explaining its decision to dismiss [a] plaintiff's complaint" because, under *de novo* review, this Court "disregard[s] any . . . conclusions of law drafted by the trial court"), *rev'd on other grounds*, 363 N.C. 366, 677 S.E.2d 454 (2009). Accordingly, because we conclude that dismissal of Counts Three, Four, and Five of plaintiffs' complaint

was improper under Rule 12(b)(6), we next determine whether that dismissal must nevertheless be upheld as to defendant Carr pursuant to Rule 12(b)(2).

A complaint against a non-resident defendant should not be dismissed for lack of personal jurisdiction if the complaint reveals that there exists "certain minimum contacts between the non-resident defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Tom Togs, Inc., v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citation and quotation marks omitted); *see also J.M. Thompson Co.*, 72 N.C. App. at 424, 324 S.E.2d at 913 ("[T]he critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the assertion comports with due process."). "In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[.]" *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786. Where the particular controversy at issue "arises out of the defendant's contacts with the forum state, the state is said to be exercising 'specific' jurisdiction." *Id.* at 366, 348 S.E.2d at 786. To establish "specific" jurisdiction, it must be evident that "a defendant has 'fair warning' that he may be sued in a state for injuries arising from activities that he 'purposefully directed' toward that state's residents." *Id.* (citation omitted).

In the instant case, because the controversy arises from defendant Carr's alleged contacts with North Carolina, specific jurisdiction is at issue.

Plaintiffs' complaint alleges, in pertinent part, that "Defendant Thomas A. Carr . . . is an Authorized Trustee for FCP Fund" and that "the acts of FCP Fund, complained of herein, were at the direction, and under the control of Carr." Defendants did not attach to their motion to dismiss any evidence purporting to establish otherwise. Plaintiffs' allegation is therefore "accepted as true and deemed controlling." *Parker*, 243 N.C. App. at 97, 776 S.E.2d at 721. In that plaintiffs allege that defendant Carr directed and controlled each of the acts complained of in the instant case, plaintiffs have sufficiently disclosed the existence of personal jurisdiction over defendant Carr so as to survive dismissal under Rule 12(b)(2). *See Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 165, 565 S.E.2d 705, 710 (2002) ("Specific jurisdiction exists if the defendant has purposely directed its activities toward the resident[s] of the forum and the cause of action relates to such activities."); *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 236, 506 S.E.2d 754, 758

(1998) (holding that the trial court properly denied the motion to dismiss for lack of personal jurisdiction over the individual defendants where the complaint included uncontroverted allegations that the principal corporation "was a sham and facade controlled and directed by" the individual defendants).

Accordingly, we likewise reverse the trial court's dismissal of Counts Three, Four, and Five of plaintiffs' complaint to the extent that it was based in part upon a lack of personal jurisdiction against defendant Carr.

Conclusion

For the reasoning contained herein, the trial court's order granting defendants' motions to dismiss plaintiffs' claims for breach of contract, breach of statutory obligations, and unfair and deceptive trade practices is affirmed. We reverse the dismissal of plaintiffs' Counts Three, Four, and Five, plaintiffs' claims for breach of fiduciary duty and piercing the corporate veil, and remand to the trial court.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges STROUD and MURPHY concur.

IN THE MATTER OF C.K.C. AND W.T.C., III

No. COA18-592

Filed 18 December 2018

1. Termination of Parental Rights—willful abandonment—motion requesting custody

The trial erred by finding that respondent-father willfully abandoned his children and terminating his parental rights where, during the six months immediately preceding the petition, respondent-father filed a motion in the cause seeking to modify a prior consent order and requesting that he be granted custody. His motion thoroughly averted the trial court's determination that he willfully abandoned the children.

2. Termination of Parental Rights—abandonment—consent order—void as against public policy

The trial court erred in a termination of parental rights proceeding by concluding that respondent-father willfully abandoned his children through a consent order that was void as against public policy. There is a two-step judicial process that must be followed in proceedings for the termination of parental rights.

3. Termination of Parental Rights—neglect—by abandonment—consent order—void as against public policy

To the extent that the trial relied on a consent order that was void as against public policy, it erred by concluding that grounds existed to terminate a father's parental rights for neglect based on abandonment.

Appeal by respondent-father from order entered 19 March 2018 by Judge Wesley W. Barkley in Catawba County District Court. Heard in the Court of Appeals 29 November 2018.

Stephen M. Schoeberle for petitioner-appellee grandmother.

Anné C. Wright for respondent-appellant father.

ZACHARY, Judge.

Respondent, the biological father of the juveniles C.K.C. ("Cooper") and W.T.C., III ("Wes"),[1] appeals from an order terminating his parental rights. After careful review, we reverse.

I. Background

Respondent-father and the juveniles' biological mother were married in October 2007 and divorced in June 2015.[2] Cooper was born in February 2009, and Wes was born in February 2012. Petitioner "Karen Macintosh,"[3] the juveniles' maternal grandmother, obtained an *ex parte* emergency custody order on 6 February 2014, in which she was granted temporary custody of Cooper and Wes. The maternal grandfather and his wife ("the Duncans")[4] were subsequently allowed to intervene in the custody matter.

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1. Pseudonyms are used throughout the opinion to protect the identities of the juveniles and other relevant parties, and for ease of reading.

2. The juveniles' mother is not a party to this appeal.

3. A pseudonym.

4. A pseudonym.

On 14 January 2016, pursuant to a consent order, Petitioner-grandmother and the Duncans were awarded joint legal custody of Cooper and Wes. Petitioner-grandmother was granted primary physical custody of the children, and the Duncans were granted secondary physical custody, consisting of visitation every other weekend. Under the terms of the consent order, Respondent-father's child support obligation was terminated, and he was granted no visitation, although the order stated that it did "not prevent any remaining party from allowing" Respondent-father to have supervised visitation with the children. The consent order further provided that Petitioner-grandmother "shall file an action to terminate the parental rights" of Respondent-father, and "[a]ll parties agree that they shall not oppose said termination."

On 19 October 2017, Respondent-father filed a motion in the cause seeking to modify the consent order. Respondent-father asserted that there had been a significant change in circumstances since the entry of the order that affected the children's best interests. He claimed that Petitioner-grandmother had "attempted to totally alienate the minor children from [Respondent-father] and his family" and that he had "a stable home, marriage, and family life, and [was] ready, willing, and able to provide a stable home for the minor children." Respondent-father sought "sole care, custody, and control" of Cooper and Wes, subject to limited visitation with the other parties. Approximately one month later, on 16 November 2017, Petitioner-grandmother filed a petition to terminate Respondent-father's parental rights to the children based upon the grounds of neglect and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (7) (2017).

After a hearing on 20 February 2018, the trial court entered an order on 19 March 2018 in which it determined that grounds existed to terminate Respondent-father's parental rights based upon neglect by abandonment and willful abandonment. N.C. Gen. Stat. § 7B-1111(a)(1), (7). The trial court further concluded that it was in the best interests of Cooper and Wes that Respondent-father's parental rights be terminated. Accordingly, the trial court terminated Respondent-father's parental rights. Respondent-father appeals.

II. Analysis

"This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re C.J.H.*, 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015). We review

the trial court's legal conclusions *de novo*. *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015), *disc. review denied*, 369 N.C. 182, 793 S.E.2d 695 (2016). "A finding of any one of the enumerated grounds for termination of parental rights under [N.C. Gen. Stat.] 7B-1111 is sufficient to support a termination." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003).

A. Willful Abandonment

[1] Respondent-father first argues that the trial court erred in determining grounds existed to terminate his parental rights based upon the ground of willful abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). We agree.

A trial court may terminate parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. The word willful encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (internal quotation marks and citations omitted).

As this Court has held,

> [a] judicial determination that a parent willfully abandoned [the parent's] child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to [the parent's] obligations as a parent in an appropriate fashion; the findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child.

In re S.R.G., 195 N.C. App. 79, 87, 671 S.E.2d 47, 53 (2009), *disc. review denied and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010). "Although the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re D.E.M.*, __ N.C. App. __, __, 810 S.E.2d 375, 378 (2018).

In this case, Petitioner-grandmother filed her petition to terminate Respondent-father's parental rights on 16 November 2017; therefore, the relevant six-month period was from 16 May 2017 to 16 November 2017.

During that period of time, on 19 October 2017, Respondent-father filed a motion in the cause seeking to modify the consent order and requesting that he be granted the "sole care, custody, and control" of Cooper and Wes. Respondent-father's attempt to gain custody of Cooper and Wes demonstrates that he did not intend to forego all parental duties and relinquish all parental rights with regard to the juveniles. His motion thoroughly averts the trial court's determination that he willfully abandoned Cooper and Wes. *See In re D.T.L.*, 219 N.C. App. 219, 222, 722 S.E.2d 516, 518 (2012) ("Respondent's institution of a civil custody action undermines the trial court's finding and conclusion that he willfully abandoned the juveniles . . . and cannot support a conclusion that he had a willful determination to forego all parental duties and relinquish all parental claims to the juveniles.").

[2] Additionally, several of the trial court's findings of fact in support of its conclusion that Respondent-father willfully abandoned Cooper and Wes rely on the 14 January 2016 consent order, including the following:

> 30. That a Consent Order was signed by all parties particularly to this action, and particularly by [Respondent-father] in Catawba County File No. 14 CVD 244.
>
> 31. That the language of that order is very specific as to all manner of interactions with the children, including who has custody, which in this case would be joint legal custody between [Petitioner-grandmother] . . . and the [Duncan] family, however primary would have been placed with [Petitioner-grandmother], secondary with the [Duncan] family.
>
> 32. That the Order is very specific as to visitation and as to contact, and in fact indicates that [Respondent-father] shall have no visitation with the minor children.
>
> 33. That the order indicates likewise that his child support obligation will be terminated.
>
> 34. That the Order indicates that a Petition to Terminate the Parental Rights of the Defendants shall be filed, and that all parties agree they shall not oppose said termination.
>
> 35. That [Respondent-father] signed that document, and was represented by counsel at the time.
>
> 36. *That by signing said Order, [Respondent-father], in essence, in January 2016 agreed to close the door himself*

> *to his ability to parent these children, or to have the control or capacity to parent the children.*
>
> . . . .
>
> 40. That [Petitioner-grandmother] informed [Respondent-father], pursuant to the Consent Order, that she was exercising her authority and control to deny visitation; but the denial adhered to the language in the Consent Order that was signed by [Respondent-father].

(Emphasis added).

We agree that the consent order into which the parties entered provided that Respondent-father's child support obligations would be terminated, that he would have no scheduled visitation, and that all parties—including Respondent-father—would not oppose termination of his parental rights. However, we conclude that the consent order, as construed by the trial court, is void as against public policy, insofar as it constitutes an agreement that Respondent-father's parental rights should be terminated or that Respondent-father relinquished his parental rights to Wes and Cooper.

Our statutes provide for a two-step judicial process in juvenile proceedings for termination of parental rights: the adjudicatory stage and the dispositional stage. *See* N.C. Gen. Stat. §§ 7B-1109, -1110 (2017). This statutorily prescribed process must be followed. *See In re Jurga*, 123 N.C. App. 91, 96, 472 S.E.2d 223, 226 (1996) (holding that a written declaration of voluntary termination of parental rights contravened statutory procedures and was therefore ineffective). Moreover, an agreement to relinquish parental rights "is void as against public policy because it removes from the court its power to assert the . . . objectives" of the termination of parental rights statutes. *Foy v. Foy*, 57 N.C. App. 128, 131, 290 S.E.2d 748, 750 (1982) ("In essence, the parental rights of a parent in his child are not to be bartered away at the parent's whim."). Furthermore, the terms of the consent order do not meet the statutory requirements for a consent to adoption under N.C. Gen. Stat. § 48-3-606 or for relinquishment of parental rights to an agency under N.C. Gen. Stat. § 48-3-703. *See generally* N.C. Gen. Stat. §§ 48-3-606, 48-3-703 (2017). Thus, to the extent that the trial court relied upon the consent order in determining that Respondent-father had willfully abandoned Cooper and Wes, particularly with respect to finding number 36 above, we conclude that the consent order, as construed, is void as against public policy. Accordingly, we hold that the trial court erred by concluding

that grounds existed to terminate Respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

B. Neglect by Abandonment

[3] Respondent-father next contends that the trial court erred in concluding that grounds existed to terminate his parental rights based upon neglect by abandonment under N.C. Gen. Stat. § 7B-1111(a)(1). We agree.

Our juvenile code provides that a court may terminate parental rights upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C. Gen. Stat. § 7B-101 (2017). N.C. Gen. Stat. § 7B-1111(a)(1). The definition of a neglected juvenile includes one "who has been abandoned[.]" N.C. Gen. Stat. § 7B-101(15). As explained above, "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *Searle*, 82 N.C. App. at 275, 346 S.E.2d at 514. "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). Thus, in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct "which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child" as of the time of the termination hearing. *See S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

Our previous analysis regarding the trial court's determination that Respondent-father willfully abandoned Cooper and Wes pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) is relevant to the determination of whether Respondent-father neglected the juveniles by abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Respondent-father's attempt to gain custody of Cooper and Wes in October 2017 demonstrates that he did not intend to "forego all parental duties and relinquish all parental claims to the juveniles" at the time of the termination hearing. *See D.T.L.*, 219 N.C. App. at 222, 722 S.E.2d at 518. Thus, we similarly conclude that Respondent-father's attempt to gain custody of the juveniles by filing a motion in the cause precludes the trial court's determination that Respondent-father neglected the juveniles by abandonment. To the extent that the trial court relied on the 14 January 2016 consent order in

concluding that Respondent-father had neglected the juveniles by abandonment, for the reasons previously stated herein, we conclude that the consent order, as construed by the trial court, is void as against public policy. Therefore, we hold that the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent-father's parental rights.

III. Conclusion

In conclusion, we hold that the trial court erred in terminating Respondent-father's parental rights based upon the grounds of willful abandonment and neglect by abandonment. We therefore reverse the trial court's order.

Respondent-father also challenges the trial court's dispositional conclusion that termination of his parental rights was in the best interests of Cooper and Wes. However, given that we have reversed the trial court's order on adjudicatory grounds, we need not address that argument. *See In re Anderson*, 151 N.C. App. 94, 99-100, 564 S.E.2d 599, 603 (2002).

REVERSED.

Judges CALABRIA and TYSON concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY MICHAEL D. RADCLIFF AND MARGENE K. RADCLIFF DATED MAY 23, 2003 AND RECORDED IN BOOK 1446 AT PAGE 2024 AND RERECORDED IN BOOK 1472 AT PAGE 2465 IN THE IREDELL COUNTY PUBLIC REGISTRY, NORTH CAROLINA.

No. COA18-419

Filed 18 December 2018

1. Mortgages and Deeds of Trust—foreclosure—upset bid reopened—subject matter jurisdiction

The trial court had subject matter jurisdiction to reopen and extend an upset bid for ten days pursuant to N.C.G.S. § 45-21.27(h). Although an individual third-party bidder who filed an upset bid contended that the rights of the parties were fixed when the upset period expired, the dispute here did not involve a borrower but a bidder who had interests in the collateral property that stood to be eliminated by the foreclosure sale. That bidder was not seeking to

avoid the foreclosure sale but to reopen the upset bid period based on not receiving a proper notice of the upset bid.

2. Mortgages and Deeds of Trust—foreclosure—upset bid period—reopened—no abuse of discretion

The trial court did not abuse its discretion in a foreclosure process by reopening the upset bid period on the motion of a bidder (Wells Fargo) where there was an inexplicable five-day delay between the substitute trustee's receipt of notice from the clerk of the upset bid and the mailing of the notice to Wells Fargo. The controlling statute, N.C.G.S. § 45-21.27(e), did not contemplate the impact of the delayed notice by the substitute trustee when there is a party (Wells Fargo) bidding to protect a property interest in the collateral.

Appeal by Michael Johnson from order entered 2 January 2018 by Judge Casey M. Viser in Iredell County Superior Court. Heard in the Court of Appeals 15 October 2018.

Scarbrough & Scarbrough, PLLC, by John F. Scarbrough, James E. Scarbrough, and Madeline J. Trilling, for appellant Michael Johnson.

Horack, Talley, Pharr & Lowndes, PA, by Amy P. Hunt, for appellee Wells Fargo Bank, N.A.

ELMORE, Judge.

Michael Johnson appeals from an order granting the motion of Wells Fargo Bank, N.A., to reopen the upset bid period in a power-of-sale foreclosure action on the basis that Wells Fargo never received notice of Johnson's upset bid, and that if it had, Wells Fargo would have placed an additional upset bid prior to the period's expiration. On appeal, Johnson contends the trial court lacked subject matter jurisdiction to reopen the upset bid period because the rights of the parties had already become fixed pursuant to N.C. Gen. Stat. § 45-21.29A. Johnson further contends the trial court abused its discretion in granting Wells Fargo's motion pursuant to N.C. Gen. Stat. § 45-21.27(h).

For the reasons stated herein, we affirm.

I. Background

This appeal arises out of a special proceeding by a mortgagee to foreclose on a deed of trust given by Michael and Margene Radcliff in

2003 to secure a promissory note in the amount of $1,000,000.00. The collateral real property was encumbered by two junior deeds of trust for the benefit of Wells Fargo: one given by Margene Radcliff in 2005 to secure future advances of as much as $1,000,000.00 under the terms of a business equity line promissory note, and another given by Margene Radcliff—as trustee of the Margene Radcliff Revocable Trust—in 2007 to secure future advances of up to $820,000.00 under a home equity line of credit.

The substitute trustee under the first deed of trust initiated this action by filing a notice of hearing on 18 May 2017. On 20 July, the clerk of court entered an order permitting the substitute trustee to proceed with a foreclosure sale. At the 31 August sale, Affinity Capital, LLC, was the high bidder at $970,073.69. The substitute trustee thereafter filed a report setting forth the high bid and indicating that the 10-day statutory period for upset bids would expire on 11 September.

On 6 September 2017, Wells Fargo placed and filed a notice of upset bid in the amount of $1,018,577.37, and the upset bid period was renewed until 18 September. On 15 September, Johnson—an individual third-party bidder—filed his upset bid in the amount of $1,069,506.24, and the upset bid period was renewed until 25 September. On 28 September, Wells Fargo filed a "motion to extend upset period." The motion requested that the upset bid period be reopened and extended for an additional ten days on the basis that Wells Fargo had not received notice of Johnson's 15 September upset bid, and that if it had, Wells Fargo would have placed an additional upset bid prior to 25 September.

Wells Fargo's motion was first heard by the clerk of court on 17 October 2017, and on 31 October, the clerk entered an order denying the motion and concluding that Johnson's 15 September upset bid was the high and final bid. Wells Fargo then appealed to the trial court, which granted the motion and reopened the upset bid period in an order dated 2 January 2018. In its order, the trial court made the following relevant findings of fact and conclusions of law[1]:

> 5. [Wells Fargo] never received notice of the September 15, 2017 upset bid as required, or contemplated, by G.S. § 45-21.27(e), and Wells Fargo was prepared to tender an additional upset bid had it known an upset bid had been filed on September 15, 2017.

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1. The trial court failed to distinguish between its findings of fact and conclusions of law in the order.

> 6. Wells Fargo has interests in the collateral real property that stand to be eliminated by this foreclosure proceeding. Without limitation, Wells Fargo is the beneficiary of (i) that certain Deed of Trust securing the original principal amount of $1,000,000 recorded on June 1, 2005 in Deed Book 1650, Page 1540, and (ii) that certain Open-End Deed of Trust securing advances up to the original principal amount of $820,000 recorded on August 29, 2007 in Deed Book 1879, Page 1853, both of the Iredell County Registry.
>
> 7. The Court has the authority pursuant to G.S. [§] 45-21.27(h) to "make all such orders as may be just and necessary to safeguard the interests of all parties" and has the inherent authority to remedy issues that may arise in foreclosure sales.
>
> 8. Michael Johnson has incurred attorney's fees in defense of Wells Fargo's motion . . . which the Court finds to be reasonable and should be borne by Wells Fargo.

Based on its findings and conclusions, the trial court ordered that

> A. The upset period in this matter is reopened for ten (10) days, starting with the date this order is filed;
>
> B. The September 15, 2017 upset bid is presently the high bid subject to upset pursuant to the provisions of Chapter 45 of the General Statutes and the terms of this Order, and this matter is remanded to the Clerk; [and]
>
> C. Wells Fargo will pay Michael Johnson the sum of $2,175.00, being the reasonable attorney's fees he incurred in defense of the motion before the Court[.]

On 4 January 2018, Wells Fargo placed an upset bid in the amount of $1,122,981.56. Instead of placing an additional upset bid within the 10-day period, Johnson filed notice of appeal on 10 January from the trial court's order granting Wells Fargo's motion to reopen the upset bid period.

II. Discussion

On appeal, Johnson contends that because the rights of the parties had already become fixed pursuant to N.C. Gen. Stat. § 45-21.29A, the trial court lacked subject matter jurisdiction to reopen the upset bid period. He further contends the trial court abused its discretion in granting Wells Fargo's motion pursuant to N.C. Gen. Stat. § 45-21.27(h)

because the trial court's findings of fact and conclusions of law were not supported by the evidence.

In response to Johnson's appeal, Wells Fargo contends the trial court had subject matter jurisdiction pursuant to N.C. Gen. Stat. § 45-21.27(h), and that as a third-party bidder with no interest in the collateral real property, Johnson's "rights" were not fixed. Wells Fargo emphasizes that Johnson is not a party the foreclosure statutes seek to protect, that the trial court properly reopened the upset bid period based on the evidence presented, and that the plain language of N.C. Gen. Stat. § 45-21.27(h) supports the trial court's order.

Each assignment of error is addressed in turn.

A. The trial court had subject matter jurisdiction to reopen the upset bid period.

[1] "In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *In re Cornblum*, 220 N.C. App. 100, 102, 727 S.E.2d 338, 340 (2012) (citation omitted).

In contending that the trial court lacked subject matter jurisdiction to reopen the upset bid period, Johnson quotes *Cumberland Cty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 524, 528, 776 S.E.2d 329, 333 (2015), for the proposition that "a moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim[.]" He then cites to N.C. Gen. Stat. § 45-21.29A (2017), which provides that "[i]f an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed." Johnson asserts that "[t]his Court has consistently held that once the upset bid period in a foreclosure proceeding has expired, and the rights of the parties are fixed under N.C. Gen. Stat. § 45-21.29A, any action by a party seeking to prevent the sale from becoming final is moot and subject to dismissal." He relies primarily on *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 704 S.E.2d 1 (2010), to support his argument.

In *Goad*, the plaintiff borrower sought to have a foreclosure sale enjoined. In affirming the trial court's denial of the plaintiff's request, this Court held that

> absent sufficient action by a party seeking to avoid a foreclosure sale to prevent the sale from becoming final, any attempt to enjoin such a sale which has not been heard and decided by the date for the submission of upset bids becomes moot and subject to dismissal at that time.

Id. at 264, 704 S.E.2d at 5. Similarly, in the case of *In re Hackley*, 212 N.C. App. 596, 713 S.E.2d 119 (2011), this Court—relying on its holding in *Goad*—held that where the appellant borrower did not obtain a stay of the foreclosure sale pending appeal, and the foreclosure sale was consummated and the rights of the parties fixed, the case was moot and the appeal subject to dismissal. *Id.* at 605-06, 713 S.E.2d at 125.

The cases cited by Johnson are distinguishable as they each address a situation in which a borrower was attempting to delay or halt a foreclosure sale. That is simply not the case here, where the dispute does not involve a borrower but rather two bidders, one of which has interests in the collateral real property that stand to be eliminated by the foreclosure sale. That bidder, Wells Fargo, was not seeking to avoid a foreclosure sale altogether, but to reopen the upset bid period on the basis that it did not receive proper notice of Johnson's 15 September upset bid. Wells Fargo correctly asserts that "[t]he present case is an attempt to cure a procedural defect in the foreclosure statutes, to obtain a high bid, and to enhance the rights of the parties to the foreclosure."

In contending that the trial court had subject matter jurisdiction to reopen the upset bid period, Wells Fargo relies on N.C. Gen. Stat. § 45-21.27(h) (2017), which provides as follows:

> The clerk of superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure.

The procedural defect here refers to the vague notice requirements contained in N.C. Gen. Stat. § 45-21.27(e1), discussed in more detail below. As for the trial court's authority to fix that procedural defect, we conclude that under these circumstances, the trial court had subject matter jurisdiction pursuant to N.C. Gen. Stat. § 45-21.27(h) to reopen and extend the upset bid period for an additional ten days. This assignment of error is therefore overruled.

B. The trial court did not abuse its discretion in reopening the upset bid period.

[2] In his second and final argument on appeal, Johnson contends the trial court's order reopening the upset bid period was not supported by competent evidence. We disagree.

Pursuant to N.C. Gen. Stat. § 45-21.27(h), it is within the trial court's discretion to "make all such orders as may be just and necessary to safeguard the interests of all parties." "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." *In re Brown*, 156 N.C. App. 477, 485, 577 S.E.2d 398, 403 (2003).

N.C. Gen. Stat. § 45-21.27(e) (2017) provides that "[a]t the same time that an upset bid on real property is submitted to the court . . . the upset bidder shall simultaneously file with the clerk a notice of upset bid." N.C. Gen. Stat. § 45-21.27(e1) (2017) requires that the clerk then "notify the trustee or mortgagee who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owner(s) of the property." Of particular significance to the instant case, subsection (e1) does not provide a deadline by which the trustee must give notice of an upset bid to the last prior bidder.

Here, Wells Fargo moved to reopen the upset bid period on the basis that it did not receive adequate notice as required, or contemplated, by N.C. Gen. Stat. § 45-21.27(e1). In support of its motion, counsel for Wells Fargo emphasized the following timeline of events:

6 September 2017	Wells Fargo placed an upset bid.
6 September 2017	The clerk notified the substitute trustee of Wells Fargo's upset bid via email.
6 September 2017	The substitute trustee mailed notice of Wells Fargo's upset bid to the last prior bidder.
15 September 2017	Johnson placed an upset bid.
15 September 2017	The clerk notified the substitute trustee of Johnson's upset bid via email.

20 September 2017	The substitute trustee mailed notice of Johnson's upset bid to the last prior bidder (*i.e.*, Wells Fargo).
25 September 2017	The upset bid period expired.
28 September 2017	Wells Fargo served its motion requesting an extension of the upset bid period.

As the timeline illustrates, there was an inexplicable five-day delay between the substitute trustee's receipt of notice from the clerk of Johnson's upset bid and its mailing of notice of the same to Wells Fargo.

On appeal, Wells Fargo concedes that "[t]he substitute trustee technically acted in accord with [N.C. Gen. Stat. § 45-21.27(e1), which does not specify when a trustee must give notice of an upset bid to the last prior bidder]; however, the statute did not contemplate the impact of delayed notice by the substitute trustee when there is a party (like [Wells Fargo]) bidding to protect a property interest in the collateral." We agree and hold that under the circumstances of the instant case, the trial court did not abuse its discretion in reopening and extending the upset bid period to safeguard the interests of all parties as permitted by N.C. Gen. Stat. § 45-21.27(h).

III. Conclusion

Where Wells Fargo, as the last prior bidder with interests in the collateral real property that stood to be eliminated by the foreclosure proceeding, did not receive notice of a third-party's upset bid in sufficient time to protect its interests, the trial court properly reopened and extended the upset bid period for an additional ten days. Accordingly, the order of the trial court is hereby:

AFFIRMED.

Chief Judge McGEE and Judge ARROWOOD concur.

MARTIN v. MARTIN

[263 N.C. App. 173 (2018)]

ERIN LYNN MARTIN, PLAINTIFF
v.
SHAWN MICHAEL MARTIN, DEFENDANT

No. COA18-465

Filed 18 December 2018

1. Constitutional Law—due process—domestic violence protective award—-incidents not alleged in pleading

The trial court violated defendant's due process rights in a domestic violence protection proceeding by allowing plaintiff to present evidence of incidents that were not specifically pleaded in her complaint and motion.

2. Appeal and Error—mootness—temporary order—expiration

The question of whether the trial court lacked jurisdiction to grant temporary child custody in a Domestic Violence Prevention Order was moot. The order expired more than one month before the matter was heard by the Court of Appeals.

Appeal by defendant from orders entered 12 September 2017 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 31 October 2018.

Gailor Hunt Jenkins Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton and Stephanie J. Gibbs, for plaintiff-appellee.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia J. Jurney and Kristin H. Ruth, for defendant-appellant.

ZACHARY, Judge.

Shawn Michael Martin ("Defendant-Husband") appeals from the entry of a Domestic Violence Order of Protection and an Amended Domestic Violence Order of Protection. The trial court violated the due process rights of Defendant-Husband by allowing Plaintiff-Wife to present evidence of alleged acts of domestic violence not specifically pleaded in her Complaint. Further, because the domestic violence custody order in this case is more than one year old, it has expired and is moot. Accordingly, the orders entered against Defendant-Husband are reversed in part and remanded, and dismissed in part.

Factual and Procedural Background

Erin Lynn Martin ("Plaintiff-Wife") and Defendant-Husband were married on 21 June 2014, and are the parents of two minor children: Andrew and Elizabeth.[1] The couple and their children moved to North Carolina from Washington on 29 May 2017. About a month later, on 3 July 2017, Plaintiff-Wife filed a Complaint and Motion for Domestic Violence Protective Order, and the trial court entered an *Ex Parte* Domestic Violence Order.

On 12 July 2017, the Wake County Sheriff's Office unsuccessfully attempted to serve Defendant-Husband with the Summons, Complaint, and *Ex Parte* Order. Defendant-Husband filed an "Answer to Complaint and Motion for Domestic Violence Protective Order Counterclaim for Attorney Fees" denying all allegations of domestic violence on 23 August 2017. Both parties consented to a 12 September 2017 hearing on Plaintiff-Wife's Motion for a Domestic Violence Protective Order, at which time Defendant-Husband was officially served with the Summons, Complaint, and *Ex Parte* Order.

This matter came on for hearing on 12 September 2017 before the Honorable Margaret P. Eagles in Wake County District Court. Following the hearing, the trial court filed its Domestic Violence Order of Protection against Defendant-Husband. Shortly thereafter, the parties came to an agreement concerning custody of the minor children, and the trial court entered its Amended Domestic Violence Order of Protection, granting temporary legal and physical custody of the minor children to Plaintiff-Wife and visitation privileges with the minor children to Defendant-Husband. Defendant-Husband timely appealed two days later on 14 September 2017.

At the time the Domestic Violence Order of Protection was filed, dual custody proceedings were pending in Washington and in North Carolina. The Washington custody proceeding was scheduled to occur on 21 September 2017, nine days after the Order of Protection was filed. The trial court settled the record on appeal on 17 April 2018, but no information concerning subsequent custody proceedings in either state was included in the record.

Discussion

Defendant-Husband argues that the trial court erred by: (1) allowing Plaintiff-Wife to present evidence of alleged incidents of domestic

1. We have adopted pseudonyms for the minor children to protect their identities.

violence not specifically pleaded in her Complaint and Motion for Domestic Violence Protective Order; (2) entering a Domestic Violence Protective Order against Defendant-Husband without concluding as a matter of law that an act of domestic violence had occurred; and (3) entering a child custody order when the trial court lacked subject matter jurisdiction over the minor children.

I. Due Process

[1] Defendant-Husband argues that his due process rights were violated when the trial court allowed Plaintiff-Wife to present evidence of alleged incidents of domestic violence that were not specifically pleaded in her Complaint and Motion for Domestic Violence Protective Order. We agree.

We review alleged violations of constitutional rights *de novo*. *Young v. Young*, 224 N.C. App. 388, 393, 736 S.E.2d 538, 543 (2012). Both the United States and North Carolina Constitutions provide that no person can be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV; N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."). "The expression 'the law of the land' . . . is synonymous with the expression 'due process of law.' " *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 48 (2010) (citing *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)). "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." *DeBruhl v. Mecklenburg Cty. Sheriff's Office*, ___ N.C. App. ___, ___, 815 S.E.2d 1, 5 (2018). "Procedural due process protection ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner." *W.B.M.*, 202 N.C. App. at 615, 690 S.E.2d at 48. "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Emp't Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d. 494, 503 (1985)). "Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d. 62, 66 (1965)). "[T]he opportunity to be heard and to challenge the truth of the adversary's assertions is part and parcel of due process." *State v. Byrd*, 363 N.C. 214, 223, 675 S.E.2d 323, 328 (2009) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950)).

A domestic violence protective order may be sought by any individual residing in this State by filing a civil action or motion "alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person." N.C. Gen. Stat. § 50B-2(a) (2017). While our Supreme Court has stated that "a defendant [must] be given notice and the opportunity to be heard before entry of a protective order[,]" *Byrd*, 363 N.C. at 223, 675 S.E.2d at 328, our courts have not yet addressed the question of whether a complainant may present evidence at trial of claimed acts of domestic violence not alleged in the complaint.

This Court has previously recognized that the entry of a domestic violence protective order "involves both legal and non-legal collateral consequences." *Mannise v. Harrell*, ___ N.C. App. ___, ___, 791 S.E.2d 653, 660 (2016). "A domestic violence protective order may . . . place restrictions on where a defendant may or may not be located, or what personal property a defendant may possess or use." *Id.* at ___, 791 S.E.2d at 660. Additionally, a prior domestic violence order may be "consider[ed] . . . by the trial court in any custody action involving [a] [d]efendant." *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001). "[N]on-legal collateral consequences" may also include "the stigma that is likely to attach to a person judicially determined to have committed domestic abuse." *Id.* at 437, 549 S.E.2d at 914 (brackets omitted).

For example, this Court has recognized that "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a domestic violence protective order." *Id.* (brackets omitted). Because of the potential significant and lasting adverse collateral consequences faced by those against whom a domestic violence protective order is entered, it is imperative that "[t]he entry of a domestic violence protective order . . . comport with constitutional due process." *Mannise*, ___ N.C. App. at ___, 791 S.E.2d at 660.

Other jurisdictions have addressed the issue of notice, and we find their analyses persuasive. In *De Leon v. Collazo*, 178 So. 3d 906 (Fla. Dist. Ct. App. 2015), Ms. Collazo filed a "sworn petition for injunction for protection against domestic violence . . . [which] included several pages of specific allegations detailing abusive conduct by Mr. De Leon over the course of their relationship." *Id.* at 907. However, at the hearing, "Ms. Collazo testified to a number of acts and events that were not included in her sworn petition." *Id.* Although Mr. De Leon objected to the testimony, the trial court entered the permanent injunction. *Id.* at 908. The appellate court held that the admission into evidence of the unpleaded

allegations violated Mr. De Leon's due process rights "because he was given neither notice of the allegations . . . nor a full and fair opportunity to prepare to meet those allegations." *Id.* at 908-09.

Further, in *H.E.S. v. J.C.S.*, 815 A.2d 405 (N.J. 2003), the plaintiff filed a domestic violence complaint against the defendant detailing specific allegations of abuse. *Id.* at 408-09. At the hearing, the plaintiff testified during direct examination about an incident alleged in her complaint, and was then asked by counsel "whether [the] defendant had ever acted that way before." *Id.* at 409. Defense counsel objected on the grounds that the complaint failed to give notice of past acts of domestic violence. *Id.* Over the defendant's objection, the trial court allowed the plaintiff to testify to the unpleaded prior acts of domestic violence committed by the defendant. *Id.* On appeal, the New Jersey Supreme Court held that allowing testimony of allegations not pleaded in the complaint "constitute[d] a fundamental violation of due process . . . convert[ing] a hearing on a complaint alleging one act of domestic violence into a hearing on other acts of domestic violence which [we]re not even alleged in the complaint." *Id.* at 414.

Here, on 3 July 2017, Plaintiff-Wife filed a Complaint and Motion for Domestic Violence Protective Order that included paragraphs of allegations as well as an addendum of "Additional DVPO details" listing alleged acts occurring before the Complaint was filed. However, at the hearing, Plaintiff-Wife testified to several acts that were not pleaded in her Complaint. For example, Plaintiff-Wife testified that on 16 and 30 June 2017 Defendant-Husband "verbally got really loud and started yelling" and "slammed the bathroom door in my face and said, 'Shut the f*** up.' " Plaintiff-Wife further testified that one night after she locked herself in her bedroom, Defendant-Husband got a key and unlocked the bedroom door. Although Defendant-Husband said he came in to get his phone charger, Plaintiff-Wife grabbed her purse because she did not know what he was going to do. In addition, Plaintiff-Wife testified that Defendant-Husband "laid [their son] down to the ground [and his] head actually whiplashed back and hit his head really hard[,]" and that Defendant-Husband exhibited aggressive driving and road rage. Plaintiff-Wife's mother corroborated her daughter's testimony regarding Defendant-Husband's behavior.

Defendant-Husband objected to the admission of testimony regarding incidents not alleged in Plaintiff-Wife's Complaint, which the trial court overruled. Likewise, in Defendant-Husband's oral motion to dismiss, Defendant-Husband argued that "all of the things that she's brought up today are things that aren't even listed on her Complaint

which brought her to the Court in the first place." The trial court also denied Defendant-Husband's motion to dismiss. In its order granting the Domestic Violence Order of Protection, the trial court included several of the unpleaded allegations as findings.

Plaintiff-Wife argues in response that because N.C. Gen. Stat. § 50B-2(a) does not require allegations of "*specific acts* of domestic violence" and N.C. Gen. Stat. § 1A-1, Rule 9 does not include averments of domestic violence as matters that must be pleaded with specificity, then Plaintiff-Wife's Complaint properly alleged acts of domestic violence, and testimony supporting the unpleaded allegations was properly admitted into evidence at trial. We disagree.

The domestic violence statutes in Florida, Fla. Stat. § 741.30 (2012), and New Jersey, N.J. Stat. §§ 2C:25-17 to -35 (2000), are substantially similar to Chapter 50B of the North Carolina General Statutes. The Florida statute provides that "[t]he sworn petition shall allege the existence of such domestic violence and *shall include the specific facts and circumstances* upon the basis of which relief is sought." Fla. Stat. § 741.30(3)(a) (2012) (emphasis added). New Jersey law provides that "[a] victim may file a complaint alleging the commission of *an act of domestic violence*." N.J. Stat. § 2C:25-28(a) (2000) (emphasis added). While the Florida statute calls for "specific facts and circumstances" and the New Jersey statute requires an allegation of "an act of domestic violence," both states' appellate courts have held that the admission of testimony concerning unpleaded acts of domestic violence violates due process. *See De Leon*, 178 So. 3d at 908 ("[C]onsideration of these significant and substantial—but unpled—allegations deprived Mr. De Leon of his right to due process.") *and H.E.S.*, 815 A.2d at 414 (stating that it is "a fundamental violation of due process to convert a hearing on a complaint alleging one act of domestic violence into a hearing on other acts of domestic violence which are not even alleged in the complaint"). The presence or absence of the word "specific" in a domestic violence statute does not affect a defendant's due process rights to notice and an opportunity to be heard.

Further, Plaintiff-Wife is mistaken in arguing that a domestic violence defendant is not entitled to notice of the specific acts alleged simply because Chapter 50B actions are not among the list of "special matters" that must be pleaded with specificity under N.C. Gen. Stat. § 1A-1, Rule 9. Section 50B-2(a) applies to any civil action or motion seeking entry of a domestic violence protective order under Chapter 50B, while Rule 9 of the North Carolina Rules of Civil Procedure is a more general rule that is not intended to provide an exhaustive list of matters

required to be pleaded with specificity. *See*, *e.g.*, N.C. Gen. Stat. § 1A-1, Rule 9 (2017) (requiring that averments of fraud, duress, mistake, and condition of the mind, among others, must be stated with particularity). The comment to Rule 9 states that "[t]his rule is designed to lay down *some* special rules for pleading in typically recurring contexts which have traditionally caused trouble *when no codified directive existed*." *Id.* § 1A-1, Rule 9, cmt. (emphases added). Plaintiff-Wife alternatively contends that Rule 8's general pleading standard applies and that a litigant seeking a domestic violence protective order must file only "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." *Id.* § 1A-1, Rule 8. This argument is inapposite. Litigants are entitled to due process in all forms of litigation.

It is clear that Plaintiff-Wife testified to several alleged acts of domestic violence that were not pleaded in her complaint. Defendant-Husband was not on notice of and could not have anticipated these allegations and prepared an adequate defense against them. We hold that the admission of testimony of domestic violence not otherwise pleaded in a complaint and motion for a domestic violence protective order violates a defendant's right to due process. Accordingly, we reverse the Domestic Violence Order of Protection and Amended Domestic Violence Order of Protection entered against Defendant and remand to the trial court for further proceedings consistent with this holding. We need not address Defendant-Husband's argument that the trial court erred in entering the Orders without concluding as a matter of law that an act of domestic violence occurred.

II. Temporary Child Custody Order

[2] Defendant-Husband further argues that the trial court lacked jurisdiction to enter a custody order regarding the parties' minor children. Because the temporary order has expired, this argument is moot.

In its Amended Domestic Violence Order of Protection entered on 12 September 2017, the trial court granted temporary custody of the minor children to Plaintiff-Wife. It was contemplated by the trial court and the parties that the temporary custody order would remain in force until the entry of a permanent order, either in Washington or in North Carolina. Regardless, a grant of temporary custody in a Chapter 50B order cannot last longer than one year. N.C. Gen. Stat. § 50B-3(a1)(4) (2017) ("A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to

exceed one year."). Moreover, under a Chapter 50B protective order, the grant of temporary custody cannot be renewed. *Id.* § 50B-3(b) ("[A] temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period."). As a result, the custody order in the instant case necessarily expired no later than 12 September 2018, more than one month before the matter was heard by this Court. "A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. . . . [T]he proper procedure for a court to take upon a determination that [an issue] has become moot is dismissal of the action." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citations and quotation marks omitted). Accordingly, this argument is dismissed as moot.

Conclusion

The trial court violated Defendant-Husband's due process rights by allowing Plaintiff-Wife to testify to alleged incidents of domestic violence that were not pleaded in Plaintiff-Wife's Complaint. In addition, Defendant-Husband's argument that the trial court lacked jurisdiction to make a custody determination for the minor children is moot, in that the custody portion of the order has expired and cannot be renewed. As a result, we reverse the trial court's Domestic Violence Order of Protection and Amended Domestic Violence Order of Protection entered against Defendant-Husband, and dismiss the custody determination as moot. We remand the case for further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED; DISMISSED IN PART.

Judges CALABRIA and TYSON concur.

MICHAEL C. MASTER, AND WIFE, VIRGINIA A. MASTER, PLAINTIFFS
v.
COUNTRY CLUB OF LANDFALL, A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA18-215

Filed 18 December 2018

Corporations—nonprofits—membership—termination—notice and opportunity to be heard

The trial court did not err by dismissing plaintiffs' claims against a country club in an action arising from the termination of plaintiffs' membership where the country club adhered to its own internal rules and provided plaintiffs with prior notice and an opportunity to be heard.

Appeal by plaintiffs from judgments entered 16 August 2017 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 6 September 2018.

Shipman & Wright, LLP, by Gary K. Shipman, for plaintiffs.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio and Ward and Smith, P.A., by Ryal W. Tayloe, for defendant.

BERGER, Judge.

Michael Master ("Mr. Master") and Virginia Master ("Mrs. Master") (collectively, "Plaintiffs") sued Country Club of Landfall (the "Club") for terminating Plaintiffs' country club membership. Plaintiffs appeal from the trial court's denial of their motion for partial summary judgment and grant of the Club's motion for summary judgment, which dismissed all of Plaintiffs' claims with prejudice. Plaintiffs contend that the trial court erred in granting summary judgment in the Club's favor because the Club failed to follow its own internal rules and provide Plaintiffs with adequate notice and an opportunity to be heard before an impartial panel. We disagree and affirm the trial court.

Factual and Procedural Background

The Club is a private golf club, organized as a nonprofit corporation under North Carolina law, with the majority of its members residing and owning property within the Landfall community. Plaintiffs purchased

property in the Landfall community because of the Club and became members in 2013. Plaintiffs acknowledged that they held a single, family membership rather than two individual memberships and that they were subject to the Club's governing bylaws (the "Bylaws") and rules and regulations (the "Rules & Regulations").

According to the Club's Bylaws, when spouses jointly own a family club membership, "[t]he action of either spouse with respect to the Membership shall be binding on the other" and the Club is not required to "notify or obtain the consent of both spouses." Section 3.12 of the Bylaws, states, in relevant part, that the Club's Board of Directors (the "Board") "may institute disciplinary action against any Member . . . for Good Cause." "Good Cause" is defined as

> conduct by a Member . . . which the Board or its designee determines, in its sole discretion, to be detrimental to the interests, welfare, safety, well-being and harmony of the Club, its Members or employees; breach of the Club Rules; harassment or abuse, verbal or physical, of Club personnel or other person using the Club Facilities; and such other reasons as the Board shall determine to constitute Good Cause.

The Bylaws further state that the Board

> shall establish in its Rules and Regulations a procedure for disciplinary action which shall include a written notice to the Member . . . setting forth the charges, provisions for a fair hearing by the Board or a Committee appointed by the Board, and a written notice of the Board's final determination. The Board upon a vote of at least sixty percent (60%) may impose such sanctions as it deems appropriate, including, but not limited to, monetary fines, reprimand, temporary suspension of privileges, or termination of Memberships.

The Club's Rules & Regulations dictate the procedural rules for conducting a disciplinary action against a member. Article VII of the Rules & Regulations state, in relevant part:

> 7.1 The General Manager and the staff are responsible to the Board of Directors for implementing and administrating the Club Rules & Regulations and reporting rules violations to the Rules and Members Committee [(the "R&M Committee")] as appropriate. The [R&M]

> Committee shall investigate each violation of Club Rules & Regulations presented to it by the Club staff or a Member.
>
> 7.2 If there is sufficient evidence of a violation of Club Rules & Regulations, and/or By-Laws, the [R&M] Committee may, by majority vote, issue a warning letter to the member or recommend to the Board such appropriate disciplinary action as it sees fit, including but not limited to . . . termination of the offending Member's membership at the Club.
>
> 7.3 Should the [R&M] Committee recommend to the President of the Board any one or more of the following disciplinary actions: . . . [including] termination of the offending Member's membership at the Club; or any other disciplinary action, other than a warning letter, a Hearing Panel shall be formed to consider the report and recommendations of the [R&M] Committee; hold a hearing to receive both oral and written evidence and comment from the offending member; and render a final decision on the appropriate disciplinary action the offending member will receive. The Hearing Panel shall be composed of four (4) members of the Board appointed by the President and three (3) members of the [R&M] Committee appointed by the Committee Chairman. The President shall appoint the Chairman of the Hearing Panel from one of the Board members appointed to the Panel. The Chairman shall, as soon as practicable, notify the offending member, by mail or email, of the alleged violations to be considered by the Hearing Panel and the date of the hearing before the Hearing Panel when he or she may present both oral and written evidence and comment regarding the alleged violations. After considering the report and recommendations of the [R&M] Committee; the evidence and comment from the offending member; and any and all other evidence which the Hearing Panel may consider relevant, the Hearing Panel shall by a vote of at least 60% approval impose such disciplinary actions as it deems appropriate. The decision of the Hearing Panel is final and the President shall provide written notice of the decision to the member.

While the R&M Committee members were selected from the Club's active members, no R&M Committee member simultaneously served as both a member of the Board and R&M Committee at the relevant time.

When read together, it appears that Section 3.12 of the Bylaws and Section 7.3 of the Rules & Regulations seems to conflict. Section 3.12 of the Bylaws state that the Board makes the final disciplinary determination, while Section 7.3 of the Rules & Regulations dictate that a disciplinary "decision of the Hearing Panel is final." However, the parties agree that later-adopted Rules & Regulations, which substituted the Hearing Panel for the Board as the final arbiter in disciplinary decisions, governed.

In addition to the Club's Bylaws and Rules & Regulations, Plaintiffs contend that the Club was also governed by the R&M Committee's Standard Operating Procedures (the "Operating Procedures"). However, these Operating Procedures were never approved by the Board or made a part of the governing documents of the Club.

In the fall of 2014, the Board decided to make significant changes to the Bylaws, some of which would monetarily affect certain members. From February 14, 2015 until the proposed changes were ultimately defeated on April 2, 2015, Mr. Master sent a series of emails to other club members, arguing the proposed changes were unethical and immoral.

After several club members complained to the Board and the Club's General Manager regarding Mr. Master's emails, his actions were referred to the Club's R&M Committee. According to the affidavit of Ron Conway ("Conway"), who was a member of the Board and served as the liaison between the Board and the R&M Committee, the R&M Committee reviewed Mr. Master's emails during their March 2015 meeting and concluded that

> Mr. Master had engaged in a pattern of sending emails using nasty, insulting, mean-spirited and inflammatory language that was calculated to create confrontation and turmoil between Club members and to undermine the membership's trust in its Board. . . . [and] that Mr. Master's references to Hitler, Barabbas, Jesus and slavery were insulting and inappropriate and had no place within the Club.

At the conclusion of their March 2015 meeting, the R&M Committee communicated to the Club's President, Mike Giblin ("President Giblin") their unanimous recommendation to terminate Mr. Master's family membership.

Based on this recommendation and in accordance with the Club's Rules & Regulation, President Giblin referred the matter to a hearing panel (the "Hearing Panel"). He also appointed members to the Hearing Panel in accordance with the Club's Rules & Regulations.

On April 2, 2015, Conway sent a letter to Mr. Master informing him that several members had complained to the Board regarding Mr. Master's emails. Conway's letter claimed that Mr. Master's emails and conduct were "detrimental to the well-being and harmony of the Club to an egregious degree," and informed Mr. Master that a hearing would be held on April 15, 2015 to assess the matter and impose any applicable sanctions. The letter also invited Mr. Master to present evidence to defend himself at the hearing.

Mr. Master requested the hearing be rescheduled for personal reasons, and the date was changed to May 25, 2015. However, on April 28, 2015, Conway notified Mr. Master by mail and email that his hearing date would have to be rescheduled again to May 8, 2015. Mr. Master claimed that he first learned that the May 8, 2015 hearing was rescheduled on May 5, 2015.

Plaintiffs did not attend the May 8, 2015 hearing, but their attorney did attend. After stating that he was prepared to move forward with the hearing in Plaintiffs' absence, Plaintiffs' counsel did not ask any members to recuse themselves, but argued for suspension of privileges rather than termination of membership. The Hearing Panel voted to terminate Mr. Master's family membership, and Mr. Master was mailed a letter notifying him of the decision.

Plaintiffs brought this action against the Club on October 12, 2015, claiming breach of contract and seeking a declaratory judgment. The Club filed its answer along with a motion to dismiss on December 16, 2015. On July 6, 2017, Plaintiffs moved for partial summary judgment. The Club filed an amended answer and moved for summary judgment to dismiss all claims against the Club. After hearing arguments on the parties' cross-motions for summary judgment, the trial court entered an order on August 16, 2017, denying Plaintiffs' motion and granting summary judgment in favor of the Club. Plaintiffs timely appealed.

Standard of Review

"We review a trial court's order granting or denying summary judgment de novo." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Services., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). "A genuine issue of material fact has been defined as one in which the facts alleged are such as to constitute a legal defense

or are of such nature as to affect the result of the action . . . ." *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (citation and quotation marks omitted). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Variety Wholesalers, Inc.*, 365 N.C. at 523, 723 S.E.2d at 747 (citation and quotation marks omitted).

Analysis

Plaintiffs argue that the trial court erred in granting summary judgment in the Club's favor because the Club failed to follow its own internal rules and provide Plaintiffs with adequate notice and an opportunity to be heard before an impartial panel. We disagree.

North Carolina's Nonprofit Corporation Act states that "[n]o 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." N.C. Gen. Stat. § 55A-6-31(a) (2017). However, Section 55A-6-31(a) "does not require a country club's board of directors, in all situations, to provide a member with prior notice and an opportunity to be heard regarding the termination of a membership." *Emerson v. Cape Fear Country Club, Inc.*, ___ N.C. App. ___, ___, 817 S.E.2d 402, 404 (2018).

Moreover, "[i]t is well established that courts will not interfere with the internal affairs of voluntary associations. A court, therefore, will not determine, as a matter of its own judgment, whether a member should have been suspended or expelled." *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc.*, 134 N.C. App. 468, 470, 518 S.E.2d 28, 30 (1999) (*purgandum*[1]). Thus, "when a plaintiff challenges a voluntary organization's decision, the case will be dismissed as nonjusticiable unless the plaintiff alleges facts showing (i) the decision was inconsistent with due process, or (ii) the organization engaged in arbitrariness, fraud, or collusion." *McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 72, 736 S.E.2d 811, 825 (2013) (citation and quotation marks omitted). Here, Plaintiffs have not argued that the Club's decision to terminate their family membership was arbitrary, fraudulent, or collusive. Therefore, our review is limited to whether the Club's decision was inconsistent with due process.

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1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

"Private voluntary organizations are *not* required to provide their members with the full substantive and procedural due process protections afforded under the United States and North Carolina constitutions." *McAdoo*, 225 N.C. App. at 72, 736 S.E.2d at 825-26 (emphasis added); *see also NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." (citation omitted)). Rather, private associations are usually only required to "(i) follow their own internal rules and procedures, and (ii) adhere to principles of fundamental fairness by providing notice and an opportunity to be heard." *McAdoo*, 225 N.C. App. at 72, 736 S.E.2d at 826 (citations and quotation marks omitted).

First, to determine whether a private association followed its own internal rules and procedures, courts look to the association's "duly adopted laws." *Id.* at 71, 736 S.E.2d at 825. Because "the charter and bylaws of an association may constitute a contract between the organization and its members wherein members are deemed to have consented to all reasonable regulations and rules of the organization," traditional rules of contract interpretation apply when assessing whether the voluntary association followed its own internal rules and procedures. *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 237, 316 S.E.2d 59, 63 (1984). "[W]hen the language of a contract is clear and unambiguous, the court must interpret the contract as written. . . ." *Root v. Allstate Ins. Co.*, 272 N.C. 580, 583, 158 S.E.2d 829, 832 (1968) (citation omitted). "The heart of a contract is the intention of the parties," so the trial court must "seek to determine the intention of the parties as shown by the whole written instrument." *Id.* (citation and quotation marks omitted).

Second, when assessing whether the voluntary association "adhere[d] to principles of fundamental fairness by providing notice and an opportunity to be heard," it is vital to remember that "[p]rivate voluntary organizations are *not* required to provide their members with the full substantive and procedural due process protections afforded under the United States and North Carolina constitutions." *McAdoo*, 225 N.C. App. at 72, 736 S.E.2d at 825-26 (emphasis added).

As previously discussed, this Court recently "decline[d] 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)." *Emerson*, ___ N.C. App. at ___, 817 S.E.2d at 408. However, prior notice

and an opportunity to be heard *may* be required if set forth in the organization's governing documents.

Moreover, while it is true that "[a]n unbiased, impartial decisionmaker is essential" when full due process protections apply, *Crump v. Board of Education of Hickory Administrative School Unit*, 326 N.C. 603, 615, 392 S.E.2d 579, 585 (1990), it is not always necessary for private associations to utilize an impartial decision maker when making disciplinary determinations. Again, the terms of the organization's governing documents control.

Here, Plaintiffs first argue that the record evidence demonstrated the Club's failure to follow several provisions of the Bylaws and Rules & Regulations. However, our review of the record and the Club's governing documents reveal that the Club properly followed its Bylaws and Rules & Regulations. Moreover, Plaintiffs contend that the Club did not adhere to the disciplinary process outlined in the R&M Committee's Operating Procedures. However, because these Operating Procedures were never approved by the Board or made a part of the governing documents of the Club, the Operating Procedures were not duly adopted rules. As a result, the Club was not required to comport with the R&M Committee's Operating Procedures here.

Plaintiffs next argue that the record evidence demonstrates that Plaintiffs were entitled to, but did not receive adequate notice and an opportunity to be heard by an impartial tribunal.

The plain, clear and unambiguous language of the Club's Rules & Regulations expressly entitled Plaintiffs to written notice and an opportunity to be heard. Neither the Club's Bylaws nor Rules & Regulations state that disciplinary actions would be heard by an impartial tribunal. The Club's Rules & Regulations plainly state that disciplinary matters will be determined by a Hearing Panel consisting of four members from the Board and three members from the R&M Committee. There is no provision in the Club's governing documents that would guarantee an impartial, third-party tribunal to determine internal disciplinary matters.

We conclude that the Club complied with the notice and hearing requirements of the Rules & Regulations when it assessed Mr. Master's disciplinary matter. The undisputed evidence illustrates that the Club held a hearing on May 8, 2015, in which the Plaintiffs were represented by their attorney. Although Plaintiffs' counsel did not present any evidence and Plaintiffs did not personally attend the hearing, the Club provided them with the opportunity to do so.

Additionally, Plaintiffs do not contest that Conway, on behalf of the Club, sent Mr. Master a letter on April 2, 2015, notifying him of his alleged violations and hearing date. That letter explained to Mr. Master that several members had complained to the Board regarding the series of emails that Mr. Master had sent to hundreds of club members; identified Mr. Master's conduct as "detrimental to the well-being and harmony of the Club to an egregious degree"; informed Mr. Master that a hearing would be held on April 15, 2015 to assess the matter and impose any applicable sanctions; and invited Mr. Master to present evidence to defend himself against his alleged violations. In response to scheduling conflicts, the Club rescheduled the hearing to May 8, 2015, and Conway communicated this change to Mr. Master by mail and email.

Although the hearing was rescheduled twice, this fact alone does not impact our conclusion that Mr. Master received proper notice. The Club's governing documents only require members to be notified at some unspecified time prior to the hearing, and Mr. Master received notice about the rescheduled hearing prior to May 8, 2015. Therefore, the Club properly notified Mr. Master about his alleged violations and provided an opportunity to present evidence.

Moreover, the Club's Bylaws dictate that when spouses jointly own a single, family club membership, "[t]he action of either spouse with respect to the Membership shall be binding on the other" and the Club is not required to "notify or obtain the consent of both spouses." Therefore, Plaintiffs were properly notified as the Club was not obligated to also individually notify Mrs. Master regarding her husband's alleged violations and hearing date.

Because the Club adhered to its own internal rules and provided Plaintiffs with prior notice and an opportunity to be heard, "there is no justification for judicial intervention" on Plaintiffs' behalf. *Arendas v. N.C. High Sch. Athletic. Ass'n Inc.*, 217 N.C. App. 172, 174, 718 S.E.2d 198, 200 (2011). Thus, when this undisputed evidence is viewed in the light most favorable to Plaintiffs, we conclude there is no genuine issue of material fact.

Conclusion

We affirm the trial court's grant of summary judgment in the Club's favor and denial of Plaintiffs' motion for partial summary judgment.

AFFIRMED.

Judges TYSON and INMAN concur.

McKINNEY v. McKINNEY

[263 N.C. App. 190 (2018)]

GINGER A. McKINNEY, NOW GINGER L. SUTPHIN, PLAINTIFF
v.
JOSEPH A. McKINNEY, JR., DEFENDANT

No. COA18-475

Filed 18 December 2018

Attorney Fees—remand—new grounds

An award of attorney fees was affirmed where an order in a child custody proceeding was remanded and the trial court on remand awarded attorney fees on new grounds. Nothing in the mandate on remand prohibited the trial court from considering other appropriate grounds to award attorney fees and the trial court was free to enter a new award based on contempt with the necessary finding of willfulness.

Appeal by defendant from order entered 12 January 2018 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 30 October 2018.

Wyatt Early Harris Wheeler LLP, by A. Doyle Early Jr. and Katharine Y. Barnes, for plaintiff-appellee.

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

DIETZ, Judge.

Defendant Joseph McKinney appeals an award of attorneys' fees in this child custody proceeding. He argues that the trial court, on remand from a previous appeal to this Court, violated this Court's mandate. As explained below, the trial court acted consistent with our mandate and its award of attorneys' fees is supported by fact findings which, in turn, are supported by the trial record. We therefore affirm the trial court's order.

Facts and Procedural History

This appeal is part of a long-running, contentious family law proceeding that has spawned three earlier appeals to this Court. Most of the facts relevant to this case are summarized in the previous appeal, *McKinney v. McKinney*, __ N.C. App. __, __, 799 S.E.2d 280, 282 (2017) (*McKinney III*). We will not repeat them here.

In *McKinney III*, this Court vacated an order finding Defendant in civil contempt and awarding corresponding attorneys' fees to Plaintiff, and remanded the case for further proceedings. *Id.* at __, 799 S.E.2d at 285. On remand, the trial court entered a detailed order awarding attorneys' fees to Plaintiff under N.C. Gen. Stat. § 50-13.6, a statute that permits an award of attorneys' fees in a custody proceeding to "an interested party acting in good faith who has insufficient means to defray the expense of the suit." Defendant timely appealed the court's order awarding attorneys' fees.

Analysis

Defendant argues that the trial court violated this Court's mandate when it awarded attorneys' fees on remand. Specifically, he contends that this Court's mandate only permitted the trial court to make additional willfulness findings concerning an award of attorneys' fees based on civil contempt, not to consider awarding fees based on other grounds. As explained below, we reject this argument and hold that the trial court did not violate this Court's mandate.

We first provide some context concerning the award of attorneys' fees in this case. In a civil contempt proceeding in a child custody case, the trial court is authorized to award attorneys' fees on multiple grounds with differing legal standards. Under Section 50-13.6 of the General Statutes, a trial court in any child custody proceeding "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." N.C. Gen. Stat. § 50-13.6. This provision authorizes the trial court to impose attorneys' fees in a civil contempt proceeding that involves violation of an existing child custody order. *Wiggins v. Bright*, 198 N.C. App. 692, 695–96, 679 S.E.2d 874, 876–77 (2009).

Separately, this Court has held that a trial court's inherent authority to impose a remedy for civil contempt "includes the authority for a district court judge to require one whom he has found in willful contempt of court . . . to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt." *Blair v. Blair*, 8 N.C. App. 61, 63, 173 S.E.2d 513, 514 (1970). To award attorneys' fees on this ground, the trial court must make a finding that the contempt of court was willful. *Id.*

Although the parties acknowledge that Plaintiff sought an award of attorneys' fees based on N.C. Gen. Stat. § 50-13.6 in the initial contempt proceedings below, this Court in *McKinney III* interpreted the trial court's order as awarding fees solely based on its inherent authority

governing willful contempt of court. __ N.C. App. at __, 799 S.E.2d at 283–85. As a result, we vacated and remanded the attorneys' fees award because it did not include a finding of willfulness. The Court noted that "[o]n remand, the district court is free to consider evidence and enter findings regarding whether [Defendant] acted willfully . . . ." *Id.* at __, 799 S.E.2d at 285.

This statement in *McKinney III* authorized the trial court to once again impose attorneys' fees based on civil contempt, if the court made appropriate findings concerning willfulness. But, importantly, that portion of the Court's mandate did not prohibit the trial court from conducting additional proceedings in the case, or from considering other, alternative grounds on which to award attorneys' fees.

On remand, the trial court chose not to make additional findings and award attorney's fees based on civil contempt. Instead, after correctly noting that "[t]he Court of Appeals' decision did not address Plaintiff Mother's Motion for Attorney's Fees pursuant to N.C. Gen. Stat. § 50-13.6," the court made the findings required under that statute and awarded fees on that ground:

> Plaintiff Mother is an interested party acting in good faith without sufficient funds to defray the necessary expenses of prosecuting the civil contempt and defending Defendant Father's motion pursuant to Rules 59 and 60. The Court is awarding attorney's fees pursuant to N.C. Gen. Stat. § 50-13.6 and said attorney's fees of $51,083.39 are reasonable.

The trial court's ruling was entirely consistent with our mandate in *McKinney III*. "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015). Here, the mandate provided only that the trial court's civil contempt order and corresponding award of attorneys' fees were vacated, that the case was remanded for further proceedings, and that, on remand, the trial court was free to enter a new attorneys' fees award based on civil contempt if it made the necessary finding of willfulness. Nothing in that mandate prohibited the trial court from considering other appropriate grounds to award attorneys' fees. Because the court's attorneys' fees award is consistent with our mandate, and because the trial court made findings on the statutory factors contained in N.C. Gen.

Stat. § 50-13.6 and those findings are supported by competent evidence in the record, we affirm the trial court's order.

AFFIRMED.

Judges BRYANT and INMAN concur.

MTGLQ INVESTORS, L.P., PLAINTIFF
v.
PETER C. CURNIN; PC CONSTRUCTION, INC.;
BALD HEAD ASSOCIATION, DEFENDANTS

No. COA18-349

Filed 18 December 2018

1. Real Property—deed of trust—description of property

A deed of trust described the property sufficiently to create a lien where it included the lot number and correct subdivision, as well as a reference to the deed in which defendant obtained title, but did not include a book and page number. The legal description detailed the property with sufficient certainty that it could only refer to this property.

2. Deeds—ownership—chain of title—sufficiency

Deeds conveying property to defendant were sufficient to establish his ownership, and thus his ability to obtain a loan with the property as security, where several of the deeds in defendant's chain of title included the same legal description as the deed of trust, with no reference to the book and page number of the subdivision's map in the county map book. The deeds' references to extrinsic sources sufficiently described the property and its boundaries.

Appeal by Plaintiff from orders entered 24 August 2017 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 31 October 2018.

Brian M. Rowlson and G. Benjamin Milam for Plaintiff-Appellant.

The Hillis Firm, by Lindsey Walker Hillis, for Defendant-Appellee Peter C. Curnin.

Murchison, Taylor & Gibson PLLC, by Andrew K. McVey, for Defendant-Appellee Bald Head Association.

DILLON, Judge.

Plaintiff MTGLQ Investors, L.P. ("MTGLQ") appeals from an order denying its motion for summary judgment and an order granting summary judgment in favor of Defendants.

I. Background

The subject-matter of this action is certain real property located at 29 Fort Holmes Trail on Bald Head Island (the "Property"). The central issue is whether a certain deed of trust sufficiently describes the Property to create a valid lien.

The Property is owned by Defendant Peter C. Curnin ("Curnin"). In December 2007, Curnin obtained a loan from Bank of America, N.A. ("Bank of America"), securing it by the deed of trust at issue in this matter (the "Deed of Trust"). One section of the Deed of Trust includes the following legal description of the Property:

> ALL THAT TRACT OR PARCEL OF LAND LYING IN THE COUNTY OF BRUNSWICK, IN THE [STATE] OF NORTH CAROLINA, IN THE MUNICIPALITY OF THE VILLAGE OF BALD HEAD ISLAND AND MORE SPECIFICALLY IDENTIFIED AS LOT # 333 LOCATED IN STAGE I OF THE DEVELOPMENT.
>
> Being that parcel of land conveyed to Peter C. Curnin from PC Construction Inc. by that deed dated 12/13/2001 and recorded 12/13/2001 in Deed Book 1531, at Page 66 of the Brunswick County, NC Public Registry.

The legal description includes the Property's lot number ("LOT # 333") and the phase of the development ("STAGE I"). However, it does not include any reference to the book and page numbers where a title searcher could find the map of Stage I as recorded in the Brunswick County Map Book.

MTGLQ is the successor in interest to Bank of America's interest in the Deed of Trust. In 2016, MTGLQ commenced this action, seeking (1) to quiet title regarding the validity of its lien on the Property and (2) to reform the Deed of Trust to include a reference to the recorded map in the County's Map Book.

MTGLQ moved for summary judgment. After a hearing on the matter, the trial court denied MTGLQ's motion and granted summary judgment in favor of Defendants. MTGLQ timely appealed.

II. Standard of Review

We review the trial court's ruling on a motion for summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

III. Analysis

[1] MTGLQ argues that the trial court erred by denying its summary judgment motion and by granting summary judgment for Defendants. For the reasons stated below, we conclude that the Deed of Trust adequately describes the Property to create a lien on that Property without the need for reformation. Therefore, we hold that MTGLQ is entitled to summary judgment on its quiet title claim.

Our General Statutes allow a quiet title action to be brought "by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." N.C. Gen. Stat. § 41-10 (2016). An action for quiet title has two essential elements: (1) the plaintiff must own or have some interest in the property at issue, and (2) the defendant must have a claim adverse to the plaintiff's title or interest in the property. *Wells v. Clayton*, 236 N.C. 102, 107-08, 72 S.E.2d 16, 20 (1952). In this case, these elements are satisfied: MTGLQ has a lien on the Property which is adverse to Defendant's title in the Property.

In order to be valid, a deed or deed of trust must contain a legal description of the land "sufficient to identify it" or refer "to something extrinsic by which the land may be identified with certainty." *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347, 349 (1976). The entire deed should be considered when determining the identity of the land conveyed. *Quelch v. Futch*, 172 N.C. 316, 317, 90 S.E. 259, 260 (1916). Indeed, "[c]lauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that would aid the description." *Id.* "Every part of a deed ought, if possible, take effect, and every word to operate." *Id.* Thus, if a deed's language, "including the references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land." *Overton*, 289 N.C. at 293-94, 221 S.E2d at 349; N.C. Gen. Stat. § 8-39 (2007).

Here, the Deed of Trust's description, set forth above, contains the Property's lot number and the correct subdivision as well as a reference to the deed in which Defendant obtained title to the Property. This description describes the Property with certainty as it could only refer to the Property. There is no other Lot # 333 in Stage I of the development. And, in addition to the legal description set forth above, the Deed of Trust also identifies the real estate securing the loan by its correct street address and tax parcel number, as follows:

> This [Deed of Trust] secures to Lender . . . the following described property located in the County of Brunswick []
>
> Parcel ID Number: 2641O030 which currently has the address of 29 Fort Holmes Trail[,] Southport [,] North Carolina 28461.
>
> TO HAVE AND TO HOLD this property unto Trustee . . . [.]

We conclude that the four corners of the Deed of Trust document sufficiently describes the Property to create a valid lien on that Property. In reaching our conclusion, we find persuasive a recent unpublished opinion, cited in MTGLQ's brief, in which we found that a deed of trust *can* identify the property "with certainty" and "provide constructive notice of [a] lien" where the deed of trust contains the correct physical address and the tax parcel ID number. *Bank of Am., N.A. v. Charlotte Prop. Invs., LLC*, 234 N.C. App. 477, 762 S.E.2d 532, 2014 N.C. App. LEXIS 651, *8-10, (2014) (unpublished). The physical address and tax parcel ID number contained in the Deed of Trust each refer to "something extrinsic by which the land may be identified with certainty." *Overton*, 289 N.C. at 293, 221 S.E.2d at 349.

We disagree with Defendant's argument that the language in the Deed of Trust is similar to the description in *Garren v. Watts*, 235 N.C. App. 423, 763 S.E.2d 926, 2014 N.C. App. LEXIS 838 (2014) (unpublished). The deed in *Garren* varies greatly from the Deed of Trust at issue here. In *Garren*, the legal description of the real estate being conveyed was left blank, though other parts of the deed contained a reference to the grantor's address and a handwritten parcel number. *Garren*, 2014 N.C. App. LEXIS at *2. However, there was no language indicating any intention that the address referred to was being conveyed. *Garren*, 2014 N.C. App. LEXIS at *5-7. Further, there was no language indicating any intention that the property referenced in the handwritten parcel number written at the bottom of the deed was being conveyed. *Id.*

We also recognize that MTGLQ included a claim for reformation in its complaint and that Defendant argues that MTGLQ's claim is one of reformation and, therefore, time-barred. However, no reformation is needed here as the four corners of the Deed of Trust refers to things that, extrinsically, completely and adequately describe and identify the Property. And there is no statute of limitations issue with regard to MTGLQ's quiet title claim. *See Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 289-90, 338 S.E.2d 817, 819 (1986).

[2] Having determined that the Deed of Trust sufficiently describes the Property, we turn to the question as to whether Curnin is the true owner of the Property. That is, in order for Curnin to pledge the Property as security for the loan, he must have owned the Property. Curnin's ownership of the Property turns on whether the deeds in *his* chain of title sufficiently describe the Property. Several deeds in his chain of title, including the deed conveying the Property to him, all include the same legal description as the Deed of Trust, with no reference to the book and page number of the subdivision's map in the County's Map Book. We have carefully reviewed the deeds in question and conclude that their references to extrinsic sources sufficiently describe the Property and its boundaries. Therefore, the preceding deeds are valid. Curnin could, and did, encumber the Property in 2007 when he obtained the loan from Bank of America.

IV. Conclusion

The Deed of Trust sufficiently describes the Property to create a lien. We need not address MTGLQ's reformation claim. As such, the trial court erred in denying MTGLQ's motion for summary judgment and granting Defendant's motion for summary judgment. We therefore reverse the order of the trial court and remand for entry of summary judgment in favor of MTGLQ's claim that it has a valid lien on the Property.

REVERSED AND REMANDED.

Judges STROUD and BERGER concur.

PEELER v. JOSEPH

[263 N.C. App. 198 (2018)]

DEXTER D. PEELER, PLAINTIFF
v.
ANGELA E. JOSEPH, DEFENDANT

No. COA18-488

Filed 18 December 2018

1. Child Custody and Support—modification—substantial change in circumstances—new information

In an action to modify custody, the trial court did not err by finding a substantial change in circumstances existed to justify modifying custody based on previously undisclosed or unknown information that the minor child suffered from food allergies, confirmed by a court-appointed medical expert, and that the non-movant parent was in denial of those allergies and refused to alter the child's diet.

2. Child Custody and Support—modification—findings of fact—sufficiency of evidence

In an action to modify custody, the trial court's unchallenged findings of fact were sufficient to support the contested finding that the child's mother was in denial of the child's medical problems stemming from food allergies and refused to make changes to the child's diet as a result.

3. Evidence—custody modification—medical letter—hearsay—business record

In an action to modify custody, the trial court did not abuse its discretion by excluding a letter from a certified pediatric nurse practitioner reviewing the court-appointed medical expert's report on the child's health, because the letter was solicited by defendant mother and her counsel for use in court and was not a record kept in the course of regularly conducted business activity as required by Evidence Rule 803(6), thereby disqualifying the letter from admissibility under the business record exception to hearsay.

4. Child Custody and Support—modification—best interest determination—sufficiency of findings

In an action to modify custody, the trial court did not abuse its discretion by concluding the child's best interest would be served by granting the father sole legal and primary physical custody where its conclusion was supported by findings of fact that the child's mother

refused to acknowledge the child's food allergies which were detailed by the court-appointed medical expert.

Judge TYSON dissenting.

Appeal by defendant from an order entered 3 November 2017 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 15 November 2018.

Myers Law Firm, PLLC, by Matthew R. Myers, for plaintiff-appellee.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for defendant-appellant.

ARROWOOD, Judge.

Angela E. Joseph ("defendant") appeals from an order modifying custody of minor child ("J.J.") and granting sole legal and primary physical custody to Dexter D. Peeler ("plaintiff"). For the reasons stated herein, we affirm.

I. Background

Plaintiff and defendant engaged in a relationship that resulted in the birth of one minor child in April 2010. Plaintiff filed an action for custody of the minor child, J.J, on 9 December 2011. The matter came on for trial before the Honorable Charlotte Brown on 14 and 17 September 2012. Thereafter, the trial court entered a permanent custody order on 14 May 2013, which granted the parties joint legal custody, and awarded defendant primary physical custody.

Plaintiff filed a Rule 35 motion on 30 August 2013. The motion alleged J.J. had been diagnosed with chronic constipation, external hemorrhoid, and fecal impaction. It further alleged that due to defendant's "history of mistrust and/or disdain for [plaintiff] . . . the parties are generally unable to be on one (1) accord as it relates to the care and treatment of the minor child." Plaintiffs' motions were heard before the Honorable Charlotte Brown on 22 November 2013. A hand-written order modifying custody was filed on 22 November 2013 and an identical typed order was filed 7 February 2014. Both orders ordered the parties to share physical custody on an alternating two week schedule, vested plaintiff with the right to make decisions regarding education, and vested defendant with the right to make decisions regarding health.

On 24 October 2016, plaintiff filed a Rule 35 and Rule 706 motion to request the trial court appoint an expert "to conduct an evaluation and/or oral challenge" of J.J., due to the parties' inability to "agree upon the appropriate medical care" of the minor child due to the parties' "impassable deadlock on whether the minor child has a dairy intolerance and/or food allergy." On 28 October 2016, plaintiff filed a motion to modify custody, alleging changed circumstances, including that the minor child had allergies, eczema, and hives and bumps, and again alleging the parties have reached a deadlock on whether the minor child has a dairy intolerance and/or food allergy. Defendant denied the allergies existed, even though a blood test taken since the 22 November 2013 and 7 February 2014 orders indicated the minor child has a milk allergy.

Plaintiff's motions were heard on 10 January 2017. The trial court appointed Dr. Akiba Green, D.C. ("Dr. Green") as the court's expert and ordered that he evaluate J.J. and "determine the existence of any and all food allergies and/or intolerances including, but not limited to, any and all delayed food allergies." Dr. Green evaluated J.J. and found J.J. "is allergic to cow's milk, egg white and wheat" and "has delayed reactions to dairy, gluten, tapioca, teff, and quinoa." Despite Dr. Green's findings, defendant continued to deny J.J.'s allergies exist.

On 3 November 2017, the trial court entered an order granting plaintiff's motion to modify custody and awarding plaintiff sole legal and primary physical custody of J.J., with defendant allowed visitation every other weekend, from Thursday after the child is released from school, afterschool and/or summer camp until Monday morning when school and/or summer camp resumes, and shared holiday visitation.

Defendant appeals.

II. Discussion

Defendant raises four arguments on appeal: (1) whether the trial court erred by concluding a substantial change in circumstances affecting the welfare of the child occurred since the entry of the 22 November 2013 and 21 February 2014 orders; (2) whether the trial court erred in finding defendant is in "absolute denial" of the minor child's medical problems; (3) whether the trial court erred by failing to admit a letter from a certified pediatric nurse practitioner into evidence; and (4) whether the trial court erred in concluding it is in the minor child's best interest for plaintiff to have sole legal and primary physical custody. We address each argument in turn.

A. Substantial Change in Circumstances

[1] Defendant argues the trial court erred by concluding a substantial change in circumstances affecting the welfare of the child occurred since the entry of the 22 November 2013 and 21 February 2014 orders. We disagree.

"A trial court may order the modification of an existing child custody order if the court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests." *Spoon v. Spoon*, 233 N.C. App. 38, 41, 755 S.E.2d 66, 69 (2014) (citation omitted). Our court reviews a trial court's decision to modify an existing custody order for: "(1) whether the trial court's findings of fact are supported by substantial evidence; and (2) whether those findings of fact support its conclusions of law." *Id.* (citation omitted). "[W]hether changed circumstances exist is a conclusion of law" that we review *de novo*. *Thomas v. Thomas*, 233 N.C. App. 736, 739, 757 S.E.2d 375, 379 (2014) (citation omitted).

"The reason behind the often stated requirement that there must be a change of circumstances before a custody decree can be modified is to prevent [r]elitigation of conduct and circumstances that antedate the prior custody order[,]" which "prevents the dissatisfied party from presenting those circumstances to another court in the hopes that different conclusions will be drawn." *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979). Accordingly, "courts may only consider events which occurred after the entry of the previous order" when deciding whether a substantial change in circumstances occurred, and information previously disclosed to the court prior to the hearing on the motion to modify custody is *res judicata* with regard to a substantial change in circumstances determination. *Woodring v. Woodring*, 227 N.C. App. 638, 646, 745 S.E.2d 13, 20 (2013) (citations omitted).

However, a trial court treats facts that antedate the original custody order differently when they were not disclosed to the court before the original order was entered. Consistent with the reason behind the substantial change in circumstances requirement, to prevent relitigation of conduct and circumstances, facts previously undisclosed are not barred by *res judicata* and may be considered when evaluating whether a substantial change in circumstances has occurred. *Id.*

Plaintiff's 30 August 2013 Rule 35 motion alleged the minor child had been diagnosed with chronic constipation, external hemorrhoid, and fecal impaction. The motion further alleged that due to:

> a history of mistrust and/or disdain for [plaintiff] . . . the parties are generally unable to be on one (1) accord as it relates to the care and treatment of the minor child. As a result, when [plaintiff] communicated [medical information about the child] to [defendant] she disregarded it and refused to follow the medical treatment plan . . . because she believed that the information was contrived and created by [plaintiff].

Plaintiff's motion requested the court:

> 1. Order the minor child to undergo a full physical evaluation to determine the health of the minor child as it relates to constipation, allergies, and/or excema [*sic*].
>
> 2. Direct the parties to follow any and all recommendations of the court appointed pediatrician.
>
> 3. For such other and further relief as the Court deems just and proper.

In its 22 November 2013 and 21 February 2014 orders, the trial court did not address whether the child would undergo a physical evaluation by a court ordered pediatrician. Instead, the trial court vested defendant with the power to make decisions regarding health, apparently addressing the allegation that the parties had "been generally unable to agree on a proper medical protocol for the minor child." There is no evidence in the record that the trial court considered the child's specific health needs or was aware that plaintiff believed the child had allergies when drafting the 22 November 2013 or 21 February 2014 order.

On 24 October 2016, plaintiff filed another Rule 35 and Rule 706 motion, and moved to modify custody on 28 October 2016. In both motions, plaintiff again alleged "the parties are generally unable to be on one (1) accord as it relates to the care and treatment of the minor child." Plaintiff also alleged there was "an impassable deadlock on whether the minor child has a dairy intolerance and/or food allergy[,]" and that "[t]his issue has permeated through every other aspect of the minor child's life." Plaintiff alleged he observed symptoms such as eczema flare ups, constipation, hives and bumps that led him to believe the minor child has allergies that need to be addressed. Additionally, plaintiff obtained blood allergy testing for the minor child that indicated she has a milk allergy.

The trial court appointed Dr. Green as an expert witness to evaluate whether the minor child has food allergies and/or intolerances. Dr.

Green found that the minor child is allergic to cow's milk, egg white, and wheat, and has delayed reactions to dairy, gluten, tapioca, teff, and quinoa. Despite these findings, defendant continued to deny the minor child has allergies. Accordingly, the trial court found a substantial change in circumstances based on the finding that "the minor child suffers from food allergies, chronic constipation, eczema, skin problems and the like to a severe level[,]" and defendant is in "absolute denial of her child's" medical problems.

Defendant argues that a change in circumstances did not occur because "the issue of [the minor child's] food allergies had already been raised by [plaintiff] prior to the 29 October 2013 custody review hearing[.]" We disagree.

Although plaintiff had concerns that the minor child had allergies at the time the court's 21 February 2014 custody order was entered and requested that the court order a medical evaluation to determine whether the child had allergies, the order only addresses the parties' inability to agree on a medical treatment plan and there is no evidence in the record that the minor child's specific medical issues were considered by the trial court. Nevertheless, there was a change in factual circumstances since the entry of the original child custody order, not just in what was disclosed or considered by the court. Specifically, plaintiff alleged the minor child exhibited new symptoms: eczema, hives, and bumps, and offered results from a blood test that was not performed until after the entry of the 21 February 2014 order that indicated the minor child has an allergy. Furthermore, the court-appointed expert determined that the minor child has allergies, which constitutes a change in circumstances affecting the minor child.

Therefore, defendant's argument is without merit. The findings of fact related to the minor child's allergies were appropriately considered by the trial court, and sufficient to support the trial court's conclusion that a substantial change in circumstances occurred.

B. Finding of Fact 16

[2] Next, defendant argues finding of fact 16 is not supported by substantial evidence.

Finding of fact 16 found: "[defendant] is in absolute denial of her child's problems medically. She has refused to take steps to alter her diet for the minor child's benefit." Defendant contends this finding is not supported by substantial evidence because her opinion that the minor child does not have a food allergy is supported by other medical professionals

in the record. However, defendant does not challenge any other finding of fact, therefore, all other findings are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). Significantly, the following findings of fact are unchallenged, and therefore conclusive on appeal:

> 11. Plaintiff/Father has obtained blood allergy testing results that indicated that the minor child has a milk allergy. Plaintiff/Father has repeatedly asked Defendant/Mother not to give the minor child milk. Defendant/Mother has refused to acknowledge that the minor child has a milk allergy. Still to this day, Defendant/Mother does not believe that the minor child has a milk allergy.
>
> 12. The Court appointed an expert to get to the bottom of what is going on with the minor child medically. Dr. Akiba Green . . . was the court appointed expert to determine what was going on with the minor child.
>
> 13. Dr. Green evaluated the minor child and did extensive testing beyond the normal allergy testing. His findings were that the minor child is allergic to cow's milk, egg white and wheat. He also found that the minor child has delayed reactions to dairy, gluten, tapioca, teff, and quinoa.
>
> 14. Dr. Green recommended long term elimination of rice and oats because the minor child's reaction to them is similar to gluten. He found that the minor child had "leaky gut," blood sugar problems and was trending towards diabetes.
>
> 15. The Court finds that the minor child has a history of chronic constipation, hemorrhoids, fissures, eczema, hives and other symptoms that Defendant/Mother completely discounts or denies that the symptoms exist. Defendant/Mother continues to deny the issues, despite the fact that the minor child was seen as early as June 2017 for stomach issues while in Defendant/Mother's care.

These uncontested findings of fact provide substantial support for the court's determination in finding of fact 16 that the mother is in denial of the child's medical condition and her refusal to take steps to remedy the same. Because the court's uncontested findings show the child suffers

from health conditions that need to be treated, the fact that defendant has chosen to believe other opinions does not make finding of fact 16 incorrect or unsupported by substantial evidence. Therefore, defendant's argument is without merit.

C. Admissibility of Opinion Letter

[3] Defendant argues the trial court erred by excluding a 13 July 2017 letter from a certified pediatric nurse practitioner, Ms. Deanna Whitley, that reviews Dr. Green's report on the minor child's health. Defendant contends this letter is part of the minor child's medical records from Cabarrus Pediatrics, and should have been admitted under the business records exception to the hearsay rule. We disagree.

The standard of review on admissibility of evidence is abuse of discretion. *In re Goddard & Peterson, PLLC*, 248 N.C. App. 190, 198, 789 S.E.2d 835, 842 (2016). Rule 801 of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). Hearsay is generally not admissible at trial, unless otherwise allowed by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802. Deriving from the traditional business records exception, Rule 803(6) of the North Carolina Rules of Evidence establishes an exception to the general exclusion of hearsay for records of regularly conducted activity, which the rules define as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit. The term "business" as used in this

> paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6).

The exhibit in question was a letter authored by a certified nurse practitioner at the request of defendant and her counsel. The letter specifically refutes Dr. Green's report, and appears to have been drafted to be submitted to the trial court for this purpose. As pediatrician offices are not in the regular practice of producing opinion letters on expert reports for court, this letter fails to meet Rule 803(6)'s requirements that the record was kept in the course of a regularly conducted business activity, and that it was the regular practice of that business activity to make the memorandum, report, record, or data compilation. *See id.* Therefore, the trial court did not abuse its discretion by excluding the letter from evidence.

D. Best Interests Determination

[4] As her final argument, defendant contends that the trial court abused its discretion by concluding that it is in the minor child's best interests for plaintiff to have sole legal and primary physical custody of the minor child because the trial court based its "best interest" analysis almost exclusively on the trial court's findings that defendant has failed to acknowledge and manage the minor child's medical issues.

"Once the trial court makes the threshold determination that a substantial change has occurred, the trial court then must consider whether a change in custody would be in the best interests of the child." *West v. Marko*, 141 N.C. App. 688, 691, 541 S.E.2d 226, 228 (2001) (citation omitted). "As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000) (citation omitted). Here, defendant only challenged one finding of fact, finding of fact 16, which, as discussed *supra*, is supported by substantial evidence. Therefore, all of the findings of fact are binding on appeal, and the best interests determination cannot be upset absent a manifest abuse of discretion. *Id.* (citation omitted).

Where, as here, the trial court's findings of fact found defendant has refused to acknowledge the minor child's allergies even though extensive, court-ordered testing found that these allergies exist, the trial court did not abuse its discretion by concluding it was in the minor child's best

interests for plaintiff to have sole legal and primary physical custody to promote the minor child's general welfare and health.

III. Conclusion

For the forgoing reasons, we affirm the 3 November 2017 order.

AFFIRMED.

Judge INMAN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion concludes a substantial change related to J.J.'s health occurred *after* the adjudication and entry of the November 2013 permanent custody order, which supported a modification of custody. Upon review of the extensive record, the same issues concerning J.J.'s health were before the trial court before the entry of, and had been adjudicated prior to, the November 2013 order. No substantial change in circumstances exists to support a modification. The trial court's November 2017 order modifying custody should be reversed. I respectfully dissent.

I. Additional Factual Background

In their recitation of the facts, the majority's opinion fails to include J.J.'s extensive medical history and how it relates to the entry of the custody orders. The first permanent custody order of record was entered on 14 May 2013, and granted the parties joint legal custody, with primary physical custody to Defendant-mother. Over the next four months, beginning two days after the entry of that May 2013 order, J.J. was seen by a number of competent and qualified pediatricians and specialists concerning possible allergies. Her extensive medical history is reduced below to the most relevant visits.

On 16 May 2013, Plaintiff took J.J. to Dr. Michael Bean of University Pediatrics, where she was diagnosed with chronic constipation, external hemorrhoid, and fecal impaction. J.J. was prescribed Miralax for her constipation and was referred to Dr. Susan Hungness at Carolina Asthma & Allergy Center to test for potential allergies. J.J.'s skin tests were negative for pollens, molds, inhalants, milk, milk proteins casein and lactalbumin, and sesame seeds. Dr. Hungness did not find or

conclude J.J.'s constipation was related to a milk allergy. J.J.'s blood allergy tests indicated a low to moderate level reaction to milk, casein, and lactalbumin. Dr. Hungness recommended J.J. to avoid dairy products for two to three months, with further restriction to be determined by a gastroenterologist.

Defendant-mother took J.J. to Dr. Roopen Patel, also a physician at Carolina Asthma & Allergy Center, for additional testing on 6 August 2013. Skin tests for milk and soy protein allergies were negative, but Dr. Patel recommended continued monitoring for allergic reactions. Defendant also took J.J. to Dr. Lay Cheng at Carolina Pediatric Gastroenterology Clinic on 20 August 2013, as a requested follow-up to a previous appointment made by Plaintiff.

Dr. Cheng suspected J.J.'s constipation was "functional, possibly due to frequent changes in environment," and "reassured" Defendant that J.J. did not have any indication of a milk allergy, "clinically or by allergist's evaluation." Dr. Cheng recommended, *inter alia*, for J.J. to continue taking Miralax and consuming two cups of calcium and vitamin D fortified milk each day. Dr. Cheng also noted the "communication difficulties" between the parent-parties, and recommended the parties limit J.J.'s medical care providers to one per specialty to avoid confusion, limit costs, and reduce the unnecessary duplication of tests.

After a hearing on Plaintiff's August 2013 motions, the trial court entered a hand-written order modifying custody on 22 November 2013 and an identical typed order was filed over two and a half months later on 7 February 2014. Both orders found and ordered the parties to share physical custody on an alternating two week schedule, and *vested Plaintiff-father* with the right to make decisions regarding J.J.'s education and *vested Defendant-mother* with the right to make decisions regarding J.J.'s health.

Defendant took J.J. for further allergy testing by Dr. Laura Jean Larrabee at Cabarrus Pediatrics on 28 July 2014. This test showed low positive reactions to egg whites and cow's milk and borderline reactions to scallops and gluten. On 22 October 2014, Plaintiff, against the express conditions set forth in the permanent custody order, took J.J. to Dr. Jennifer Caicedo of Allergy, Asthma & Immunology Relief for additional allergy testing. Dr. Caicedo noted J.J.'s new blood tests indicated a decrease in reaction to milk. She recommended additional skin testing to milk and "open challenges" to milk and eggs in the office.

Both parties met with Dr. Larrabee on 4 November 2014. Dr. Larrabee advised that J.J.'s indicators for allergies were fairly low, and

may not actually indicate any allergies being present, but the skin testing recommended by Dr. Caicedo "would be a more accurate way to determine true allergy." She also relayed that J.J.'s gastrointestinal symptoms "could certainly be related to the amount of stress and discord related to the continuous friction" being generated between the parties.

J.J. underwent skin testing and oral challenge for milk on 17 November 2014 at Allergy Asthma & Immunology Relief. The skin test showed no reaction to milk and J.J. passed the oral challenge "without complication." J.J. also passed her oral challenge for eggs on 9 March 2015.

Plaintiff, again, against the conditions set forth in the November 2013 custody order, took J.J. for renewed and further allergy testing on 18 August 2016. J.J.'s blood test indicated a low level reaction to egg white and milk. Plaintiff and his fiancé, Iris Wilson, consulted with Dr. Caicedo concerning the results. Dr. Caicedo noted Plaintiff and Ms. Wilson had "determined themselves," without any supporting medical evidence, that J.J. had "delayed" reactions to milk and eggs, and believe J.J.'s eczema, development of environmental allergies, and chronic constipation were linked to her egg and milk allergies. Dr. Caicedo stated the results were not indicative of food allergies, and advised Plaintiff and Ms. Wilson that J.J.'s symptoms were not a manifestation of food allergies.

Apparently unhappy with the opinion of Dr. Caicedo and the multiple other specialists J.J. had seen, Plaintiff filed a Rule 35 and Rule 706 motion on 24 October 2016, requesting the trial court to appoint a medical expert "to conduct an evaluation and/or oral challenge" of J.J., due to the parties inability to "agree upon appropriate medical care" for J.J. Plaintiff also filed a motion to modify custody on 28 October 2016, which alleged changed circumstances including the parties' conflict over J.J.'s medical care.

Prior to the hearing on Plaintiff's motions, Defendant took J.J. to Allergy Partners of Rowan, where a skin test was performed for the purported milk allergy. That skin test result also returned as negative for a milk allergy and was consistent with earlier tests.

II. No Change in Circumstances

A permanent custody order *may not be modified* unless there has been a substantial change in circumstances affecting the welfare of the child. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 734 (2011) (emphasis supplied). A trial court's findings of fact are conclusive

on appeal if supported by substantial evidence, which "a reasonable mind might accept as adequate to support a conclusion." *Everette v. Collins*, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006). A trial court's conclusions of law are conclusive if supported by the findings of fact. *Id.* at 171, 625 S.E.2d at 798.

"Whether a change of circumstances affecting the welfare of the child has or has not occurred is a conclusion of law." *Jordan v. Jordan*, 162 N.C. App. 112, 116, 592 S.E.2d 1, 4 (2004). We review conclusions of law *de novo*. *Smith v. Smith*, 247 N.C. App. 135, 143, 786 S.E.2d 12, 20 (2016).

"[W]hen evaluating whether there has been a substantial change in circumstances, courts *may only* consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court." *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 20 (2013) (emphasis supplied). This requirement "is to prevent *relitigation* of conduct and circumstances that antedate the prior custody order" and have already been adjudicated and ruled upon. *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979) (emphasis original).

The majority's opinion asserts "there is no evidence in the record that the trial court considered the child's specific health needs or was aware that [P]laintiff believed the child had allergies" when it drafted the November 2013 order. However, the Rule 35 motion requested a "full physical evaluation to determine the health of the child as it relates to constipation, allergies, and/or excema [sic]."

Further, prior to the 29 October 2013 hearing, Plaintiff had served numerous subpoenas to doctors involved in J.J.'s care, requesting production of medical records or to appear at the hearing. Subpoenas were sent by Plaintiff to Dr. Hungness and Dr. Patel, of Carolina Asthma & Allergy Center, who had conducted allergy testing on J.J.; Dr. Chang, of Carolina Pediatric Gastroenterology, who had reviewed some of J.J.'s allergy tests; and Cabarrus Pediatrics, J.J.'s primary care practice with Defendant.

The November 2013 order also took into account medical decisions, and expressly allocated the authority to decide J.J.'s medical care to Defendant. While there was further conflict regarding J.J.'s purported allergies after the November 2013 order, that conflict arose as a result of Plaintiff's and his fiancé's failure to adhere to that order. Plaintiff's desire to relitigate the matter of J.J.'s medical care is not a change in

circumstances requiring a modification of the custody agreement. *See Newsome*, 42 N.C. App. at 425, 256 S.E.2d at 854.

The majority's opinion asserts Plaintiff's October 2016 motions identify "new" symptoms of eczema, hives, and bumps, and Plaintiff had obtained a blood allergy test subsequent to the November 2013 order indicating J.J. had milk allergies. Plaintiff's August 2013 Rule 35 motion also requested the trial court order a "full physical evaluation to determine the health of [J.J.] as it relates to constipation, allergies, and/or excema [sic]."

The subsequent blood allergy tests indicated J.J. had low level milk allergies. After the 2014 test, Dr. Larrabee noted such a low level may not actually indicate an allergy. She also noted that *skin testing is* "*a more accurate way to determine true allergy*" over blood tests. After the blood allergy tests in 2016, Dr. Caicedo informed Plaintiff the low-level results were not indicative of an allergy, but Plaintiff had already made up his mind despite all medical evidence to the contrary.

The trial court appointed Dr. Akiba Green of Lake Norman Health and Wellness to conduct an evaluation to ascertain whether or not J.J. had food allergies. Dr. Green is a chiropractor with an undergraduate degree in health education, a doctor of chiropractic degree from Sherman College of Chiropractic, and various certifications, including a 200-hour certification through "Functional Medicine University." Dr. Green conducted blood tests and opined J.J. had allergies to cow's milk, wheat, and egg white, and delayed reactions to oats, rice, tapioca, teff, and quinoa, in contravention to the numerous other specialists' opinions.

III. Conclusion

After review of the extensive medical records provided for J.J., no substantial evidence, which "a reasonable mind might accept as adequate to support a conclusion," exists to support a finding there was a substantial change in circumstances to modify the order. *See Everette*, 176 N.C. App. at 170, 625 S.E.2d at 798. The issue of J.J.'s purported allergies was present prior to the entry of the November 2013 order.

Testing, by at least four medical doctors, including two allergy specialists, prior to that order indicated J.J. had no allergies. Subsequent testing by Defendant, and also by Plaintiff, contrary to the mandates of the November 2013 order, indicate the same. Those doctor visits do indicate, however, Plaintiff and his fiancé, had "determined [for] themselves" that J.J. had delayed allergic reactions, contrary to the diagnoses

of the many previous physicians and at least three who were consulted after the entry of the November 2013 order.

Without any medical support, Plaintiff has become convinced his daughter has suffered from food allergies since she was three years old. Despite extensive allergy testing, physician consultation, and a court order dictating Defendant was vested with the right to make decisions concerning J.J.'s health, Plaintiff persisted in violation of Defendant's vested authority. Each time Plaintiff did not get the diagnosis he wanted, he sought out other doctors, and eventually enlisted the trial court to relitigate an issue which had existed for years and had previously been adjudicated. *See Newsome*, 42 N.C. App. at 425, 256 S.E.2d at 854. Plaintiff's repeated subjecting of his young daughter to invasive examinations, skin pricks, and blood tests to achieve his predetermined and unfounded notions borders on child abuse.

No substantial evidence exists to support a finding that a substantial change in circumstances had occurred since the entry of the November 2013 custody order. The alleged "changed circumstances," J.J.'s medical care and purported allergies, were apparent to, and litigated before, the trial court prior to the entry of the November 2013 order and were not to be reconsidered or relitigated by the trial court. *See Woodring*, 227 N.C. App. at 645, 745 S.E.2d at 20.

Without a showing of a substantial change of circumstances by Plaintiff, the trial court cannot reach the consideration of the best interests of the child, and erred by modifying an existing permanent custody order. *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 734.

The 3 November 2017 order modifying custody should be reversed. I respectfully dissent.

SERVATIUS v. RYALS

[263 N.C. App. 213 (2018)]

BONNIE R. SERVATIUS, PLAINTIFF
v.
STEPHEN K. RYALS, DEFENDANT

No. COA18-385

Filed 18 December 2018

Contempt—order—review on appeal—frustration of review

Where a mother appealed a trial court order declining to find her child's father liable and in civil contempt for failure to pay child support, the Court of Appeals was unable to ascertain the propriety of the order because the trial court failed to make findings as to whether the father was in compliance with the most recent child support order, the trial court failed to make several of the requisite findings under N.C.G.S. § 5A-21(a), and the mother failed to provide the Court of Appeals with a complete record or full transcript. The portion of the order at issue was vacated and remanded for entry of an order containing the necessary findings of fact and conclusions of law.

Appeal by plaintiff from order entered 1 December 2017 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 3 October 2018.

Servatius Law, PLLC, by Robert Servatius, for plaintiff-appellant.

No brief filed for pro se defendant-appellee.

ZACHARY, Judge.

Plaintiff Bonnie R. Servatius ("Mother") appeals from that portion of the trial court's order declining to find defendant Stephen K. Ryals ("Father") liable and in civil contempt for failure to pay child support in accordance with the terms of the parties' consent order. We vacate in part and remand for appropriate findings of fact and conclusions of law.

Background

Mother and Father had a child together, who was born on 16 September 2001. The parties were never married. In October 2005, the parties entered into a consent judgment ("the 2005 Order"), pursuant to the terms of which Father was obligated to contribute $600.00

per month in child support, payable to North Carolina Centralized Collections for disbursement to Mother.

On 6 March 2017, Mother filed a Verified Motion for Order to Show Cause in which she moved the trial court to direct Father to (1) appear and show cause why he should not be held in civil or criminal contempt for violating the 2005 Order "by failing to make $77,179.54 in child support payments . . . through centralized collections" since November 2005, and (2) "pay arrears owed to [Mother] and her attorney fees in this matter as well." Mother's motion neglected, however, to inform the trial court that the parties' child support case had been heard again in 2016, and that the court had modified the 2005 Order at that time. Without that information, on 6 June 2017, the district court judge presiding found that there was probable cause to believe that Father was in civil contempt for failing to comply with the 2005 Order, and issued an Order to Appear and Show Cause why Father should not be held in contempt.

At the contempt hearing before the Honorable Tracy H. Hewett in Mecklenburg County District Court, Mother testified that Father has been required to pay her a total of $86,400.00 in child support since 1 October 2005, but that she had only received "I think it's four—around $4,600.00" "from Centralized Collections to date." Mother was next asked:

> Q. [C]an you tell the Court when a Centralized Collection account came into existence?
>
> A. Early 2015.
>
> Q. . . . Did a Centralized Collection account exist before then?
>
> A. No.
>
> Q. Okay. So can you tell the Court whether or not, when—before the Centralized account existed, how did you receive child support payments?
>
> A. When he paid it it was with checks.
>
> . . . .
>
> Q. So since the collections account became active in 2015, have you—can you tell the Court whether or not you've received payments outside of Centralized Collections?
>
> A. No, I haven't.

Mother then testified that she was "not sure" how much child support Father had failed to pay her since 2005; she "just kn[e]w it's many tens of thousands of dollars."

Father, on the other hand, admitted that he had an arrearage, but testified that the current arrearage was "roughly around $12,500.00." Father explained that Mother had been opposing his pending motion to reduce his child support payments for four years, "so that's why [a child support arrearage had] actually grown or even exists." In addition, Father testified that in July 2016, he was adjudicated to have a total child support arrearage of $6,517.07 and that the trial court modified the 2005 Order. According to Father, he was "obligated to continue to pay the $600.00 a month that [he had] always been ordered to pay[,]" in addition to $40.00 each month to be applied toward the arrearage. Father further asserted that Mother's allegation that he owed $77,000.00 in back child support was "[a]bsolutely false" and that he had paid "well over $70,000.00" in child support "over the last 12 or 13 years."

By order entered 1 December 2017, the trial court concluded in pertinent part that

> [b]ecause neither party presented any evidence to show the Court how much child support [Father] actually paid or did not pay to [Mother] from November 1, 2005, through February 26, 2017, [Father] is neither liable nor in civil contempt for any failure to pay child support to [Mother].

Mother timely filed notice of appeal.

Mother ordered a partial transcription of certain limited portions of the contempt hearing for inclusion in the record on appeal. While the record indicates that the contempt hearing continued for at least two hours, the four select portions of the transcript that Mother produced only account for roughly fifteen minutes of that proceeding. Thus, there was presumably one hour and forty-five minutes of evidence that was presented to the trial court during the contempt hearing that is unavailable to this Court in our review of the trial court's resulting order. Father did not approve the record on appeal, or participate in its preparation.[1]

Nevertheless, on appeal, Mother urges this Court to instruct the trial court to enter a judgment in which it (1) "finds that [Father] violated the

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1. Father "fail[ed] to serve either notices of approval or objections, amendments, or proposed alternative records on appeal" within thirty days after service, and thus Mother's "proposed record on appeal . . . constitutes the record on appeal." N.C.R. App. P. 11(b).

parties' [2005 Order] by being in arrears"; and (2) "concludes as a matter of law that [Father] failed to meet his burden of proof and, as a result, is liable for the entire amount of child support arrears pled by [Mother] in her verified motion: $77,179.54[.]" This we decline to do. However, we agree with Mother that the case must be remanded to the trial court with instructions to make appropriate findings of fact and conclusions of law.

Discussion

This Court's review of a civil contempt proceeding

> is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (internal citations, quotation marks, and brackets omitted).

A party may be held in civil contempt for failure to comply with a court order, including a child support order, so long as:

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2017). Thus, noncompliance with a court order is a prerequisite before the trial court may hold a party in civil contempt.

Civil contempt proceedings may be initiated by the filing of a "motion and sworn statement or affidavit of one with an interest in enforcing the

order . . . and a finding by the judicial official of probable cause to believe there is civil contempt." N.C. Gen. Stat. § 5A-23(a) (2017). Thereafter, the proceeding is commenced "by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt[.]" *Id.* "The opposing party must then show cause why he should not be found in contempt." *Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985). In other words, "[a] show cause order in a civil contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show why he should not be held in contempt." *Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 143 (citation and quotation marks omitted). A defendant who chooses not to present evidence as to why he should not be found in contempt does so "at his own peril." *Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991). Following the contempt hearing, the trial court "must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a)." N.C. Gen. Stat. § 5A-23(e).

In the instant case, upon Mother's Verified Motion for Order to Show Cause, the district court found that there was probable cause to believe that Father was in civil contempt for failing to comply with the 2005 Order, and Father was ordered to appear and show cause as to why he should not be held in contempt. Thereafter, the trial court concluded that Father was "neither liable nor in civil contempt for any failure to pay child support to [Mother]" because "neither party presented any evidence to show the Court how much child support [Father] actually paid or did not pay." Mother contends, however, that because the burden of proof had shifted to Father, the trial court's conclusion that *neither* party presented the requisite evidence reveals that it was compelled to "have found [Father] liable for the entire amount of arrears pled by [Mother]: $77,179.54." Mother's argument is misplaced.

Mother is correct that upon entry of the trial court's Order to Appear and Show Cause, it became Father's burden to establish why he should not be held in contempt. *See Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 143. Nonetheless, the trial court was only authorized to find Father in contempt if there was sufficient evidence to support each of the elements required for a finding of civil contempt under N.C. Gen. Stat. § 5A-21(a). *See* N.C. Gen. Stat. § 5A-23(e) ("At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a)."); *see also Carter v. Hill*, 186 N.C. App. 464, 466-67, 650 S.E.2d 843, 844-45 (2007)

("Findings of fact on these particular [§ 5A-21(a)] elements are conspicuously absent from the trial court's contempt order in this case. . . . [This] error[] . . . would alone be sufficient to reverse the trial court's entry of the contempt order.").

Here, as an initial matter, the trial court's order is devoid of findings as to whether Father was in compliance with the trial court's most recent order concerning his child support obligation. Father testified that in July 2016, the trial court modified the 2005 Order by increasing Father's child support payments by $40.00 each month, to be applied toward his adjudicated arrears. Mother failed to mention the 2016 Order in her Verified Motion for Order to Show Cause, nor did she include it in the Record on Appeal. Despite being in arrears, if Father made all of his child support payments as ordered in 2016 when his arrears were adjudicated, Father would be in compliance and would not be in contempt of court.

Also absent from the trial court's order are several of the requisite findings under N.C. Gen. Stat. § 5A-21(a). There is no indication whether the purpose of the 2005 Order could still be served by Father's compliance therewith; whether Father's alleged noncompliance was willful; or whether Father was able to comply with the 2005 Order, or to take reasonable measures to do so. *E.g.*, *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985) (vacating the contempt order where "[n]o finding was made as to appellant's present ability to pay the arrearages"). Nor are we able to infer any of the relevant findings from the trial court's order. *Cf. Plott*, 74 N.C. App. at 85, 327 S.E.2d at 275 ("Though the findings are not explicit, *it is clear* that plaintiff both possessed the means to comply with the order and has wilfully refused to do so. While explicit findings are always preferable, they are not absolutely essential where the findings otherwise clearly indicate that a contempt order is warranted." (emphasis added) (citation omitted)). Mother did not provide this Court with a complete record of the relevant pleadings, including the 2016 Order that appears to have modified Father's child support obligation. Nor did we receive a full transcript of the proceedings before the trial court. The transcript is limited to brief, carefully selected fragments of the hearing, and we are otherwise unable to determine whether the evidence was sufficient to justify the trial court's refusal to hold Father in civil contempt or liable for past-due child support. *See*, *e.g.*, *McMiller*, 77 N.C. App. at 810, 336 S.E.2d at 136 ("The record before this court is unclear as to what evidence if any was taken to show [the] defendant's present ability or lack of present ability to pay the arrearage. Therefore, the judgment is vacated and the action remanded to the district court

for further proceedings not inconsistent with this opinion."); *Frank v. Glanville*, 45 N.C. App. 313, 316, 262 S.E.2d 677, 679 (1980) ("It is not clear from the record in this case that [the] defendant has the ability to comply with the contempt order, ever had the ability, or will ever be able to take reasonable measures that would enable him to comply. For that reason and because no finding of fact detailing [the] defendant's ability to comply with the contempt order was made, this case is reversed and remanded[.]").

Accordingly, because we are unable to ascertain the propriety of the trial court's order declining to hold Father in civil contempt or liable for past-due child support payments, we vacate that portion of the order and remand to the trial court for entry of an order containing the necessary findings of fact and conclusions of law, consistent with this opinion. We leave it to the trial court's discretion whether to accept additional evidence and arguments on remand.

VACATED IN PART AND REMANDED.

Judges CALABRIA and TYSON concur.

NATASHA SPENCER, PLAINTIFF
v.
PORTFOLIO RECOVERY ASSOCIATES, LLC, DEFENDANT

No. COA18-629

Filed 18 December 2018

Appeal and Error—appealability—interlocutory order—arbitration

An appeal from an order compelling arbitration was dismissed as interlocutory where plaintiff did not demonstrate that a substantial right would be lost if her appeal was not heard. Although plaintiff attempted to distinguish controlling precedent on the basis of a difference between North Carolina's Revised Uniform Arbitration Act (NC-RUAA) and the Federal Arbitration Act (FAA), there was no reason that the substantial right analysis would be any different under the FAA versus the NC-RUAA.

Appeal by plaintiff from order entered 23 January 2018 by Judge Richard L. Doughton in Superior Court, Yadkin County. Heard in the Court of Appeals 14 November 2018.

Law Office of Jonathan R. Miller, PLLC, d/b/a Salem Community Law Office, by Jonathan R. Miller, for plaintiff-appellant.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Caren D. Enloe and Zachary K. Dunn, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an interlocutory order compelling arbitration. Because plaintiff has not demonstrated that a substantial right would be lost if her appeal is not heard, we dismiss.

On 23 January 2018, the trial court granted defendant's motion to compel arbitration. Plaintiff concedes that

> [t]his precise question of the appealability of an order compelling arbitration has previously been decided by a different panel of this Court in *The Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 314 S.E.2d 291 (1984). This Court in *The Bluffs* held that an order compelling arbitration was interlocutory and did not affect a substantial right. We find the reasoning in *The Bluffs* persuasive and its holding dispositive of the case before us. Further, we are bound by it as precedent.

N. Carolina Elec. Membership Corp. v. Duke Power Co., 95 N.C. App. 123, 127, 381 S.E.2d 896, 898 (1989).

The only argument plaintiff raises to distinguish this case from *N. Carolina Elec. Membership Corp.* is that it arose from an arbitration under the Revised Uniform Arbitration Act ("NC-RUAA"), but this case arises under the Federal Arbitration Act ("FAA"). But our prior cases have not relied upon any unique feature of the NC-RUAA. *See, e.g.*, *N. Carolina Elec. Membership Corp.*, 95 N.C. App. 123, 381 S.E.2d 896. Plaintiff has not presented any single reason why an order for arbitration under the FAA would raise a substantial right but the NC-RUAA does not. Like the NC-RUAA, the FAA also normally does not allow interlocutory appeal of an order compelling arbitration.[1] The hardships

1. "(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order-- (1) granting a stay of any action under section 3 of this title; (2) directing arbitration to proceed under section 4 of this title; (3) compelling arbitration under section 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title." 9 U.S.C.A. § 16 (West 2009).

plaintiff argues here are the same as those of a party appealing an arbitration order under the NC-RUAA. Plaintiff has not identified any provision of the FAA which would make immediate review necessary. We see no reason, nor does plaintiff raise any substantive reason, why the substantial right analysis would be any different under the FAA versus the NC-RUAA.

Accordingly, we dismiss this interlocutory appeal.

DISMISSED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
SAMANTHA LEIGH BAKER, Defendant

No. COA18-527

Filed 18 December 2018

1. Jurisdiction—presentment and indictment—simultaneous submission to grand jury—validity

In an appeal from the superior court's order dismissing misdemeanor charges against a defendant for lack of subject matter jurisdiction, the Court of Appeals affirmed the trial court's determination that the State's simultaneous delivery to the grand jury of substantially identical presentments and indictments violated Sections 7A-271 and 15A-641 and rendered both documents invalid. Although a superior court attains jurisdiction over a misdemeanor pursuant to section 7A-271 if the charge is initiated by presentment, the plain language of section 15A-641(c) describing the procedure for presentments obligates a prosecutor to conduct an investigation upon a grand jury's directive. The procedure necessarily entails some passage of time after the issuance of a presentment and before that of an indictment, which did not occur in this case.

2. Constitutional Law—North Carolina—criminal charge—requirement of valid presentment or indictment

In an appeal from the superior court's order dismissing misdemeanor charges against a defendant for lack of subject matter jurisdiction, the Court of Appeals affirmed the trial court's determination

that the procedure used by the State in submitting substantially identical presentments and indictments to the grand jury at the same time violated defendant's rights pursuant to N.C. Const. art. I, § 22, since the Court held elsewhere in the opinion that the presentments and indictments were invalid. The trial court erred in finding the State's procedure violated sections 19 and 23 of the state constitution, as only section 22 was implicated.

3. Jurisdiction—superior court—lack of subject matter jurisdiction—remedy—remand to district court

In an appeal from the superior court's order dismissing misdemeanor charges against a defendant for lack of subject matter jurisdiction, the Court of Appeals held the dismissal was in error where the proper remedy was to transfer the matter to district court pursuant to N.C.G.S. § 7A-271(c). The district court still had authority to exercise jurisdiction where the superior court never attained jurisdiction due to invalid presentments and indictments, and the prosecutor made clear that the district court case was never dismissed.

Appeal by State from order entered 27 November 2017 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 15 November 2018.

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

The Robinson Law Firm, P.A., by Leslie S. Robinson for Defendant-Appellee.

INMAN, Judge.

The State appeals from the superior court's order dismissing misdemeanor charges against Samantha Leigh Baker ("Defendant") for lack of subject matter jurisdiction. After careful review of the record and applicable law, we affirm the superior court's ruling that the State improperly circumvented district court jurisdiction by simultaneously obtaining a presentment and indictment from a grand jury, but we hold that the charges are not subject to dismissal. We affirm in part, reverse in part, and remand.

I. Factual and Procedural Background

The record reflects the following facts:

On 31 December 2015, Defendant was arrested and issued citations for impaired driving and operating an overcrowded vehicle in Pitt County. After Defendant's initial hearing date in Pitt County District Court and before her case was called for trial, Defendant was indicted by the Pitt County Grand Jury on both misdemeanor counts and her case was transferred to Pitt County Superior Court.

In the wake of a decision by this Court holding that impaired driving citations were insufficient to toll the two-year statute of limitations for prosecution of those cases,[1] the Pitt County District Attorney's Office employed a novel and unusual procedure to obtain grand jury presentments and indictments in pending impaired driving cases. Legal assistants to prosecutors prepared presentments and indictments identical in content, except for their titles ("PRESENTMENT" versus "INDICTMENT") and the description of the grand jury's action in the foreman's signature block ("Bill of Presentment" versus "Bill of Indictment"). After a prosecutor signed both the presentment and indictment for each impaired driving case, both documents were combined and placed in a folder for simultaneous delivery to the grand jury.

At the start of the next superior court session in which the grand jury was convened, the prosecutor delivered to a law enforcement officer in charge of the grand jury, in open court, the folder containing all documents to be reviewed by the grand jury in that session, including the substantially identical presentments and indictments for impaired driving cases. When the arresting officer in each impaired driving case came before the grand jury, the grand jury officer provided to the testifying officer both the presentment and indictment for that case. As with all grand jury proceedings, all the testimony and verbal exchanges before the grand jury occurred behind closed doors and in secret, so no transcript is available of those proceedings.

During its session on 27 February 2017, the grand jury considered the presentment and indictment prepared and signed by the district

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1. Assistant District Attorney Phillip Entzminger—the prosecutor who signed the presentment and indictment at issue—testified that the procedure was in response to a then-recent, but later struck down, decision rendered by this Court. *See State v. Turner*, __ N.C. App __, __, 793 S.E.2d 287, 290 (2016) (holding that Section 15-1 of our General Statutes does not toll the two-year statute of limitations for, *inter alia*, citations received for driving while impaired), *rev'd by* __ N.C. __, 817 S.E.2d 173 (2018).

attorney's office charging Defendant with impaired driving and operating an overcrowded vehicle, and heard testimony from Officer C. Cordena, the officer who had arrested and initially cited Defendant for those offenses.

At the end of the 27 February 2017 session, the grand jury foreman, escorted by the grand jury officer, returned to the courtroom and presented to the presiding judge the folder containing all the documents reviewed and returned by the grand jury. After the judge reviewed the documents and confirmed in open court that each had been signed by the grand jury foreman, they were filed with the clerk's office.[2]

Defendant's case was ultimately called for trial in Pitt County Superior Court. Defendant filed a motion to dismiss her case for lack of subject matter jurisdiction due to the constitutional and statutory invalidity of the presentment and indictment procedure. After a hearing, the superior court on 27 November 2017 granted Defendant's motion, concluding that the district attorney's office had violated Sections 7A-271 and 15A-641 of our General Statutes and Defendant's constitutional rights. The State timely appealed.

II. Analysis

A. Standard of Review

[1] The State argues that the superior court erred in concluding as a matter of law that it was without jurisdiction to hear Defendant's case. "Questions of subject matter jurisdiction are reviewed *de novo*." *State v. Rogers*, __ N.C. App. __, __, 808 S.E.2d 156, 162 (2017).

The State does not challenge any of the trial court's findings of fact, so each of those findings is binding on appeal. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Conclusions of law drawn from the findings of facts are reviewed *de novo*. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id*. at 628, 669 S.E.2d at 294 (quotations and citations omitted).

B. Presentment and Indictment

The district court is vested with exclusive jurisdiction for most misdemeanor cases. N.C. Gen. Stat. § 7A-272(a) (2017). The superior court

2. The grand jury proceedings took place from 10:01 am until 3:52 pm. In that time span, the grand jury returned 286 true bills of indictments, 34 presentments, and one no true bill.

attains original jurisdiction for misdemeanor actions only if, among other independent reasons, "the charge is initiated by presentment." N.C. Gen. Stat. § 7A-271(a)(2) (2017).

> A presentment is a written accusation by a grand jury, *made on its own motion* and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the *district attorney is obligated to investigate* the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

N.C. Gen. Stat. § 15A-641(c) (2017) (emphasis added). An indictment, by contrast, "is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses." N.C. Gen. Stat. § 15A-641(a) (2017). The plain language of Section 15A-641 precludes a grand jury from issuing a presentment and indictment on the same charges absent an investigation by the prosecutor following the presentment and prior to the indictment.

The State argues that Section 15A-641 conflicts with Section 15A-644, requiring a contrary conclusion. Section 15A-644 provides that a valid presentment "must contain everything required of an indictment" except that the statutory requirement for the prosecutor's signature "do[es] not apply."[3] N.C. Gen. Stat. § 15A-644(c) (2017). An indictment must contain (1) the superior court's name; (2) the title of the action; (3) the criminal offense charged; (4) the prosecutor's signature, though its absence is not fatal; and (5) the grand jury foreman's signature attesting the grand jury's unanimous concurrence. *Id.* § 15A-644(a). The State asserts that Section 15A-644(c) governs the procedure for presentments, and that because the presentment here meets all the requirements of Section 15A-644(c), it is valid.

The State further asserts that Section 15A-641(c) is merely a definitional provision, intending to only parallel the common law definition of a presentment.

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3. Because we base our decision today on the *timing* of the presentment and the indictment, not the *substance* of the presentment, we need not address the issue of whether a prosecutor's signature on a presentment form given to the grand jury violates Section 15A-644.

The State confuses the issue in this case. It is not the sufficiency of the presentment form and contents that is at issue, but the presentment's simultaneous occurrence with the State's indictment that makes both invalid. Also, contrary to the State's argument, the second sentence of Section 15A-641(c) does in fact dictate what procedure must occur before an indictment can be provided. A valid presentment instructs the prosecutor to perform an investigation, without an accompanying indictment, into suspected illegal activity. N.C. Gen. Stat. § 15A-641(c); *State v. Morris*, 104 N.C. 837, 839, 10 S.E. 454, 455 (1889).[4] This procedural requirement, while also defining what a presentment is, was not followed in this case. Contrary to the State's argument, Sections 15A-644(c) and 15A-641(c) do not conflict with each other. One merely defines what a presentment is and what it instructs, while the other provides what an *otherwise valid presentment* must contain.

Section 15A-641 was "intended to set out the North Carolina common law relating to the definitions of indictment . . . and presentment." N.C. Gen. Stat. § 15A-641 official commentary (2017). So, in addition to deriving our holding based on the plain language of the statute, we consider the long history of case law regarding presentments and indictments to interpret the statute.

The distinction between an indictment and a presentment dates as far back as the 1776 Halifax Convention, the genesis of North Carolina's Constitution. *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952). Enshrined within Section 8 of the Declaration of Rights, the 1776 Constitution provided that "no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment." *Id.* at 457, 73 S.E.2d at 285 (quotations omitted). While North Carolina's Constitution was, in relevant part, adjusted in 1797, 1868, and again in 1950, that delineation between presentment and indictment never wavered. *Id.* at 457, 73 S.E.2d at 285. Article I, Section 22 of our Constitution provides:

> Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, *or* impeachment. . . .

N.C. Const. art. I, § 22 (emphasis added). Historically, similar to the way the terms are codified now in Section 15A-641, an indictment was

4. This decision was reprinted in 1920 as 104 N.C. 576.

referenced in the "constitutional provision to signify a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury . . . as a true bill." *Thomas*, 236 N.C. at 457, 73 S.E.2d at 285. By contrast, a presentment was "an accusation, made *ex mero motu* by a grand jury, of an offense, upon their own observation and knowledge, or upon evidence before them, and *without any bill of indictment laid before them*." *Morris*, 104 N.C. at 839, 10 S.E. at 455 (emphasis added). Some duration of time is required for the prosecutor to sufficiently investigate the grand jury's directive because the presentment must not stem from "any bill of indictment [brought] before them."[5] *Lewis v. Bd. of Comm'rs of Wake Cnty.*, 74 N.C. 194, 197 (1876).[6]

While the grand jury acts of its own volition for presentments, it can still rely "upon information from others," including the prosecutor.[7] *Thomas*, 236 N.C. at 457, 73 S.E.2d at 285; *see* N.C. Gen. Stat. § 15A-628(a)(4) (2017) ("An investigation may be initiated upon the concurrence of 12 members of the grand jury itself or upon the request of the presiding or convening judge or the prosecutor."); *see also State v. Gunter*, 111 N.C. App. 621, 625, 433 S.E.2d 191, 193 (1993) ("[T]he district attorney presented information to the grand jury regarding the offense, and the grand jury issued the presentment[.]").

Since 1797, presentments have not initiated criminal charges; rather, a presentment is "nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment" to submit back to them. *State v. Wall*, 271 N.C. 675, 682, 157 S.E.2d 363, 368 (1967) (quotations and citation omitted). If the delivery of an indictment

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5. For the first time on appeal, during oral argument, the State asserted that in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978), the North Carolina Supreme Court held that an indictment issued on the same day as a presentment was valid. *Cole* is readily distinguishable in fact and law. The defendant in *Cole* was tried originally in the district court in 18 December 1974 and only went to the superior court on appeal. So *Cole* was not a case in which the superior court had original jurisdiction. While Defendant's appeal was pending in superior court, the grand jury returned a presentment and the district attorney's office issued an indictment on the same day, though the decision does not state whether the presentment and indictment occurred simultaneously. Contrary to the State's rendition, *Cole* held that an indictment language must only contain the "same factual subject matter" initiated by the presentment; that decision did not address the temporal context of the presentment and indictment. *Id.* at 309, 240 S.E.2d at 358.

6. This decision was reprinted in 1957 as 74 N.C. 156.

7. We agree with the State that the prosecutor did not violate Section 15A-628(a)(4) or the common law practice of furnishing information to the grand jury—in the guise of the presentment form and Officer Cordena's private grand jury testimony—in order to facilitate its investigation.

were not preceded by a factual investigation by the prosecutor after the return of a presentment, then the presentment, in and of itself, would institute criminal proceedings. *See State v. Guilford*, 49 N.C. (4 Jones) 83, 86 (1856) (noting that, prior to 1797, grand jury presentments "were frequently so informal" that they oppressed citizens who "had committed no violation of the public law"). A presentment returned simultaneously with an indictment would not be from the grand jury's "own knowledge or observation," or "upon information from others," but by the direct endorsement of the prosecutor. *Thomas*, 236 N.C. at 457, 73 S.E.2d at 285.

For all of these reasons, we are unpersuaded by the State's argument that the simultaneous submission to, and return of, both a presentment and an indictment in a misdemeanor case could confer jurisdiction on the superior court.

Here, the trial court found that the prosecutor "did not investigate the factual background of the Presentment after it was returned and before the Grand Jury considered the Indictment" of Defendant on the misdemeanor charges. Instead, "the prosecutor's office reviewed the case file prior to the preparation of the Presentment and Indictment." Because the prosecutor submitted these documents to the grand jury simultaneously and they were returned by the grand jury simultaneously, in contravention of Section 15A-641(c), we hold that each was rendered invalid as a matter of law. Because the presentment and indictment were invalid, we affirm the superior court's ruling that it did not have subject matter jurisdiction.

C. Constitutional Issues

[2] The trial court also concluded that Defendant's North Carolina constitutional rights were violated pursuant to Article I, Sections 19, 22, and 23 of our Constitution. The State and Defendant agree on appeal that only Article I, Section 22 is implicated in this case.

Article I, Section 22 provides:

> Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

N.C. Const. art. I, § 22. Defendant contends she was "put to answer" for her criminal charges by the invalid presentment and indictment. As

discussed *supra*, the presentment and indictment were invalid because they were issued and returned in violation of Sections 7A-271 and 15A-641. As a result of the State's improper prosecution in superior court, Defendant had to appear in that court to seek dismissal of the prosecution and had to appear before this Court following the State's appeal. Although we affirm the trial court's conclusion of law that the superior court prosecution violated Defendant's right pursuant to Article I, Section 22, we need not determine whether Defendant was prejudiced by the State's violation of her North Carolina constitutional right and do not address that issue.

D. Dismissal Versus Remand to District Court

[3] The State, pursuant to authorities submitted supplemental to its briefs and in oral argument, contends that if this Court holds the superior court was without jurisdiction, the proper remedy is not dismissal but remand to the district court for proceedings commenced by Defendant's initial misdemeanor citations. We agree.

Section 7A-271(c) provides that the superior court, if it does not have jurisdiction pursuant to Section 7A-721(a), must "transfer[] to the district court any pending misdemeanor." N.C. Gen. Stat. § 7A-271(c) (2017). Accordingly, rather than affirming the trial court's order of dismissal, we remand to the superior court to enter an order transferring Defendant's case to the district court in Pitt County.

We acknowledge and distinguish this Court's recent decision in *State v. Cole*, __ N.C. App. __, __ S.E.2d __ (2018) (No. COA18-286). In *Cole*, Defendant was initially prosecuted, tried, and ultimately found guilty of driving while impaired in superior court. The superior court held concurrent jurisdiction with the district court when the grand jury issued a presentment and then, five days later, an indictment charging the defendant with impaired driving, and then exercised its jurisdiction when the case went to trial. *Id.* at __, __ S.E.2d at __; *see Gunter*, 111 N.C. App. at 624, 433 S.E.2d at 193 (holding that Section 7A-271(a)(2) grants the superior court the ability to acquire jurisdiction of a case already pending in district court). On appeal, the defendant argued that his pretrial motion to dismiss should have been granted because "the State never dismissed the citation in district court," which was still active and pending. *Cole*, __ N.C. App. at __, __ S.E.2d at __. During the motion to dismiss hearing, the State admitted that there was no longer a pending district court case against the defendant. *Id.* at __, __ S.E.2d at __. We held that (1) "[d]espite the State's failure to dismiss the citation in district court, it made clear it had abandoned its prosecution in district court" in favor

of the superior court, serving as a "functional equivalent of a dismissal;" and (2) once jeopardy attached in the superior court, the State was precluded from bringing the case a second time in the district court. *Id.* at __, __ S.E.2d at __.

The superior court and district court can under certain circumstances retain concurrent jurisdiction in a criminal matter. However, when this happens, "the court first exercising jurisdiction in a particular prosecution obtains jurisdiction to the exclusion of the other. But when it enters a *nolle prosequi* it loses jurisdiction and the other court may proceed." *State v. Karbas*, 28 N.C. App. 372, 374, 221 S.E.2d 98, 100 (1976).

In *Cole*, there was "no record evidence suggesting the district court exercised its jurisdiction over the offense after the existence of concurrent jurisdiction with the superior court." *Cole*, __ N.C. App. at __, __ S.E.2d at __. Additionally, the prosecutor in *Cole* made an express statement on the record that there was no longer a pending district court case because it was "super[s]eded" by the superior court indictment. *Id.* at __, __ S.E.2d at __. Unlike in *Cole*, the superior court in this case failed to attain jurisdiction over Defendant and the prosecutor made clear that the district court case was "never dismissed." Because the superior court was unable to exercise any jurisdiction, let alone to the exclusion of the district court, *Cole*'s holding that the State functionally dismissed the prosecution in district court once the superior court exercised exclusive jurisdiction is inapposite. Furthermore, jeopardy never attached against Defendant because the superior court determined it lacked jurisdiction.

In sum, Section 7A-271(c) instructs the trial court to transfer the misdemeanor charge to the district court when Section 7A-271(a) cannot be met. While *Cole* holds that the State implicitly abandons its prosecution in district court when it proceeds to trial in superior court and acknowledges its intent on the record not to proceed in district court, it does not apply here where the superior court failed to even exercise jurisdiction. Thus, the district court still has authority to exercise jurisdiction over Defendant's case and, upon remand, should be transferred thereto.

III. Conclusion

We hold that the trial court did not err in concluding that it was without jurisdiction to hear Defendant's case because the presentment and indictment were improperly obtained and were thus invalid. We affirm the trial court's ruling that the prosecution violated Sections 7A-271 and 15A-641 of our General Statutes and Article I, Section 22 of the North

Carolina Constitution. We do not address whether Defendant was prejudiced by the State's violation of her North Carolina constitutional right.

We hold that the trial court erred in holding that the State violated Defendant's rights provided by Article I, Sections 19 and 23 of the North Carolina Constitution. We also hold that the trial court erred in dismissing the case, rather than transferring it to the district court upon the finding of a lack of jurisdiction.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
TERRAINE SANCHEZ BYERS

No. COA18-250

Filed 18 December 2018

1. Appeal and Error—preservation of issues—denial of motion for DNA testing

Defendant preserved for appellate review the denial of his motion for post-conviction DNA testing. N.C.G.S. § 15A-270.1 explicitly states that the defendant may appeal an order denying the defendant's motion for DNA testing, including by an interlocutory appeal.

2. Criminal Law—post-conviction DNA testing—inventory

The statutory procedure for an inventory of evidence for post-conviction DNA testing is set out in N.C.G.S. § 15A-268(a7) and N.C.G.S. § 15A-269(f). In this case, there was no evidence in the record that defendant made a request to a custodial agency and was not entitled to an inventory of the evidence under section 15A-268(a7).

3. Criminal Law—post-conviction DNA testing—inventory—timing

The trial court did not err by denying defendant's motion for post-conviction DNA testing prior to obtaining and reviewing the inventory. N.C.G.S. § 15A-269(b) clearly lays out the conditions that

must exist prior to granting a motion for post-conviction DNA testing; obtaining and reviewing the results of an inventory prepared by a custodial agency is not one of the conditions. Whether the requested evidence is still in the possession of the custodial agency is immaterial to the trial court's determination.

4. Attorneys—appointment of counsel—post-conviction DNA testing—materiality requirement

The trial court erred by denying defendant's motion for post-conviction DNA testing where the allegations in defendant's motion were sufficient to establish that he was entitled to the appointment of counsel. To be entitled to counsel, defendant must establish that the DNA testing may be material to his wrongful conviction claim and the weight of the evidence indicating guilt must be weighed against the probative value of the possible DNA evidence. The materiality standard must not be interpreted in such a way as to make the relief unattainable.

Judge ARROWOOD dissenting.

Appeal by Defendant from order dated 3 August 2017 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 1 October 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant.

McGEE, Chief Judge.

Terraine Sanchez Byers ("Defendant") was convicted of first-degree murder of his former girlfriend and first-degree burglary on 3 March 2004. After exhausting his direct appeal, Defendant filed a *pro se* motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 on 31 July 2017. The trial court entered an order dated 3 August 2017 denying Defendant's motion. Defendant appeals and argues that the trial court erred in denying his motion for post-conviction DNA testing. We agree.

I. Factual and Procedural History

Defendant was convicted of first-degree murder and first-degree burglary on 3 March 2004. Defendant was sentenced to life imprisonment

without parole for the murder conviction and a minimum of 77 months to a maximum of 102 months of imprisonment for the burglary conviction. Defendant appealed and this Court upheld the trial court's decision in *State v. Byers*, 175 N.C. App. 280, 623 S.E.2d 357 (2006) ("*Byers I*"). Our Supreme Court subsequently denied Defendant's petition for discretionary review on 6 April 2006. S*tate v. Byers*, 360 N.C. 485, 631 S.E.2d 135 (2006).

Defendant's convictions arose out of events that occurred on the evening of 22 November 2001 when Defendant's ex-girlfriend, Shanvell Burke ("Ms. Burke"), was stabbed to death inside her Charlotte apartment ("Ms. Burke's apartment" or "the apartment"). Officers had previously been called to Ms. Burke's apartment multiple times because of Ms. Burke's fear of Defendant. *Byers I*, 175 N.C. App. at 284, 623 S.E.2d at 359-60. Reginald Williams ("Mr. Williams") was inside Ms. Burke's apartment on the evening of 22 November 2001 and testified that he and Ms. Burke were watching television when they heard a crash at the back door of the apartment. *Id.* at 283, 623 S.E.2d at 359. Mr. Williams further testified that Ms. Burke went to the back door and he heard her yelling, "Terraine, stop" before Mr. Williams fled the apartment in fear. *Id.*

When officers arrived at the scene, they saw Defendant leaving the apartment through a broken window in a door, and described him as "nervous and profusely sweating." *Id.* at 283, 623 S.E.2d at 359. After informing the officers that Ms. Burke was inside and injured, Defendant attempted to flee the scene. *Id.* Defendant was quickly apprehended and was found to have a deep laceration on his left hand. *Id.* The officers found Ms. Burke deceased inside the apartment. The officers also found a knife with a broken blade. *Id.* at 283-84, 623 S.E.2d at 359.

Investigators analyzed fingernail scrapings from Defendant's hands, a blood stain from a cushion on Ms. Burke's couch, the knife handle, the knife blade, and various other blood stains throughout the apartment. *Id.* at 285, 623 S.E.2d at 360. The DNA from the several samples all matched either Defendant or Ms. Burke. *Id.* Defendant stipulated that the blood on the shirt that he was wearing at the time of his arrest was Ms. Burke's. For a more detailed description of the facts underlying Defendant's convictions, refer to this Court's prior opinion in *Byers I*.

Defendant filed a *pro se* motion for post-conviction DNA testing on 31 July 2017. In his motion, Defendant asserted that he was on the other side of town waiting for a bus when the attack on Ms. Burke occurred. Defendant further alleged that one of the State's witnesses testified she saw Defendant getting on the 9:00 p.m. city bus on the night of the

events in question. Defendant alleged that a private investigator swore in an affidavit that it would have been impossible for Defendant to arrive at Ms. Burke's apartment prior to the alleged 911 call.

Defendant further stated in his motion that, when he arrived at Ms. Burke's apartment, he noticed the "back door smashed in." Defendant also asserted that he went inside the apartment to investigate and was attacked by a man wearing a plaid jacket. The two men struggled, which Defendant argues explains the presence of his DNA throughout the apartment. Defendant stated he lost his balance during the attack and fell, allowing the assailant to escape. Defendant argues that, because both he and Ms. Burke struggled with the unknown assailant, DNA testing of his and Ms. Burke's previously untested clothing would reveal the identity of the actual perpetrator. Defendant noted that the State's DNA expert reported the presence of human blood in various locations throughout Ms. Burke's apartment that did not match either Defendant or Ms. Burke; however, this information was not introduced at trial. Defendant further requested that the items of clothing be preserved and that an inventory of the evidence be prepared.

The trial court entered an order dated 3 August 2017 denying Defendant's motion. The trial court held that Defendant had failed to sufficiently allege how DNA testing of the requested items would be "material to his defense." Defendant appeals.

II. Analysis

The issues Defendant argues are that the trial court erred in denying his motion for post-conviction DNA testing: (1) "prior to obtaining and reviewing the statutorily required inventory of evidence" collected during the criminal investigation, and (2) "before appointing counsel when [his] motion for such testing establishe[d] that . . . [D]efendant [was] indigent and that the testing may be material to his defense."

A. *Denial of Motion Prior to Inventory of Evidence*

Defendant argues the trial court erred by denying his motion for post-conviction DNA testing before obtaining and reviewing the statutorily required and requested inventory of physical and biological evidence collected during the criminal investigation.

1. Appellate Jurisdiction

[1] Initially, the State responds by arguing Defendant "lacks the right to appeal" the denial of a motion to locate and preserve evidence under N.C. Gen. Stat. § 7A-27(b)(1) and N.C. Gen. Stat. § 15A-270.1. The State

further argues that Defendant failed to preserve this issue for appellate review by failing to obtain a ruling on the motion as required by N.C. R. App. P 10(a)(1), that "ordinarily results in waiver of appellate review of the issue." *In re B.E.*, 186 N.C. App. 656, 657, 652 S.E.2d 344, 345 (2007). However, the State misconstrues Defendant's argument. Defendant does not argue, as the State contends, that the trial court erred by failing to order the preservation and inventory of the requested evidence. Instead, Defendant argues the trial court erred in denying his motion for post-conviction DNA testing prior to receiving the inventory of evidence. Therefore, this case is distinguishable from the case cited by the State, *State v. Doisey*, 240 N.C. App. 441, 770 S.E.2d 177 (2015), where this Court dismissed a defendant's argument that the trial court erred in failing to order the inventory of biological evidence.

N.C. Gen. Stat. § 15A-270.1 (2017) explicitly states that "[t]he defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal." Therefore, appeal was the proper avenue for reversing the trial court's order, and Defendant preserved this issue for appellate review by appealing the denial of his motion for post-conviction DNA testing. Defendant has also filed a petition for a writ of *certiorari* for review of this issue. However, having found that Defendant's appeal is proper under N.C.G.S. § 15A-270.1, we deny his petition as unnecessary.

2. Procedure for the Inventory of Evidence

[2] In order to fully analyze Defendant's argument, we must consider the statutory procedure for requesting an inventory of evidence and the role of the inventory within the post-conviction DNA testing statute. The statutory procedure for compiling an inventory of evidence is set out in N.C. Gen. Stat. § 15A-268(a7), which requires custodial agencies:

> Upon written request by the defendant, the custodial agency shall prepare an inventory of biological evidence relevant to the defendant's case that is in the custodial agency's custody. If the evidence was destroyed through court order or other written directive, the custodial agency shall provide the defendant with a copy of the court order or written directive.

N.C.G.S. § 15A-268(a7). N.C.G.S. § 15A-269(f) (2017) similarly requires: "Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or

reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court."

Defendant's argument that the trial court erred by denying his motion for post-conviction DNA testing prior to obtaining an inventory of evidence was recently addressed by this Court in *State v. Tilghman*, ___ N.C. App. ___, ___ S.E.2d___, 2018 WL 4700630 (filed 2 October 2018). In *Tilghman*, the defendant made similar arguments under both N.C.G.S. § 15A-268(a7) and N.C.G.S. § 15A-269(f), that the trial court erred by denying his motion for post-conviction DNA testing prior to receiving an inventory of the evidence. *Tilghman*, ___ N.C. App. at ___, ___ S.E.2d at ___. In *Tilghman*, this Court, addressed both statutes in turn, rejected the defendant's arguments and found no error in the trial court's denial of the defendant's motion.

In addressing N.C.G.S. § 15A-268(a7), *Tilghman* held the trial court "did not err in denying [d]efendant's motion for postconviction DNA testing prior to obtaining an inventory of biological evidence which [d]efendant never requested, and we must dismiss this argument. . . . Assuming *arguendo* [d]efendant properly requested an inventory of biological evidence, case law would bind us to dismiss this argument." *Id.* at ___, ___ S.E.2d at ___ (internal citations omitted) (citing *Doisey*, 240 N.C. App. at 447-48, 770 S.E.2d at 181-82). Unlike the defendants in both *Tilghman* and *Doisey*, Defendant in the present case clearly filed a written request for an inventory of biological evidence. While Defendant's motion was titled a "Request for Post-Conviction DNA Testing," on page fourteen of his motion, Defendant specifically states: "Defendant also request [sic] the court to order preservation, preparation of the evidence and its inventory." Defendant's motion cites to both N.C.G.S. § 15A-268(a7) and N.C.G.S. § 15A-269(f).

However, in *State v. Randall*, ___ N.C. App. ___, ___, 817 S.E.2d 219, 222 (2018) this Court addressed the requirements of N.C.G.S. § 15A-268(a7) and held that the written request for an inventory of evidence must be directed to the custodial agency. This Court held that, without evidence in the record that the defendant made a proper request under N.C.G.S. § 15A-268(a7), there was no ruling for this Court to consider and that defendant's appeal must be dismissed. Similarly, the record in the case before us is devoid of any evidence indicating Defendant ever made a request to a custodial agency; therefore, Defendant was not entitled to an inventory of the evidence under N.C.G.S. § 15A-268(a7).

In addressing N.C.G.S. § 15A-269, this Court in *Tilghman* held:

> The statute is silent as to whether a defendant or the trial court bears the burden of serving the motion for inventory on the custodial agency.
>
> Here, the record lacks proof either Defendant or the trial court served the custodial agency with the motion for inventory. Assuming *arguendo* it is the trial court's burden to serve the custodial agency with the motion, any error by the court below [in denying the defendant's motion for post-conviction DNA testing prior to receiving the inventory] is harmless error. As held *supra*, Defendant failed to meet his burden of showing materiality. Accordingly, the trial [court] did not err by denying his motion for DNA testing prior to an inventory under N.C. Gen. Stat. § 15A-269(f).

Tilghman, ___ N.C. App. at ___, ___ S.E.2d at ___. As discussed below, Defendant in the present case, unlike in *Tilghman*, met his burden of showing materiality.

3. Timing of Trial Court's Determination

[3] Defendant contends that a trial court is required to receive the inventory prior to making its determination under N.C.G.S § 15A-269. We disagree. In *Doisey*, this Court stated:

> The stated policy behind [our State's DNA Database and Databank Act of 1993] is to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person[.] Thus, in applying the Act in any particular case, we must strive to harmonize its provisions while being mindful of this legislative intent and seeking to avoid nonsensical interpretations. Both the plain language of section 15A–269 as quoted *supra*, and the express intent of the Act as stated in section 15A–266.1, make absolutely clear that its ultimate focus is to help solve crimes through DNA *testing*. All provisions of the Act must be understood as facilitating that ultimate goal.

Doisey, 240 N.C. App. at 445, 770 S.E.2d at 180 (internal quotation marks and citations omitted). We further noted that "the required inventory under section 15A–269 is merely an ancillary procedure to an underlying request for DNA testing." *Id.* at 446, 770 S.E.2d at 181.

N.C.G.S. § 15A-269(f) provides that: "[u]pon receipt of a motion for postconviction DNA testing, the custodial agency *shall* inventory the evidence . . . ." This language indicates that a custodial agency's duty to prepare an inventory is conditioned on the receipt of a motion for post-conviction DNA testing, unlike N.C.G.S. § 15-268(a7), where the duty to act is predicated on the receipt of a "written request by the defendant." "Thus, a defendant who requests DNA testing under section 15A–269 need not make any additional written request for an inventory of biological evidence." *Doisey*, 240 N.C. App. at 445, 770 S.E.2d at 180.

Under the language of N.C.G.S. § 15A-269, the trial court's duty is not similarly conditioned on the receipt of an inventory from a custodial agency. Instead, N.C.G.S. § 15A-269(b) states:

> 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.G.S. § 15A-269(b) clearly lays out three conditions the trial court must determine exist prior to granting a motion for post-conviction DNA testing. Obtaining and reviewing the results of an inventory prepared by a custodial agency is not one of the conditions. This reading of N.C.G.S. § 15A-269(b) is consistent with the overall purpose of the statute to "assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person[.]" *Doisey*, 240 N.C. App. at 445, 770 S.E.2d at 180.

Defendant argues that, "[w]ithout obtaining and reviewing the required inventories, the trial court lacked any knowledge about the nature or status of the evidence in [Defendant's] case[.]" Under N.C.G.S. § 15A-269(a), "[t]he defendant has the burden . . . of establishing

the facts essential to his claim by a preponderance of the evidence." *State v. Cox*, 245 N.C. App. 307, 310, 781 S.E.2d 865, 867 (2016). The trial court's ability to analyze whether the conditions in N.C.G.S. § 15A-269(b) were met is not contingent on the results of an inventory of the evidence. Whether the requested evidence is still in the possession of the custodial agency is immaterial to the trial court's determination under N.C.G.S. § 15A-269(b). Instead, the trial court is required to make its determination as to whether Defendant has sufficiently alleged the conditions set forth in N.C.G.S. § 15A-269(b) that the DNA testing sought is: (1) material to Defendant's defense, (2) related to the prior investigation or prosecution, (3) has not been tested previously or would result in more accurate results, (4) likely to produce a more favorable result for Defendant, and (5) Defendant has signed an affidavit of innocence. *See* N.C.G.S. § 15A-269(b). Therefore, the trial court did not err in denying Defendant's motion for post-conviction DNA testing prior to obtaining and reviewing the inventory.

B. *Appointment of Counsel*

[4] Defendant argues the trial court erred in denying his motion for post-conviction DNA testing because the allegations in his motion were sufficient to establish that he was entitled to the appointment of counsel. We agree. N.C. Gen. Stat. § 15A-269 (2017) sets out the standards for evaluating motions for post-conviction DNA testing and for the appointment of counsel. Under N.C.G.S. § 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.

. . . .

> (c) . . . [T]he court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner . . . upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

N.C.G.S. § 15-269. "Thus, to be entitled to counsel, defendant must first establish that (1) he is indigent and (2) DNA testing may be material to his wrongful conviction claim." *Cox*, 245 N.C. App. at 312, 781 S.E.2d at 868.

In *State v. Gardner*, 227 N.C. App. 364, 742 S.E.2d 352 (2013), this Court held that the materiality showing required to be entitled to the appointment of counsel under subsection (c) is no less demanding than under subsection (a)(1). *Id.* at 368, 742 S.E.2d at 355. The level of materiality required under subsection (a)(1) to support a motion for post-conviction DNA testing has been frequently litigated and has been a high bar for *pro se* litigants. *See, e.g.*, *State v. Lane*, 370 N.C. 508, 809 S.E.2d 568 (2018); *Randall*, ___ N.C. App. ___, 817 S.E.2d 219. In *Lane*, our Supreme Court held that DNA evidence is "material" when

> there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. 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. In the context of a capital case, we must consider whether the evidence would have changed the jury's verdict in either the guilt or sentencing phases.

Lane, 370 N.C. at 519, 809 S.E.2d at 575 (internal quotation marks and citations omitted).

This Court has regularly held that the burden of proof to show materiality is on the movant and a defendant fails to meet that burden when the defendant provides only "conclusory statements" as to the evidence's materiality. *See State v. Turner*, 239 N.C. App. 450, 454, 768 S.E.2d 356, 359 (2015); *State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012). Instead, " '[a] defendant must provide *specific reasons* that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting the previous test results.' " *Cox*, 245

N.C. App. at 312, 781 S.E.2d at 869 (emphasis in original) (quoting *State v. Collins*, 234 N.C. App. 398, 411-12, 761 S.E.2d 914, 922-23 (2014)).

In this case, while the trial court's order denying Defendant's motion refers to his description of the events as "conclusory claims," Defendant has alleged more than the defendants in the above-cited cases. Defendant has provided specific reasons that the requested DNA test would be significantly more probative of the identity of the perpetrator including: (1) a comprehensive statement of Defendant's version of the events of the night of Ms. Burke's murder, stating that he was on a bus at the time of Ms. Burke's murder, arrived at the scene after she was attacked, and was then attacked by an unknown assailant; (2) Defendant's version of events was consistent with his statements at the scene, his defense at trial, and the testimony of at least one eyewitness; (3) specifically identifying items to be DNA tested; and (4) explaining how DNA testing of the various items of clothing would corroborate his version of the events and why the DNA evidence presented at trial offered an incomplete picture of the events.

Defendant's motion avoids many of the issues this Court's prior cases have highlighted in finding insufficient allegations of materiality. Defendant did not plead guilty and has maintained his innocence. *Cf. State v. Randall*, ___ N.C. App. ___, 817 S.E.2d 219 (2018) (noting that those who plead guilty have more difficulty in alleging materiality). There was additional evidence supporting Defendant's allegation that there was a different perpetrator, including his statements to officers at the scene of the crime and eyewitness testimony regarding his location at the time of the crime. *Cf. Lane*, 370 N.C. 508, 809 S.E.2d 598 (holding that "the dearth of evidence at trial pointing to a second perpetrator" supported finding the defendant failed to sufficiently allege materiality). Defendant is hoping to show the presence of an alternative perpetrator's DNA, rather than the lack of his own DNA. *Cf. Collins*, 234 N.C. App. at 410, 761 S.E.2d at 923 (noting that defendants seeking to demonstrate a "lack of biological evidence" are not entitled to post-conviction DNA testing). The items Defendant moved to have tested were identified and preserved soon after Ms. Burke's murder. *Cf. Randall*, ___ N.C. App. ___, ___, 817 S.E.2d 219, 222 (2018) (holding that DNA evidence collected over a month after the alleged crime was not material, as it could not be used to prove Defendant was not involved in a sexual relationship with a minor). The results of the DNA testing could corroborate Defendant's defense at trial. *Cf. State v. McPhaul*, ___ N.C. App. ___, 812 S.E.2d 728 (17 April 2018) (unpublished) (holding DNA testing of gunshot residue kits was not material as it could not support Defendant's

theory of self-defense). The DNA results could directly contradict the State's argument that Defendant was the sole perpetrator of the crime. *Cf. State v. Little*, ___ N.C. App. ___, 796 S.E.2d 404 (21 February 2017) (unpublished) (holding DNA testing of rape kit for DNA of a third-party would not be material because the victim admitted to consensual sex with the third party the day prior to her attack).

Our Supreme Court has held that a defendant fails to establish materiality where the evidence of guilt is so overwhelming that there is not "a reasonable probability that the verdict would have been more favorable to the defendant" had the DNA evidence been presented. *Lane*, 370 N.C. at 518-20, 809 S.E.2d at 575-76; *State v. Floyd*, 237 N.C. App. 300, 765 S.E.2d 74 (2014) (holding that materiality is a higher burden than relevancy at trial). In evaluating the standard for an ineffective assistance of counsel claim under the Sixth Amendment, the United States Supreme Court applies a similar "reasonable probability" standard. A defendant "must show that there is a reasonable probability that, but for counsel's" deficient representation, there is a "reasonable probability . . . the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984). The Supreme Court in *Strickland* further explained the standard by holding:

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . . When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Id. at 693-95, 80 L. E. 2d at 697-98.

In the case before us, there is substantial evidence at trial tending to show Defendant's guilt. However, evidence indicating guilt cannot be dispositive of the issue. The weight of the evidence indicating guilt must be weighed against the probative value of the possible DNA evidence. Our Supreme Court has found DNA to be "highly probative of the identity of the victim's killer." *State v. Daughtry*, 340 N.C. 488, 512, 459 S.E.2d 747, 759 (1995).

In enacting N.C.G.S. § 15A-269, our General Assembly created a potential method of relief for wrongly incarcerated individuals. To interpret the materiality standard in such a way as to make that relief unattainable would defeat that legislative purpose. *See Burgess v. Your*

House of Raleigh, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) ("[A] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage."). A recent dissent in an opinion in this Court highlighted the position in which our previous interpretation of materiality has placed *pro se* defendants, stating "we are requiring indigent defendants to meet this illusory burden of materiality, with no guidance or examples of what actually constitutes materiality. Under our case law, therefore, it would be difficult for even an experienced criminal defense attorney to plead these petitions correctly." *State v. Sayre*, ___ N.C. App. ___, 803 S.E.2d 699 (2017) (unpublished) (Murphy, J., dissenting) *aff'd per curiam* ___ N.C. ___, ___ S.E.2d ___ (2018). We hold Defendant in the present case has satisfied this difficult burden. Because the trial court erred in finding that Defendant failed to meet his burden of establishing materiality, the trial court's order must be reversed.

III. Conclusion

The trial court did not err in making its determination prior to receiving an inventory of the available evidence. However, the trial court erred in determining that Defendant failed to sufficiently plead the materiality of the requested post-conviction DNA testing. Therefore, the trial court's order must be reversed and remanded for the entry of an order consistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE concurs.

Judge ARROWOOD dissents with separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. I would hold the trial court did not err by denying defendant's motion for DNA testing because the allegations in his motion were not sufficient to establish that he was entitled to the appointment of counsel.

"In reviewing a denial of a motion for postconviction DNA testing, findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018) (citation, internal

quotation marks, and alteration omitted). The movant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing, which includes the facts necessary to establish materiality." *Id.* at 518, 809 S.E.2d at 574 (internal quotation marks and citations omitted).

N.C. Gen. Stat. § 15A-269 (2017) provides, in relevant part:

> (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.
>
> . . . .
>
> (c) . . . [T]he court shall appoint counsel for the person who brings a motion under this section if that person is

> indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner . . . upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

N.C. Gen. Stat. § 15A-269. "Thus, to be entitled to counsel, defendant must first establish that (1) he is indigent and (2) DNA testing may be material to his wrongful conviction claim." *State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868 (2016) (citation omitted). The materiality showing required under N.C. Gen. Stat. § 15A 269(c) is no less demanding than under (a)(1). *State v. Gardner*, 227 N.C. App. 364, 368, 742 S.E.2d 352, 355 (2013). Our Supreme Court has previously determined that, in this context, "material means there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575 (citation and internal quotation marks omitted).

Whether a "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" that we review *de novo* on appeal. *Id*. at 517-18, 809 S.E.2d at 574. To allege that the requested DNA would be material, a "defendant must provide *specific reasons* that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting the previous test results." *Cox*, 245 N.C. App. at 312, 781 S.E.2d at 869 (citation and internal quotation marks omitted). Our determination as to whether the request is material to a defendant's defense must be based on "the context of the entire record, and hinges upon whether the evidence would have affected the jury's deliberations." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575 (internal citation and quotation marks omitted).

Here, defendant's motion alleges: (1) his theory at trial was that someone else committed the crimes; (2) the State's failure to test the blood on both his and the victim's clothes deprived him of a fair trial because testing the clothes would reveal the identity of this person he claims murdered the victim; and (3) the perpetrator's blood will be on the clothes because the perpetrator fought both defendant and the victim on the night of the victim's murder.

In light of the context of the entire record, I disagree with the majority that these allegations were sufficient to establish materiality, and agree with the trial court that defendant "failed to show how conducting additional DNA testing is material to his defense." The insufficiency of

these allegations is demonstrated by our Supreme Court's recent decision in *Lane*.

In *Lane*, our Supreme Court considered whether a trial court improperly denied a defendant's motion for postconviction DNA testing of hair samples because defendant failed "to show that the requested postconviction DNA testing of hair samples is material to his defense[.]" *Lane*, 370 N.C. at 516, 809 S.E.2d at 574 (internal quotation marks omitted). The court concluded that the defendant could not establish materiality because of the "overwhelming evidence of defendant's guilt presented at trial, the dearth of evidence at trial pointing to a second perpetrator, and the inability of forensic testing to determine whether the hair samples at issue are relevant to establish a third party was involved in these crimes together[.]" *Id.* at 520, 809 S.E.2d at 576. This evidence that the defendant in *Lane* raped, sodomized, and murdered the victim included a confession by defendant, which never mentioned a second perpetrator, eyewitness testimony, and forensic testing that revealed a "hair was found in [the victim's] anal canal . . . could not" rule out defendant "as the source of the hair." *Id.* at 520-21, 809 S.E.2d at 576. The State's evidence also included forensic evidence that:

> the trash bag in which [the victim] was found was consistent with the size, composition, construction, texture, red drawstrings, and reinforcement characteristics of the trash bags found in defendant's home. Fibers from a blue tarp and a roll of duct tape also found at defendant's home were consistent with the tarp and duct tape found near the location where [the victim's] body was found. Fourteen hairs consistent with the victim's head hairs were found in defendant's vacuum cleaner and carpet sample, confirming [the victim] was in defendant's home, and these hairs exhibited signs of being cut, confirming [the victim] was subjected to some kind of force.

Id. at 521, 809 S.E.2d at 576.

Here, as described by the majority, defendant was convicted of first degree burglary and first degree murder on 3 March 2004. *State v. Byers*, 175 N.C. App. 280, 282, 623 S.E.2d 357, 358 (2006). The State's evidence of defendant's guilt was extensive. The State's witness Reginald Williams testified that he visited the victim on the night of her murder. *Id.* at 283, 623 S.E.2d at 359. "Shortly after 9:00 p.m., they heard a crash at the back door[,]" so the victim "went to the back door and started yelling 'Terraine, stop.' " *Id.* Williams feared for his life, so he ran out the front

door and located a bus driver, who called 911 for him. *Id.* Williams testified that the victim feared defendant and was afraid he was going to do something to hurt her. *Id.* He also testified that the victim "previously had allowed him to listen to telephone messages left for her by defendant, her ex-boyfriend. In one message, defendant stated he thought [the victim] was messing with somebody 'and when he found out who it was, he was gonna kill them[,]' " which is why the witness fled. *Id.*

Additionally, one of the victim's neighbors testified that she observed defendant near the back door of the victim's apartment around 8:00 p.m., and police observed defendant coming out of the victim's apartment through a broken window in a door when they arrived on the scene. *Id.* Defendant told the officers "that a female lay inside the apartment, and she was hurt. While speaking, he turned, re-entered the apartment" and attempted to flee. *Id.*

An officer testified he had responded to a domestic call at the victim's residence twice in the eleven days prior to the murder because defendant had been released from jail after being locked up for domestic violence and had "returned to bother" the victim. *Id.* Additional officers testified to prior incidents of domestic violence involving defendant and the victim. *Id.* at 283, 623 S.E.2d at 359-60.

During the trial, the State presented DNA evidence analyzing

> fingernail scrapings from defendant's hands; a blood stain from a couch cushion; a swab from a knife; a swab from a knife blade; and blood stains from various places in the apartment, including the upper handrail of the stairway. The fingernail scrapings from defendant's right hand contained a mixture of DNA from the victim and defendant, with the majority contributed by defendant. The left fingernail scrapings taken from defendant revealed the victim contributed the majority of the DNA in the sample. The DNA in the blood stain on the upper handrail and the couch matched defendant's. The DNA in the blood stains from the knife and the knife blade matched the victim.

Id. at 285, 623 S.E.2d at 360. Although the blood on defendant's clothing did not undergo DNA testing, defendant stipulated at trial that it was the victim's blood on the clothing.

In contrast, defendant did not present any evidence at trial. *Id.* at 285, 623 S.E.2d at 360. Furthermore, the record before us, beyond the motion's allegations, does not support his claim that defendant

presented a defense at trial that there was a second perpetrator, or his allegations that he made specific statements about a second perpetrator at the scene. I do note that the record contains a narrative report from reporting officer Jeff R. Shelton that upon his arrival to the crime scene he saw defendant exiting the back door of the victim's apartment and he told the officers "there was someone else inside" before he fled from the officers, however, I do not think this is enough evidence to support defendant's allegation that he has maintained there was a second perpetrator.

Thus, in light of the overwhelming evidence of defendant's guilt and dearth of evidence pointing to a second perpetrator, defendant did not meet his burden to prove by a preponderance of the evidence every fact necessary to establish materiality, and the trial evidence was sufficient to dictate the trial court's ultimate conclusion on materiality, as in *Lane*. Accordingly, I would hold that no reasonable probability exists under the facts of this case that a jury would fail to convict defendant and that the trial court did not err by concluding defendant failed to establish materiality.

Because defendant failed to meet his burden of showing materiality, I need not address whether the trial court erred by denying his motion for DNA testing prior to an inventory under N.C. Gen. Stat. § 15A-269(f) (2017). *See State v. Tilghman*, 261 N.C. App. 716, 723, 821 S.E.2d 253, 259. ("Defendant failed to meet his burden of showing materiality. Accordingly, the trial did not err by denying his motion for DNA testing prior to an inventory under N.C. Gen. Stat. § 15A-269(f).").

STATE v. COLEY

[263 N.C. App. 249 (2018)]

STATE OF NORTH CAROLINA
v.
JOHN THOMAS COLEY

No. COA18-234

Filed 18 December 2018

1. Criminal Law—self-defense—failure to instruct

The trial court erred by failing to instruct the jury on self-defense in a prosecution for assault with a deadly weapon inflicting serious injury where competent evidence was presented showing that defendant had an objectively reasonable belief that he needed to use deadly force to repel another assault by the victim. Although the prosecutor introduced the idea of a warning shot, which would not entitle defendant to a self-defense instruction, defendant's testimony taken as a whole supported his argument that he shot the victim and intended to do so, in order to protect himself. Intent to kill is not necessary for self-defense and sufficient evidence was presented to provide an instruction on self-defense to the jury.

2. Criminal Law—defense of habitation—jury instruction

In a prosecution for assault with a deadly weapon inflicting serious injury, defendant should have been afforded a jury instruction on the defense of habitation where he intended to and did shoot at the victim while under attack inside his home.

Judge ZACHARY dissenting.

Appeal by defendant from judgments entered 25 September 2017 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Kimberly P. Hoppin for defendant-appellant.

TYSON, Judge.

John Thomas Coley ("Defendant") appeals from his convictions of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. Defendant argues on appeal that the trial court

erred by declining to instruct the jury on self-defense and defense of habitation. We reverse Defendant's convictions, vacate the judgment, and grant him a new trial.

I. Background

On the evening of 7 June 2016, Defendant was sitting outside of his neighbor's house with friends. At the time, Defendant was recovering from a broken leg and was using crutches and a wheelchair. Derrick Garris, who "stayed at [Defendant's] house off and on," approached Defendant at the neighbor's house and punched Defendant, causing him to fall out of his chair. Defendant got up and began walking home on crutches. When Defendant arrived home, Garris grabbed Defendant and threw him up against the door. After Defendant opened the door, Garris grabbed Defendant and threw him over two chairs. Defendant bounced off the chairs and landed on the floor. Garris then grabbed and threw Defendant into a recliner. Garris repeatedly called Defendant "12," which is slang for a narcotics officer or law enforcement agent, and accused Defendant of "snitch[ing] on [his] brothers" and getting them "locked up" for trafficking guns. Defendant denied Garris' accusations.

Garris left, but quickly returned with a friend, Djimon Lucas, allegedly to retrieve his clothes. As Defendant attempted to explain the earlier events to Lucas, Garris punched Defendant a couple more times and then left again. Defendant testified that by the time he had climbed from the floor into his wheelchair, he saw Garris once more entering the house. As Garris entered, Defendant reached down beside his wheelchair, retrieved a gun, and shot at Garris. Conversely, Garris testified that he was standing in the street in front of the house when the gunshot hit him and that he fled the scene seeking medical assistance.

On 12 December 2016, the Guilford County Grand Jury indicted Defendant for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. During the charge conference at trial, the court denied Defendant's request for jury instructions on self-defense and defense of habitation. Defendant objected and preserved the issue for appeal.

The jury found Defendant not guilty of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury, a lesser-included offense without intent to kill, and possession of a firearm by a felon. The trial court sentenced Defendant to twenty-six to forty-four months' imprisonment for assault with a deadly weapon inflicting serious injury, together with a

consecutive term of thirteen to twenty-five months for possession of a firearm by a felon. Defendant gave oral notice of appeal in court.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Standard of Review

A defendant is entitled to a self-defense instruction when "competent evidence of self-defense is presented at trial." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis omitted). Defendant's evidence, taken as true, is sufficient to support the instruction, even if contradictory evidence exists. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). "[T]he evidence is to be viewed in the light most favorable to the defendant." *Id.* (citation omitted). "[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *State v. Bass*, __ N.C. __, __, 819 S.E.2d 322, 326 (2018).

Determining whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. *State v. Voltz*, ___ N.C. App. ___, ___ 804 S.E.2d 760, 765 (2017). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

IV. Self-Defense

[1] Defendant argues the trial court erred by failing to instruct the jury on self-defense. We agree.

The trial judge must instruct the jury on the law applicable to the substantive features of the case arising from the evidence and apply the law to the facts of the case. *State v. Covington*, 317 N.C. 127, 131, 343 S.E.2d 524, 527 (1986). Self-defense is a substantial and essential feature of a case; thus, a defendant who presents competent evidence of self-defense at trial is entitled to a jury instruction on this defense. *Morgan*, 315 N.C. at 643, 340 S.E.2d at 95. The evidence is viewed in the light most favorable to the defendant, and if the evidence taken as true is sufficient to support a self-defense instruction, it must be given, even if the State presents contradictory evidence. *Moore*, 363 N.C. at 796, 688 S.E.2d at 449.

In North Carolina, the right to use deadly force to defend oneself is provided both by statute and case law. Under statute,

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be* if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.

N.C. Gen. Stat. § 14-51.3(a) (2017) (emphasis supplied).

The State's cross-examination of Defendant focused upon whether or not Defendant had intended to kill Garris when Defendant shot at him. However, intent to kill is not necessary for an instruction on self-defense, only that the defendant intentionally used deadly force to defend himself without retreating from a place where he had a lawful right to be. *State v. Richardson*, 341 N.C. 585, 594, 461 S.E.2d 724, 730 (1995) ("self-defense involves an admitted, intentional act"); *see also State v. Ayers*, __ N.C. App. __, __, 819 S.E.2d 407, 412 ("Defendant intended to 'strike the blow' . . . even if he did not intend to kill"), *stay allowed*, __ N.C. __, 817 S.E.2d 735 (2018).

An instruction on self-defense is not appropriate where a defendant testifies he did not intend to hit anyone when he fired his weapon. *State v. Cook*, __ N.C. App. __, __, 802 S.E.2d 575, 577 (2017), *aff'd per curiam*, 370 N.C. 506, 809 S.E.2d 566 (2018) ("a defendant who fires a gun in the face of a perceived attack is *not* entitled to a self-defense instruction *if he testifies* that he did not intend to shoot the attacker when he fired the gun").

Defendant's statement of the shot being a "warning shot" came only as a response to the prosecutor's question on whether Defendant had "intend[ed] to kill" Garris. Taken as a whole, Defendant's testimony supports his argument that he had shot at Garris, and intended to do so:

> [Prosecutor:] Did you shoot [Garris]?
>
> [Defendant:] Yes, I did.
>
> [Prosecutor:] Did you intend to kill [Garris]?

> [Defendant:] No, I didn't.
>
> [Prosecutor:] When you shot [Garris] and, be clear, you did not intend to kill [Garris]?
>
> [Defendant:] No, sir. My intentions was to warn him off so he wouldn't hurt me again.
>
> [Prosecutor:] So, you were shooting a warning shot?
>
> [Defendant:] Yes, sir.
>
> [Prosecutor:] So, isn't a warning shot when you shoot in the air?
>
> [Defendant:] Sometimes people shoot warning shots in the air, sometimes people shoot them at the door, sometimes people shoot warning shots at people's feet. I mean, there's several places you can shoot a warning shot.
>
> [Prosecutor:] But it's your testimony that your intentions were not to kill [Garris]?
>
> [Defendant:] And that is correct. *That's why there was only one shot fired.*
>
> [Prosecutor:] So, why would you use deadly force if it was not your intention to kill [Garris]?
>
> [Defendant:] *Because that was the only means of protection that I could use. I had nothing else.*

(Emphasis supplied).

The prosecutor introduced the idea of a warning shot, and tried to assert a warning shot would occur when a person "shoot[s] in the air." Our precedents hold this action would not be entitled to a self-defense instruction. *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) (instruction on self-defense is not appropriate where "the defendant testified that he fired his pistol three times into the air to scare [the victim] and the others and make them retreat so he could leave the area").

Defendant's testimony asserts he only fired one shot at Garris because he did not intend to kill him, but was using "the only means of protection" he had to defend himself against Garris' repeated attacks. If Defendant had intended to simply warn Garris and then cause further injury to defend himself, he would have fired more than one shot. *See id.* at 874, 467 S.E.2d at 394-95 (where defendant fired three warning shots,

and the third one struck the victim in the back, "it is entirely unreasonable to believe" a person would have thought the use of deadly force was necessary to protect himself from a fleeing assailant).

In *Williams*, our Supreme Court concluded "a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat." *Id.* Such a belief must be "objectively reasonable." *Id.* In the light most favorable to him, Defendant's testimony and cross-examination, including the testimony above, indicates he had a reasonable belief Garris would continue to severely injure him or even kill him. Defendant shot at Garris to "strike the blow" as a way to prevent further assault or death.

During direct examination, Defendant had testified to his fear of Garris. Garris had implied Defendant was a "snitch" and, as Defendant stated:

> [Defendant:] Normally in the streets a snitch get beat up. They jump -- they jump on snitches.
>
> [Defense Counsel:] Okay. When you say beat up, is -- is that the extent of it?
>
> [Defendant:] I mean, it could go from being killed, beaten with bats. I mean, it's – there's no limit to what could happen to you.
>
> . . .
>
> [Defense Counsel:] You said you had a feeling he was going to come back. Why -- why did you have that feeling?
>
> [Defendant:] Because he had already jumped on me so many times, I mean, he -- he, as they seen, as the jury seen, he's a pretty big dude. He had jumped on me so many times, I took him as being a aggressive individual.
>
> [Defense Counsel:] Did you -- did you have any -- what -- what did you think he was going to do if he came back?
>
> [Defendant:] He was going to jump on me again or possibly even kill me. I, you know, I had no understanding of what he might have did.
>
> . . .

> [Defendant:] Well, again, like I said, he had attacked me so many times, my statement he was going to jump on me as if he was going to punch me in my face or maybe even try to hurt, harm, or endanger me physically. Like I never knew what he left to go get, as if he might have -- he could have went and got another weapon, I don't know.

Defendant's testimony of his fear of Garris, his uncertainty of whether Garris was armed, and his need to protect himself continued during cross-examination.

> [Prosecutor:] Okay. And you – [Garris] did not have a gun in his hand when he walked in the door, did he?
>
> [Defendant:] No, he didn't, but I don't know what he had. He could have possessed a knife, a bat, anything.
>
> [Prosecutor:] He could have, but you didn't see any of that in his hand, did you?
>
> [Defendant:] I don't know what he possessed.
>
> [Prosecutor:] I'm just asking what you saw.
>
> [Defendant:] At the time, no, I wasn't looking to see what he had. I was only worried about getting hurt.
>
> [Prosecutor:] So, the answer to my question is you did not see a weapon in [Garris'] hand?
>
> [Defendant:] At the time I didn't -- I wasn't looking. *I was more focused on not getting hurt.*
>
> . . .
>
> [Prosecutor:] How would you describe the force that you used?
>
> [Defendant:] *As protective.*
>
> [Prosecutor:] Did you think that the shot that you gave [Garris] was something that he could die from?
>
> [Defendant:] No, I didn't.
>
> [Prosecutor:] So, you didn't think that shooting a person in vital areas of their body they would die from that?
>
> [Defendant:] I didn't feel it was a vital area.

. . .

> [Prosecutor:] So, you thought the appropriate response was to shoot him?
>
> [Defendant:] Once he came back in, I felt like he was going to attack me another time, yes, sir.

(Emphasis supplied).

Viewing Defendant's testimony as true, competent evidence was presented from which a jury could reasonably infer Defendant intended to "strike the blow" when he aimed at Garris and shot his gun in self-defense. *Ayers*, __, N.C. App. at __, 819 S.E.2d at 412; *cf. Williams*, 342 N.C. at 873, 467 S.E.2d at 394.

Viewed in the light most favorable to him, ample testimony was presented showing Defendant had an objectively reasonable belief he needed to use deadly force to repel another physical attack to his person by Garris. *Cf. Williams*, 342 N.C. at 873, 467 S.E.2d at 394. Because of the previous assaults by Garris, Defendant, who required the use of a wheelchair or crutches to maneuver and ambulate as a result of his injuries, was reasonably afraid of further injury or even death. Defendant did not know whether or not Garris had retrieved a weapon before Garris returned, after multiple prior assaults, and came back into Defendant's home for a final time. "From this evidence, a jury could reasonably infer that [D]efendant reasonably believed [Garris] was armed at the time of the altercation." *State v. Irabor*, __ N.C. __, __, __S.E.2d __, __, 2018 WL 6051600, at *4 (2018).

The State's argument focuses on a very brief portion of Defendant's responses to the prosecutor's questions, that he fired a "warning shot," but neglects to review in the light most favorable to Defendant his testimony to support a jury instruction for self-defense. Even though contradictory evidence exists, sufficient evidence was presented to provide an instruction on self-defense to the jury. *Moore*, 363 N.C. at 796, 688 S.E.2d at 449; *see also Irabor*, 2018 WL 6051600, at *4.

V. Defense of Habitation

[2] Our statutes provide that a lawful occupant of a home "is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another" if:

> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering,

> or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2017). Further, any "person who unlawfully and by force enters or attempts to enter a person's home . . . is presumed to be doing so with the intent to commit an unlawful act involving force or violence." N.C. Gen. Stat. § 14-51.2(d).

Defendant was inside his home when Garris crossed over the door's threshold, according to Defendant's testimony. Garris had repeatedly assaulted Defendant previously that evening, including throwing Defendant into and over furniture inside his home. Defendant had barely managed to get himself off of the floor and into his wheelchair when Garris returned and entered Defendant's home.

The dissenting opinion argues Garris also had a right to be in the house, negating the defense of home presumption in N.C. Gen. Stat. § 14-51.2(b). *See* N.C. Gen. Stat. § 14-51.2(c)(1). Defendant testified Garris "stayed" in the house occasionally. Garris testified he only kept some clothes at Defendant's house, but no other belongings.

Presuming a conflict in the evidence exists as to whether Garris had a right to be in the home, it is to be resolved by the jury, properly instructed. *See Moore*, 363 N.C. at 796, 688 S.E.2d at 449. Because Defendant intended to and did shoot at Garris while under attack inside his home, he should have been afforded the instruction on defense of habitation. N.C. Gen. Stat. § 14-51.2; *cf. Cook*, __ N.C. App. at __, 802 S.E.2d at 578.

VI. Conclusion

Defendant presented competent evidence at trial that he was acting in self-defense. The trial court was required to instruct the jury on self-defense. *See Morgan*, 315 N.C. at 643, 340 S.E.2d at 95. Defendant's response to the State's question that he had fired a "warning shot" is not dispositive of his lack of intent to shoot Garris. Defendant continuously describes his actions as shooting at Garris, and only stated he did not intend to kill Garris, which is not a requirement for self-defense. The State focuses on two responses at cross-examination to dispense

of Defendant's right to self-defense, but ignores the remainder of Defendant's testimony.

Viewed in the light most favorable to Defendant, the evidence was sufficient to support a jury instruction on self-defense and on defense of habitation. *See Moore*, 363 N.C. at 796, 688 S.E.2d at 449; N.C. Gen. Stat. § 14-51.2(b). The trial court's failure to provide the requested instructions on self-defense was error and prejudicial, as Defendant was acquitted by the jury on all charges involving an intent to kill. Defendant is entitled to a new trial with complete self-defense instructions. *See Bass*, __ N.C. at __, 819 S.E.2d at 326. *It is so ordered.*

NEW TRIAL.

Judge CALABRIA concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting.

In this case, Defendant testified that he fired a warning shot at Garris. This acknowledgment by Defendant demonstrates that he did not "inten[d] to strike the victim with the blow," *State v. Ayers*, ___, N.C. App. ___, ___, 819 S.E.2d 407, 411, *stay allowed*, ___, N.C. ___, 817 S.E.2d 735 (2018), and that such act exceeded that which was reasonably necessary to protect himself from death or serious bodily harm, thereby precluding a jury instruction on self-defense. The trial court also correctly declined to instruct on defense of habitation because Defendant's testimony that he fired a warning shot rebuts the statutory presumption of "reasonable fear of imminent death or serious bodily harm" when using defensive force in the home. Additionally, Garris was a lawful occupant of Defendant's residence further precluding an instruction on defense of habitation. For these reasons and as explained below, I respectfully dissent.

I.

In North Carolina, both statute and case law provide the right to use force to defend oneself. The General Assembly has enacted two relevant statutes concerning self-defense and defense of habitation. *See* N.C. Gen. Stat. §§ 14-51.2, -51.3 (2016). Concerning defense of the person, N.C. Gen. Stat. § 14-51.3 provides, in pertinent part:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.
>
> (b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .

Id. § 14-51.3.

Regarding defense of habitation, N.C. Gen. Stat. § 14-51.2 provides, in pertinent part:

> (b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace . . . .
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
>
> (c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:
>
> (1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner

> or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.
>
> . . . .
>
> (d) A person who unlawfully and by force enters or attempts to enter a person's home . . . is presumed to be doing so with the intent to commit an unlawful act involving force or violence.
>
> (e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .
>
> (f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.
>
> (g) This section is not intended to repeal or limit any other defense that may exist under the common law.

Id. § 14-51.2(b)-(g).

However, a defendant cannot establish that he is entitled to a self-defense instruction under any of these standards when he testifies that he did not "inten[d] to strike the victim with the blow." *Ayers*, ___ N.C. App. at ___, 819 S.E.2d at 411.

II.

If an individual reasonably believes that deadly force is necessary to prevent death or great bodily harm to that individual or to another, then the individual is justified in the use of that deadly force and does not have a duty to retreat in any place that the individual has a lawful right to be. N.C. Gen. Stat. § 14-51.3(a)(1) (2016).

In *State v. Cook*, officers were executing a search warrant at the defendant's residence while the defendant was upstairs in his bedroom. ___ N.C. App. ___, ___, 802 S.E.2d 575, 576 (2017). Two officers went upstairs and announced their presence to the defendant. *Id.* at ___, 802 S.E.2d at 576. As one officer kicked down the door of the bedroom, the defendant fired two gunshots from inside his bedroom, narrowly missing an officer. *Id.* at ___, 802 S.E.2d at 576. On appeal, the defendant argued that he shot at the officers in self-defense and stated that he had "no specific intention" when he fired his weapon and was "just scared." *Id.* at ___, 802 S.E.2d at 576. This Court, applying § 14-51.3, held that because the defendant "testified that he did not intend to shoot anyone

when he fired his gun . . . he was not entitled to a self-defense instruction." *Id.* at ___, 802 S.E.2d at 576.

Here, as in *Cook*, Defendant testified that he did not intend to kill Garris, but merely to "warn him off" by firing one shot:

> [The State:] Did you shoot [Garris]?
>
> [Defendant:] Yes, I did.
>
> [The State:] *Did you intend to kill [Garris]?*
>
> [Defendant:] *No, I didn't.*
>
> [The State:] When you shot [Garris] and, be clear, you did not intend to kill [Garris]?
>
> [Defendant:] No, sir. *My intentions was to warn him off* so he wouldn't hurt me again.
>
> [The State:] *So, you were shooting a warning shot?*
>
> [Defendant:] *Yes, sir.*
>
> . . . .
>
> [The State:] But it's your testimony that your intentions were not to kill [Garris]?
>
> [Defendant:] And that is correct. That's why there was only one shot fired.
>
> [The State:] So, why would you use deadly force if it was not your intention to kill [Garris]?
>
> [Defendant:] Because that was the only means of protection that I could use. I had nothing else.

(Emphasis added).

It is evident from Defendant's testimony that he intended merely to fire a warning shot. Defendant's act of shooting a warning shot exceeded that which was reasonably necessary to protect himself from death or serious bodily harm, thereby precluding a jury instruction on self-defense. Therefore, the trial court did not err by refusing to instruct the jury on self-defense.

Despite Defendant's testimony that he meant to fire a warning shot, the majority argues that "Defendant's testimony supports his argument that he had shot at Garris, and intended to do so." *Majority Op.* at 6. The

majority further states that all self-defense requires is "that the defendant intentionally used deadly force to defend himself without retreating from a place where he had a lawful right to be." *Id.* at 5. Shooting a gun at someone is certainly using deadly force, but a warning shot is not an intentional attempt to strike a blow as *Ayers* requires. The majority's assertion that "[i]f Defendant had intended to simply warn Garris and then cause further injury to defend himself, he would have fired more than one shot," *id.* at 8, disregards Defendant's express testimony that demonstrates his lack of intent to strike a blow to Garris. The manner and number of warning shots should not be dispositive as to whether a defendant is entitled to a self-defense instruction. Such insistence muddies the water of self-defense law in this State. When asked whether Defendant knew that he had hit Garris, Defendant responded, "No, I didn't at the time." This testimony, together with Defendant's acknowledgement that the one shot he took was a warning shot, demonstrates that Defendant did not possess an intent to strike a blow upon Garris. An errant warning shot that inadvertently hits an attacker does not reveal an intent to shoot the attacker.

III.

The trial court properly declined to instruct on defense of habitation as well. In 2011, the General Assembly enacted the defense of habitation statute, N.C. Gen. Stat. § 14-51.2, which provides a rebuttable presumption that the lawful occupant of a home has "a reasonable fear of imminent death or serious bodily harm . . . when using defensive force that is intended or likely to cause death or serious bodily harm to another" when the following two circumstances apply. *Id.* § 14-51.2(b). First, "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, . . . or if that person had removed or was attempting to remove another against that person's will from the home," and second, "[t]he person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred." *Id.* § 14-51.2(b)(1),(2).

The statutory defense of habitation with its presumption of reasonable fear does not apply where the defendant testifies that he fired a warning shot and did not intend to shoot his attacker. *Cook*, ___ N.C. App. at ___, 802 S.E.2d at 578 ("[A] defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C. Gen. Stat. § 14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm." (emphasis added)). Defendant's testimony that he shot to "warn [Garris] off"

without the intention of shooting him rebuts the statutory presumption that Defendant held a reasonable fear of imminent harm. Furthermore, a warning shot is not force "that is intended or likely to cause death or serious bodily harm to another." *Id.* § 14-51.2(b).

Moreover, Garris was a lawful occupant of Defendant's home, thereby precluding Defendant's right to a jury instruction on defense of habitation. Defendant allowed Garris to live with him at his residence "off and on," and Garris possessed a key to the house. Garris testified that on the night that Defendant shot Garris, he was going to Defendant's residence to retrieve some of his clothes. The statutory presumption of "reasonable fear of imminent death or serious bodily harm" does not apply if "[t]he person against whom the defensive force is used has the right to be in or is a lawful resident of the home." *Id.* § 14-51.2(c)(1).

Garris was a lawful occupant of the home because he had been living at the residence, he possessed a key to the residence, and some of his personal belongings remained at Defendant's residence. Even viewed in the light most favorable to Defendant, no evidence was presented that Defendant rescinded Garris's right to be present in the home even after their altercation—in fact, Garris testified that he left "voluntarily" after the altercation with Defendant. For this reason, and because Defendant's testimony that he shot a warning shot rebutted the statutory presumption that Defendant held a reasonable fear of imminent harm, the trial court correctly declined to instruct the jury on defense of habitation.

IV.

Where Defendant testified that he shot in warning, lacking an intent to shoot the attacker, the trial court did not err in declining to instruct the jury on self-defense or defense of habitation. In addition, the trial court did not err in refusing to instruct the jury on defense of habitation where Garris was a lawful occupant of the house into which he entered. For these reasons, I would find no error in the trial court's jury instructions concerning self-defense and defense of habitation. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOSEPH HARLON GODFREY

No. COA18-565

Filed 18 December 2018

1. Evidence—prior bad acts—same victim—same acts—common plan or scheme

In a prosecution for first-degree sex offense with a child, the trial court did not err or abuse its discretion by admitting testimony from the victim regarding two prior incidents involving the same type of sexual act perpetrated against her by the defendant, because the incidents were not too remote in time, indicated a common plan or scheme, and were not so highly prejudicial as to require exclusion. Further, the trial court gave limiting instructions to the jury to consider the testimony only for the purpose for which it was admitted.

2. Appeal and Error—abandonment of issues—lack of argument on appeal—prior bad acts

On appeal from a conviction for first-degree sex offense with a child, defendant abandoned his argument that the trial court should have excluded evidence that he previously observed the victim through a hole in the wall taking showers. Although defendant challenged the basis for the trial court's ruling, he offered no specific argument as to why that prior act was inadmissible under Evidence Rule 404(b) or should have been excluded under Rule 403.

3. Evidence—prior bad acts—recorded statement—temporal proximity to charged offense

In a prosecution for first-degree sex offense with a child, the trial court did not err by admitting a recorded statement defendant made to the victim that he remembered the first incident of the specific sexual act he perpetrated against her even though the date of that incident was not given. Since the referenced act was similar to the one giving rise to the criminal charge and was evidence of a common scheme or plan, any remoteness in time went to the weight of the evidence, not its admissibility.

4. Evidence—prior bad acts—dissimilar to criminal conduct—lack of prejudice

In a prosecution for first-degree sex offense with a child, defendant failed to demonstrate he was prejudiced by the trial court's

admission of evidence that defendant and the victim watched pornography together, given the overwhelming evidence establishing defendant's guilt, including testimony from the victim and defendant's recorded admissions.

Appeal by defendant from judgment entered 8 December 2017 by Judge Gregory R. Hayes in Caldwell County Superior Court. Heard in the Court of Appeals 31 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.

Gillette Law Firm PLLC, by Jeffrey W. Gillette, for defendant-appellant.

ZACHARY, Judge.

Defendant Joseph H. Godfrey appeals from a judgment entered upon a jury verdict finding him guilty of first-degree sex offense with a child. Defendant argues that his guilty verdict resulted from the trial court having improperly allowed the jury to hear evidence of his prior bad acts, and that therefore he is entitled to a new trial. We find no error.

Background

Defendant is the victim's uncle by marriage. In December 2016, the victim reported to the Caldwell County Sheriff's Office that Defendant had sexually assaulted her "many times" when she was a child, including a final incident that took place on or about 1 May 2004 when the victim was twelve years old (the "May 2004 incident"). This was the first time that the victim had told anyone about the assaults. According to the victim, she decided to come forward in 2016 because "[i]t was brought to [her] attention . . . that there was someone within the family, at a young age, that was groped." Detective Roger Crosby was assigned to the case.

In an attempt to obtain evidence to corroborate the victim's account some twelve years after the fact, the victim "volunteered to the idea of placing a recording device upon her person and approaching [Defendant] at his residence . . . in order to get him to have a casual conversation about what happened to her when she was young." Detective Crosby agreed to this plan, which the victim successfully executed on 5 January 2017. The victim recorded Defendant making various incriminating statements, and Defendant was thereafter arrested and indicted for one count of first-degree sex offense with a child, specifically for

the May 2004 incident. Defendant was tried before a jury beginning on 4 December 2017.

At trial, the victim testified that Defendant had served as her "sole care provider" during childhood while her father was incarcerated for fifteen years and her mother "worked two and three jobs to support [the victim and her] brother." In May 2004, the victim was staying with Defendant at his home and was twelve years old. The victim recalled that she was outside playing with her cousins and that when she ran inside to grab something to drink, Defendant came up to her, stuck his hands in each of her pockets, and pulled her into the laundry room. The victim testified that Defendant "removed my clothing. He removed my underwear. He removed my pants. And he set me up on top of his washing machine." According to the victim, Defendant then "chose to use his middle finger . . . on his hand, and insert[ed] it in my vagina." This happened for "a few minutes" until the victim "started to freak out on [Defendant]," because he had "pulled his finger out" and "his pants all the way down," which the victim believed meant that he was about to rape her. At that point the victim kicked Defendant and ran. As she ran out of the front door, she fell and broke her wrist. The victim testified that she began crying and that a few moments later Defendant came up behind her and asked her what was wrong. The victim did not remember anything further about the incident.

The victim was able to estimate the date on which the May 2004 incident occurred based on the date that the doctor treated her broken wrist, which was just before her brother's birthday. The victim also testified that she kept getting urinary tract infections after the incident, but that she never told anyone why because she "was scared and . . . had nobody that [she] felt like [she] could trust." The victim testified that there was no further sexual contact between her and Defendant after the May 2004 incident.

In addition, the victim testified concerning the "bed incident," which occurred about a month or two prior to the May 2004 incident, but was not charged in Defendant's indictment. The victim testified that she stayed the night at Defendant's house and was sharing a bed with her younger cousin, Defendant's daughter. While her cousin was asleep, Defendant "comes and crawls in the . . . bed where I am, to be beside of me . . . . And he started feeling on my legs, and at that time, he stuck his middle finger in my vagina." This lasted "a few minutes" and afterward she "freaked out, just as I always do. I got up and ran towards the kitchen area . . . and he went to the bathroom that was closest to the bed, to wash his hands." She did not tell anyone about that incident because,

she explained, "I was scared. And once again, I didn't have anyone that I actually trusted that would believe me."

The trial testimony of the victim included another incident that she claimed occurred about two years earlier, when the victim was staying with Defendant at his place in Lick Mountain (the "Lick Mountain incident"). That incident was not charged in Defendant's indictment. The victim explained the Lick Mountain incident as follows:

> If I'm not mistaken, I did have strep, and I had a high fever and a very nauseous stomach. And I'd asked him repeatedly to call my mother to come get me, and he would not do so. He started wrest—like, he started off tickling me on the floor, and he went to, like, wrestle around with me and carried me to his bed.

When Defendant got her to his bed, "[h]e, once again, penetrated my vagina with his middle finger." The incident lasted "just a few minutes" and she did not tell anybody about it because she "didn't have trust that people would believe [her]."

Detective Crosby's report following the victim's initial statement did not include any indication that the victim had disclosed that digital penetration occurred during the May 2004 incident. Defendant's daughter—with whom the victim said she was sharing a bed during the bed incident—also testified at trial. Defendant's daughter testified that she had no recollection of anything similar to what the victim had testified to, and that

> I'm a very light sleeper, and I think if she would have got up and run like she said, I would have definitely woke up. I had a little, single-size bed that my grandmother gave me. It's a day bed, and so I could barely fit in it, let alone if she was with me, my dad. No way could he have fit.

The State also offered the audio recording and transcript of the seventy-five minute conversation between the victim and Defendant into evidence. The victim eventually prompted Defendant to talk about their earlier sexual encounters by telling Defendant that "I wish we would have, like, done more." When she asked what he remembered, Defendant responded, "[t]he first hand [ride] you ever took." The victim and Defendant proceeded to talk about the May 2004 incident, the bed incident, and the Lick Mountain incident, each of which Defendant said he remembered. Later in the conversation, Defendant told the victim that he "had a hole drilled in th[e] wall" at his Lick Mountain house and

"used to watch [the victim] take showers" in order to see her digitally penetrating herself. The victim also testified at trial about watching pornography with Defendant on multiple occasions prior to the May 2004 incident, during which Defendant "would put my hand on his erected penis." Defendant admitted in the recorded conversation that he remembered watching pornography with the victim when she was young.

Defendant repeatedly objected to the introduction of evidence of the bed incident and the Lick Mountain incident, as well as various portions of the recorded conversation. Defendant argued that the challenged evidence must be excluded under Rule 404(b) of the North Carolina Rules of Evidence because it was being offered to influence the jury "to simply convict him based on all of the other allegations that he's not charged with." Additionally, Defendant argued that the circumstances surrounding the May 2004 incident and the circumstances surrounding the two other incidents were not sufficiently similar and were too remote in time from one another, thus rendering the admission of this evidence unduly prejudicial under Rule 403. The State, however, argued that the prior incidents were admissible under Rule 404(b) because they were being offered to show "a common plan or scheme," rather than Defendant's propensity to commit the charged offense. The State noted that each of the incidents involved digital penetration, all occurred "in a very compact area of time," and that the victim's young age "show[ed] the escalation for grooming" for sexual acts.

The trial court concluded that Defendant's prior acts could be admitted for the proper purpose of showing, *inter alia*, that Defendant had a "common plan or scheme" to digitally penetrate the victim. The trial court found that both of the earlier incidents were sufficiently similar to, and not too remote in time from, the May 2004 incident for which Defendant was on trial. The court concluded that while the prior acts were "of course prejudicial," they were "more probative on the issue of whether or not . . . there was a common plan or scheme and whether or not that relates to the 2004 incident." The trial court therefore admitted evidence of each of the prior acts into evidence. The trial court repeatedly instructed the jury that it was to consider the evidence of Defendant's prior acts solely for the limited purposes for which the evidence was offered.

The jury found Defendant guilty of first-degree sex offense with a child on 8 December 2017. Defendant was sentenced to 288 to 355 months' imprisonment based on the sentencing provisions in effect in 2004. Defendant gave oral notice of appeal in open court.

On appeal, Defendant argues that his judgment must be vacated and a new trial ordered because the trial court erroneously permitted the jury to base its conviction upon the improper introduction of evidence of Defendant's prior acts. We disagree.

Standard of Review

The standards of review from a trial court's Rule 404(b) and 403 rulings are distinct from one another. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

Rule 403 and Rule 404(b)

Evidence is generally admissible so long as it is relevant. N.C. Gen. Stat. § 8C-1, Rule 402 (2017). "Relevant evidence" is defined as 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." *Id.* § 8C-1, Rule 401 (2017). Even where relevant, however, Rule 404 limits the introduction of character evidence, including evidence of a defendant's past crimes, wrongs, or acts. *Id.* § 8C-1, Rule 404 (2017). Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." *Id.* § 8C-1, Rule 404(b). Otherwise, however, Rule 404(b) is "a clear general rule of *inclusion*," and will allow such evidence to be admitted so long as it is relevant to any fact or issue other than "to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 289 S.E.2d 48, 54 (1990). For example, Rule 404(b) contains a non-exclusive list of other proper purposes "for which evidence of prior acts may be admitted, including 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.' " *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b)). Moreover, "prior acts testimony need not involve incidents for which the defendant was actually convicted of a crime." *State v. West*, 103 N.C. App. 1, 10, 404 S.E.2d 191, 197-98 (1991).

" '[T]his Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant.' " *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

This is particularly true "when those offenses involve the same victim as the victim in the crime for which the defendant is on trial." *State v. Miller*, 321 N.C. 445, 454, 364 S.E.2d 387, 392 (1988). "Such evidence is often viewed as showing a 'common scheme or plan' by the defendant to sexually abuse the victim." *State v. Faircloth*, 99 N.C. App. 685, 689, 394 S.E.2d 198, 201 (1990) (citing *State v. Shamsid-Deen*, 324 N.C. 437, 444, 379 S.E.2d 842, 847 (1989)).

Nevertheless, "[a]lthough relevant" for a proper purpose under Rule 404(b), Rule 403 provides that "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." N.C. Gen. Stat. § 8C-1, Rule 403 (2017). It is in this context that the admissibility of evidence under Rule 404(b) is initially "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). While the level of similarity between the acts need not "rise to the level of the unique and bizarre," *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988),

> [f]actual disparity or the stretch of time dilute commonalities, and the probative value of the analogy attaches less to the acts than to the character of the actor. Conversely, testimony regarding a[n] [act] that was virtually identical committed less than seventy-two hours before the [act] for which the defendant is on trial lends more ballast to the act than to the character of the actor.

State v. Price, 326 N.C. 56, 69, 388 S.E.2d 84, 91 (internal citation and quotation marks omitted), *vacated and remanded on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Thus, "[w]hen prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *West*, 103 N.C. App. at 9, 404 S.E.2d at 197.

Bed Incident and Lick Mountain Incident

[1] Defendant contends that it was error for the trial court to allow the jury to hear testimony concerning the bed incident and the Lick Mountain incident because they "were not relevant and not sufficiently similar to the May 2004 incident," and because the "only purpose . . . was to portray [Defendant's] bad character and imply his propensity to act in conformity with such character." We disagree.

Defendant was indicted for violation of N.C. Gen. Stat. § 14-27.4 (2004), which provided that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4(a)(1) (2004). The trial court instructed the jury that "[a] 'sexual act' means any penetration, however slight, by an object into the genital opening of a person's body."

All three incidents involved the same type of sexual act. The victim testified that during the May 2004 incident Defendant "chose to use his middle finger . . . and insert[ed] it in my vagina[.]" She similarly testified concerning the bed incident and the Lick Mountain incident, stating that Defendant used his middle finger to penetrate her, and that the May 2004 assault "was the same thing" that Defendant did during those prior incidents. In the recorded conversation between Defendant and the victim, Defendant told the victim that he had to use one finger because "[y]ou was too small." The victim also testified that the Lick Mountain incident, the bed incident, and the May 2004 incident all occurred while she was staying with Defendant.

In short, the May 2004 incident, the bed incident, and the Lick Mountain incident each involved the same victim, the same specific alleged mode of penetration, and the same circumstance—while the victim was under Defendant's supervision. Thus, the bed incident and the Lick Mountain incident were sufficiently similar to the May 2004 incident, and evidence of these incidents was relevant to show that the May 2004 incident was part of a common scheme or plan by Defendant to take advantage of the victim by digitally penetrating her while she was under his control. *See*, *e.g.*, *Miller*, 321 N.C. at 454, 364 S.E.2d at 392 ("The evidence that defendant had committed another sex offense against the same child, his young son, . . . was admissible under Rule 404(b)."); *State v. Curry*, 153 N.C. App. 260, 265, 569 S.E.2d 691, 695 (2002) ("[T]he ages of the victims, the manner in which Defendant pursued them and gained their trust . . . [,] and the sexual conduct in which Defendant had engaged with the victims are all sufficiently similar to be probative of Defendant's intent and common plan or scheme."). Accordingly, evidence of the bed and Lick Mountain incidents was properly admitted under Rule 404(b).

Defendant next argues that testimony concerning the Lick Mountain incident should have nevertheless been excluded because it was too remote in time from the May 2004 incident, thereby diminishing its probative value in showing a common scheme or plan. While Defendant is correct that the Lick Mountain incident is alleged to have occurred two

or three years prior to the May 2004 incident, we do not find that this stretch of time inherently rendered the evidence of the Lick Mountain incident so remote in time as to eliminate its probative value. *E.g.*, *Curry*, 153 N.C. App. at 265, 569 S.E.2d at 695 ("These acts, which were continuously performed over the course of ten years cannot be said to be too remote in time to be inadmissible."). This is particularly so in light of its striking similarity to the bed and May 2004 incidents. *See*, *e.g.*, *Faircloth*, 99 N.C. App at 690, 394 S.E.2d at 201 ("[T]his case involves three incidents of similar conduct against the same victim within a 28-month span. We do not believe, on these facts, that the time period is so great as to erode the relevance of the first two incidents to the charged offense."); *State v. Roberson*, 93 N.C. App. 83, 85, 376 S.E.2d 486, 488 ("The intervening [five] years do not dilute the similarities especially when considered in light of [the victim's] testimony that [the] defendant had touched her in the same way during the year before the trial."), *disc. review denied*, 324 N.C. 435, 379 S.E.2d 247 (1989).

We likewise reject Defendant's argument that admission of testimony regarding the bed and Lick Mountain incidents was so "highly prejudicial" that the trial court had to reject admission of the testimony pursuant to Rule 403. The trial court concluded that evidence of the bed incident was "indeed, prejudicial[,] . . . but it appears to be more probative on the 2004 allegation than it is prejudicial, and so that will be admitted." The trial court also concluded that evidence of the Lick Mountain incident "appears to be more probative on the issue of whether or not the actual alleged offense occurred than it is prejudicial, because once again, it involved fingers to the vagina." Such determinations were fully within the trial court's discretion, and we find no abuse thereof. *See State v. Stevenson*, 169 N.C. App. 797, 801-02, 611 S.E.2d 206, 210 (2005) ("The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court, which we leave undisturbed unless the trial court's ruling is manifestly unsupported by reason or so arbitrary it could not have been the result of a reasoned decision[.]" (internal citations and quotation marks omitted)). The trial court gave limiting instructions as to the purpose for which the testimony was being admitted, and the allowance of testimony concerning two additional incidents was not so cumulative or likely to mislead the jury as to constitute an abuse of discretion. *See*, *e.g.*, *id.* at 802, 611 S.E.2d at 210 (holding that the trial court did not abuse its discretion where it provided a limiting instruction confining the permissible use of the prior acts testimony). Accordingly, we find no error in the trial court's admission of the testimony regarding the bed incident and the Lick Mountain incident under Rule 403.

Other Prior Bad Acts

[2] Next, Defendant argues that the trial court erred by allowing the jury to hear (1) the portion of the recorded conversation in which Defendant stated that he "had a hole drilled in th[e] wall" at his Lick Mountain house and "used to watch [the victim] take showers"; (2) the portion of the recorded conversation in which Defendant asked the victim if she remembered "[t]he first hand [ride] you ever took"; and (3) the recorded conversation and the victim's testimony that Defendant had the victim watch pornography with him on several occasions, during which Defendant "would put [the victim's] hand on his erected penis."

First, Defendant argues that the trial court conducted an erroneous inquiry concerning the admissibility of evidence that Defendant "had a hole drilled in th[e] [bathroom] wall." The trial court concluded that this act was "similar to the prior events. I'm not sure about temporal proximity, but I'm not sure I have to make that decision on this issue, because the shower incident comes in by his own statement, by a statement against interest."

Defendant argues, and correctly so, that this prior act falls within the scope of Rule 404(b), thus requiring analysis thereunder. *See*, *e.g.*, *State v. Doisey*, 138 N.C. App. 620, 626, 532 S.E.2d 240, 244-45, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000). However, Defendant offers no specific argument as to why that prior act, in light of the particular circumstances of this case, was inadmissible under Rule 404(b) or should have been excluded under Rule 403. Accordingly, any argument to that point is deemed abandoned. *See State v. Joiner*, 237 N.C. App. 513, 522, 767 S.E.2d 557, 563 (2014) ("It is not the job of this Court to make [the] Defendant's argument for him." (citing *Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 402, 610, S.E.2d 360, 361 (2005)); N.C.R. App. P. 28(b)(6); *see also State v. Turner*, 239 N.C. App. 450, 455, 768 S.E.2d 356, 359 (2015) ("[A] trial court's ruling . . . should not be set aside merely because the court gives a wrong or insufficient reason for it." (brackets omitted)).

[3] Next, Defendant argues that it was error for the trial court to admit Defendant's recorded statement to the victim that he remembered "[t]he first hand [ride] you ever took." The date of the incident to which this statement referred was not provided. However, Defendant notes that when taken in conjunction with the victim's testimony, assuming "this was a form of penetration, it must have referred to the incident at Lick Mountain or something prior to that." Defendant thus argues that, "without indication of temporal proximity, the jury could only take this

as evidence of propensity on [Defendant's] part[,]" and that it should have therefore been excluded. However, because of the similarity of this description to the other events, as discussed *supra*, we conclude that the trial court did not err in admitting this statement on the grounds of temporal proximity. Moreover, "[w]hile remoteness of another offense is relevant to its admissibility to show *modus operandi* or a common scheme or plan, remoteness usually goes to the weight of the evidence, not its admissibility." *State v. Hall*, 85 N.C. App. 447, 451, 355 S.E.2d 250, 253 (internal citation omitted), *disc. review denied*, 320 N.C. 515, 358 S.E.2d 525 (1987).

[4] Finally, Defendant argues that it was error for the trial court to admit the evidence that the victim and Defendant watched pornography together. Defendant maintains that "[w]hile these statements may have been relevant to some generalized scheme or plan to gain sexual gratification from [the victim], they do not appear to bear on the critical issue in this case—whether or not [Defendant] penetrated [the victim's] genitalia." However, even assuming that this was admitted in error, Defendant cannot establish that he was prejudiced thereby.

In order to warrant a new trial, a defendant must show that he was prejudiced by the alleged error; that is, that there exists "a reasonable possibility that had the error not been committed a different result would have been reached at the trial." *State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008) (citing N.C. Gen. Stat. § 15A-1443). Where "abundant evidence" exists to otherwise support a defendant's guilty verdict, "the admission of evidence, even though technically incompetent, will not be held prejudicial when [the] defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." *State v. Williams*, 275 N.C. 77, 89, 165 S.E.2d 481, 489 (1969).

Here, there was overwhelming evidence presented to the jury establishing that Defendant digitally penetrated the victim during the May 2004 incident. This included evidence of the bed and Lick Mountain incidents showing a common scheme or plan to perform the same act, the victim's detailed testimony describing the May 2004 incident, and Defendant's various admissions in the recorded conversation. The sum of this evidence was more than sufficient to support the jury's guilty verdict of first-degree sex offense against a child. Thus, even assuming, *arguendo*, that the trial court erred in concluding that the statements that Defendant watched pornography with the victim were admissible under Rule 404(b) and Rule 403, we conclude that Defendant was not prejudiced thereby.

Conclusion

For the reasoning contained herein, Defendant received a fair trial, free from error.

NO ERROR.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
JOHN EDWARD HEELAN

No. COA17-1245

Filed 18 December 2018

1. Sexual Offenses—indecent liberties—lack of actual child victim—attempt—statutory interpretation

In a prosecution for taking indecent liberties with a child and solicitation of a child by computer, the Court of Appeals rejected defendant's argument that he could not be charged with indecent liberties where the person who responded to his online solicitation was not actually a child but an undercover police officer. By its inclusion of attempt within the definition of the crime, N.C.G.S. § 14-202.1 did not require an actual child victim to sustain a charge or an attempt conviction.

2. Sexual Offenses—indecent liberties—solicitation of child by computer—sufficiency of evidence

In a prosecution for taking indecent liberties with a child and solicitation of a child by computer based on defendant's online post seeking female companionship and subsequent communication with an undercover police officer posing as a fourteen-year-old girl, the State presented substantial evidence that defendant believed the person with whom he communicated was an underage minor. The trial court properly denied defendant's motions to dismiss where numerous email exchanges and defendant's statements to law enforcement showed he believed the person he was communicating with and sexually pursuing was a minor. None of the evidence supported defendant's alternative version of events that he was enabling a role-playing fantasy by an adult.

3. Evidence—indecent liberties—cross-examination—alleged prior assault of minor daughter—impeachment purposes

In a prosecution for taking indecent liberties with a child and solicitation of a child by computer, the trial court did not err by allowing the State to cross-examine defendant for impeachment purposes about an alleged prior sexual assault of defendant's then-minor daughter, despite the State initially stating it would not present the evidence for Rule 404(b) purposes because the daughter declined to testify. No prejudicial error occurred because the State's questions did not themselves constitute evidence, and defendant's conclusive denials rendered the questioning harmless.

4. Satellite-Based Monitoring—risk assessment—level of supervision—sufficiency of findings

In a prosecution for taking indecent liberties with a child and solicitation of a child by computer, the trial court erred by ordering defendant to enroll in satellite-based monitoring (SBM) upon the Division of Adult Correction's risk assessment of moderate-low. The SBM order was reversed where the trial court failed to make additional findings to support its conclusion that defendant required the highest level of supervision that SBM would provide, and the State did not present evidence at sentencing from which such findings could be made.

Appeal by defendant from judgments entered 16 June 2017 by Judge Marvin P. Pope, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant.

ELMORE, Judge.

Defendant John Edward Heelan appeals from judgments entered after a jury found him guilty of taking or attempting to take indecent liberties with a child, and of solicitation of a child by computer. The undisputed trial evidence showed that defendant posted a Craigslist advertisement seeking female companionship; an adult police officer posing as a fourteen-year-old girl named "Brittany Duncan" responded to the ad; defendant and "Brittany" exchanged over 100 messages over a

period of fifteen days, during which defendant sent her numerous sexually explicit messages and formulated a plan for them to meet up at a public place in order to later have sex; and when defendant arrived at the location to carry out the plan, he was met by police and arrested. Defendant's trial defense was that he did not believe Brittany to be an actual minor, but rather an adult female he was role-playing with to help her live out her sexual fantasy of pretending to be an underage female in sexual pursuit of an older man. The jury found defendant guilty as charged.

On appeal, defendant argues the trial court erred by (1) denying his motions to quash or dismiss the indecent-liberties indictment because "Brittany Duncan" was not an actual child victim, as required to sustain a charge and conviction for indecent liberties with a child; (2) denying his motions to dismiss both charges for insufficiency of the evidence because the State's evidence proved Brittany was not an actual child, and it failed to present substantial evidence that defendant believed her to be an actual child; (3) allowing the State, over objection, to question him about his alleged prior sexual assault of his then-minor daughter because the State impermissibly repackaged this Rule 404(b) sexual misconduct evidence as impeachment evidence; and (4) ordering that he enroll in satellite-based monitoring ("SBM") because its findings were insufficient to support its conclusion that defendant required the highest level of supervision and monitoring as necessary to impose SBM. We hold defendant received a fair trial, free of prejudicial error, but reverse the SBM order.

I. Background

On 28 November 2016, defendant was indicted for taking indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1, and for solicitation of a child by computer and appearing, in violation of N.C. Gen. Stat. § 14-202.3. The undisputed trial evidence showed the following facts.

On 29 January 2016, defendant posted in Craigslist's "casual encounters" subsection an advertisement entitled, "lick n stick – m4w." In the ad, defendant wrote that he was a "$$ Generous $$ older swm [single white male]" seeking a female "24 or younger" to engage in cunnilingus and vaginal sex. That same day, Detective Jason Reid of the Boone Police Department, posing as a fictitious fourteen-year-old female named "Brittany Duncan," responded by email to defendant's post. Over the course of several messages between defendant and "Brittany" from 29 January until 12 February 2016, Brittany twice directly disclosed

she was only fourteen years old and made numerous references implying she was a minor who lived under close maternal supervision, and defendant sent multiple explicit messages to Brittany in sexual pursuit of her, and repeatedly encouraged Brittany not to raise her mother's suspicions about them communicating. Additionally, at defendant's request, Brittany sent him two images purportedly depicting herself, which actually depicted a twenty-one-year-old former police department intern.

The 100-plus messages between defendant and Brittany culminated in their plan to meet up at 10:00 a.m. on 12 February 2016 at the Panera Bread restaurant in Boone Mall in order to later engage in sex. While driving to Panera Bread, defendant requested Brittany phone him, and a female in her twenties working with the police department called and briefly spoke with him. When defendant arrived at the Panera Bread parking lot, he texted Brittany to meet him outside, but he was instead met by Detective Reid and Special Bureau of Investigation Agent Nathan Anderson. The detectives briefly interviewed defendant while he was sitting in his car and then arrested him for solicitation of a child by computer. Their search of defendant's car revealed that he had arrived to meet up with Brittany in possession of, *inter alia*, two Viagra pills and a tube of KY Jelly. The detectives then transported defendant to the Boone Police Department, where he waived his *Miranda* rights and participated in a forty-five minute videotaped custodial interview with both detectives. Defendant was later charged with taking indecent liberties with a child, and with solicitation of a child by computer and appearing.

Before trial, on 22 May 2017, defendant moved to quash the indecent-liberties indictment. He argued it was legally insufficient because it charged him with taking indecent liberties with "Brittany Duncan," who was not an actual child but an adult officer posing as one. The trial court denied the motion. Also before trial, at the start of its first day on 12 June 2017, defendant moved *in limine* to exclude anticipatory Rule 404(b) prior sexual misconduct evidence arising from an incident in 2000 in which he allegedly sexually assaulted his then-twelve-year-old daughter. The State replied it did not "anticipate introducing any 404(b) evidence" because defendant's daughter "declined to participate in this process." Accordingly, defendant withdrew his motion. However, as discussed below, the trial court later allowed the State to cross-examine defendant about that alleged incident for impeachment purposes.

At trial, the State introduced a binder of 426 pages of messages exchanged between defendant and Brittany. Detective Reid testified about messaging defendant while posing as Brittany and read several relevant exchanges to the jury. During the exchanges, Brittany twice

disclosed that she was only fourteen years old, and made several references implying she was a minor living under close maternal supervision, who was sexually inexperienced but interested in the sexual companionship of an older man; defendant, in response, described his experience losing his virginity at age fourteen, explained how being with an older man rather than a teenage boy would make Brittany's first sexual experience more enjoyable, sent Brittany several sexually explicit messages and sexually graphic stories or song lyrics, encouraged Brittany not to tell her mother about them communicating, expressed concerns about her mother reading their messages, and formulated a plan for them to meet up for sex without raising Brittany's mother's suspicions. Detective Reid also testified that when he first interviewed defendant briefly at the Panera Bread parking lot, defendant initially denied knowing Brittany but later admitted that he had been communicating with her and knew her to be only fourteen years old.

The State also published to the jury during its case-in-chief defendant's later videotaped custodial interview, during which defendant expressed remorse for his actions and again admitted he believed Brittany to be fourteen years old. During that interview, defendant also stated to the detectives that he "never had sex with a minor" before.

At the close of the State's evidence, defendant moved to dismiss both charges for insufficiency of the evidence. As to the solicitation charge, defendant argued generally that the State failed to present substantial evidence "of each and every element." As to indecent liberties, defendant argued in relevant part the same grounds underlying his prior motion to quash the indictment—that is, the State failed to present evidence that Brittany was an actual minor, and without the element of an actual child victim, a charge for taking indecent liberties with a child cannot be sustained. The trial court denied the motions.

Defendant testified on his own behalf. Despite previously giving notice of the affirmative defense of entrapment, defendant's trial testimony established a fantasy defense—that is, defendant did not have the specific intent to take indecent liberties with a child or to solicit a child by computer because he did not believe Brittany to be an actual minor but rather a role-playing adult living out her sexual fantasy of pretending to be an underage female seeking to sexually engage an older male. Defendant testified that although Brittany had disclosed to him during their emails that she was only fourteen years old, he knew Brittany was not an actual minor when she emailed him the photo of the twenty-one-year-old former police department intern purportedly depicting

herself, a belief that strengthened when Brittany sent the second photo of the same adult female purportedly depicting herself, and again when he heard the adult female's voice purporting to be Brittany, who had phoned him while he was in route to meet up with her at Panera Bread. When defense counsel referred to his videotaped custodial interview statements, defendant explained that he was "willing to say anything to get back home and get out of [the police station]."

On cross-examination, defendant reiterated that after Brittany sent him the first photo of an adult female purportedly depicting herself, he knew Brittany to be an adult but believed she was living out her sexual fantasy of pretending to be an underage girl. When pressed on the numerous incriminating messages suggesting otherwise, defendant repeatedly replied that he was merely role-playing to help "enforce[ ] the fantasy."

During the middle of cross-examination and outside the presence of the jury, the State informed the trial court and the defense that it intended to use defendant's alleged prior sexual assault of his then-minor daughter to impeach his credibility as a witness. The State explained it intended to reference defendant's prior statement during the videotaped custodial interview that he "never had sex with a minor" and then question him about the alleged prior sexual assault to prove he had previously lied to police. Defense counsel objected, arguing in relevant part that the State before trial agreed not to introduce that evidence for Rule 404(b) sexual misconduct purposes and thus should not be allowed to repackage it to the jury as impeachment evidence. The trial court concluded defendant's pretrial motion to exclude was for Rule 404(b) purposes, not credibility purposes, and ruled it would allow the questioning solely for impeachment. When the State attempted to impeach defendant's credibility by referencing his prior custodial statement and then questioning him about his alleged prior sexual assault of his then-minor daughter, however, defendant flatly denied the allegations, and the State ceased its line of questioning.

At the close of evidence, defendant renewed his motions to dismiss both charges for insufficiency of the evidence, which the trial court denied. After the trial court charged the jury on taking indecent liberties with a child and on child solicitation by computer, the jury during its deliberations sent a note to the trial court asking whether someone can be found guilty of taking or attempting to take indecent liberties with a child if no actual child victim existed. In response to the jury's question, and over defendant's objection, the trial court instructed the jury on the criminal liability theory of attempt.

On 14 June 2017, the jury found defendant guilty of both charges. The trial court entered judgments imposing a thirteen to twenty-five month prison sentence for the solicitation conviction, and a consecutive prison sentence of sixteen to twenty-nine months for the indecent-liberties conviction. Additionally, the trial court ordered that, defendant upon his release from prison, be enrolled in SBM for a period of ten years. Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court erred by (1) denying his motions to quash or dismiss the indecent-liberties indictment on the ground that a charge or conviction for indecent liberties with a child cannot be sustained without an actual child victim; (2) denying his motions to dismiss both charges for insufficiency of the evidence on the grounds that the State failed to present any evidence of the indecent-liberties element of an actual minor victim, and failed to present substantial evidence of the solicitation element that defendant reasonably believed Brittany to be an actual minor; (3) permitting the State, over his objection, to cross-examine him about the alleged prior sexual assault of his then-minor daughter on the grounds that the State impermissibly repackaged its Rule 404(b) evidence of sexual misconduct as impeachment evidence; and (4) ordering that he enroll in SBM because the trial court's findings were insufficient to support the order.

A. Motions to Quash or Dismiss the Indecent-Liberties Charge

[1] Defendant first asserts the trial court erred by denying his pretrial motion to quash the indecent-liberties indictment and his later trial motion to dismiss that charge. He argues the charge alleged, and the trial evidence proved, Brittany Duncan was not an actual child, and "[w]ithout an actual child, there can be no taking indecent liberties with a child." We disagree.

1. Review Standard

We review statutory interpretation issues *de novo*. *See State v. Davis*, 368 N.C. 794, 797, 785 S.E.2d 312, 315 (2016). "Where 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." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted). "[I]t is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citations omitted). Additionally, "[t]he Legislature is presumed

to know the existing law and to legislate with reference to it." *State v. Davis*, 198 N.C. App. 443, 451–52, 680 S.E.2d 239, 246 (2009) (quoting *State v. S. Ry. Co.*, 145 N.C. 495, 542, 59 S.E. 570, 587 (1907)).

2. Discussion

Defendant contends the plain language and statutory structure of N.C. Gen. Stat. § 14-202.1, our taking indecent-liberties-with-a-child statute; in conjunction with an *in pari materia* interpretation of N.C. Gen. Stat. § 14-202.3, our child-solicitation-by-computer statute; as well as a consideration of the legislative histories of both statutes, "compel the conclusion that the General Assembly intended § 14-202.1 to require that a defendant take or attempt to take an indecent liberty with an actual child in order . . . to be convicted."

Our indecent-liberties statute provides in pertinent part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . :
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

N.C. Gen. Stat. § 14-202.1(a), –(a)(1) (2017). North Carolina courts have interpreted the elements of taking indecent liberties with a child as follows:

> "(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire."

State v. Cowan, 207 N.C. App. 192, 201, 700 S.E.2d 239, 245 (2010) (quoting *State v. Rhodes*, 321 N.C. 102, 104–05, 361 S.E.2d 578, 580 (1987)).

However, a defendant "may be convicted of an *attempt* to commit [a] crime[,]" when he or she "has the specific intent to commit [the] crime and under the circumstances as he [or she] reasonably saw them did the acts necessary to consummate the substantive offense, but, because of facts unknown to him [or her] essential elements of the substantive offense were lacking[.]" *State v. Hageman*, 307 N.C. 1, 13, 296 S.E.2d

433, 441 (1982) (emphasis added). "The elements of an attempt to commit a crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Baker*, 369 N.C. 586, 595, 799 S.E.2d 816, 822 (2017) (internal quotation marks omitted) (quoting *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000)).

Here, the indictment charging defendant with taking indecent liberties with a child alleged in relevant part that defendant

> did take and attempt to take immoral, improper, and indecent liberties with "Brittany Duncan," the name of the alias used by Detective Jason Reid of the Boone Police Department, *a child the defendant believed to be under the age of 16 years at the time of the offense*, for the purpose of arousing and gratifying sexual desire.

(Emphasis added.) The undisputed trial evidence showed defendant sent numerous sexually explicit messages to "Brittany Duncan," who identified herself to defendant as a fourteen-year-old female, but who was actually an adult undercover officer. The disputed issue at trial was whether defendant actually believed Brittany to be a child or, as he testified in his defense, he believed Brittany to be an adult role-playing her sexual fantasy of pretending to be a child. Although the essential element of the child's age was missing, we conclude the indictment and trial evidence here were sufficient to support a charge and conviction of attempted taking indecent liberties with a child. *Cf. State v. Ellis*, 188 N.C. App. 820, 825–26, 657 S.E.2d 51, 54–55 (2008) (relying on *Hageman*'s instruction on the criminal liability theory of attempt to opine in dicta that a defendant may be convicted of attempted taking indecent liberties with a child based upon inappropriate messaging with an adult undercover officer posing as a child).

Given N.C. Gen. Stat. § 14-202.1's unambiguous inclusion of "attempt[ ]" within the definition of the crime, we need not resort to other canons of judicial interpretation. Including "attempt" indicates the General Assembly envisioned something less than the actual taking of indecent liberties with a child may sustain a conviction, and underscores legislative intent to impose criminal liability regardless of whether a defendant succeeds in committing the crime. *Cf. State v. Curry*, 203 N.C. App. 375, 393, 692 S.E.2d 129, 142 (2010) ("The crime of robbery with a dangerous weapon, as defined by N.C. Gen. Stat. § 14-87, includes within the definition of the crime an attempt to commit the crime; that is, the State may present evidence that defendant either completed the

crime or that he attempted the crime, but either way the evidence would be sufficient that defendant may be found guilty of robbery with a dangerous weapon." (citing N.C. Gen. Stat. § 14-87 (2005)).

Accordingly, we hold that an actual child victim is not required to sustain a charge or an attempt conviction under N.C. Gen. Stat. § 14-202.1. Therefore, the trial court properly denied the motions to quash or dismiss the charge on this basis.

B. Motions to Dismiss Both Charges for Insufficiency of Evidence

[2] Defendant next contends the trial court erred by denying his motions to dismiss both charges for insufficient evidence. We disagree.

1. Review Standard

Our review standard of a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence is *de novo*. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citing *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982)). Our review scope is "whether the State presented substantial evidence in support of [the challenged] element of the charged offense." *State v. Jones*, 367 N.C. 299, 304–05, 758 S.E.2d 345, 349 (2014) (quoting *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012)). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* "[A]ll evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *Id.* "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (brackets omitted).

2. Discussion

Defendant argues the indecent-liberties charge should have been dismissed because the State failed to present any evidence to support the element of an actual child victim, and the solicitation charge should have been dismissed because the State failed to present substantial evidence of the element that defendant reasonably believed he was soliciting an actual child. Having concluded an actual child victim is not required to sustain a charge or attempt conviction of taking indecent liberties with a child, the issue presented for both charges is whether the State presented substantial evidence that defendant believed Brittany to be an underage minor.

At trial, the State introduced a binder of 426 pages of emails between defendant and Brittany, a person who directly identified herself twice as a fourteen-year-old minor, and who made numerous references implying she was a minor. For example, Brittany reference to being homeschooled, doing homework, living with her mother, not being allowed out of her house without her mother's permission, being unable to drive, engaging in activities common for minors, her friends discussing relationship experiences with teenage boys, and her being embarrassed that she only ever kissed a boy. In response, defendant encouraged Brittany to keep up with her homework, expressed concern about her mother reading their messages, gave Brittany advice on ways not to raise her mother's suspicions about them communicating, formulated a plan for how they could meet up for a sexual encounter without Brittany's mother knowing, described his experience losing his virginity at age fourteen, explained how being with an older man like himself would be more enjoyable for Brittany's first sexual experience than being with a teenage boy, described to Brittany what she could expect during her first sexual encounter, suggested meeting in public since "father-daughter" time would not raise suspicions, and expressed to Brittany how "it's real cool to feel a young girl squiggle and squirm when you hit all the right spots[.]" In sum, these numerous communications portrayed Brittany as a fourteen-year-old girl, under close maternal supervision, and nothing about them indicates defendant believed otherwise or that Brittany was engaging in a role-playing fantasy. Several of these relevant and graphic exchanges were read to the jury, which we decline to repeat.

Moreover, Detective Reid testified that when he first approached defendant at the Panera Bread parking lot, although defendant initially denied knowing Britany, he eventually admitted that "he, in fact, did know that Brittany was a 14-year-old girl." Additionally, during his later videotaped custodial interview that was published to the jury, the following relevant exchanges occurred:

> Q: . . . The bottom line . . . is that you knew [Brittany] was fourteen, and she said okay and you tried to blow her off, but you kept talking to her. . . . [D]id you not process that and think there was something wrong with that?
>
> A: Yes I did.
>
> Q: What did you think?
>
> A: I thought I was making a mistake but I was enjoying the companionship.

. . . .

> Q: Well understand something, you were corresponding with a 14 year old girl. Okay.
>
> A: I understand.

Viewed in the light most favorable to the State, it presented substantial evidence that defendant believed Brittany to be a minor, with whom he was communicating with and sexually pursuing. Accordingly, the trial court properly denied defendant's motion to dismiss both charges for insufficiency of the evidence.

C. Allowing the State to Impeach Defendant during Cross-Examination

[3] Defendant next contends the trial court erred by allowing the prosecutor, over his objection, to cross-examine him for impeachment purposes about the alleged prior sexual assault of his then-minor daughter. He argues the State impermissibly repackaged its Rule 404(b) prior-sexual-misconduct evidence as impeachment evidence and, because the State introduced during its case-in-chief the statement it sought to impeach, our Rules of Evidence prohibited it from doing so.

Before trial, defendant filed a motion *in limine* seeking to exclude anticipatory Rule 404(b) prior sexual misconduct evidence concerning an incident in 2000 in which he was charged with sexually molesting his then twelve-year-old daughter, a charge that was later dismissed. The State replied that it would not present that evidence for Rule 404(b) purposes because defendant's daughter declined to testify. However, during defendant's cross-examination, the State disclosed it intended to use that evidence to impeach his credibility as a witness, since defendant stated during the videotaped custodial interview it had previously published to the jury during its case-in-chief that he "never had sex with a minor." Over defendant's objection, the trial court ruled that it would allow the questioning solely for credibility purposes.

During defendant's cross-examination, after the prosecutor referenced his prior videotaped custodial statement, the following relevant exchange occurred:

> Q. [Your daughter] spent New Year's Eve with you, December 31st, 1999; did she not?
>
> A. That is correct.
>
> Q. And on that New Year's Eve she was 12 years old; is that right?

A. She would've been 12.

. . . .

Q. And so she at that time was two years younger than Brittany was in these messages.

A. That is correct.

Q. And you went into her room on New Year's Eve and you made her perform oral sex on you, didn't you?

[DEFENSE]: Objection.

A. That's incorrect.

THE COURT: Overruled.

Q. ([STATE]) And you also digitally penetrated your 12-year-old daughter?

[DEFENSE]: Objection.

A. That is incorrect.

THE COURT: Overruled.

Assuming, *arguendo*, the trial court erred by allowing this prosecutorial questioning for impeachment purposes, "questions asked by an attorney are not evidence." *State v. Taylor*, 344 N.C. 31, 41, 473 S.E.2d 596, 602 (1996). Additionally, "a question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind." *State v. Richardson*, 226 N.C. App. 292, 303, 741 S.E.2d 434, 442 (2013) (quoting *State v. Smith*, 289 N.C. 143, 157, 221 S.E.2d 247, 255 (1976)). No evidence was generated by the challenged questioning other than defendant's conclusive denials of the alleged prior sexual misconduct, which rendered the challenged prosecutorial questioning harmless. *See State v. McClintick*, 315 N.C. 649, 659, 340 S.E.2d 41, 47 (1986) (finding prosecutorial questioning harmless where "the [S]tate's query into each matter ended upon the defendant's flat denial" and the "defendant's denials were conclusive" (citations omitted)); *State v. Black*, 283 N.C. 344, 350, 196 S.E.2d 225, 229 (1973) ("Defendant's negative answers were conclusive and rendered the questions harmless." (citations omitted)); *see also State v. Davis*, 349 N.C. 1, 40, 506 S.E.2d 455, 476 (1998) ("No improper testimony was admitted, and the jurors heard defendant's sister deny any knowledge of such conversation."). While we do not go so far as to hold that reversible error could never occur from improper questioning on cross-examination of a criminal

defendant where the defendant denies the allegations contained in the questions, based on the facts of this case we conclude no prejudicial error occurred. Accordingly, we overrule this argument.

D. SBM Order

[4] Finally, defendant argues, and the State concedes, the trial court reversibly erred by ordering that he enroll in SBM. The Division of Adult Correction's ("DOC") STATIC-99R risk assessment of "Moderate-Low," without additional findings by the trial court, was insufficient to support the trial court's conclusion that defendant "requires the highest possible level of supervision and monitoring" necessary to impose SBM. *See State v. Kilby*, 198 N.C. App. 363, 370, 679 S.E.2d 430, 434 (2009) ("The findings of fact are insufficient to support the trial court's conclusion that 'defendant requires the highest possible level of supervision and monitoring' based upon a 'moderate' risk assessment from the DOC."). Because the State failed to present evidence at sentencing to support findings that would support this determination, we reverse the SBM order. *Id.* at 370–71, 679 S.E.2d at 434.

III. Conclusion

Because we conclude that an actual child victim is not necessary to sustain a charge or conviction of attempted taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1, we hold the trial court properly denied defendant's motions to quash or dismiss the indecent-liberties charge on that basis. Viewed in the light most favorable to the State, it presented substantial evidence of the challenged elements of both charges, and thus the trial court properly denied defendant's motions to dismiss those charges for insufficiency of the evidence. Assuming, *arguendo*, the trial court erred by allowing the State to cross-examine defendant for impeachment purposes about the alleged prior sexual assault of his then-minor daughter, defendant's conclusive denials that the incident ever occurred rendered that questioning harmless. Accordingly, we hold defendant received a fair trial, free of prejudicial error. Finally, as the State concedes, because the trial court's findings were inadequate to support its order imposing SBM, we reverse the SBM order.

NO PREJUDICIAL TRIAL ERROR; SBM ORDER REVERSED.

Judges DILLON and DAVIS concur.

STATE v. HOLMES

[263 N.C. App. 289 (2018)]

STATE OF NORTH CAROLINA
v.
KARLOS ANTONIO HOLMES, DEFENDANT

No. COA17-1237

Filed 18 December 2018

1. Homicide—unlawful killing—cause of death—undetermined —sufficiency of evidence

In a first-degree murder case, the State presented substantial evidence from which the jury could conclude the victim's death was the natural result of a criminal act—even though the victim's cause of death could not be determined—including expert medical testimony regarding the nature of the victim's wounds and what causes of death could be ruled out.

2. Homicide—identity of perpetrator—circumstantial evidence —sufficiency of evidence

In a first-degree murder case, the State presented substantial evidence, even if circumstantial, from which the jury could conclude that defendant had motive and opportunity to kill his girlfriend.

3. Homicide—jury instructions—lesser-included offenses—premeditation and deliberation

In a first-degree murder case, defendant's requests to instruct the jury on the lesser-included offenses of second-degree murder and voluntary manslaughter were properly denied where the evidence supported all the elements of first-degree murder, including premeditation and deliberation, and no evidence was presented of provocation that would tend to negate any of those elements.

4. Evidence—relevance—probative value—first-degree murder —letters of debt

In a first-degree murder case, the trial court did not abuse its discretion by admitting letters detailing defendant's outstanding debts where the letters were probative of a financial motive to kill his girlfriend, to whom he owed child support, and were not unfairly prejudicial to defendant.

5. Homicide—prosecutor's closing argument—comment about defendant's finances—prejudice analysis

In a first-degree murder case, defendant failed to demonstrate he was prejudiced by the prosecutor's statement in closing

argument that defendant had "absolutely no money." Prior to this statement, the State detailed defendant's debts, his living situation, and his employment status, and no reasonable probability existed that a different outcome would have resulted absent the challenged comment.

6. Evidence—expert testimony—undetermined cause of death—electrical principles and experiment

In a first-degree murder case where no definitive cause of death was given for a victim who was found dead in a bathtub with a hair dryer, the trial court did not err by admitting expert testimony and evidence regarding an electrical experiment to determine the amount of current leakage from a hair dryer when submerged in water. Defendant's arguments challenging the qualifications of the experts, reliability of their methods, and form of the experiment were rejected.

Appeal by Defendant from judgment entered 26 May 2017 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Isham Faison Hicks, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

MURPHY, Judge.

The victim, Ms. Claiborne, lived with and was engaged to Defendant, Karlos Antonio Holmes. The couple had a tumultuous relationship after their engagement. On Sunday, 24 November 2013, Ms. Claiborne sent Defendant a text message telling him to move out of the home and that she would be changing the locks and continuing to request child support. Ms. Claiborne went to a concert that Sunday night and returned home afterwards. The next morning, her friends and colleagues, concerned that Ms. Claiborne was absent from work and not responding to text messages, went to Ms. Claiborne's home to check on her. Once they gained entry to the home, they found Ms. Claiborne lying dead in the bathtub along with a hair dryer. The police arrived and found white feathers throughout the home and a feather pillow in the room where Defendant had been staying. A subsequent autopsy found petechiae under Ms. Claiborne's eyelids and an internal bruise under her skull.

While the forensic pathologist stated it was her medical opinion that Ms. Claiborne did not die from electrocution, he was unable to determine a cause of death with certainty. Defendant was charged with and convicted of first-degree murder.

On appeal, Defendant argues the trial court erred in (A) denying his motion to dismiss the first-degree murder charge; (B) failing to instruct on the lesser-included offenses of second-degree murder and voluntary manslaughter; (C) admitting letters detailing Defendant's debts; (D) overruling his objection to a statement made by the State during closing argument; and (E) admitting testimony from two expert witnesses. We find no error in part and no prejudicial error in part.

BACKGROUND

Defendant and Ms. Claiborne had a romantic relationship and were the parents of a young child, Christopher[1]. Ms. Claiborne and Christopher lived in Charlotte in a home Ms. Claiborne owned. In early 2013, Defendant came to Charlotte to visit Ms. Claiborne and assist in her recovery after laparoscopic surgery for endometriosis. Defendant's move to Charlotte and his stay at Ms. Claiborne's home became permanent and the two became engaged late in 2013.

As of November 2013, the two were having relationship troubles. Ms. Claiborne's cousin testified that "a lot of animosity" existed between Defendant and Ms. Claiborne and that the two barely spoke during their engagement party. Ms. Claiborne told her cousin that she did not want "to continue with the wedding because [Defendant] was having financial issues and he was basically spending all of her money and she was using all of her money for wedding stuff."

On Sunday, 24 November, Christopher was with Ms. Claiborne's mother in Virginia, and Ms. Claiborne had plans to attend a concert with two friends and colleagues, Ms. Carlisle ("Carlisle") and Ms. Horne ("Horne"). Carlisle arrived at Ms. Claiborne's home before the concert to curl Ms. Claiborne's hair. Ms. Claiborne had just taken a shower and was putting on clothes, and Carlisle noted that there were no bruises on Ms. Claiborne's body when she fully disrobed. Carlisle then used a curling iron to curl Ms. Claiborne's hair. While in Ms. Claiborne's room, Carlisle noted that "everything was put up and organized nice and neat." The two then left Ms. Claiborne's home in Ms. Claiborne's BMW for the concert, where they met Horne and other friends. Ms. Claiborne and Carlisle

1. A pseudonym is used to protect the privacy of the minor-child.

arrived back at Ms. Claiborne's home at approximately 10:00 P.M. that night. Defendant's Volkswagen was not at the home when they arrived, and Carlisle watched Ms. Claiborne safely enter the home.

The next morning, Horne texted a group chat with Carlisle and Ms. Claiborne, and Ms. Claiborne never responded. Carlisle then sent Ms. Claiborne an individual text message asking whether she was at work and if she was okay. Ms. Claiborne never responded. Carlisle did not "feel right about the situation," and told her supervisor that she would be leaving work for an hour. Horne texted Defendant about Ms. Claiborne's whereabouts, to which he responded:

> I'm sorry for the delayed response, but I just got out of a – out of a meeting for work. She went out with [Carlisle] last night, but I left early this morning and [she] wasn't there when I went to work. I'll call to check on her in a little bit, I think she had another doctor's appointment.

Horne replied to the text message and asked whether Ms. Claiborne's BMW was at home earlier that day. Defendant did not respond.

Carlisle and Horne went to Ms. Claiborne's home, where they found Defendant's Volkswagen, but not Ms. Claiborne's BMW. All the doors and windows to the home were locked, so Carlisle had to lift the garage door for Horne to enter through an unlocked door inside the garage. While searching for Ms. Claiborne in the home, Horne entered the bedroom and found it to be "a disaster." Her clothes, shoes, and bags were strewn across the floor. Horne then looked in the bathroom, where she found Ms. Claiborne unresponsive in the bathtub with a blow dryer in her lap. Horne pulled out and unplugged the blow dryer, and unsuccessfully tried to find a pulse on Ms. Claiborne.

Defendant arrived at the home shortly after emergency personnel, alone and driving Ms. Claiborne's BMW. Defendant stated he was unaware that Ms. Claiborne was supposed to go to work that morning. He also told a paramedic that he had spoken to Ms. Claiborne approximately 30 to 45 minutes before he arrived at the home and that she told him she planned to take a bath.

When police arrived at the scene, they found a white feather in the bathroom where Ms. Claiborne was found. They further found the furniture had been moved in Ms. Claiborne's bedroom and that her closet was "a mess[,]" with a pile of clothes, broken hangers, and Ms. Claiborne's engagement ring hidden in a shoebox under two feet of clothing. In the bedroom with an air mattress where Defendant was staying, police

found clothing and shoes scattered across the floor and a black duffle bag across the room containing white socks in the original packaging. There were also white feathers on the floor of the room and a feather pillow behind the air mattress. A subsequent search of the kitchen revealed white feathers on wet socks found in the trashcan, and additional white feathers were found in the trash bin outside of the home.

A search of Ms. Claiborne's BMW revealed a broken end table from Ms. Claiborne's bedroom, Defendant's keys to his vehicle, and a Ziploc bag containing mail. The mail in the Ziploc bag consisted of thirteen parcels addressed to Defendant containing notices of delinquent child support payments and other debts.

DNA analysis indicated that Defendant's DNA was found under one of Ms. Claiborne's fingernails and on one of the ends of the hair dryer's electrical cord. The autopsy performed on Ms. Claiborne revealed a large bruise around her hip and upper thigh, a scratch on her right thigh, and petechiae inside her eyelids. The forensic pathologist found no indication that Ms. Claiborne ingested alcohol or drugs, no evidence supporting electrocution, and no water in her lungs to indicate drowning. However, because there were no "strong, solid physical indications that point to an exact thing that [caused the death]," the forensic pathologist was unable to determine a cause of death.

Defendant was arrested approximately three months after Ms. Claiborne's death and was charged with first-degree murder. A jury convicted Defendant on that charge and the trial court entered judgment, sentencing Defendant to life without parole. Defendant timely appeals.

ANALYSIS

A. Motion to Dismiss

> The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. 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. Pressley, 235 N.C. App. 613, 616, 762 S.E.2d 374, 376 (internal citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 763 S.E.2d 382 (2014). "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

reviewing claims of sufficiency of the evidence, we consider all evidence in the light most favorable to the State, drawing all reasonable inferences in its favor. *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007).

To convict Defendant of first-degree murder under N.C.G.S. § 14-17, the State must prove Defendant committed: "(1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007). Thus, to survive a motion to dismiss on the first-degree murder charge, the State was required to offer substantial evidence of each element and of Defendant's identity as the perpetrator of the unlawful killing. Defendant claims the State failed to meet this burden with respect to two specific elements: (1) the unlawful killing and (2) Defendant's identity as the perpetrator. We discuss each contention in turn.

1. Unlawful Killing

[1] Defendant contends the State failed to show that Ms. Claiborne died by virtue of a criminal act and, therefore, failed to offer substantial evidence of an "unlawful killing." We disagree.

In proving first-degree murder, the State must show that the victim's "immediate cause of death is the natural result of [Defendant's alleged] criminal acts." *State v. Cummings*, 301 N.C. 374, 378, 271 S.E.2d 277, 280 (1980). "There is no proper foundation . . . for a finding by the jury as to the cause of death without expert medical testimony where the cause of death is obscure and an average layman could have no well grounded opinion as to the cause." *State v. Minton*, 234 N.C. 716, 722, 68 S.E.2d 844, 848 (1952). *Minton*, however, does not place a requirement on the State to offer expert medical testimony that arrives at a *final*, *determined* cause of death in order for the jury to make a finding as to the cause of death.

Here, the State presented expert medical testimony by the forensic pathologist, Dr. Thomas Darrell Owens ("Dr. Owens"), who performed the autopsy on Ms. Claiborne. While Dr. Owens testified that he was unable to clinically determine a cause of death, the State presented substantial evidence from which the jury could determine that the cause of Ms. Claiborne's death was the natural result of a criminal act. At trial, Dr. Owens testified that the autopsy he performed revealed petechiae, red dots similar to bruising, on the inside of Ms. Claiborne's eyelids. Dr. Owens testified that petechiae are caused by pressure in the head when blood is "flowing in, but the drainage can't drain out[,]" leading to burst

blood vessels. The presence of petechiae led Dr. Owens to believe that "there was potentially some type of pressure around [Ms. Claiborne's] upper chest or her neck and head area so that the blood got trapped and the little blood vessels popped in the skin because the blood couldn't drain out." Indeed, Dr. Owens testified that the presence of petechiae is "more consistent with pressure on the chest and neck, as in a sitting, pressing or pressure around the neck" and that such pressure, in the form of suffocation, "almost never" leaves a mark in the area where the pressure is applied.

Dr. Owens also testified that he found a large bruise around Ms. Claiborne's right side around her hip in the upper part of her thigh that was less than 18 hours old, along with a superficial linear abrasion on the side of her right thigh. Carlisle testified that the night before Ms. Claiborne's death, she saw Ms. Claiborne fully naked as she was dressing and did not see such a bruise. Additionally, Dr. Owens noted a subgaleal hemorrhage on the inside of Ms. Claiborne's scalp that "would indicate her head was hit by something or her head hit into something to cause that deep bruise."

Dr. Owens also offered expert medical testimony as to what, in his opinion, *did not* cause Ms. Claiborne's death. Ms. Claiborne's toxicology report came back negative for alcohol and all drugs tested. This was notable, as "the vast majority [of cases of suicide] are positive for alcohol" when suicide is carried out by instrumentation and suicides involving drugs usually involve high levels of drugs. Moreover, Dr. Owens ruled out drowning, as there was no water found in Ms. Claiborne's lungs. Finally, Dr. Owens found no evidence to support a finding that Ms. Claiborne died of electrocution, and it was Dr. Owens's expert medical opinion that "she did not die of electrocution."

Taken in the light most favorable to the State and affording it the benefit of all reasonable inferences, the evidence presented was sufficient such that a reasonable juror could accept the evidence as adequate to support the conclusion that the cause of Ms. Claiborne's death was the natural result of a criminal act.

2. Defendant as Perpetrator

[2] Defendant contends the State also failed to offer substantial evidence that Defendant was the perpetrator of the crime. We, again, disagree.

The evidence offered by the State was circumstantial; however, "[c]ircumstantial evidence may be sufficient to overcome a motion to dismiss 'even when the evidence does not rule out every hypothesis of

innocence.' " *State v. Hayden*, 212 N.C. App. 482, 484, 711 S.E.2d 492, 494 (2011) (quoting *State v. Stone*, 323 N.C. 447, 452, 373, S.E.2d 430, 433 (1988)). When the evidence of a defendant's identity as the perpetrator is circumstantial:

> [C]ourts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime.

State v. Bell, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983), *aff'd*, 311 N.C. 299, 316 S.E.2d 72 (1984). Such a question of "[w]hether the State has presented sufficient evidence to identify defendant as the perpetrator of the offense is not subject to an easily quantifiable bright line test." *State v. Miles*, 222 N.C. App. 593, 600, 730 S.E.2d 816, 823 (2012), *aff'd*, 366 N.C. 503, 750 S.E.2d 833 (2013). Thus, while evidence of *either* motive or opportunity, standing alone, is insufficient to withstand a motion to dismiss, we assess "the quality and strength of the evidence as a whole." *Id.*

Regarding motive, the State presented substantial evidence of a tumultuous relationship between Defendant and Ms. Claiborne that was colored by Defendant's financial troubles. It was known that Ms. Claiborne and Defendant had relationship problems after their engagement and that animosity existed between the two, which was apparent at the couple's engagement party. Ms. Claiborne explicitly stated to a friend that she did not want "to continue with the wedding because [Defendant] was having financial issues and he was basically spending all of her money and she was using all of her money for wedding stuff." Additionally, the day before Ms. Claiborne was killed, she sent a text message to Defendant stating, "You have until Tuesday at 8:00 as I'm leaving to go out of town Wednesday or Thursday. And my locks will be changed. So do my [sic] act stupid. Thanks." She then sent an additional text stating, "I will also be [sic] send a request not to stop child support FYI." Law enforcement later found a Ziploc bag of notices about Defendant's child support payments and commercial debts. Defendant's financial hardships, coupled with his tempestuous relationship with Ms. Claiborne and her threat to end the relationship and remove Defendant from her home, are sufficient for a reasonable juror to conclude Defendant had motive to kill Ms. Claiborne. *See State v. Gray*, ___ N.C. App. ___, ___, 820 S.E.2d 364, ___ (Sept. 18, 2018) (No.

COA17-1162) (holding "motive tended to be sufficiently established with testimony concerning the hostility that existed" between the defendant and victim).

In order to show opportunity, "the State must have presented at trial evidence not only placing the defendant at the scene of the crime, but placing him there at the time the crime was committed." *Hayden*, 212 N.C. App. at 488, 711 S.E.2d at 497. Ms. Claiborne was found with her body already in rigor mortis. The forensic pathologist testified that the onset of rigor mortis is first noticeable in the fingers and jaw after 30 minutes to an hour after death and the body progressively stiffens over the next 6 to 8 hours. As the 911 call was placed at 11:48 A.M., this indicates that Ms. Claiborne's death occurred during the night or early morning.

The State presented evidence that Defendant was in the home between the time that Ms. Claiborne returned home from the concert the night before and when her body was found the next day. Ms. Claiborne arrived home from the concert in her BMW and Carlisle watched Ms. Claiborne enter the home. When Defendant arrived the next day after Ms. Claiborne's body was found, he was driving Ms. Claiborne's BMW. Thus, Defendant was necessarily at the home during this time period to take possession of Ms. Claiborne's car. Moreover, the broken end table found in the BMW that Defendant was driving when he arrived at the home was circumstantial evidence placing Defendant at the scene when Ms. Claiborne was killed.

Defendant argues that his presence at the home during this time is insufficient to show opportunity, as "[h]e had access to the house during this time because he lived there." However, we have made it clear that presence at or near the scene of a killing around the time it was committed is sufficient for a reasonable juror to conclude Defendant had the opportunity to commit the killing. *Miles*, 222 N.C. App. at 601, 730 S.E.2d at 823 ("Taking the State's evidence as a whole and resolving all contradictions in favor of the State, a reasonable juror could conclude that defendant was in the vicinity of the victim's home and the scene of the crime at the time of death, thereby establishing defendant's opportunity to commit the murder.")

As previously stated, a reasonable mind might accept the evidence, viewed in the light most favorable to the State and affording it the benefit of all reasonable inferences, as adequate to support the conclusion that Ms. Claiborne was suffocated to death. The State introduced evidence tending to establish that Defendant had the capability of carrying

out this method of killing and evidence establishing his identity as the perpetrator of such an action. A white feather pillow was found behind the air mattress in the room in which Defendant stayed. Also found in Defendant's room was an opened pack of white socks still in the original packaging. White feathers were found on the floor in the bedroom, in a trash bin outside the home, and in the bathroom where Ms. Claiborne's body was found. A pair of wet white socks was found in the trashcan in the kitchen with a feather on the socks. This evidence, viewed in the light most favorable to the State, would allow a reasonable juror to conclude that Defendant had the means of suffocating Ms. Claiborne with the feather pillow found in his room and that this evidence connected Defendant to the means of the killing.

Based upon this evidence, there was sufficient evidence from which a reasonable inference of Defendant's guilt could be drawn. Accordingly, it was for "the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that [Defendant was] actually guilty." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000). The trial court did not err in denying Defendant's motion to dismiss.

B. Instruction on Lesser-Included Offenses

[3] Defendant argues the trial court erred in failing to submit an instruction to the jury on second-degree murder and/or voluntary manslaughter. Specifically, Defendant contends the evidence negated premeditation and deliberation. We disagree.

"We review the trial court's denial of the request for an instruction on the lesser included offense de novo." *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660 (2012). A trial court is required to give a jury instruction on a lesser-included offense "only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Still, the "trial court should refrain from indiscriminately or automatically instructing on lesser included offenses. Such restraint ensures that the jury's discretion is . . . channelled so that it may convict a defendant of only those crimes fairly supported by the evidence." *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (citation, alteration, and internal quotation marks omitted). Our caselaw has made it clear when the trial court shall submit an instruction for second-degree murder as a lesser-included offense to first-degree murder:

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and

> deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Millsaps, 356 N.C. at 560, 572 S.E.2d at 771.

In order to satisfy its burden that Defendant's act was premeditated, the State must show that "the act was thought over beforehand for some length of time, however short." *Taylor*, 362 N.C. at 531, 669 S.E.2d at 256 (quoting *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000)). To establish deliberation, Defendant must have possessed "an intent to kill, carried out in a cool state of blood . . . and not under the influence of a violent passion or a sufficient legal provocation." *Id.* Premeditation and deliberation are typically proven through circumstantial evidence. *State v. Childress*, 367 N.C. 693, 695, 766 S.E.2d 328, 330 (2014). Our Supreme Court "has identified several examples of circumstantial evidence, any one of which may support a finding of the existence of these elusive qualities." *Id.* Such examples include:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id.

Here, the State offered substantial evidence to support a finding of premeditation and deliberation. As discussed above, Defendant and Ms. Claiborne had a tumultuous relationship with ill-will existing between the two. Ms. Claiborne planned to call off the wedding and sent Defendant a text message telling him that he needed to move out of the home and that she would be changing the locks. Moreover, she informed Defendant, who had financial troubles, that she would continue to seek child support payments. The next day her body was found. After the killing, Defendant gave inconsistent statements regarding the morning Ms. Claiborne's body was found. He told Ms. Claiborne's friend, Horne, that he left early for work and Ms. Claiborne was not there. He also stated that he thought she had a doctor's appointment. However, Defendant

had Ms. Claiborne's BMW and the keys to his own car with him, leaving Ms. Claiborne with no vehicle the morning her body was found. Indeed, when Horne asked Defendant whether the BMW was at the home when he went to work, he never responded. Moreover, there was no evidence that Ms. Claiborne provoked Defendant in any way. Accordingly, there was substantial evidence to support the jury's finding of premeditation and deliberation.

However, the sufficiency of the evidence to satisfy the State's burden in proving the elements of first-degree murder does not end our inquiry. The key issue here is whether there was evidence to negate a finding of premeditation and deliberation and support a conviction of second-degree murder. "An instruction on the charge of second-degree murder requires that the unlawful killing of a human being occur without premeditation and deliberation." *Laurean*, 220 N.C. App. at 347-48, 724 S.E.2d at 662. "[I]f the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). Stated differently, the specific intent to kill must be "formed under the influence of the provocation of the quarrel or struggle itself" in order to negate premeditation and deliberation. *Id.* at 114, 282 S.E.2d at 795-96.

The only evidence Defendant claims negates premeditation and deliberation are the text from Ms. Claiborne telling Defendant to move out of the home and the signs of the struggle indicated by strewn clothes and broken furniture. From this evidence, Defendant claims premeditation and deliberation were negated because "the jury could have concluded" that an argument arose that "aroused a sudden passion in him." However, these two pieces of evidence do not negate premeditation and deliberation.

Ms. Claiborne sent Defendant the text message telling him to move out of the home and that she would continue to request child support on Sunday, the day before her body was found. In order to negate premeditation and deliberation by showing a sufficient provocation, the intent to kill must be formed and immediately executed in the passion caused by that provocation. There is no evidence that Defendant formed and immediately executed the intent to kill under the provocation of that text message when he received it. Even assuming Defendant and Ms. Claiborne did later argue about the text message, "evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his

ability to reason." *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785 (1995). Nevertheless, there is no such additional evidence in the record before us.

Additionally, the strewn clothes and broken furniture that Defendant says indicate signs of a struggle do not negate premeditation and deliberation in this case. Our appellate courts have never held that evidence of a struggle, fight, or victim resistance necessarily negates premeditation and deliberation. *See State v. Hightower*, 340 N.C. 735, 744, 459 S.E.2d 739, 744 (1995) ("[A]ny attempts by [the victim] at hitting or kicking defendant on or near the dirt road prior to his stabbing her were the direct result of defendant's pursuit of her."). The mere fact that there were strewn clothes and a broken end table, alone, are not evidence that show a provocation sufficient to render Defendant incapable of deliberating his actions.

We find Defendant's reliance on *State v. Beck*, 163 N.C. App. 469, 594 S.E.2d 94 (2004), *rev'd in part on other grounds*, 359 N.C. 611, 614 S.E.2d 274 (2005), misplaced and unpersuasive. In *Beck*, we held there was evidence sufficient to negate premeditation and deliberation where the defendant was "very drunk" when he went to see the victim, the victim initiated a physical attack on the defendant, and the victim made numerous threats to the defendant's child during the fight that ensued. *Id.* at 473-74, 594 S.E.2d at 97. The record here contains no evidence of any of these circumstances that would require an outcome similar to *Beck*. Defendant claims the jury "could have concluded" an argument occurred that aroused a sudden passion in Defendant that negated premeditation and deliberation; however, the mere possibility of such an argument or altercation is insufficient to render the trial court's decision not to instruct on second-degree murder erroneous. Defendant has not pointed us to any evidence that he was incapable of deliberating his action or that he was unable to reason due to a sufficient provocation. Because the evidence does not establish that Defendant formed the intent to kill Ms. Claiborne under the influence of provocation such that premeditation and deliberation are negated, the trial court did not err in failing to instruct the jury on second-degree murder.

The trial court similarly did not err in failing to instruct the jury on voluntary manslaughter. "Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Norris*, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). "Killing another while under the influence of passion or in the heat of blood produced by adequate provocation is voluntary manslaughter."

State v. Allbrooks, ___ N.C. App. ___, ___, 808 S.E.2d 168, 172 (2017). "To reduce the crime of murder to voluntary manslaughter, the defendant must either rely on evidence presented by the State or assume a burden to go forward with or produce some evidence of all elements of heat of passion on sudden provocation." *Id.* Defendant did not present such evidence, and the State's evidence does not establish a sudden provocation, much less that he acted under an "immediate grip of sufficient passion" to warrant a voluntary manslaughter instruction. Without evidence of such a provocation and heat of passion, the trial court did not err in failing to instruct the jury on voluntary manslaughter.

C. Letters

[4] Defendant argues the trial court erred in admitting letters detailing his outstanding debts over his timely objection that the letters were not relevant under Rule 401. In the alternative, Defendant contends that the trial court abused its discretion in admitting the letters, as the probative value was substantially outweighed by the danger of unfair prejudice under Rule 403. We disagree with both contentions.

"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 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000); *see also* N.C.G.S. § 8C-1, Rule 401 (2017). Trial court rulings on relevancy technically are not discretionary. *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004). However, because we have noted 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," rulings on relevancy are given great deference on appeal. *Id.*

Evidence may be excluded under Rule 403 even if it is relevant:

> 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.G.S. § 8C-1, Rule 403 (2017). Rule 403 determinations "are discretionary, and a trial court's decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion." *State v. Chapman*, 359 N.C. 328, 348,

611 S.E.2d 794, 811 (2005). Abuse of discretion occurs when the trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Whether Defendant had a motive to murder Ms. Claiborne was a strongly contested issue in this case. The State alleged that Defendant was facing financial difficulties and that those difficulties created a financial motive to kill Ms. Claiborne. We have previously held that evidence of financial difficulties may be relevant to such a contested issue. *See State v. Britt*, 217 N.C. App. 309, 317, 718 S.E.2d 725, 731 (2011) (holding that trial court did not abuse its discretion in admitting letters detailing the defendant's financial hardship because the letters "support[ed] the State's theory that defendant had a financial motive to kill his wife."); *State v. Peterson*, 179 N.C. App. 437, 465, 634 S.E.2d 594, 615 (2006) (holding that "evidence of a potential inheritance of a great deal of money combined with current financial difficulties may be evidence of a motive for murder."), *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007), *cert. denied*, 552 U.S. 1271, 170 L.Ed.2d 377 (2008). The letters here indeed indicated that Defendant faced financial hardships with both consumer and child support debt. This, coupled with evidence that Ms. Claiborne had threatened to remove Defendant from the home and expressed that she would continue to request child support, indicate that the letters made the existence of a financial motive to murder Ms. Claiborne more probable.

Defendant attempts to distinguish this case from those where we have held evidence was relevant to a financial motive to murder, noting that the amount of debt was not as high and that Defendant stood to gain no monetary benefit from a life insurance policy. We find this argument unpersuasive. "Relevant evidence is that which has any tendency, *however slight*, to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence." *Britt*, 217 N.C. App. at 317, 718 S.E.2d at 731 (emphasis added). Because Defendant's financial difficulties were "calculated to throw . . . light upon the supposed crime[,]" the trial court did not err in admitting the letters. *See State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965). The weight of such evidence was for the jury. *See id.* at 287, 141 S.E.2d at 513.

Additionally, we do not find that the trial court's Rule 403 determination that the probative value of the letters was not outweighed by the danger of unfair prejudice was manifestly unsupported by reason. The trial court here indeed limited the danger of unfair prejudice by

prohibiting the State from publishing to the jury letters which indicated a criminal action against Defendant. The trial court did not abuse its discretion in admitting the letters.

D. State's Closing Argument

[5] During its closing argument, the State made the remark that Defendant "has absolutely no money." Defendant argues on appeal that the trial court abused its discretion in overruling his timely objection to this statement based on his contention that the content of the statement was not in evidence. We disagree.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). "In order to assess whether a trial court has abused its discretion when deciding a particular matter, [we] must determine if the ruling could not have been the result of a reasoned decision." *Id.* (citation and internal quotation marks omitted). Our Supreme Court in *Jones* instructed:

> When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper. . . . [I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others. Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.

Id. A defendant is prejudiced by a non-Constitutional 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. The burden of showing such prejudice under this subsection is upon the defendant." N.C.G.S. § 15A-1443(a) (2017).

We need not decide whether the content of the statement that Defendant "has absolutely no money" referenced circumstances outside of the evidence, as Defendant has failed to show that such an alleged error prejudiced him. Preceding the statement, the State detailed Defendant's debts, all of which were in evidence. The State also noted that Defendant lived in the home that Ms. Claiborne owned. Moreover, the State acknowledged that Defendant had in fact started a new job the day Ms. Claiborne's body was found. With all of this evidence

before the jury, there is no reasonable probability that the outcome of the trial would have been different absent the contested hyperbole.

E. Expert Testimony

[6] Defendant next argues the trial court erred in admitting the expert opinions of Michael Kale ("Kale") and Michael McFarlane ("McFarlane"). We consider each in turn and find no error.

It remains well-established that "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony[,]" and the trial court's determination is reviewed for abuse of discretion. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984); *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012). "The trial court's decision will not be disturbed on appeal unless '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. Mendoza*, ___ N.C. App. ___, ___, 794 S.E.2d 828, 834 (2016) (quoting *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010)). Thus, "[t]rial courts act as a gatekeeper in determining admissibility of expert testimony, and a trial court's decision to admit or exclude expert testimony will not be reversed on appeal unless there is no evidence to support it." *State v. Walston*, 369 N.C. 547, 551, 789 S.E.2d 741, 745 (2017) (citation and internal quotation marks omitted).

Under Rule 702:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.
> >
> > (2) The testimony is the product of reliable principles and methods.
> >
> > (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S § 8C-1, Rule 702 (2017). In order for expert testimony to be admissible, it must satisfy the three prongs of Rule 702: the expert testimony must pass a relevance inquiry, the expert must be appropriately qualified, and the expert testimony must be reliable by satisfying the

three inquiries enumerated in Rule 702(a)(1)-(3). *State v. McGrady*, 368 N.C. 880, 889-90, 787 S.E.2d 1, 8-9 (2016).

1. Kale

Defendant first contends that Kale was not qualified to offer expert testimony that a running hair dryer dropped in a tub of water would not create current leakage if there is no path to the ground for the electrical current.

Kale testified that he is an inspection supervisor for Mecklenburg County Code Enforcement specializing in electrical code enforcement, a position he has held for 15 years. In 2001, Kale received a Level III inspection certification, the highest level of certification for electrical inspectors. He continues to take 60 hours in continuing education classes in the field per year. Prior to his current position, Kale had been an electrical contractor since 1987. Kale stated that in the early 1980s, he began constructing electrical wiring systems and continued to do so until his current position where he switched from constructing to inspecting such systems. More specifically, Kale's current responsibilities as an inspection supervisor include checking "the installation of electrical systems and power distribution systems" by testing and visually inspecting electrical wiring to ensure compliance with national and state codes. Kale testified that an appliance with a running circuit placed in a bathtub with water, with no pathway to the ground, would not create electrical leakage, as "the only path back to ground is the circuit [to which] it's attached . . . ." Given Kale's knowledge, experience, and training in electrical systems, which encompasses how electricity moves, it was not an abuse of discretion for the trial court to determine that Kale had the necessary qualifications to provide this opinion.

Defendant cites *Leary v. Nantahala Power & Light Co.*, 76 N.C. App. 165, 332 S.E.2d 703 (1985) in support of his argument that Kale was not qualified. However, *Leary* is readily distinguishable from the case at hand. In *Leary*, a witness was tendered as an expert in the field of "operation and maintenance of electrical distribution systems." *Leary*, 76 N.C. App. at 173, 332 S.E.2d at 709. The witness, however, studied education in school, failed to complete his course of instruction as a lineman, and was responsible in his current position for "talking with prospective residential customers, obtaining rights-of-way for provision of service to their homes, determining the location of the power poles, scheduling line crews and specifying the materials to be used in providing electrical service systems to the residences." *Id.* In contrast, Kale began his career in the 1980s constructing electrical wiring systems and

subsequently advanced to inspecting such systems for 15 years. While Kale lacked a post-secondary degree in electrical engineering, we have never required such a formal credential. *State v. Norman*, 213 N.C. App. 114, 124, 711 S.E.2d 849, 857, *disc. review denied*, 365 N.C. 360, 718 S.E.2d 401 (2011) (holding that the witness's "extensive practical experience" in the relevant fields qualified him to testify as an expert despite his lack of a formal degree). Kale's experience, training, skill, and experience in the electrical systems field are distinguishable to the witness in *Leary*.

Defendant next contends that Kale's opinion on how an appliance would react when placed in water was not based on reliable methods. Specifically, Defendant claims that Kale "formed his opinion . . . when he witnessed a fire department instructor throw a hair dryer into a similar tub of water" and it kept running. However, this contention mischaracterizes the testimony. After testifying to the potential effect of placing an appliance in water with respect to the electrical system, the State asked Kale, "have you ever witnessed this . . . phenomenon demonstrated?" Kale's response to the question describing the demonstration he witnessed merely assisted in illustrating Kale's preceding testimony. The testimony was not an experiment "requiring substantially similar circumstances to test the validity of such a hypothesis" and did not serve as the basis for Kale's preceding opinion. *See State v. Anderson*, 200 N.C. App. 216, 222, 684 S.E.2d 450, 455 (2009). Rather, "[the] illustration enabled the jury to better understand his testimony and to realize completely its cogency and force." *See id.* Defendant's argument is accordingly without merit.

2. McFarlane

Defendant contends the trial court abused its discretion in admitting evidence of McFarlane's experiment. McFarlane worked for the Federal Bureau of Investigation as a forensic examiner of electronic devices and was tendered as an expert in electrical systems and forensic electricity. McFarlane testified that appliances such as a hairdryer have an ALCI safety plug, which disables the electrical current going to the device when a certain amount of current leakage occurs. To test whether the ALCI on the hairdryer found with Ms. Claiborne was working and to determine the exact amount of leakage at which the ALCI would disable the current, McFarlane conducted an experiment. He set up "a trough with water in it" and attached wires to the hairdryer that he then placed in the water. At the other end of the trough, he placed additional wires to provide a secondary pathway for the current to leak to the ground. McFarlane then moved the hairdryer closer to the other

wires to determine the exact amount of leakage from the hair dryer circuit to the secondary pathway that occurred before the ALCI plug disabled the current going to the hair dryer.

"An experiment is a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried." *State v. Golphin*, 352 N.C. 364, 433, 533 S.E.2d 168, 215 (2000) (citation and internal quotation marks omitted), *cert. denied*, 532 U.S. 931, 121 S.Ct. 1380, 149 L.E.2d 305 (2001).

> Experimental evidence is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence. The absence of exact similarity of conditions does not require exclusion of the evidence, but rather goes to its weight with the jury. The trial court is generally afforded broad discretion in determining whether sufficient similarity of conditions has been shown.

State v. Locklear, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998) (internal citations omitted), *cert. denied*, 526 U.S. 1075, 119 S. Ct. 1475, 143 L.Ed.2d 559 (1999). We have held that "the substantial similarity requirement for experimental evidence does not require precise reproduction of circumstances[,]" but the "trial court must consider whether the differences between conditions can be explained by the witnesses so that any effects arising from the dissimilarity may be understood by the jury . . . ." *State v. Chapman*, 244 N.C. App. 699, 715, 781 S.E.2d 320, 331 (2016).

Here, McFarlane conducted the experiment to test the amount of current that would need to be leaked in order for the ALCI safety plug to disable the current going to the device. McFarlane used the same hair dryer that was found with Ms. Claiborne in the bathtub. He also used a "trough with water in it" to recreate the bathtub. Additionally, McFarlane testified that when he turned on the hair dryer, it functioned correctly with the attached wires. McFarlane's failure to say what the trough was made of or whether it had a metal drain did not render the experiment void of substantial similarity as Defendant suggests. McFarlane testified that the presence of a metal drain is relevant in determining whether the drain is connected to something that would provide an alternative pathway for the current to reach the ground. However, this experiment was testing the *amount* of leakage that causes the ALCI safety plug to disable the current and did not concern the medium through which the current travels once it is already leaked. Affording the trial court broad discretion, we do not find that the trial court abused its discretion in admitting this evidence.

The State later asked McFarlane whether "based on your examination, using that trough of water, *potentially* does electricity prefer to go through this hair dryer circuit, or does it like to go through the water instead?" McFarlane responded, "Given the tap water that I was using from Quantico, Virginia, the preference of the hair dryer circuit was to go through the hair dryer and not through the water." Our review of the record and the context of McFarlane's testimony indicates that the "truth" or "hypothesis" to be tested was not the medium through which the current preferred to go. However, even assuming this test was an experiment within the meaning of our caselaw to test such a hypothesis, the trial court did not abuse its discretion in admitting the evidence in this context.

We have held that "candid acknowledgment of dissimilarities and limitations of the experiment is generally sufficient to prevent experimental evidence from being prejudicial." *Chapman*, 244 N.C. App. at 715-16, 781 S.E.2d at 331-32 (citation, alteration, and internal quotation marks omitted). The prosecutor qualified his question with the term "potentially," indicating the same result will not always happen. Moreover, McFarlane made it clear that the current continues to go through the hair dryer circuit only in "an ideal bathtub situation" where there is no alternative pathway to the ground and indicated that an alternative pathway to the ground could alter the result he observed. McFarlane was also cross-examined on whether the bathtub in question had a metal drain and what implications this could have. Accordingly, we find no error.

We also reject Defendant's contention that McFarlane's testimony that the current preferred to go through the hair dryer circuit was not based on reliable methods as required by Rule 702. McFarlane testified as to the nature and behavior of electrical currents, the workings of electrical circuits, and specifically how the electrical circuit within a hair dryer works. McFarlane then explained that he was employing these principles of electricity to test the amount of current-leakage necessary to trigger the safety device on the hair dryer. From this test, McFarlane specifically indicated that, given the tap water in Quantico, Virginia and the water trough he was using, the current preferred to go through the hair dryer's electrical current. He never opined based on this test that the water definitively preferred to go through the water in Ms. Claiborne's situation. Rather, he was describing the "ideal bathtub situation" based on the nature of electricity and electrical circuits. The trial court thus acted within its discretion in its determination that McFarlane's testimony was based upon sufficient facts and data and was the product of reliable principles and methods.

CONCLUSION

The trial court did not err in denying Defendant's motion to dismiss where substantial evidence, taken in the light most favorable to the State and affording it every reasonable inference, established each essential element of first-degree murder and that Defendant was the perpetrator of such offense. Additionally, the trial court did not err in failing to instruct the jury on second-degree murder and voluntary manslaughter where there was no evidence to negate premeditation and deliberation. The trial court also did not abuse its discretion in admitting letters detailing Defendant's financial troubles where the letters were probative of a financial motive to kill the victim and were not unfairly prejudicial to Defendant. Defendant further failed to show prejudice from the State's remark that he has "absolutely no money" during closing argument when the jury heard evidence on Defendant's full financial status. Finally, the trial court did not err in admitting expert testimony and evidence of an experiment where that determination was not manifestly unsupported by reason. Accordingly, Defendant received a fair trial.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges CALABRIA and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
TERRENCE LOWELL HYMAN

No. COA16-398-2

Filed 18 December 2018

1. Constitutional Law—effective assistance of counsel—trial counsel—procedural bar

After a series of post-conviction proceedings following defendant's conviction for first-degree murder, the Court of Appeals rejected defendant's arguments that he was not procedurally barred from raising an ineffective assistance of trial counsel claim in his motion for appropriate relief (MAR). The trial court's denial of the MAR was proper where the merits of defendant's claim were addressed and rejected on direct appeal.

2. Constitutional Law—effective assistance of counsel—remand counsel—no procedural bar

After a series of post-conviction proceedings following defendant's conviction for first-degree murder, the trial court erred in basing its denial of defendant's motion for appropriate relief (MAR) on a procedural bar. Defendant's claim that his counsel on remand provided ineffective assistance could not have been raised in his second appeal where the record was not sufficiently developed to allow consideration of remand counsel's possible conflict of interest (due to previously representing defendant's co-defendant). The lack of sufficient information also should have precluded the trial court from finding that defendant voluntarily waived his remand counsel's potential conflict. These determinations rendered irrelevant defendant's related claim that his appellate counsel was ineffective for failure to raise an ineffective assistance of counsel claim about remand counsel.

3. Constitutional Law—effective assistance of counsel—remand counsel—merits

After a series of post-conviction proceedings following defendant's conviction for first-degree murder, the trial court properly denied defendant's motion for appropriate relief where its unchallenged findings of fact supported its conclusion that defendant failed to show his remand counsel was ineffective due to a potential dual-representation conflict arising from counsel's prior representation of defendant's co-defendant. Even if remand counsel had an actual conflict, defendant failed to establish that conflict adversely affected remand counsel's performance at the remand hearing.

Appeal by defendant from order entered 12 May 2015 by Judge Cy A. Grant, Sr. in Bertie County Superior Court. Originally heard in the Court of Appeals 5 October 2016. By opinion issued 21 February 2017, a divided panel of this Court, ___ N.C. App. ___, 797 S.E.2d 308 (2017), reversed the superior court's order denying defendant's motion for appropriate relief based upon a merits-review of the exculpatory-witness component of his ineffective assistance of trial counsel claim and, therefore, declined to consider his remaining challenges to the trial court's denial of the dual-representation-conflict components of his ineffective assistance of counsel claims. By opinion issued 17 August 2018, our Supreme Court, ___ N.C. ___, 817 S.E.2d 157 (2018), affirmed in part and reversed in part, and remanded to this Court with instructions to consider those remaining challenges.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb and Nicholaos G. Vlahos, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant.

ELMORE, Judge.

Previously, a divided panel of this Court, ___ N.C. App. ___, 797 S.E.2d 308 (2017) (*Hyman III*), held that the exculpatory-witness component of defendants' ineffective assistance of trial counsel claim was not procedurally barred from appellate review and that "defendant is entitled to relief under *Strickland* on [that component of his] claim" and, therefore, reversed the trial court's order denying defendant's motion for appropriate relief ("MAR"). *Id.* at ___, 797 S.E.2d at 322. The majority thus declined to "address [defendant's] remaining arguments," *id.*, which included his challenges to the trial court's denial of his MAR as to the dual-representation-conflict components of his ineffective assistance of counsel claims, *id.* at ___, 797 S.E.2d at 316. The dissenting judge opined that the exculpatory-witness claim had been procedurally defaulted by N.C. Gen. Stat. § 15A-1419(a)(3) but, nonetheless, that because defendant failed to satisfy his burden of establishing any claim to support granting his MAR, he would affirm the trial court's order. *Id.* at ___, 797 S.E.2d at 323–24 (Dillon, J., dissenting).

On 17 August 2018, our Supreme Court affirmed in part our decision in *Hyman III*—that is, "defendant's [exculpatory-witness] ineffective assistance of counsel claim [was] not procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3)"—reversed in part our decision—that is, "to overturn the trial court's order denying defendant's [MAR]" based upon a merits-review of the exculpatory-witness component of his ineffective assistance of trial counsel claim—and remanded "for consideration of remaining challenges to the trial court's order denying defendant's [MAR]." *State v. Hyman*, ___ N.C. ___, ___, 817 S.E.2d 157, 173 (2018).

Defendant's remaining challenges, which were neither addressed by our Court in *Hyman III* nor our Supreme Court in its later decision, concerned the trial court's denial of his MAR as to his claims he received (1) ineffective assistance of trial counsel because his attorney had a dual-representation conflict arising from her prior representation of one of the State's primary witnesses against him, and (2) ineffective assistance of counsel at the evidentiary remand hearing ordered to develop that claim in *State v. Hyman*, 172 N.C. App. 173, 616 S.E.2d 28, 2005 WL 1804345

(2005) (unpublished) (*Hyman I*). Specifically, defendant argued the trial court improperly concluded he was procedurally barred from reasserting as grounds to support his MAR the dual-representation-conflict component of his ineffective assistance of trial counsel claim because his remand attorney himself had a dual-representation conflict arising from his prior representation of a co-defendant also charged with the victim's murder. Additionally, defendant argued that, to the extent the dual-representation remand counsel conflict claim had been procedurally barred under N.C. Gen. Stat. § 15A-1419(a)(3) by his failure to raise it on direct appeal in *State v. Hyman*, 182 N.C. App. 529, 642 S.E.2d 548, 2007 WL 968753 (2007) (unpublished) (*Hyman II*), he received ineffective assistance of appellate counsel.

I. Background

The trial facts and procedural history of this case are discussed more fully in our prior opinions, *Hyman I*, *Hyman II*, *Hyman III*, and in our Supreme Court's subsequent opinion, *Hyman*, ___ N.C. at ___–___, 817 S.E.2d at 157–67. We discuss only that relevant to provide basic context and to adjudicate the remanded issues.

In September 2003, a jury found defendant guilty of first-degree murder for the 6 May 2001 shooting death of Ernest Bennett, and the trial court sentenced him to life in prison without parole. Defendant appealed, arguing the trial court erred by failing to conduct a hearing and inquire into a potential dual-representation trial counsel conflict when it became apparent that his first-chair defense counsel, Teresa Smallwood, "previously represented [one of the State's primary witnesses, Derrick] Speller in an unrelated case." *Hyman I*, at *4. On 2 August 2005, we issued our decision in *Hyman I*, in part remanding to the superior court for an evidentiary hearing on the Smallwood dual-representation-conflict claim "to determine if the actual conflict adversely affected [Smallwood's] performance[.]" *Id.* at *6 (quoting *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 759 (1993)).

That remand hearing occurred on 3 October and 2 November 2005. The trial court appointed A. Jackson Warmack to represent defendant. Warmack had previously represented Telly Swain, a co-defendant also charged with Bennett's murder. Warmack advised the trial court before the remand hearing that there might be a potential conflict with his later representation of defendant, but Warmack explained that he had previously contacted the North Carolina State Bar and determined no actual conflict would exist given the limited scope of the remand hearing. After defendant confirmed to the trial court he did not object to

Warmack's representation, Warmack proceeded as defendant's counsel at the remand hearing.

After the remand hearing, the trial court entered an order concluding "Smallwood's representation of defendant was not adversely affected by her prior representation of Speller." *Hyman II*, at *2. Defendant appealed, arguing "Smallwood's actual conflict of interest adversely affected her representation of him." *Id.* On 3 April 2007, this Court issued its decision in *Hyman II*, directly addressing and rejecting the Smallwood dual-representation-conflict component of defendant's ineffective assistance of trial counsel claim, and holding that defendant "failed to show the trial court erred when it found and concluded Smallwood's representation of him was not adversely affected by her previous representation of Speller." *Id.* at *6. The *Hyman II* panel thus affirmed the trial court's remand order. *Id.*

In July 2013, defendant filed an MAR in the superior court, asserting "his right to effective, conflict-free trial counsel was violated" and, "[t]o the extent this claim is in any way procedurally barred, . . . his right to effective, conflict-free counsel was violated on remand and/or ineffective assistance of appellate counsel." Relevant to defendant's remaining challenges presented on remand, he argued he received ineffective assistance of (1) trial counsel based upon Smallwood's dual-representation conflict "between her duties to her former client, the State's witness [Speller], and her duties to defendant"; (2) remand counsel based upon Warmack's dual-representation conflict "from having previously represented [co-defendant] Swain"; and (3) appellate counsel to the extent his failure to raise Warmack's dual-representation conflict on appeal in *Hyman II* procedurally defaulted that claim. The trial court granted defendant's request for an evidentiary MAR hearing.

After that evidentiary hearing, the trial court entered an order on 12 May 2015 denying defendant's MAR. In its order, the trial court concluded defendant was procedurally barred from (1) reasserting Smallwood's dual-representation conflict as grounds to support his MAR because this Court in *Hyman II* previously addressed and rejected that claim, *see* N.C. Gen. Stat. § 15A-1419(a)(2); and (2) raising Warmack's dual-representation conflict because defendant failed to raise it on appeal in *Hyman II*, *see* N.C. Gen. Stat. § 15A-1419(a)(3). Alternatively, the trial court concluded (3) the Warmack dual-representation remand counsel conflict claim was meritless because (a) defendant waived Warmack's potential conflict at the remand hearing; (b) defendant failed to establish Warmack had an actual conflict when representing him at the remand hearing; and (c) even if an actual conflict existed, defendant

failed to establish it adversely affected Warmack's representation of him at the remand hearing. The trial court also concluded (4) to the extent defendant was procedurally barred from raising Warmack's dual-representation conflict because his appellate counsel did not raise it on appeal in *Hyman II*, he did not receive ineffective assistance of appellate counsel because the underlying claim was meritless.

II. Issues Presented on Remand

Defendant's remaining challenges presented on remand concerned the propriety of the trial court's denial of his MAR as to the Smallwood dual-representation-conflict component of his ineffective assistance of trial counsel claim. He argued he was "not procedurally barred from asserting Smallwood's dual representation conflict" because "Warmack provided ineffective assistance of counsel at the remand hearing." Specifically, defendant challenged the trial court's conclusions that (1) the Smallwood dual-representation trial counsel conflict claim was rejected by this Court in *Hyman II*; (2) the findings in its 2005 remand order as to the timing of Smallwood's representations of Speller and defendant were binding at the 2013 evidentiary MAR hearing; (3) defendant "properly waived Warmack's conflict" at the 2005 remand hearing; (4) "any claim regarding Warmack's conflict is procedurally barred because appellate counsel did not raise it in *Hyman II*"; (5) "Warmack provided effective representation" at the 2005 remand hearing; and (6) "[defendant] would not have suffered prejudice even if his appellate counsel had argued Warmack's conflict in *Hyman II* because the conflict claim is meritless." Because these challenges concern three related but independent ineffective assistance of counsel claims, we reorganize our discussion accordingly.

III. Analysis

A. Review Standard

"[A]ppellate courts review trial court orders deciding motions for appropriate relief 'to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *Hyman*, ___ N.C. at ___, 817 S.E.2d at 169 (other internal quotation marks omitted) (quoting *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005)). But where, as here, "no exceptions are taken to findings of fact made in a ruling on a motion for appropriate relief, such findings are presumed to be supported by competent evidence and are binding on appeal." *Id.* (brackets omitted) (quoting *State v. Mbacke*, 365 N.C. 403, 406, 721 S.E.2d 218, 220 (2012)). Legal conclusions "are

fully reviewable." *Id.* (citing *State v. Bush*, 307 N.C. 152, 168, 297 S.E.2d 563, 573 (1982)).

B. Smallwood Dual-Representation Trial Counsel Conflict Claim

[1] Defendant argues the trial court erred by concluding he was procedurally barred from reasserting in his MAR the Smallwood dual-representation-conflict component of his ineffective assistance of trial counsel claim. We disagree.

An MAR is properly denied when "[t]he ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State[.] . . ." N.C. Gen. Stat. § 15A-1419(a)(2) (2017). Because this Court on direct appeal in *Hyman II* addressed the merits and rejected the Smallwood dual-representation-conflict claim, *Hyman II*, at *5–6, the trial court properly concluded that component of defendant's ineffective assistance of trial counsel claim had been defaulted under N.C. Gen. Stat. § 15A-1419(a)(2)'s procedural bar on successive postconviction relief challenges. We thus overrule defendant's first two challenges to the trial court's conclusions.

C. Warmack Dual-Representation Remand Counsel Conflict Claim

[2] Nonetheless, defendant essentially argues any procedural default of the Smallwood dual-representation-conflict claim should be excused because he received ineffective assistance of counsel at the evidentiary remand hearing ordered on that claim. He argues Warmack provided him ineffective assistance of remand counsel because Warmack himself had a dual-representation conflict arising from having previously represented co-defendant Swain. We disagree.

1. Procedural Bars

As an initial matter, defendant argues the trial court erred by concluding the Warmack dual-representation-conflict claim was barred under N.C. Gen. Stat. § 15A-1419(a)(3) because he failed to raise it on appeal in *Hyman II*. To the extent we agree this claim was procedurally barred on that basis, defendant argues he received ineffective assistance of appellate counsel because his attorney failed to raise it on appeal in *Hyman II*. Defendant also argues the trial court erred by concluding he waived Warmack's potential conflict at the remand hearing.

An MAR is properly denied if "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3)

(2017). This procedural bar " 'is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review' and requires the reviewing court, instead, 'to determine whether the particular claim at issue could have been brought on direct review.' " *Hyman*, ___ N.C. at ___, 817 S.E.2d at 170 (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001)). Rather, "to be subject to the procedural default specified in N.C.G.S. § 15A-1419(a)(3), the direct appeal record must have contained sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Id.*

Here, although the direct appeal record in *Hyman II* contained the 2005 remand hearing transcript disclosing Warmack's potential conflict, *see West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202–03, 274 S.E.2d 221, 223 (1981) ("[A] court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration." (citations omitted)), the only information on that potential conflict was reflected in the following relevant exchange:

> THE COURT: . . . I discussed this matter with the prosecution . . . and we decided in the best interest of all that [defendant] have a new attorney appointed to represent him at this hearing and I decided to appoint Mr. Warmack . . . .
>
> Do you have any objection to handling this case, Mr. Warmack?
>
> MR. WARMACK: No, sir, Your Honor. I think for the record, after I received the phone call last week *since I did have some other involvement in the case I contacted the State bar and determined there would be no conflict there.* And then I talked to [defendant] this morning or just a few minutes ago and came in and explained the situation and told him that if he had any problems with it this would be the time.
>
> THE COURT: Do you have any objection to Mr. Warmack representing you, [defendant]?
>
> THE DEFENDANT: No.
>
> THE COURT: All right, very well. I'm going to appoint Mr. Warmack to represent [defendant] at [the remand] hearing.

(Emphasis added.) No other information in the 2005 remand hearing transcript explained the nature or extent of Warmack's potential conflict, which was later developed at the 2013 evidentiary MAR hearing.

Thus, we conclude that "defendant was not in a position to adequately raise [this] ineffective assistance of counsel claim asserted in his [MAR] on direct appeal" in *Hyman II*. *Hyman*, ___ N.C. at ___, 817 S.E.2d at 170. Accordingly, the trial court erred by concluding defendant was procedurally barred by N.C. Gen. Stat. § 15A-1419(a)(3) from raising Warmack's dual-representation conflict as grounds to support his MAR. Because counsel's failure to raise this claim on appeal in *Hyman II* did not operate as a procedural bar, we overrule defendant's related claim that he received ineffective assistance of appellate counsel on that basis. Additionally, because the above exchange was insufficient to establish defendant knowingly, intelligently, and voluntarily waived Warmack's potential conflict at the remand hearing, we hold the trial court erred by concluding otherwise. *See, e.g.*, *State v. Choudhry*, 365 N.C. 215, 223, 717 S.E.2d 348, 354 (2011) ("[A] trial court may not rely solely on representations of counsel to find that a defendant understands the nature of a conflict[.] . . .").

Accordingly, we agree with defendant's third and fourth challenges to the trial court's conclusions that he either waived or was procedurally barred from raising Warmack's dual-representation conflict, which renders irrelevant defendant's sixth challenge to the conclusion as to his ineffective assistance of appellate counsel claim. We turn now to the merits of defendant's fifth challenge to the trial court's conclusions—that is, Warmack provided him effective assistance of counsel at the remand hearing on the Smallwood dual-representation-conflict component of his ineffective assistance of trial counsel claim.

2. Merits

[3] Defendant argues the trial court erred by concluding Warmack provided him effective assistance of counsel at the remand hearing because Warmack had a dual-representation conflict arising from his prior representation of Swain. We disagree.

" 'A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted grounds for relief,' with 'the moving party ha[ving] the burden of proving by a preponderance of the evidence every fact essential to support the motion[.]' " *Hyman*, ___ N.C. at ___, 817 S.E.2d at 172 (quoting N.C. Gen. Stat. § 15A-1420(c)(6) (2017), and then *id.* § 15A-1420(c)(5) (2017)). "When issues involving successive or simultaneous representation of clients in related matters have arisen

before this Court, we have applied the *Sullivan* analysis rather than the *Strickland* framework to resolve resulting claims of ineffective assistance of counsel." *State v. Phillips*, 365 N.C. 103, 120–21, 711 S.E.2d 122, 137 (2011) (citations omitted). To obtain relief under *Sullivan*, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L.Ed.2d 333, 346–47 (1980); other citation omitted).

Here, the trial court issued the following relevant findings and conclusions concerning the Warmack dual-representation-conflict claim:

> 2. Prior to the 2005 remand hearing, Defendant's attorney, Mr. Warmack, informed the undersigned that he had made Defendant aware of a potential conflict of interest. Mr. Warmack also informed the undersigned that given he had some other involvement in the case, he had contacted the North Carolina State Bar, and based upon his conversation with the North Carolina State Bar, he determined there would be no conflict. The undersigned asked Defendant whether he had any objection to Mr. Warmack representing him, and Defendant responded in the negative.
>
> 3. . . . [O]n May 16, 2001, Mr. Warmack was appointed to represent Telly Swain, who like Defendant was charged with the first-degree murder of Bennett. . . . In Swain's case, Mr. Warmack filed . . . an Enmund-Tison motion. . . . Mr. Warmack noted that he had information indicating Swain was not the person who shot Bennett. . . . Mr. Warmack argued in the Enmund-Tison motion that Defendant, not Swain, shot Bennett.
>
> 4. . . . [I]n connection with the first-degree murder charge, Swain pled guilty to felony riot and assault inflicting serious bodily injury on June 2, 2003. Swain's plea agreement specified that he was to give truthful testimony if called to testify against any of his codefendants. As such, Swain's judgment was continued until prayed for by the State. Mr. Warmack testified at the MAR evidentiary hearing that he encouraged Swain to give a statement to law enforcement. Swain did so and, therein, identified Defendant as the person who shot Bennett. However, Mr. Warmack did not expect the State to call Swain as a witness, given his

criminal record. Mr. Warmack specifically testified that he thought the State calling Swain was at best a "remote possibility" that would happen only if the State's case fell apart. Swain did not testify at Defendant's trial. The Superior Court, Bertie County, entered judgment against Swain on October 6, 2003[.] . . .

5. At the MAR evidentiary hearing, Mr. Warmack testified that on September 30, 2005, District Attorney Asbell asked him if he would represent Defendant in a matter that had been remanded by the North Carolina Court of Appeals as to an evidentiary issue concerning Ms. Smallwood's representation of Defendant. Mr. Warmack expressed concern to District Attorney Asbell about representing Defendant, given that he had previously represented one of his codefendants, Swain. Mr. Warmack called the North Carolina State Bar and explained to personnel at the Bar that District Attorney Asbell wanted him to represent Defendant at an evidentiary hearing for the purpose of resolving the very specific issue for which the Court of Appeals remanded the case. According to Mr. Warmack, the North Carolina State Bar informed him that as long as the remand hearing was limited to what he articulated the issue to be, there did not appear to be a conflict.

6. Mr. Warmack testified at the MAR evidentiary hearing that it was his understanding from the Court of Appeals' opinion [in *Hyman I*] that there was no evidence in the record regarding Ms. Smallwood's prior representation of Speller. Nor was there information as to whether or not that representation affected Ms. Smallwood's representation of Defendant. As such, Mr. Warmack believed that the scope of the remand hearing was limited to a determination of whether an actual conflict of interest adversely affected Ms. Smallwood's representation of Defendant. It was Mr. Warmack's belief that if he was to present evidence beyond what he understood the limited scope of the remand hearing to be, including probing the substance of Ms. Smallwood's alleged conversation with Speller, he would have had a conflict based upon his prior representation of Swain.

. . . .

9. Mr. Warmack testified that nothing about his representation of Defendant at the remand hearing had anything to do with Swain and that he would not have conducted the remand hearing any differently if he had not previously represented Swain.

. . . .

6. . . . Defendant has not presented any evidence at the MAR evidentiary hearing to establish that Mr. Warmack was engaged in an actual conflict of interest when representing Defendant at the remand hearing which adversely affected Mr. Warmack's representation. Any competing interests between Mr. Warmack's former client, Swain, and his client at the remand hearing, Defendant, were minimal, given the limited scope of the remand hearing. Moreover, the conflict of interest was only a potential one, given that Swain was at best a potential witness at any retrial. This is true, particularly considering Swain did not testify at Defendant's original trial. Also, it is notable that Mr. Warmack was of the opinion that the State would not have called Swain at Defendant's trial because of his criminal record.

7. Even assuming an actual conflict existed, there was no adverse effect on counsel's representation. Defendant presented no evidence that Mr. Warmack's representation of Defendant was in any way influenced by his prior representation of Swain. Mr. Warmack's understanding of the remand hearing was that it had a very limited scope. The attorney conformed his performance in consideration of that scope, not in consideration of the interests of his former client. In fact, Mr. Warmack testified at the MAR evidentiary hearing that he would not have conducted the remand hearing any differently if he had not previously represented Swain.

We conclude the trial court's unchallenged findings supported its conclusion that defendant failed to establish he received ineffective assistance of remand counsel arising from Warmack's alleged dual-representation conflict. Particularly, the trial court's binding findings—that "Defendant presented no evidence that Mr. Warmack's representation of Defendant was in any way influenced by his prior representation of Swain" and that Warmack "conformed his performance in consideration

of [his understanding of the very limited] scope [of the remand hearing], not in consideration of the interests of his former client[,]" Swain—supported its conclusion that, even if Warmack had an actual dual-representation conflict, defendant failed to satisfy his burden of establishing that conflict "adversely affected [Warmack's] performance." *Bruton*, 344 N.C. at 391, 474 S.E.2d at 343 (quoting *Sullivan*, 446 U.S. at 348, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346–47). We therefore overrule defendant's fifth challenge to the trial court's conclusions concerning the merits of the Warmack dual-representation-conflict claim. Accordingly, the trial court properly denied defendant's MAR on the asserted ground that Warmack provided him ineffective assistance of counsel at the remand hearing on the Smallwood dual-representation-conflict component of his ineffective assistance of trial counsel claim because Warmack himself had a dual-representation conflict.

IV. Conclusion

Defendant's remaining challenges to the trial court's denial of his MAR, which were remanded for our consideration, concerned only the dual-representation-conflict components of his ineffective assistance of counsel claims. Because this Court on direct appeal in *Hyman II* addressed the merits of and rejected the Smallwood dual-representation-conflict component of defendant's ineffective assistance of trial counsel claim, the trial court properly concluded defendant was procedurally barred by N.C. Gen. Stat. § 15A-1419(a)(2) from reasserting that claim to support his MAR.

Because the appellate record in *Hyman II* had not been sufficiently developed for defendant to adequately raise the Warmack dual-representation remand counsel conflict claim, the trial court improperly concluded defendant was procedurally barred by N.C. Gen. Stat. § 15A-1419(a)(3) from raising that claim to support his MAR. Accordingly, we overrule defendant's related argument that he received ineffective assistance of appellate counsel based upon his attorney's failure to raise that claim on appeal in *Hyman II*. However, because the trial court's unchallenged findings supported its conclusion that defendant failed to satisfy his burden of establishing Warmack's prior representation of Swain adversely affected his representation of defendant at the remand hearing, the trial court properly denied defendant's MAR on that basis.

In summary, because the trial court properly concluded N.C. Gen. Stat. § 15A-1419(a)(2)'s procedural bar defaulted the Smallwood dual-representation-conflict component of defendant's ineffective assistance of trial counsel claim, and its findings supported its conclusion

that defendant failed to establish he received ineffective assistance of remand counsel based upon Warmack's alleged dual-representation conflict, the trial court properly denied defendant's MAR as to the dual-representation-conflict components of his ineffective assistance of counsel claims. Therefore, after our "consideration of defendant's remaining challenges to the trial court's order denying his [MAR]," *Hyman*, ___ N.C. at ___, 817 S.E.2d at 159, we affirm the trial court's order.

AFFIRMED.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA
v.
MONROE GORDON PILAND, III, DEFENDANT

No. COA17-1337

Filed 18 December 2018

1. Search and Seizure—knock and talk—search warrant application—sufficiency of facts—marijuana odor

In a prosecution for multiple drug offenses, the trial court did not commit plain error by denying defendant's motion to suppress evidence obtained from a search and seizure of his home. The warrant contained facts that law enforcement officers were conducting a "knock and talk" that lawfully brought them onto defendant's property, and the officers did not exceed the permissible scope of that procedure where they parked in defendant's driveway and stood between the car and the adjacent garage from which odors of marijuana emanated.

2. Appeal and Error—preservation of issues—Fourth Amendment—intrusion of officers—revocation of implied license

In a prosecution for multiple drug offenses, defendant failed to preserve for appellate review an argument that signs he placed on his front door operated as a revocation of any implied license for law enforcement officers to approach his home, where he did not first raise the argument in the trial court.

3. Drugs—statutory enhancement—within 1,000 feet of child care center—sufficiency of evidence

In a prosecution for multiple drug offenses that were alleged to have taken place within 1,000 feet of a child care center, the State did not present sufficient evidence that a home-based child daycare near defendant's home met the definition of "child care center" within the meaning of N.C.G.S. § 90-95(e)(8). A State's witness described the daycare as a child care home, not a center, and no evidence was presented about how many children were actually cared for at the home at any given time.

4. Evidence—expert testimony—controlled substance—chemical analysis—procedure employed

In a prosecution for multiple drug offenses, the admission of testimony by the State's expert witness identifying pills as hydrocodone without an explanation of the methods employed for the chemical analysis was an abuse of discretion but did not rise to the level of plain error. The expert's conclusion did not amount to baseless speculation where she testified she performed a chemical analysis that revealed the existence of hydrocodone.

Appeal by Defendant from judgment entered 13 March 2017 by Judge Robert G. Horne in Buncombe County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

MURPHY, Judge.

This case involves three challenges by Defendant, Monroe Piland, arising from his trial on various drug-related offenses. Defendant first challenges the trial court's denial of his motion to suppress evidence stemming from a search and seizure of his residence. Officers approached Defendant's front door and lingered by his garage before seizing his home to await a search warrant. Defendant moved to suppress the evidence as the fruit of an unconstitutional search and seizure, which the trial court denied. Defendant appeals this denial, raising constitutional arguments.

Second, Defendant challenges the trial court's denial of his motion to dismiss. At the close of the State's evidence, Defendant argued that the State failed to prove the required elements of each offense. The trial court denied this motion in respect to every charge except one. While Defendant also raises a facial challenge to two indictments containing enhancement provisions, we instead address his alternative argument that the trial court erred in denying his motion to dismiss the two enhancement offenses.

Third, Defendant challenges the trial court's admission of expert testimony. The State's expert testified that she conducted a chemical analysis of the evidence but failed to testify as to the methodology of her chemical analysis. Defendant challenges her testimony as unreliable and alleges that the trial court committed plain error in failing to execute its gatekeeping function under N.C.G.S. § 8C-1, Rule 702.

BACKGROUND

The Buncombe County Anti-Crime Task Force ("BCAT") received a tip from the Buncombe County Department of Social Services that Defendant was growing marijuana in his residence. In response, three BCAT officers, Sergeant Thomas, Detective Austin, and Detective May, drove to Defendant's home on 22 October 2015 to have a "knock and talk" conversation. The officers pulled into the driveway and parked in front of Defendant's car, which was parked at the far end of the driveway beside the home. The garage was located immediately left of the driveway and faced the driveway, such that the front of the home faced the street but the garage faced perpendicular to the street. Sergeant Thomas went to the front door to knock, while Detectives May and Austin remained by the garage. Detective May testified, "There was a very evident odor of marijuana that was coming from the garage area." He also testified that because all three officers could smell marijuana, he knew that they would seize the home in order to obtain a search warrant.

On Defendant's front door was a sign that said "inquiries" with his phone number on it and a second sign stating "warning" with a citation to several statutes.[1] The officers understood the signs to be a "warning" that the officers "did not have the right to be on his residence."

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1. The second sign stated, "!!! WARNING!!! IT IS MY DUTY TO INFORM YOU OF YOUR RIGHT TO WITHDRAW FROM ANY ACTION THAT WILL VIOLATE YOUR SWORN OATH TO UPHOLD THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS WELL AS YOUR STATE CONSTITUTION. ANYONE WHO UNDER COLOR OF LAW OR UNLAWFUL AUTHORITY DEPRIVES ANY CITIZEN OF RIGHTS PRIVILEGES OR IMMUNITIES SECURED TO THEM BY THE US CONSTITUTION IS SUBJECT TO CIVIL

Defendant eventually answered Sergeant Thomas's knocks at the front door, and, as soon as Defendant opened the door, Sergeant Thomas smelled "the pungent order [sic] of marijuana emanating from the interior of the residence." Sergeant Thomas then made the decision to "maintain the residence pending the issuance of a search warrant." The basis for the search warrant came from the following affidavit:

> On Wednesday October 21, 2015, information was received by agents of the Buncombe County Anti-Crime Task Force (BCAT) regarding [Defendant's] residence . . . .
>
> The information was received from a worker with the Buncombe County Department of Social Services and said that marijuana was being grown at this residence. Specifically, that the marijuana was being grown in the garage of the residence.
>
> On Thursday October 22, 2015, BCAT agents went to the residence to conduct a follow up investigation. Upon their arrival, BCAT agents could detect the odor of marijuana coming from the garage while standing in front of the garage doors.
>
> Contact was made with the homeowner, [Defendant]. While BCAT agents were speaking with [Defendant] on the front porch, the odor of fresh growing Marijuana could be detected.

Authorized by the search warrant, police seized contraband including various types of marijuana, drug paraphernalia, opium poppies, a pill bottle containing 170.5 hydrocodone (dihydrocodeinone) pills, liquid morphine, and hallucinogenic mushrooms (psilocin).

In March 2016, a grand jury indicted Defendant on four drug-related offenses: possession of 28 grams or more of opium, opiates and opium derivatives; possession with intent to sell and deliver (PWISD) opium poppy; maintaining a dwelling for keeping, manufacturing, delivering, and selling controlled substances; and possession of marijuana paraphernalia.

AND (OR) CRIMINAL PENALTIES PURSUANT TO TITLE 42 U.S.C. § 1983, § 1985, AND § 1986, AS WELL AS TITLE 18 U.S.C. § 241 AND § 242 WHICH CARRIES A FINE OF UP TO $10,000 AND/OR IMPRISONMENT FOR NOT MORE THAN TEN YEARS OR BOTH. IGNORANCE OF THE LAW IS NO EXCUSE! YOU HAVE BEEN OFFICIALLY NOTICED! ANY UNLAWFUL THING YOU SAY OR DO WILL BE USED AGAINST YOU!" (emphasis in original).

In September 2016, an Assistant District Attorney and Detective May discovered that Defendant's home was less than 1,000 feet away from a home in which the homeowner ran a child care facility. In October 2016, a grand jury further indicted Defendant for four drug-related enhancement offenses: possession with intent to manufacture, sell, or deliver (PWIMSD) dihydrocodeinone within 1,000 feet of a child care facility; PWISD psilocin within 1,000 feet of a child care facility; manufacturing marijuana within 1,000 feet of a child care facility; and PWIMSD marijuana within 1,000 feet of a child care facility. The indictments cited N.C.G.S. § 90-95(e)(8) as the relevant provision for these offenses. N.C.G.S. § 90-95(e)(8) provides the requirements for sentencing enhancement for crimes committed under N.C.G.S. § 90-95(a)(1):

> Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for a child care center . . . or within 1,000 feet of the boundary of real property used for a child care *center*. . . shall be punished as a Class E felon.

N.C.G.S. § 90-95(e)(8) (2017) (emphasis added). Each of the indictments used the word "facility" rather than center. The two indictments regarding marijuana alleged:

> [T]he defendant named above unlawfully, willfully, and feloniously did manufacture marijuana, a controlled substance which is included in schedule VI of the North Carolina Controlled Substances Act within 1000 feet of a licensed child care *facility*[.]
>
> [T]he defendant named above unlawfully, willfully and feloniously did possess with the intent to manufacture, sell and deliver, more than 1-1/2 ounces of marijuana . . . within 1000 feet of a licensed child care *facility*[.]

(emphasis added). The enhancement provision raised the offenses of manufacturing marijuana and PWIMSD marijuana from a Class I felony to a Class E felony. N.C.G.S. § 90-95(b)(2), (e)(8).

Before trial, Defendant, proceeding *pro se*, moved to suppress all evidence stemming from the search and seizure of his home. After a hearing, the trial court denied Defendant's motion. The trial court made the following findings of fact, *inter alia*, in its written order:

> 7. The affidavit established that BCAT agents had gone to the . . . residence to conduct a follow up investigation. Upon their arrival, agents could detect the odor of

> marijuana coming from the garage. The agents then made contact with the homeowner [Defendant]. As they spoke with the Defendant on the front porch, the agents detected the odor of fresh growing marijuana;
>
> 8. The BCAT agents went to the property as a follow up on the DSS report and intend to conduct a "knock and talk".

Based on these facts, the trial court concluded that there was a substantial basis to conclude that probable cause existed for the issuance of the search warrant and denied Defendant's motion to suppress.

At trial, Detective May confirmed that the distance from Defendant's home to the child care facility was 452 feet. The State then introduced witness testimony from Iva Jean Herron Metcalf, a childcare licensing consultant with the North Carolina Division of Child Development and Early Education, to establish the existence of the child care facility near Defendant's home. She testified, without objection, that the daycare met the definition of a childcare "facility." More specifically, she testified that the child care facility was a child care "home," a distinctive term defined by statute. N.C.G.S. § 110-86(3)(b) (2017).

Special Agent Elizabeth Reagan testified as an expert witness to the identification of controlled substances seized from Defendant's home. She testified as to her education, qualifications, and work duties and that she accordingly chemically tested one pill from the bottle seized from Defendant's home. Based on her chemical analysis, she concluded that the pills were hydrocodone. However, she did not describe the methodology employed in her analysis and stated only that she "performed a chemical analysis[.]" Defendant did not object to the admission of her expert opinion.

At the close of the State's evidence, Defendant moved to dismiss the charges, arguing that the State failed to prove each element of the offenses. The trial court dismissed one charge of PWISD opium poppy because there was no chemical analysis performed on that substance but denied the motion as to all other charges. The jury ultimately convicted Defendant of seven drug-related offenses.[2] The trial court sentenced

2. Trafficking opium, opiates, or opium derivative by possessing 28 grams or more; manufacturing marijuana within 1,000 feet of a licensed child care center; maintaining a dwelling for keeping or selling of a controlled substance; possession of marijuana with intent to manufacture, sell, or deliver (PWIMSD) within 1,000 feet of a licensed child care center; possession of dihydrocodeinone; possession of psilocin; and possession of marijuana drug paraphernalia.

Defendant to an active term of 225 to 282 months for trafficking opium, as well as a $500,000.00 fine. The trial court consolidated the remaining convictions and sentenced Defendant to an active sentence of 25 to 42 months for the Class E manufacturing marijuana within 1,000 feet of a child care felony.

ANALYSIS

A. Motion to Suppress

[1] On appeal, Defendant argues that the trial court committed plain error by allowing the State to introduce evidence resulting from an unconstitutional search and seizure of his home. Specifically, Defendant argues that the search warrant application was tainted because the officers had no right to linger in the curtilage outside of the garage or to ignore Defendant's revocation of an implied license to approach the front door.

Defendant does not challenge the trial court's findings of fact, but instead challenges the denial of the motion to suppress on the basis that the evidence is the result of a "tainted" search and seizure. Normally, "[t]he standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (quoting *State v. Logner*, 148 N.C. App. 135, 137, 557 S.E.2d 191, 193 (2001)).

However, Defendant did not preserve the issue of the admissibility of the evidence at trial by objecting to its admission. Therefore, our standard of review is plain error:

> 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). "[T]o 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted).

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (alteration in original) (quoting U.S. Const. amend. IV). "The touchstone of the Fourth Amendment is reasonableness." *Id.* (citation omitted). "Generally, a warrant supported by probable cause is required before a search is considered reasonable." *State v. Phillips*, 151 N.C. App. 185, 191, 565 S.E.2d 697, 702 (2002) (citation omitted). "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *State v. Battle*, 202 N.C. App. 376, 383, 688 S.E.2d 805, 812 (2010) (citation and quotation marks omitted).

Defendant does not challenge the search warrant application as facially invalid, but rather challenges that the search warrant application was tainted as a result of an unlawful search and seizure. However, we decline to supplement the four corners of the warrant with the transcript in our review. "Our Supreme Court has stated it was error for a reviewing court to rely upon facts . . . that [go] beyond the four corners of [the] warrant." *State v. Parson*, ____ N.C. App. ____, ____, 791 S.E.2d 528, 536 (2016) (citation and quotation marks omitted). Therefore, our review is limited to determining whether the following facts contained in the warrant were obtained in violation of Defendant's Fourth Amendment rights:

> On Thursday October 22, 2015, BCAT agents went to the residence to conduct a follow up investigation. Upon their arrival, BCAT agents could detect the odor of marijuana coming from the garage while standing in front of the garage doors.
>
> Contact was made with the homeowner, [Defendant]. While BCAT agents were speaking with [Defendant] on the front porch, the odor of fresh growing Marijuana could be detected.

Based on these facts, we conclude that the trial court did not err in denying Defendant's motion to suppress because the search and seizure was not an unconstitutional violation amounting to plain error.

1. Garage

Defendant claims that the officers unconstitutionally searched and seized his home by "parking in [Defendant]'s driveway, blocking his car, and lingering in the curtilage near his garage instead of parking on the street . . . ."

We find *State v. Grice* instructive here. In *Grice*, the police responded to a tip that the defendant was growing marijuana at his home and conducted a "knock and talk investigation." 367 N.C. at 754, 767 S.E.2d at 314. The officers drove into the driveway and parked behind the defendant's car. *Id.* One of the officers knocked at the door while the other remained in the driveway. *Id.* at 754-55, 767 S.E.2d at 314-15. From the driveway, the officer spotted marijuana growing in buckets about fifteen yards away. *Id.* at 755, 767 S.E.2d at 315. Both officers approached the buckets and seized the plants before they obtained a search warrant. *Id.* Our Supreme Court held that the knock and talk investigation brought the officers lawfully onto the property and that "[t]he presence of the clearly identifiable contraband justified walking further into the curtilage." *Id.* at 758, 767 S.E.2d at 317.

In order to determine whether the officers could linger by the garage, it is necessary to first determine whether the officers had a lawful right to be in Defendant's driveway. The officers went to Defendant's home to conduct a knock and talk investigation:

> 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. This Court and the North Carolina Supreme Court 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.

State v. Marrero, ____ N.C. App. ____, ____, 789 S.E.2d 560, 564 (2016) (citations omitted). Thus, officers conducting a knock and talk investigation can lawfully approach a home so long as the officers remain within the permissible scope afforded by the knock and talk. *See id.* The United States Supreme Court explained the permissible scope in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013):

> [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, 133 S. Ct. at 1415-16 (citations, footnote, and internal quotation marks omitted). We note that "law enforcement may not use a knock and talk as a pretext to search the home's curtilage." *State v. Huddy*, ____ N.C. App. ____, ____, 799 S.E.2d 650, 654 (2017) (citation omitted). "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.' " *Id.* (quoting *Jardines*, 569 U.S. at 8, 133 S. Ct. at 1415). "This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home's curtilage." *Id.*

We conclude that the officers had a lawful presence in the portion of Defendant's driveway where they parked to perform the knock and talk. In light of *Grice* and *Jardines*, we next examine the officers' conduct. Defendant's driveway was directly next to the garage door. While there is a path before the garage which allows a visitor to walk to the front door, this path attaches to the driveway and is only a few feet from the garage. Thus, any private citizen wishing to knock on Defendant's front door would be entitled to drive into the driveway, get out, walk between the car and the path so as to stand next to the garage, and continue on the path to the front porch. Therefore, we conclude that the officers' conduct here, as in *Grice*, was permitted when they pulled into the driveway by the garage, got out of their car, and stood between the car and the garage. *See Grice*, 367 N.C. at 757-58, 767 S.E.2d at 316.

Grice is sufficiently analogous to Defendant's case with respect to the officers' presence in Defendant's curtilage to allow the officers' lingering by the garage.[3] Just as in *Grice*, law enforcement went to the residence lawfully to conduct a knock and talk. The officers in *Grice* could see the marijuana from the driveway, and here, the officers could smell the marijuana from their location in the driveway. Moreover, our

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3. On 1 June 2018, Defendant submitted a memorandum of additional authority citing to the United States Supreme Court's opinion in *Collins v. Virginia*, ____ U.S. ____, ____, 138 S. Ct. 1663, 1669-73 (2018). However, while factually similar, we find that the officers' conduct here did not exceed the scope of reasonable behavior as did the officer's conduct in *Collins*.

Supreme Court has held that when the contraband is in plain view, there is no search under the Fourth Amendment. *Grice*, 367 N.C. at 756, 767 S.E.2d at 316.

We therefore find that the officers' lingering by the garage was justified and did not constitute a search under the Fourth Amendment.

2. Front Door

[2] Defendant argues that he revoked the officers' implied license when they remained at his front door after he told them to leave through the placement of signage. Defendant further argues that by ignoring this written revocation, the officers violated his constitutional rights under the Fourth Amendment. However, because Defendant did not make this argument before the trial court, the issue is not preserved for appeal. "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Shelly*, 181 N.C. App. 196, 206-07, 638 S.E.2d 516, 524 (2007) (citations and internal quotation marks omitted). "[T]his Court routinely dismisses arguments advanced by defendants in criminal cases when the defendants attempt to mount and ride a stronger or better, and possibly prevailing steed not run before the trial court." *State v. Hester*, ____ N.C. App. ____, ____, 803 S.E.2d 8, 16 (2017). Therefore, "[w]hen a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived." *Shelly*, 181 N.C. App. at 207, 638 S.E.2d at 524 (citation omitted).

After careful review of the transcript from the suppression hearing, we find that Defendant did not argue that the signs on his door revoked the officers' implied license, or even that the signs expressed a specific intent that the officers leave the residence. Rather, Defendant argued that the officers "intruded upon his dwelling" by "coming to the garage door." Consequently, we will not allow Defendant to "swap horses" to prevail at the appellate level with this new argument. *Shelly*, 181 N.C. App. at 206, 638 S.E.2d at 524.

Because Defendant did not argue that the signs acted as a revocation of the officers' implied license at the suppression hearing, he cannot present this argument on appeal. We therefore decline to consider the merits of this argument.

3. Facts Supporting the Search Warrant Were Lawfully Obtained

Because the officers lawfully lingered by the garage prior to the discovery of the facts in the search warrant affidavit, we find that there is no error in the trial court's denial of Defendant's motion to suppress.

B. Enhancement of Offense for PWIMSD Marijuana Within 1,000 Feet of a Child Care Facility and for Manufacturing Marijuana within 1,000 Feet of a Child Care Facility

[3] Defendant challenges as facially invalid the indictment for manufacturing marijuana within 1,000 feet of a child care "facility" and the indictment for PWIMSD marijuana within 1,000 feet of a child care "facility." A defendant can challenge the facial validity of an indictment at any time, even if he or she did not raise it at trial, because a facially invalid indictment "depriv[es] the trial court of its jurisdiction." *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016) (citation omitted). Defendant argues, in the alternative, that we should find that the trial court erred in denying his motion to dismiss regarding the enhancement of the offenses because the evidence "was insufficient to prove that the facility was, in fact, a 'child care center.' " Because we conclude that the evidence does not support a conviction based on the enhancement offenses, we find it unnecessary to address Defendant's argument that the indictments are facially invalid.

While Defendant moved to dismiss at the end of the State's case, he did not renew his motion to dismiss at the close of all evidence and has, therefore, failed to preserve the issue on appeal:

> A defendant may make a motion to dismiss the action . . . 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 . . . at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(a)(3). "Nevertheless, this Court's imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the occurrence of default." *State v. Davis*, 198 N.C. App. 146, 149, 678 S.E.2d 709, 712 (2009) (alteration in original) (citation and internal quotation marks omitted).

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. We find that justice requires us to invoke Rule 2, and we therefore examine Defendant's motion to dismiss in light of evidence presented at trial.

We first note the discrepancies between the language in the indictments and the language in the statute. Defendant was convicted of offenses within 1,000 feet of a child care "facility." However, the statute provides that this sentencing enhancement only applies within 1,000 feet of a child care "center":

> Any person 21 years of age or older who commits an offense under [this statute] on property used for a child care center, or for an elementary or secondary school or within 1,000 feet of the boundary of real property used for a child care center, or for an elementary or secondary school shall be punished as a Class E felon . . . . For purposes of this subdivision, a child care center is as defined in G.S. 110-86(3)[a], *and* that is licensed by the Secretary of the Department of Health and Human Services.

N.C.G.S. § 90-95(e)(8) (emphasis added). N.C.G.S. § 110-86(3) explicitly defines:

> (3) Child care facility. –Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.
>
> a. A child care *center* is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.
>
> b. A family child care *home* is a child care arrangement located in a residence where, at any one time, more

> than two children, but less than nine children, receive child care.

N.C.G.S. § 110-86(3)(a)-(b) (2017) (emphasis added).

At trial, the child care licensing consultant for the State of North Carolina Division of Child Development and Early Education testified that the daycare was a child care "facility" and, specifically, a child care "home," but never testified that it was a child care "center."

> *The State*: Now, are you aware of a child care facility located at [daycare owner's residence]?
>
> *Witness*: Yes.
>
> *The State*: Could you give us a description of who owns that and what their licensing is?
>
> *Witness*: [The owner] has her basement converted to a child care *facility*. She cares for, being a family child care *home* she can care for five pre-schoolers and three school-agers, a maximum of eight children in that facility. I've been monitoring her for ten years.
>
> . . . .
>
> *The State*: Now, is that a child care *facility* as defined under General Statute 110-86?
>
> *Witness*: Yes, family child care *home*.
>
> *The State*: Now, there are a number of exclusions listed in Section (2) of 110-86. Does this child care *facility* fit any of those exclusions?
>
> *Witness*: No.

(emphasis added). The witness's express testimony was that the child care facility was, specifically, a child care *home*. At no point in her testimony did the witness testify that the facility met the definition of a child care center or present evidence that it could be classified as such. The witness's description of the facility was that the owner "*can* care for five pre-schoolers and three school-agers." (emphasis added). In order to meet the definition of a child care center under N.C.G.S. § 110-86(3)(a), it must be shown that "at any one time, *there are* three or more pre-school-age children or nine or more school-age children receiving child care." N.C.G.S. § 110-86(3)(a) (2017) (emphasis added). There was no evidence elicited from the licensing consultant or any other witness

about how many children there actually were in the facility at any given time – only the potential capacity of the facility. Thus, there was no evidence that this facility met the definition of a child care center under N.C.G.S. § 110-86(3)(a).

N.C.G.S. § 90-95(e)(8) explicitly states that the enhancement provision applies only to child care "centers." The statute does not provide the enhancement for "homes" or "facilities." "A statute that is clear and unambiguous must be given its plain and definite meaning." *State ex. rel. Utilities Commission v. North Carolina Sustainable Energy Ass'n*, ____ N.C. App. ____, ____, 803 S.E.2d 430, 432 (2017) (internal quotation marks and citation omitted). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (internal quotation marks and citation omitted). "Furthermore, this Court cannot delete words or insert words not used in a statute." *North Carolina Sustainable Energy Ass'n*, ____ N.C. App. at ____, 803 S.E.2d at 433 (internal quotation marks and citation omitted). We therefore conclude that the Legislature intended that N.C.G.S. § 90-95(e)(8) apply only to child care "centers."

Even in the light most favorable to the State, the evidence at trial was that the child care facility in question was a "facility" and "home," but not a child care "center" as defined by our General Assembly. Consequently, it was error for the trial court to deny Defendant's motion to dismiss the statutory enhancement. The judgment for manufacturing marijuana within 1,000 feet of a child care *center* and the judgment for PWIMSD marijuana within 1,000 feet of a child care *center* are therefore vacated and this case is remanded for resentencing on the lesser included offenses of manufacturing marijuana and possession with intent to manufacture, sell, or deliver marijuana. *See State v. Gooch*, 307 N.C. 253, 257-58, 297 S.E.2d 599, 601-02 (1982) (vacating a verdict of possession of more than one ounce of marijuana and remanding for resentencing of the lesser included offense of simple possession of marijuana because the jury necessarily found the defendant guilty on all other essential elements of the offense). Further, because six of Defendant's convictions were consolidated into the same judgment, the trial court must conduct a new sentencing hearing on the consolidated charges. *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) ("When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing . . . ." (citation omitted)).

C. Expert Witness Testimony

[4] Finally, Defendant challenges the expert witness testimony that the pills contained in the bottle were hydrocodone because the expert did not testify as to the methods employed in her chemical analysis. If a defendant challenges the trial court's allowance of expert testimony based on the requirements of Rule 702(a), the appellate court will not reverse "absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation omitted). However, "an unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts." *State v. Hunt*, ____ N.C. App. ____, ____, 792 S.E.2d 552, 559 (2016). As is the case here, when a defendant does not challenge the admission of the expert testimony at trial, we only review for plain error. *Id.*

"Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a)."[4] *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10 (citations omitted). To be reliable, the testimony must satisfy a three-part 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 (alteration in original) (citation omitted); *see* N.C.G.S. § 8C-1, Rule 702(a). "[T]he trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (citation omitted).

The expert testimony here stated:

> *The State*: Okay. Once you received [the pill bottle], how did you begin your analysis of it?
>
> *Expert Witness*: [T]he first thing I did was examine all the tablets for consistency . . . . I then performed a chemical analysis on a single tablet to confirm that they did in fact contain what the manufacturer had reported.
>
> . . . .
>
> *The State*: And what did you find those pills to contain?

4. "Preliminary questions concerning the qualification of a person to be a witness, . . . or the admissibility of evidence shall be determined by the court . . . ." N.C.G.S. § 8C-1, Rule 104(a) (2017).

> *Expert Witness*: Based on the results of my analysis, . . . hydrocodone, which is a Schedule III preparation of an opium derivative.

Defendant argues that the testimony contains a serious defect as the expert witness "did not identify, describe, or justify the procedure she employed to determine whether the pills contained a controlled substance." Specifically, "[s]he did not identify the test she performed, describe how she performed it, or explain[] why she considered it reliable." Thus, Defendant asserts that the trial court did not properly exercise its gatekeeping function which amounts to plain error. We agree that the failure to consider the methods of analysis employed was an abuse of discretion, but this does not amount to plain error in this case.

Defendant relies on *State v. Brunson*, 204 N.C. App. 357, 693 S.E.2d 390 (2010), for the proposition that "the admission of her testimony identifying the pills as hydrocodone amounted to plain error." In *Brunson*, an expert witness testified that certain pills contained hydrocodone based on "markings, color, and shape," but not based on a chemical analysis. *Id.* at 358-60, 693 S.E.2d at 391. On appeal, we held that the trial court's allowance of her testimony was plain error because her "visual identification lacked sufficient indices of reliability to determine the actual substance of the pills." *Id.* at 361, 693 S.E.2d at 393. As a result, "her testimony, although supported by experience and education, was tantamount to baseless speculation and equivalent to testimony of a layperson." *Id.* at 360, 693 S.E.2d at 392.

Because the expert in *Brunson* did not perform a chemical analysis, we held there was a "significant probability that, had the lower court properly excluded [the expert's] testimony, the jury would have found defendant not guilty." *Id.* at 361, 693 S.E.2d at 393. Here, however, the expert performed a chemical analysis. The evidence merely lacks any discussion of that analysis. We therefore find *Brunson* distinguishable from Defendant's case.

Since our review is limited to plain error review, we ask whether the trial court committed an error "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Bush*, 164 N.C. App. 254, 257-58, 595 S.E.2d 715, 717-18 (2004) (citations and internal quotations omitted). The standard is so high "in part at least because the defendant could have prevented any error by making a timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986) (citation omitted). Here, it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to

the methodology of her chemical analysis. However, the error does not amount to plain error because the expert testified that she performed a "chemical analysis" and as to the results of that chemical analysis. Her testimony stating that she conducted a chemical analysis and that the result was hydrocodone does not amount to "baseless speculation," and therefore her testimony was not so prejudicial that justice could not have been done. *See Brunson*, 204 N.C. App. at 360, 693 S.E.2d at 392.

CONCLUSION

We hold that the officers had a lawful presence in Defendant's driveway, justified by the knock and talk investigation. Furthermore, the officers here, as in *Grice*, were permitted to get out of their cars and stand by the garage. Defendant's argument that the signs on the front door revoked the officers' implied license to approach is unpreserved for appeal, and we therefore decline to consider the merits of this argument.

We also hold that the trial court erred in denying Defendant's motion to dismiss because the State failed to prove that the child care facility was a child care "center" as defined by our General Assembly. Because we conclude that the resulting judgments based on the enhancement provision must be vacated and remanded for resentencing of the lesser included offenses, we do not decide whether the indictments for those judgments are facially invalid.

Lastly, we hold that the trial court's admission of expert testimony regarding a chemical analysis of the evidence, while lacking in testimony regarding the specific methods involved in that analysis, does not rise to the level of plain error.

NO ERROR IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING; NO PLAIN ERROR IN PART.

Judges CALABRIA and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
HAROLD LEE PLESS, JR.

No. COA18-21

Filed 18 December 2018

1. Identification of Defendants—out-of-court identification—single photo—impermissibly suggestive—factors

The use of a single photo in an out-of-court identification procedure was not impermissibly suggestive where a police investigator showed a DMV photo of defendant to the undercover detective who had purchased illegal drugs from defendant several days earlier. Both officers had participated in the undercover purchase (the detective as the buyer and the investigator as a member of the surveillance team), had a direct view of the suspect, were paying close attention to the suspect, were certain of their identification, and identified defendant as the suspect by looking at the DMV photo within a few days of the undercover purchase.

2. Constitutional Law—Confrontation Clause—expert testimony—data produced by another lab analyst

The admission of an expert's testimony regarding the identity of seized substances as oxycodone and heroin did not violate the Confrontation Clause where the lab analyst who had performed the testing that generated the raw data moved out of state and her supervisor testified as to her own independent opinion based on her own analysis of the data. Further, the weight of the substances was machine generated and admissible to show the basis of the expert's opinion.

Judge MURPHY concurring in result by separate opinion.

Appeal by defendant from judgment entered 27 July 2017 by Judge Julia Lynn Gullett in Superior Court, Iredell County. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Whitney H. Belich, for the State.

William D. Spence for defendant-appellant.

STROUD, Judge.

Defendant appeals from convictions of several drug-related offenses. The trial court did not err by denying defendant's motion to suppress evidence regarding the pretrial identification using his DMV photograph, and the trial court did not err by admitting evidence of the identification and weight of the controlled substances from a substitute analyst who did her own independent analysis of machine-generated data. We therefore affirm the trial court's denial of defendant's motion to suppress and find no error as to the admission of evidence.

I. Background

Detective Jessica Jurney of the Iredell County Sheriff's Office conducted an undercover narcotics purchase with Sergeant Chris Walker of the Mooresville Police Department in September of 2012. Detective Jurney was to meet a man known as "Junior" at a McDonald's restaurant to purchase the drugs. "Junior" arrived at the McDonald's parking lot in a gold Lexus. Detective Jurney interacted with him for three or four minutes and successfully purchased what would later be identified as oxycodone and heroin from defendant. A surveillance team from the Mooresville Police Department including Sgt. Walker witnessed the transaction. The identity of defendant was unknown at the time of the drug deal, but Sgt. Walker obtained defendant's name from a confidential informant. Several days after the transaction, Sgt. Walker obtained a photograph of defendant from the Department of Motor Vehicles ("DMV") and showed it to Detective Jurney. Sgt. Walker also testified that he had seen defendant on another occasion driving the same gold Lexus with the same license plate number as the one he saw during the drug transaction.

Defendant was indicted on numerous drug related charges in December of 2012. Defendant pled guilty to these charges, but his plea was overturned by this Court in 2016 based upon a sentencing error. On remand, defendant elected to have a new trial, and Detective Jurney and Sgt. Walker identified defendant over objection in court as the individual who sold the drugs to Jurney. Erica Lam, the forensic chemist who tested the substances purchased from defendant, was not available to testify during the trial since she had moved out of state.[1] The State

1. Defendant had a separate trial for drug charges related to an October 2012 traffic stop which he also appealed to this Court. *State v. Pless*, ___ N.C. App. ____, 817 S.E.2d 498 (2018) (unpublished). In the 2017 trial related to defendant's October 2012 drug charges, Lam testified as an expert witness about oxycodone pills found on defendant.

presented Lam's supervisor, Lori Knops, who independently reviewed Lam's findings to testify instead. The jury found defendant guilty of possession with intent to manufacture, sell, or deliver heroin, sale of heroin, trafficking in opium or heroin by possession, trafficking in opium or heroin by sale, possession with intent to sell or deliver oxycodone, and sale of oxycodone. Judgment was entered against defendant on all charges which were consolidated into a sentence of 70 months minimum to 84 months maximum. Defendant gave notice of appeal in open court.

II. Motion to Suppress

[1] "[Defendant] contends that the in-court identification of him by Ms. Jurney and by Officer Walker should have been suppressed because the identifications were unreliable; tainted by the impermissibly suggestive Department of Motor Vehicles photograph."

Standard of Review

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

Analysis

Defendant does not challenge any of the trial court's findings of fact in the order but argues, "[a]lthough the court's findings of fact 17 and 18 discuss the DMV photo, the trial court failed to address whether or not this procedure was impermissibly suggestive and, if it was, whether or not it was so impermissibly suggestive that it created a very substantial likelihood of irreparable misidentification." We review the trial court's conclusions of law *de novo*. Our Supreme Court has described a two-step process for this issue:

> This Court employs a two-step process in evaluating such claims of denial of due process. First we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need proceed no further. If it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures

> employed gave rise to a substantial likelihood of irreparable misidentification.

State v. Hannah, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984) (citations omitted). Relevant factors for determining whether the identification procedures were impermissibly suggestive include: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty shown by the witness, and the time between the offense and the identification." *State v. Johnson*, 161 N.C. App. 68, 73, 587 S.E.2d 445, 448 (2003) (citation omitted).

Some of the relevant findings of fact are:

> 4. Investigator Jurney was provided with information from the informant and then observed a black male with a stocky to heavy set build and a bald head walk across the parking lot of the McDonald's parking lot and get into a gold in color Lexus motor vehicle. The black male was alone in the vehicle.
>
> 5. Investigator Jurney approached the black male while he was in the vehicle and had a conversation with him.
>
> 6. Investigator Jurney then gave the black male $230.00 in pre-recorded buy money and the black male gave her 19 pills and a plastic bag containing a brown powder substance. Investigator Jurney was anticipating to purchase oxycodone and heroin. The contraband appeared to Investigator Jurney to be consistent with oxycodone and heroin, based upon her training, education and experience.
>
> 7. At the time of this transaction, Investigator Jurney had been working as an undercover officer for approximately 1 year and had conducted dozens of undercover purchases of controlled substances. Investigator Jurney knew the importance of identifying the correct suspect.
>
> 8. Investigator Jurney was able to observe the suspect, continuously throughout the drug transaction, which lasted 3 to 4 minutes at least and had an unobstructed view of the suspect during this time.
>
> 9. Investigator Jurney was at an arm's length and was able to see the suspects [sic] face through the open window of the vehicle in which the suspect was seated.

10. At the conclusion of the drug transaction, Investigator Jurney exchanged telephone numbers with the suspect and watched the suspect drive away. Investigator Jurney paid close attention to the suspect in order to be able to identify the suspect at a later time.

11: Ms. Jurney identified the defendant in Court as the person who sold the contraband to her on September 7, 2012 and indicated that there was no doubt that it was the defendant who sold the contraband to her.

12. Investigator Walker was part of the surveillance team providing security for Investigator Jurney on September 7, 2012.

13. Investigator Walker's view of the suspect was not obstructed. Investigator Walker observed the interaction between the suspect and Investigator Jurney from a distance of approximately 25 – 30 yards.

14. Investigator Walker knows that correctly identifying a suspect in a criminal investigation is of the utmost importance.

15. Investigator Walker observed the gold in color Lexus in the McDonald's parking lot. Investigator Walker observed a stocky black male with a bald head near the vehicle. Investigator Walker made arrangements with the confidential informant for the drug transaction to occur and knew that the subject's nickname was "Junior."

16. A few days after the drug transaction, Investigator Walker then obtained what was believed to be the suspect's name (Harold Pless) from the confidential informant and requested that another employee of the Mooresville Police Department perform a name search of "Harold Pless."

17. Investigator Walker was provided a DMV photo of the defendant and recognized the defendant as the individual who sold the pills and suspected heroin to Investigator Jurney on September 7, 2012.

18. Investigator Walker then contacted Investigator Jurney and showed her the single DMV photo of the defendant. Investigator Jurney identified the photo of the defendant and confirmed that the defendant was the subject who sold her the contraband.

> 19. On October 5, 2012, Investigator Walker saw the defendant in the same McDonald's parking lot near the intersection of US Highway 21 and Gateway Blvd., Mooresville, NC. The defendant was operating the same gold in color Lexus motor vehicle and the defendant was placed under arrest.
>
> 20. Investigator Walker identified the defendant in Court as the person who sold the contraband to Ms. Jurney on September 7, 2012.

The trial court then made these conclusions of law regarding the identification[2]:

> 2. In evaluating the likelihood of irreparable misidentification, the Court considers:
>
> a. the opportunity of the witness to view the criminal at the time of the crime;
>
> b. the witness' degree of attention;
>
> c. the accuracy of the witness' prior description;
>
> d. the level of certainty demonstrated at the confrontation;
>
> e. the time between the crime and the confrontation.
>
> 3. Both Investigator Walker and Investigator Jurney had direct and unobstructed views of the suspect.
>
> 4. Both Investigator Walker and Investigator Jurney were paying close attention to suspect because correctly identifying the perpetrator is of the utmost importance.
>
> 5. Both Investigator Walker and Investigator Jurney were certain in their identification of the defendant as the perpetrator.
>
> 6. Although there was a long period of time between the time of the offense and the confrontation, both Investigator Walker and Investigator Jurney recorded detailed notes of the event and identified the defendant

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2. *See Barnette v. Lowe's Home Ctrs. Inc.*, 247 N.C. App. 1, 6, 785 S.E.2d 161, 165 (2016). Most of these are actually findings of fact although they are identified in the order as conclusions of law, but defendant does not challenge the factual portions of the conclusions of law. ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review.").

> as the perpetrator by looking at a DMV photo within a few days of the occurrence.
>
> 7. Based upon the totality of the circumstances, the defendant's motion should be denied.

It is obvious that the trial court did not "fail to address" whether the identification was impermissibly suggestive based upon the trial court's detailed findings of fact and recitation of the factors it must consider to determine this exact issue. But defendant is correct that the trial court did not make an explicit conclusion of law that the identification procedure was not impermissibly suggestive. Instead, the trial court listed the factors in conclusion of law 2 and then made separate findings of ultimate fact as to each factor in conclusions of law 3 through 6. The trial court's ultimate findings on the factors show that the trial court did address the identification procedure and implicitly concluded it was not impermissibly suggestive. The conclusions of law could be worded more clearly, but we have no doubt as to the meaning and substance.

Defendant cites to *State v. Smith*, 134 N.C. App. 123, 516 S.E.2d 902 (1999), in support of his argument that the "evidence presented during voir dire and the facts found, however, show that the DMV's photo procedure was irreparably suggestive and resulted in a strong possibility of misidentification and violation of due process." But again, defendant does not challenge the findings of fact, just the trial court's analysis of those facts. And this case differs from *Smith*, where this Court found the use of a high school yearbook to identify a defendant to be impermissibly suggestive when "[d]efendant's picture was the only picture of a black male on the page, and defendant's name was printed below his picture and clearly visible." 134 N.C. App. at 127, 516 S.E.2d 902, 906. ("[The Officer] knew that the suspect she was attempting to identify was a black male, and [a confidential informant] had previously told her defendant's name as it appeared under his photo.").

Defendant also relies on *State v. Al-Bayyinah*, 356 N.C. 150, 567 S.E.2d 120, (2002), and *State v. Knight*, 282 N.C. 220, 192 S.E.2d 183 (1972), for the premise that "[s]ingle-photo identifications are inherently suggestive." But there is no absolute prohibition of using a single photograph:

> In *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968), the Court refused to prohibit absolutely the use of identification by photograph and instead held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph

> will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Knight, 282 N.C. at 225, 192 S.E.2d at 287.

The present case also differs from *State v. Jones*, where this Court found the use of a single photo was impermissibly suggestive. In *Jones*, an agent was shown a picture "some seven months after the incident occurred, after the witness had been notified that he would be receiving a photograph of the defendant and with the defendant's name written on the back[.]" 98 N.C. App. 342, 347, 391 S.E.2d 52, 56 (1990). Here, the DMV photo was shown to Detective Jurney only days after the purchase took place, and she neither knew defendant's name nor was it on the photo.

Defendant also argues that the trial court must have found the identification procedure to be impermissibly suggestive because the order addressed both of the two steps of the analysis but the second step would not be necessary based upon a conclusion of law that the procedure was not impermissibly suggestive. *See Hannah*, 312 N.C. at 290, 322 S.E.2d at 151 ("If this question is answered in the negative, we need proceed no further. If it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification." (citations omitted)). The trial court concluded that the identification procedure was not impermissibly suggestive, as discussed above. Defendant is correct that the trial court need not have addressed the reliability of the identification under the totality of the circumstances, given its prior determination regarding the identification procedure, but the trial court did not err by ruling upon this issue. In addition, if the trial court did not in fact conclude that the identification procedure was not impermissibly suggestive, the trial court did not err in its alternative conclusion that the identification was reliable under the totality of the circumstances.

While we recognize that it is the better practice to use multiple photos in a photo identification procedure, the trial court did not err in its conclusion that, in this case, the use of a single photo was not impermissibly suggestive. And even if the procedure was impermissibly suggestive, the trial court's findings of fact also support a conclusion that the procedure did not create "a substantial likelihood of irreparable misidentification." The trial court's findings of fact in this order are supported by competent evidence, and these factual findings support the trial court's ultimate conclusions of law.

III. Expert Testimony

[2] Defendant argues that the trial court erred by allowing expert testimony on the weight and identification of the pills as oxycodone and the powder as heroin. Because the State's expert had an independent basis for her testimony, we find no error in allowing her to testify.

Standard of Review

Prior to trial, the State notified defendant it intended to call Knops to testify as to the weights and identification of the pills and powder. Defendant filed a motion *in limine* asking to exclude testimony from the State's expert, Knops, because the actual analysis of the pills and powder were done by another expert who has since moved out of state. The trial court denied defendant's motion *in limine*, and, at trial, he objected to the introduction of Knops's testimony regarding the brown powder, but failed to object to her testimony regarding the pills.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1). "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). 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) (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).

Analysis

Our Supreme Court has stated that "when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity 'to fully cross-examine the expert witness who testifies against him[.]' " *State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 161 (2013) (citation and quotation marks omitted). Further, "the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible

statements." *Id.* (citing *Bullcoming v. New Mexico*, 564 U.S. 647, 652, 131 S. Ct. 2705, 2710 (2011)). However, "machine-generated raw data, if truly machine-generated, are not statements by a person, they are neither hearsay nor testimonial." *Id.* at 10, 743 S.E.2d at 162 (citation and quotation marks omitted).

Here, Erica Lam performed the forensic chemistry analysis on the evidence purchased from Defendant. However, Lam moved out of state and was not available to testify at trial about the results of her chemical analysis. The State called Lori Knops, Lam's supervisor, to testify about the results of the tests on the evidence obtained from defendant. After *voir dire* on Knops's proposed testimony, the trial court concluded:

> In this matter, the Court does believe that scientific and technical and other specialized knowledge will assist the trier of fact in understanding the evidence in order to determine a fact in issue, that this witness is qualified as an expert by knowledge, skill, experience, training, and education. The Court does find that her testimony is based on sufficient facts or data, that her testimony is a product of reliable principles and methods, and the witness has applied the principles and methods reliable to the facts of this case, and so the Court therefore will allow her to testify as to her findings. Court will exclude the prior testimony of Ms. Lam as to the pills, but will allow this witness to testify as to her peer review and her findings based on the information of Ms. Lam.

Knops was tendered as an expert in "forensic chemistry" without objection and testified about the procedure at the lab where she and Lams worked ("NMS"):

> Q Now, could you tell us, what is the process by which NMS Labs goes about determining whether something that is suspected of being a controlled substance is in fact a controlled substance?
>
> A A series of tests are conducted on the unknown substance. Essentially it's a two-part test. The first would be a preliminary or a presumptive test to essentially dictate what confirmatory test is used, and that is, the second part is to do a confirmatory test.

Knops stated a peer review was performed on Lam's reports, and Knops personally reviewed the peer review. She stated that a peer review's

purpose is to "look at the data that is produced and to formulate your opinion as to the result, and if that result matches the result that was produced by the working analyst." Defendant did not object to Knops's testimony regarding the substance of the pills. However, defendant did object to the identification of the heroin and the weight of the pills and the introduction of Knops's report, which contained in part:

> Case ID Numbers:
>
> 16-WIN-019752 (Agency Number: 2012004651, Date of Offense: 09/07/2012)
>
> Name/DOB: Pless Jr. Harold Lee (09/30/1971)
>
> . . . The case file for Laboratory Report, 16-WIN-019752 was reviewed by myself on July 24, 2017. I reviewed the analytical results of the above-listed Laboratory Reports and affirm the following:
>
> 16-WIN-019752
>
> Lab Item #1 – Heroin, confirmed; 1 sample tested, Weight 0.45 g (+/- 0.01 g)
>
> Lab Item #2 – Acetaminophen and Oxycodone, confirmed; Weight 9.45 g (+/- 0.01 g); 1 sample tested, Weight 0. 52 g (+/- 0.01 g)
>
> a. Identity of the Substances

The situation presented here as to Knops's testimony regarding State's Exhibits 3 and 4, identified as oxycodone and heroin, is identical to *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156.

> [Knops] analyzed the data pertaining to the seized substance[s] and gave her independent expert opinion that the substance was [heroin and Oxycodone]. Defendant had the opportunity to cross-examine the witness against him: [Knops]. The admission of an independent expert opinion based on the expert's own scientific analysis is not the type of evil the Confrontation Clause was designed to prevent.

Id. at 14, 743 S.E.2d at 165.

Knops's opinion on the identity of the heroin and oxycodone resulted from her independent analysis of Lam's data:

> Q And did you review Ms. Lam's, the work product and the raw data that was generated relative to the testing of State's Exhibit 3?

A I did.

Q Based on your review of those items and your visual inspection of the tablets now, did you form an opinion satisfactory to yourself as to what those tablets are?

A Yes, I did.

Q What is it?

A Acetiminophen [sic] and Oxycodone tablet.

. . . .

Q Based upon your review of, of the peer review, and of the analyses as noted in the data generated by NMS Labs and Ms. Lam, did you form an opinion satisfactory to yourself as to whether, as to what the identity of the substance is contained in State's Exhibit 4?

A Yes, I did.

Q What is it?

[Defendant's Counsel]: Object.

THE COURT: Overruled.

A That State's Exhibit 4 is heroin.

We find no error as to the identification of the oxycodone and the heroin.

b. Weight of the Substances

Knops was also questioned by the State about the weight of the pills:

Q Now, does that [your report] reference the weight, the collective weight of all pills?

A Yes, it does.

Q Which is what?

[Defendant's Counsel]: Object. This goes back to the earlier motion.

THE COURT: Overruled.

Q Go ahead.

A The collective weight was 9.45 grams.

Q Now, could you tell us, please, whether -- you didn't yourself put them on a balance and weigh them yourself?

A I did not.

Q Based upon your review of the work product that was generated in the original analysis, and based upon your visual inspection of the pills, as you sit here right now, could you tell the jury whether you had an opinion

> satisfactory to yourself as to whether 9.45 grams was consistent with the weight of the pills as they appeared?
>
> A: It's consistent, yes.

On cross-examination, defendant's counsel asked Ms. Knops about how she obtained the weight of the substances:

> Q And the same thing is true with the weight that was recorded for the heroin; is that right?
>
> A Yes. There wasn't any notes as to anyone observing her while she performed the test.
>
> Q And so the weight in your report for both the pills and the heroin was essentially repeated from Ms. Lam's report?
>
> A Yes.
>
> Q Is that correct?
>
> A Yes, it was from my review of her weights obtained on that balance tape.

On redirect, Knops restated her opinion:

> My opinion is State's 3 contained acetiminophen [sic] and Oxycodone with a weight of the 9.45 grams. And by looking at the evidence here today and these tablets, that weight is consistent with what I am visually seeing right now.

Because weight is machine generated, it is neither hearsay nor testimonial, and the trial court did not err by allowing Knops's testimony on the weight of the substances or her report to be admitted into evidence. *See id.* at 10, 743 S.E.2d at 162 ("[C]onsistent with the Confrontation Clause, if 'of a type reasonably relied upon by experts in the particular field,' N.C.R. Evid. 703, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion."). Knops provided an independent basis for her opinion. The admission of Knops's testimony did not violate defendant's confrontation rights, so the trial court did not err by allowing this evidence.

IV. Conclusion

We affirm the trial court's denial of defendant's motion to suppress and hold that the trial court did not err by allowing Knops's testimony on the identification and weights of the substances or admitting Knops's report into evidence.

AFFIRMED IN PART; NO ERROR IN PART.

Judge ZACHARY concurs.

Judge MURPHY concurs in the result by separate opinion.

MURPHY, Judge, concurring in result by separate opinion.

I concur with the Majority's analysis as to the motion to suppress, but concur in result only as to its analysis of Defendant's second argument, regarding expert testimony and the Confrontation Clause. Where a party fails to raise a constitutional issue at trial, such a challenge cannot ordinarily be considered for the first time on appeal. *State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829, 834 (2010). Here, Defendant did not raise a Confrontation Clause challenge at trial, so the issue is not properly before us on appeal.

In *Davis*, we held:

> As Defendant failed to object at trial to any of the aforementioned testimony, Defendant failed to preserve for appeal the argument that the evidence was erroneously admitted. *See* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely ... objection ... stating the specific grounds for the ruling the party desired the court to make...."). "Moreover, because [D]efendant did not 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), [D]efendant is not entitled to plain error review of this issue." *State v. Dennison*, 359 N.C. 312, 312–13, 608 S.E.2d 756, 757 (2005) (citing N.C. R. App. P. 10(c)(4)). Furthermore, "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). While this Court may pass upon constitutional questions not properly raised at the trial level in the exercise of its supervisory jurisdiction "[t]o prevent manifest injustice [,]" N.C. R. App. P. 2, because there was copious unchallenged evidence before the jury that the substance at issue was cocaine, including . . . unchallenged testimony, we decline to invoke Rule 2 in this case.

Id. Our holding and analysis in *Davis* is indistinguishable from the instant case. Therefore, I would not reach the Defendant's argument regarding Ms. Knop's expert testimony. Consequently, I agree with the Majority's ultimate determination that Defendant received a fair trial, free from error, and concur in the mandate.

STATE OF NORTH CAROLINA
v.
SETHY TONY SEAM

No. COA18-202

Filed 18 December 2018

1. Constitutional Law—Eighth Amendment—sentence—gross disproportionality—juvenile defendant—life imprisonment with possibility of parole

A sentence of life imprisonment with the possibility of parole for defendant's conviction of felony murder, committed when he was sixteen years old, was not grossly disproportionate under the Eighth Amendment. The Court of Appeals reviewed the record and arguments of counsel and concluded that this was not the "exceedingly unusual" case of a sentence being disproportionate to the crime. Assuming arguendo that it was appropriate to consider defendant's participation in the crime, the court noted that defendant actively participated in the robbery of the gas station and did not attempt to help the victim after he was shot.

2. Constitutional Law—North Carolina—sentence—gross disproportionality—juvenile defendant—life imprisonment with possibility of parole

Where the Court of Appeals concluded that defendant's sentence of life imprisonment with the possibility of parole for a felony murder committed when defendant was sixteen years old was not grossly disproportionate under the Eighth Amendment, the court likewise also concluded that defendant's sentence did not violate the North Carolina Constitution's prohibition against cruel or unusual punishments in Article I, Section 27.

3. Appeal and Error—prior Supreme Court case—virtually identical argument rejected

Where defense counsel conceded that an argument virtually identical to his argument regarding the prohibition against ex post facto laws had been rejected by the North Carolina Supreme Court, defendant's argument was overruled.

Appeal by defendant from judgment entered 11 October 2017 by Judge Jeffrey K. Carpenter in Davidson County Superior Court. Heard in the Court of Appeals 4 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

DAVIS, Judge.

In this case, Sethy Tony Seam ("Defendant") challenges the constitutionality of his sentence of life imprisonment with the possibility of parole for his conviction of felony murder when he was sixteen years old. Because we conclude that his sentence is not grossly disproportionate under the Eighth Amendment of the United States Constitution, we hold that his sentence is constitutional.

Factual and Procedural Background

This matter is before this Court for the third time. The relevant facts regarding Defendant's underlying crime are set out in full in our decision in *State v. Seam*, 552 S.E.2d 708, 2001 N.C. App. LEXIS 773 (2001) (unpublished) (hereinafter "*Seam I*").

> . . . On the evening of 19 November 1997, defendant and Freddie Van walked to King's Superette in Lexington, North Carolina. They both entered the store around closing time when the store's proprietor, Mr. Harold King, Sr. (Mr. King), was squatting down in the rear of the store, fixing the beer cooler. Defendant and Van were standing in the middle of the store when Van pulled a .22 caliber pistol from the front of his pants and said, "Freeze, give me all your money." As Van approached Mr. King from behind, Mr. King stood up and said, "How much do you all want?" At this time, Van pointed the pistol at Mr. King's

> back and ordered him to the cash register at the front of the store. As Van and Mr. King were approaching the cash register, defendant also moved closer to the cash register. Suddenly, Van knocked Mr. King's glasses off, whereupon Mr. King turned around and punched Van in the mouth. An argument ensued and Van shot Mr. King three times, fatally wounding him. Defendant and Van attempted to open the cash register but were unsuccessful. They then ran from the store. Thereafter, defendant and Van agreed they would not talk to anyone about this event.
>
> The next day, defendant and Jason Kruisenga visited the home of brothers, Jeremy and Stephen Weier. Defendant offered to sell a black long nose .22 caliber pistol to Jeremy and Stephen Weier but both brothers declined. However, defendant, Kruisenga, and Stephen Weier went into the nearby woods and fired the pistol about 15 times. The ammunition used belonged to Stephen Weier, although defendant had his own ammunition. After this practice shooting, Kruisenga and Stephen Weier saw defendant hide the pistol in some weeds. The following day, Kruisenga and Stephen Weier saw Van and they went to the weeded area where defendant had hidden the pistol. Kruisenga retrieved the pistol and gave it to Van who left with it.

Seam I at **1-2 (brackets omitted).

On 5 January 1998, a Davidson County grand jury indicted Defendant for first-degree murder and attempted robbery with a dangerous weapon. In September 1999, a jury trial was held before the Honorable Charles C. Lamm in Davidson County Superior Court. On 30 September 1999, the jury convicted Defendant of the attempted robbery offense along with first-degree murder based upon the felony murder rule. Judge Lamm imposed a sentence of life imprisonment without the possibility of parole and arrested judgment on the attempted robbery conviction. Defendant appealed to this Court, and in *Seam I* we upheld Defendant's conviction. *Id*. at *14.

Defendant filed a motion for appropriate relief on 29 April 2011 alleging, in part, that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. On 8 August 2013, Judge Theodore S. Royster, Jr. held that Defendant's sentence was, in fact, unconstitutional based on the United States Supreme Court's holding in

Miller v. Alabama, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), which prohibited the imposition of mandatory sentences of life imprisonment without the possibility of parole upon juveniles. On that same day, Judge Royster ordered that Defendant be resentenced pursuant to *Miller*. Our Supreme Court affirmed Judge Royster's 8 August 2013 order and remanded the case for resentencing. *State v. Seam*, 369 N.C. 418, 794 S.E.2d 439 (2016).

On 30 December 2016, Judge Royster resentenced Defendant to a term of 183-229 months imprisonment. The State appealed, and on 5 September 2017 this Court vacated Judge Royster's resentencing order. *State v. Seam*, __ N.C. App. __, 805 S.E.2d 302 (2017). We held that Judge Royster had lacked jurisdiction to resentence Defendant because the mandate from the Supreme Court had not yet issued, and we therefore remanded the case for a second resentencing hearing. *Id.* at __, 805 S.E.2d at 303.

On 11 October 2017, a new resentencing hearing was held before the Honorable Jeffrey K. Carpenter. Following the hearing, Judge Carpenter entered an order resentencing Defendant to life imprisonment with the possibility of parole. Defendant gave timely notice of appeal to this Court.

Analysis

In this appeal, Defendant asserts that the sentence imposed by Judge Carpenter violates the Eighth Amendment as well as Article I, Section 27 of the North Carolina Constitution. In addition, he contends that his sentence is in violation of the constitutional prohibition against *ex post facto* laws. We address each argument in turn.

I. Eighth Amendment

A. Background

In order to analyze Defendant's argument, it is necessary to address in some detail relevant caselaw from the United States Supreme Court as well as from our own appellate courts. In *Miller*, as noted above, the United States Supreme Court held that the Eighth Amendment forbids the imposition upon a juvenile defendant of a mandatory sentence of life imprisonment *without* the possibility of parole. *Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430. The Court ruled that before such a sentence can be imposed mitigating circumstances relating to the juvenile's age and age-related characteristics must be considered. *Id.*

In *Montgomery v. Louisiana*, __ U.S. __, 193 L. Ed. 2d 599 (2016), the Supreme Court held that its decision in *Miller* operated retroactively

such that it applied to any person who had previously been sentenced as a juvenile to life imprisonment without the possibility of parole. *Id.* at __, 193 L. Ed. 2d at 622. Notably, however, the Court explained that "[g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.*

In response to *Miller*, the North Carolina General Assembly enacted N.C. Gen. Stat. § 15A-1340.19A *et seq.*, a statutory sentencing scheme for juveniles subject to life imprisonment without the possibility of parole. N.C. Gen. Stat. § 15A-1340.19B states, in pertinent part, as follows:

> (1) If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.

N.C. Gen. Stat. § 15A-1340.19B(a) (2017).

In *State v. Jefferson*, __ N.C. App. __, 798 S.E.2d 121, *disc. review denied*, 370 N.C. 214, 804 S.E.2d 527 (2017), *cert. denied*, __ U.S. __, 200 L. Ed. 2d 318 (2018), this Court considered a categorical constitutional challenge to the requirement in N.C. Gen. Stat. § 15A-1340.19B(a)(1) that all juveniles convicted of first-degree murder under the felony murder rule receive a mandatory sentence of life imprisonment with the possibility of parole. *Id.* at __, 798 S.E.2d at 123. The defendant in *Jefferson* argued that § 15A-1340.19B(a)(1) was unconstitutional under the Eighth Amendment on the theory that *Miller*'s holding should "be extended to reach sentences of life *with* the possibility of parole." *Id.* at __, 798 S.E.2d at 124.

We upheld the constitutionality of N.C. Gen. Stat. § 15A-1340.19B(a)(1), noting that in *Montgomery* the United States Supreme Court had expressly "held that a State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them . . . [because] it ensures that juveniles . . . will not be forced to serve disproportionate sentences in violation of the Eighth Amendment." *Id.* at __, 798 S.E.2d at 125 (internal citation and quotation marks omitted). In our opinion, we further stated the following:

> The decisions of the state courts which have been asked to extend *Miller* beyond explicit sentences of life without parole similarly make clear the touchstone of the

> *Miller* analysis is whether the defendant is sentenced to a life term (or its functional equivalent) without an opportunity to obtain release based on demonstrated maturity and rehabilitation. In *State v. Null*, the Iowa Supreme Court invalidated a mandatory 52.5 year sentence, noting that geriatric release, if one is to be afforded the opportunity for release at all, does not provide the defendant a meaningful opportunity to regain his freedom and reenter society. Similarly, the Wyoming, Indiana, and California supreme courts have held *Miller* requires individualized sentencing where one or more mandatory minimum sentences results in a *de facto* life sentence without parole.
>
> Defendant's sentence is neither an explicit nor a *de facto* term of life imprisonment without parole. Upon serving twenty-five years of his sentence, Defendant will become eligible for parole, where state law mandates he be given an opportunity to provide the Post-Release Supervision and Parole Commission with evidence of his maturity and rehabilitation. The Commission may only refuse him parole if it appears Defendant is a substantial risk to violate the conditions of his parole, his release would unduly depreciate the seriousness of his crime or promote disrespect for law, his rehabilitation would be better served by remaining in prison, or he posed a substantial risk of recidivism. Because parole is intended to be a means of restoring offenders who are good social risks to society, its very purpose is to allow Defendant to demonstrate he has been rehabilitated and obtained sufficient maturity as to have overcome whatever age-related weaknesses in character that led to the commission of his crime.
>
> Consequently, we conclude neither the United States Supreme Court nor the North Carolina Supreme Court has yet held the Eighth Amendment requires the trial court to consider these mitigating factors before applying such a sentence to a juvenile defendant. Because Defendant has failed to meet his burden of proving the statute is unconstitutional in all applications, we must presume the statute is constitutional and defer to the legislature, which has the exclusive authority to prescribe criminal punishments.

Jefferson, __ N.C. at __, 798 S.E.2d at 125-26 (internal citations, quotation marks, and brackets omitted).

Thus, *Jefferson* makes clear that N.C. Gen. Stat. § 15A-1340.19B(a)(1) is not facially unconstitutional. In the present case, however, Defendant claims to be making a different argument than that at issue in *Jefferson* — that is, he contends that "[t]he current North Carolina statute for sentencing juveniles is unconstitutional *as applied to* [Defendant] because his sentence is not proportioned to the offender and the offense; and because the sentencing judge had no discretion to consider a different option." (Emphasis added.)

Defendant concedes that his sentence is not directly implicated by the holding in *Miller* given that he did not receive a sentence of life imprisonment *without* the possibility of parole. Instead, he argues, *Miller* and *Montgomery* should be construed so as to entitle him to a sentencing hearing during which the court would possess the discretion to consider whether the sentence of life imprisonment with parole is appropriate given "his age and age-related characteristics," including "immaturity, impetuosity, and failure to appreciate risks and consequences; the family and home environment that surrounds the juvenile; the circumstances of the offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; and the inability to deal with police or prosecutors or his own attorneys."

However, as Defendant acknowledges, *Miller* specifically requires such an individualized consideration of these types of mitigating factors only in cases where a juvenile defendant has been sentenced to life imprisonment *without* the possibility of parole. *See Miller*, 567 U.S. at 480, 183 L. Ed. 2d at 424. Because Defendant's sentence affords him the possibility of parole, *Miller* is inapplicable.

Based on our thorough review of the relevant Eighth Amendment caselaw, it is clear that the type of "as applied" challenge Defendant seeks to bring in this case is not legally available to him. Instead, he is limited solely to a review of whether his sentence was grossly disproportionate to his crime. This Court discussed the nature of this type of review in *State v. Stubbs*, 232 N.C. App. 274, 754 S.E.2d 174 (2014), *aff'd*, 368 N.C. 40, 770 S.E.2d 74 (2015).

> As to [Eighth Amendment challenges] in which the Court considers whether a term-of-years sentence is unconstitutionally excessive given the circumstances of a case, the Court [in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)] noted that "it has been difficult for [challengers] to establish a lack of

proportionality." *Id.* at 59, 130 S.Ct. at 2021, 176 L.Ed.2d at 836. Referring to *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), as a leading case on the review of Eighth Amendment challenges to term-of-years sentences as disproportionate, Justice Kennedy delivering the opinion of the *Graham* court acknowledged his concurring opinion in *Harmelin*: "[T]he Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' " *Graham*, 560 U.S. at 59-60, 130 S.Ct. at 2021, L.Ed.2d at 836 (quoting *Harmelin*, 501 U.S. at 997, 1000-1001, 111 S.Ct. at 2705, 115 L.Ed.2d at 836 (Kennedy, J., concurring in part and concurring in judgment)). *Accord Rummel v. Estelle*, 445 U.S. 263, 288, 100 S.Ct. 1133, 62 L.Ed.2d 832 (1980) (Powell, J., dissenting (The scope of the Cruel and Unusual Punishments Clause extends . . . to punishments that are grossly disproportionate. Disproportionality analysis . . . focuses on whether, a person deserves such punishment . . . . A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concludes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged.")).

In *Harmelin*, 501 U.S. 957, 111 S.Ct. 836, 115 L.Ed.2d 836, the defendant challenged his sentence of life in prison without the possibility of parole on the grounds that it was "significantly" disproportionate to his crime, possession of 650 or more grams of cocaine. The defendant further argued that because the sentence was mandatory upon conviction, it amounted to cruel and unusual punishment as it precluded consideration of individual mitigating circumstances. *Id.* at 961, 111 S.Ct. at 2683, 115 L.Ed.2d at 843 n.1. In an opinion delivered by Justice Scalia, a majority of the Court held that the sentence was not cruel and unusual punishment solely because it was mandatory upon conviction. In addressing the defendant's alternative argument, that his sentence of life in prison without

> possibility of parole was significantly disproportionate to his crime of possessing 650 or more grams of cocaine, a majority of the Court concluded that the defendant's sentence did not run afoul of the Eighth Amendment; however, the Court revealed varied views as to whether the Eighth Amendment includes a protection against disproportionate sentencing and if so, to what extent. *See also Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (holding that the defendant's sentence of twenty-five years to life for felony grand theft under California's "three strikes and you're out" law did not violate the Eighth Amendment's prohibition on cruel and unusual punishments). *Cf. Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (holding that South Dakota's sentence of life without possibility of parole for uttering a "no account" check after the defendant had previously been convicted of six non-violent felonies was disproportionate to his crime and prohibited by the Eighth Amendment).

Stubbs, 232 N.C. App. at 282-83, 754 S.E.2d at 179-80.

We are also guided by our Supreme Court's decision in *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). In *Green*, the defendant was convicted of a first-degree sexual offense that he committed when he was thirteen years old, and he was sentenced to a mandatory term of life imprisonment without the possibility of parole. *Id.* at 592, 502 S.E.2d at 822. On appeal, the defendant claimed that his sentence violated the Eighth Amendment because it was grossly disproportionate given his young age. *Id.* at 609, 502 S.E.2d at 832. The Court rejected this argument, stating the following:

> [A] criminal sentence fixed by the legislature must be proportionate to the crime committed. However, in *Harmelin*, the United States Supreme Court held that outside of the capital context, there is no general proportionality principle inherent in the prohibition against cruel and unusual punishment. Indeed, the prohibition against cruel and unusual punishment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. Only in exceedingly rare noncapital cases will sentences imposed be so grossly disproportionate as to be considered cruel or unusual.

Green, 348 N.C. at 609, 502 S.E.2d at 831-32 (internal citations and quotation marks omitted).[1] Thus, in order to prevail in his Eighth Amendment challenge, Defendant must demonstrate that his sentence is grossly disproportionate to the offense for which he was convicted.

B. Gross Disproportionality

[1] Having determined that Defendant here is entitled only to a review of his sentence for gross disproportionality, we proceed to apply that test. As an initial matter, we note from the record that the trial court appears to have been under the misapprehension that no further analysis under the Eighth Amendment could ever be appropriate in this context due to the mandatory nature of the punishment required under N.C. Gen. Stat. § 15A-1340.19B(a)(1). This belief was mistaken because the trial court did possess the authority to make a determination as to whether Defendant's sentence was, in fact, grossly disproportionate. However, as the cases discussed above make clear, Defendant was not entitled to an evidentiary hearing or accompanying findings of fact as to the possible existence of mitigating factors. Rather, the only issue proper for resolution was whether Defendant's sentence of life imprisonment with the possibility of parole is grossly disproportionate to his crime.

Therefore, because we are capable of making such a determination in the present appeal, a remand for the trial court to do so is unnecessary and would be inconsistent with considerations of judicial economy. *See State v. Fernandez*, __ N.C. App. __, __, 808 S.E.2d 362, 368 (2017) (holding that this Court could address as-applied constitutional challenge to statute even where trial court failed to make findings of fact because no such findings were necessary); *see also Coucoulas/Knight Properties, LLC v. Town of Hillsborough*, 199 N.C. App. 455, 458, 683 S.E.2d 228, 231 (2009) ("[I]n the interests of judicial economy, when the entirety of the record is before us, this Court may conclude remand is unnecessary."), *aff'd per curiam*, 364 N.C. 127, 691 S.E.2d 411 (2010); *State v. Wilson*, 127 N.C. App 129, 133, 488 S.E.2d 303, 306 (1997) (determining that remand was not required because it would serve no useful purpose, "particularly from the point of view of judicial economy").

Based on our thorough review of the record and the arguments of counsel, we conclude that this is not an example of the "exceedingly unusual" case where a defendant's sentence is grossly disproportionate

1. We recognize that *Green* was decided prior to the United States Supreme Court's decision in *Miller*. We nevertheless find *Green* to be instructive as it is the North Carolina Supreme Court's most recent decision applying the "grossly disproportionate" test under the Eighth Amendment.

to his crime. *Green*, 348 N.C. at 609, 502 S.E.2d at 832. The gravity of the offense of felony murder is beyond argument. Moreover, even assuming *arguendo* that it is appropriate for us to consider the extent of Defendant's actual participation in the crime, the depth of his involvement is undisputed. While Defendant did not fire the gun that killed Harold King, he was nonetheless an active participant in the events that resulted in King's murder. Defendant entered the store with Freddy Van for the purpose of committing a robbery and approached the cash register while King was being held at gunpoint. *Seam I* at *2. After King was shot, Defendant did not render assistance to him or call 911. *Id.* Instead, he attempted to open the cash register to steal money from the store. *Id.* Moreover, after leaving the store, Defendant agreed with Van not to discuss the murder with anyone else and later tried to profit from the crime by selling the murder weapon. *Id.* When his friends refused to buy the gun, Defendant buried it in the woods. *Id.*

Thus, we are unable to agree with Defendant that his sentence of life imprisonment with the possibility of parole is grossly disproportionate to the severity of his crime. His Eighth Amendment argument is therefore overruled.

II. Article I, Section 27 of the North Carolina Constitution

[2] Defendant also contends that his sentence is unconstitutional based on the North Carolina Constitution regardless of its constitutionality under the Eighth Amendment. Article I, Section 27 of the North Carolina Constitution prohibits the infliction of "cruel *or* unusual punishments." N.C. Const. art. I, § 27 (emphasis added). The wording of this provision differs from the language of the Eighth Amendment, which prohibits the infliction of "cruel *and* unusual punishments." U.S. Const. amend. VIII (emphasis added).

Despite this difference in the wording of the two provisions, however, our Supreme Court "historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *Green*, 348 N.C. at 603, 502 S.E.2d at 828; *see also Stubbs*, 232 N.C. App. at 280, 754 S.E.2d at 178 (analyzing "cruel and/or unusual punishment" claim the same under both federal and state constitutional provisions); *State v. Pettigrew*, 204 N.C. App. 248, 258, 693 S.E.2d 698, 705 (noting that standard is identical under both federal and state constitutions), *appeal dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010). Thus, because we have determined that Defendant's sentence does not violate the Eighth Amendment, we likewise conclude it passes muster under Article I, Section 27 of the North Carolina Constitution.

III. *Ex Post Facto* Law

[3] Defendant's final argument is that because N.C. Gen. Stat. § 15A-1340.19B did not exist at the time he committed his crime, his sentence constitutes a violation of the prohibition against *ex post facto* laws. However, as Defendant's attorney conceded at oral argument, a virtually identical contention was rejected by our Supreme Court in *State v. James*, 371 N.C. 77, 813 S.E.2d 195 (2018). Therefore, *James* forecloses Defendant's argument on this issue.

Conclusion

For the reasons stated above, we conclude that Defendant's sentence of life imprisonment with the possibility of parole is constitutional.

AFFIRMED.

Judges HUNTER, JR. and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DAVID JOE SHULER, DEFENDANT

No. COA18-416

Filed 18 December 2018

Indictment and Information—statutory rape—identity of victim

An indictment for statutory rape of a person 13, 14, or 15 years old was facially defective where it did not include the name of the victim. An indictment need not include the victim's full name but requires more than a generic term. Although it seemed likely in this case that defendant subjectively knew the victim's identity, the function of the indictment includes protection against double jeopardy as well as providing defendant with notice of the crime with which he is charged.

Appeal by Defendant from judgment entered 23 March 2017 by Judge William H. Coward in Swain County Superior Court. Heard in the Court of Appeals 13 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Larissa Williamson, for the State.

W. Michael Spivey for the Defendant.

DILLON, Judge.

David Joe Shuler ("Defendant") appeals from a judgment finding him guilty of statutory sex offense and petitions this Court for review of subsequent orders requiring him to register as a sex offender and prohibiting contact with the victims. Because we conclude that the indictment was facially defective, we vacate the judgment and orders.

I. Background

In March 2015, Defendant was indicted in two separate indictments for statutory rape of a person who is thirteen (13), fourteen (14), or fifteen (15) years old.[1] N.C. Gen. Stat. § 14-27.7A(b) (2015).[2]

Defendant was tried for both crimes by a jury. At the close of the State's evidence, the trial court dismissed one of the offenses on Defendant's motion. The jury found Defendant guilty of the remaining offense. Defendant was sentenced to a term of imprisonment and was required to register as a sex offender. The court also issued a no-contact order.

Defendant gave oral notice of appeal in open court and filed a petition for writ of certiorari seeking review of the trial court's order requiring him to register as a sex offender and prohibiting contact with the victims.

II. Analysis

On appeal, Defendant argues that the indictment was facially invalid because it did not include the name of the victim.[3] Indeed, the indictment charging Defendant does not identify the victim by name, but identifies her merely as "Victim #1." For the reasons below, we agree with Defendant.

An indictment purported to be invalid on its face may be challenged at any time. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326,

1. Defendant was indicted as an *accessory* to statutory rape. However, in North Carolina, pursuant to Section 14-5.2 of our General Statutes, an accessory before the fact is punishable as a principal felon. N.C. Gen. Stat. § 14-5.2 (2015).

2. Re-codified as N.C. Gen. Stat. § 14-27.25 as of 1 December 2015.

3. Defendant makes other arguments on appeal; however, because of our resolution of his argument concerning the indictment, we need not address Defendant's other arguments.

341 (2000). The facial validity of an indictment is reviewed *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981).

Our General Statutes compel us to conclude that the indictment in the present case is fatally defective. Specifically, "[a]t common law it [was] of vital importance that the name of the person against whom the offense was directed be stated with exactitude." *State v. Scott*, 237 N.C. 432, 433, 75 S.E.2d 154, 155 (1953). As our Supreme Court explained:

> The purpose of setting forth the name of the person who is the subject on which an offense is committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if accused a second time.

Id. at 433-34, 75 S.E.2d at 155 (quoting *State v. Angel*, 29 N.C. 27, 29 (1846)). This common law requirement that the victim be named has not been relaxed for prosecutions under Section 14-27.7A(b) of our General Statutes, the crime for which Defendant was convicted. Specifically, our General Assembly requires that an indictment charging this crime must "nam[e] the victim." N.C. Gen. Stat. § 15-144.2(a) (2015).

Likewise, our jurisprudence compels us to conclude that the indictment in the present case is fatally defective. Indeed, we have recognized that an indictment subject to Section 15-144.2(a) of our General Statutes must name the victim. *State v. Dillard*, 90 N.C. App. 318, 320, 368 S.E.2d 442, 444 (1988) (holding that "for an indictment to be legally valid," it must allege "the victim's name"); *see also State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982).

The indictment need not include the victim's full name as we have held that the use of the victim's initials may satisfy the "naming" requirement of Section 15-144.2(a). *State v. McKoy*, 196 N.C. App. 650, 657-58, 675 S.E.2d 406, 411-12 (2009). But an indictment which identifies the victim by some generic term is not sufficient. For instance, in distinguishing *McKoy*, we held that an indictment which merely referred to the victim as "the child" was fatally defective. *In re M.S.*, 199 N.C. App. 260, 262-67, 681 S.E.2d 441, 443-46 (2009). Moreover, in a recent unpublished opinion, we held that a charging document identifying the victim merely as "the victim" was fatally defective. *In re R.A.S.*, COA16-805, 2017 N.C. App. LEXIS 157, **7 (N.C. App. Mar. 7, 2017) ("The petition did not include the victim's name, initials, or any other means of identifying the victim. By only referring to 'the victim[,]' the petition violates N.C. Gen. Stat. § 15-144.2(a) and is fatally defective.").

We note another unpublished opinion cited by the State, where a panel of our Court held that a superseding indictment identifying the victim as "victim 1" was sufficient. *State v. White*, COA16-945, 2017 N.C. App. LEXIS 888, *6-14 (N.C. App. Oct. 17, 2017). However, the holding was based in part on the fact that the original indictment, arrest warrant, and notice of dismissal all gave the full name of the victim. *Id.* (holding that even though the original indictment naming the victim was superseded by an indictment that listed the victim as "victim #1," the defendant had already received sufficient notice of the identity of the victim).

We are not persuaded by the State's argument that the identification of the perpetrator in the indictment sufficiently apprised the Defendant of who the victim was in that the indictment identified the perpetrator of the sexual assault. As the State concedes, the Defendant was not present at the commission of the underlying crimes, but was only an alleged accessory before the fact. Also, in *M.S.*, cited above, the indictment identified the perpetrator as the person being charged and further described the date and location of the act for which he was being charged. And it seems likely that the defendant in that case subjectively knew the victim's identity. However, the charging document was nonetheless held to be defective for failing to identify the victim. Indeed, while one purpose of an indictment is to put the defendant on notice of the crime for which he is being charged, naming the victim satisfies another function of an indictment; namely, to guard against the possibility of double jeopardy.

Therefore, based on our General Statutes and our jurisprudence, we must conclude that the indictment for "statutory rape of person 13, 14, or 15 years old" in 15CRS000121 is fatally defective. And since the indictment is fatally defective, the trial court did not have jurisdiction over Defendant. *See State v. Simpson*, 302 N.C. 613, 616, 276 S.E.2d 361, 363 (1981) ("[A] valid bill of indictment is essential to the jurisdiction of the court[.]"); *accord State v. Stokes*, 274 N.C. 409, 410-11, 163 S.E.2d 770, 772 (1968) ("It is hornbook law that it is an essential of jurisdiction that a criminal offense should be sufficiently charged in a warrant or an indictment."). As such, we have no choice but to vacate the judgment against Defendant. *Stokes*, 274 N.C. at 415, 163 S.E.2d at 775.

In concluding that the indictment in 15CRS000121 is fatally defective and thereby arresting the judgment against Defendant, Defendant's other assignments of error are moot.

III. Conclusion

We conclude that the indictment for "statutory rape of person 13, 14, or 15 years old" in 15CRS000121 is fatally defective by failing to include

the name of the victim. Therefore, we vacate the judgment. If the State so desires, it may proceed against Defendant on a legally sufficient indictment. *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 904 (1960).

VACATED.

Judge BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BRAD CHATMAN WIRT

No. COA18-375

Filed 18 December 2018

1. Drugs—possession—constructive—status as driver of vehicle—inference of possession

The State presented sufficient evidence to convict defendant of possession of methamphetamine and possession of firearm by a felon where defendant's status as the driver of the vehicle—even though there also was a passenger—was enough to give rise to an inference of possession of the methamphetamine found in the bed of the truck and the firearm found under the passenger seat, and there was additional incriminating evidence to support a finding of constructive possession of both items.

2. Drugs—possession—constructive—status as driver of vehicle—inference of possession—jury instruction

The trial court did not err by instructing the jury that defendant's status as the driver of a stopped vehicle was sufficient to support an inference that he constructively possessed methamphetamine and a firearm found in the vehicle, even though there was a passenger in the vehicle, where the instruction was supported by case law.

Appeal by Defendant from judgments entered 16 November 2017 by Judge V. Bradford Long in Superior Court, Randolph County. Heard in the Court of Appeals 15 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Stuart Saunders, for the State.

Stephen G. Driggers for Defendant.

McGEE, Chief Judge.

Brad Chatman Wirt ("Defendant") appeals his convictions for possession of methamphetamine, possession of a firearm by a felon, and habitual felon status. Defendant argues the trial court erred in instructing the jury that his status as the driver of a stopped vehicle was sufficient to support an inference that he constructively possessed both methamphetamine and a firearm. We disagree.

I. Factual and Procedural History

Defendant was stopped by officers of the Randolph County Sheriff's Office ("Sheriff's Office") on 6 January 2016 while driving a beige Chevrolet pickup truck ("the truck"). The Sheriff's Office had received "drug complaints" about a man named Omar Sanchez ("Sanchez"). Officers conducted a two-hour "rolling surveillance" of Sanchez and Defendant as they drove to several hotels in the area. Both Sanchez and Defendant were seen driving the truck during the two-hour surveillance. Officers checked the truck's registration, found the license plate had expired, and pulled the truck over.

At the time of the stop, Defendant was in the driver's seat and Sanchez was in the passenger seat. Officers ran a check of Defendant's driver's license and discovered Defendant had an outstanding warrant and that his license was suspended. The officers used a K-9 unit to perform a "free air sniff" of the truck. The K-9 unit alerted to the tailgate of the truck. The officers found several bags and backpacks in the bed of the truck that Sanchez stated belonged to him. While searching one of the backpacks, officers found 241 blue pills and a notebook containing Sanchez's name. Another backpack contained a compass with 0.2 grams of a crystalline substance[1], a digital scale and counterweight, and a notebook containing entries in Defendant's handwriting concerning Defendant's wife. The officers then searched the interior of the truck and found a revolver and holster beneath the passenger seat.

After Defendant was arrested, he was taken to a special operations center and a strip search was conducted. During the search, officers found a bag inside Defendant's underwear containing thirty-nine pills,

1. Defendant's brief refers to the substance found on the compass as cocaine. However, the State Crime Laboratory tested and labeled the substance as methamphetamine. Defendant was subsequently indicted and convicted of possession of methamphetamine.

fifteen of which were later determined to be diazepam. Defendant was indicted for possession of methamphetamine, possession of a firearm by a felon, three counts of possession with intent to manufacture, sell or deliver a controlled substance, and having attained habitual felon status.

Following the presentation of evidence at trial, the State requested the trial court include jury instructions based on this Court's opinion in *State v. Mitchell*, 224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (2012). The requested instruction explained:

> An inference of constructive possession can arise from evidence which tends to show that a defendant was the custodian of the vehicle where the contraband was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where the contraband was found is sufficient in and of itself to give rise to the inference of knowledge and possession sufficient to go to the jury.

Defendant objected to the additional instruction, but the trial court elected to include the expanded instruction. At Defendant's request, the trial court also added a definition of "inference" to the jury instructions.

The jury was instructed on actual and constructive possession. The jury instructions stated that an inference of possession can arise when an item is found in a premises that Defendant had control over even if Defendant did not own the premises. The instructions further informed the jury that "power to control the automobile where the contraband was found is sufficient in and of itself to give rise to the inference of knowledge and possession."

The jury found Defendant guilty of possession of methamphetamine, possession of a firearm by a felon, and possession of diazepam. Defendant entered a plea of guilty to habitual felon status. Defendant appeals his convictions for possession of methamphetamine, possession of a firearm by a felon, and habitual felon status.

II. Analysis

Defendant's sole issue on appeal is that "the trial court erred by giving the special instruction on constructive possession offered by the State over defense objection where that instruction was an incomplete and misleading statement of the law." Defendant's brief also implies that the State presented insufficient evidence to support a finding that he

constructively possessed either the firearm or the methamphetamine and the State specifically addresses these arguments. Thus, we first consider whether there was sufficient evidence to support a finding of constructive possession and then address whether the trial court erred in giving the special instruction for constructive possession.

A. *Sufficient Evidence*

[1] Defendant states there was insufficient evidence to convict him of possession of a firearm by a felon and possession of methamphetamine. "The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). "Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State . . . there is substantial evidence to support a jury finding of each essential element of the offense charged, and of the defendant being the perpetrator of such offense." *Id.*

Defendant was convicted of possession of methamphetamine in violation of N.C. Gen. Stat. § 90-95(A)(3) (2017). In order to sustain a conviction for possession of methamphetamine, the State must prove beyond a reasonable doubt that (1) Defendant was in possession of (2) a controlled substance. N.C. Gen. Stat. § 90-95(A)(3) (2017). The State presented evidence that the North Carolina State Crime Laboratory determined the substance found on the compass was methamphetamine, a Schedule II controlled substance, and Defendant does not challenge this finding. Therefore, the only question for this Court is whether there was sufficient evidence to show Defendant possessed the methamphetamine.

Defendant was also convicted of possession of a firearm by a felon. To sustain a conviction for possession of a firearm by a felon, the State must prove beyond a reasonable doubt that "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Best*, 214 N.C. App. 39, 45, 713 S.E.2d 556, 561 (2011) (internal citations omitted). At trial, Defendant stipulated to his status as a convicted felon. However, Defendant contends there was insufficient evidence to support that he was in possession of the firearm.

The State must prove that Defendant possessed methamphetamine or the firearm either actually or constructively. "Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (internal citations omitted). As the methamphetamine

was found in a backpack in the bed of the truck, and not in Defendant's physical or personal custody, the State was required to present sufficient evidence to show constructive possession.

> "[A]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient*, *in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury."

Mitchell, 224 N.C. App. at 177, 735 S.E.2d at 443 (internal citations omitted). As Defendant was undisputedly the driver of the truck in which the methamphetamine was found at the time the officers stopped the truck, Defendant's dominion and control over the truck is sufficient to give rise to an inference of possession.

In *Mitchell*, the defendant was convicted of possession of marijuana and possession of a firearm by a felon. *Id.* at 172, 735 S.E.2d at 440. The defendant in *Mitchell* was driving a rental car, had a suspended license, and his girlfriend was in the passenger seat when the vehicle was stopped by a police officer. *Id.* After the defendant revealed that his girlfriend was in possession of a marijuana cigarette and told the officer there was a gun in the glove compartment, the officer searched the vehicle and found a handgun and 79.3 grams of marijuana. *Id.* at 172-73, 735 S.E.2d at 440. This Court found that " '[p]ower to control' the vehicle is sufficient evidence from which it is reasonable to infer possession" ("*Mitchell* standard"), and upheld the convictions. *Id.* at 178, 735 S.E.2d at 443.

Similar to *Mitchell*, in the present case Defendant was driving a borrowed truck, with a passenger, when illegal drugs and a weapon were found in the truck. However, Defendant argues that his dominion and control over the truck was insufficient to give rise to an inference of constructive possession because he was not the only occupant of the truck. Instead, Defendant argues that when a defendant does not have "exclusive possession of the place where the [contraband is] found, the State must show other incriminating circumstances before constructive possession may be inferred" ("additional evidence rule"). *Best*, 214 N.C. App. at 53, 713 S.E.2d at 565. Defendant further argues that "the State presented little 'additional incriminating evidence' to support an inference

beyond a reasonable doubt that [Defendant] constructively possessed" the firearm or the methamphetamine on the compass. However, *Best* also states that the fact the contraband was found in a vehicle driven by a defendant "standing alone, *might* be sufficient to permit a reasonable inference" of possession. *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562 (emphasis added).

Defendant contends that the definition of constructive possession should include the additional evidence rule as our Supreme Court discussed in *State v. Chekanow*, 370 N.C. 488, 494, 809 S.E.2d 546, 551 (2018) that:

> "[I]f drugs are found in a closet in the defendant's home and the defendant is the sole resident of the home, the evidence of constructive possession is sufficient to take the issue to the jury." But if drugs are found "in a vehicle driven by one person and carrying several others as passengers," the defendant is not in exclusive possession and other incriminating circumstances must be shown.

Importantly, the quoted portion of *Chekanow* was part of a citation showing the limited scope of our State's prior jurisprudence concerning exclusive possession, not as part of the Supreme Court's ultimate holding. *Id.* at 493, 809 S.E.2d at 550. Instead, *Chekanow* involved the discovery of marijuana plants outdoors on the outskirts of the defendant's property, not contraband inside a vehicle. *Id.* at 490, 809 S.E.2d at 548. Additionally, the quoted portion of *Chekanow* comes from a North Carolina Crimes treatise, not from North Carolina case law. *Id.* at 493, 809 S.E.2d at 551 (quoting Jessica Smith, NORTH CAROLINA CRIMES 702 (7th ed. 2012)). Our Supreme Court denied review in both *Best* and *Mitchell*. We believe had the Supreme Court intended to overrule this Court's prior holdings that power to control the automobile where the contraband was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession, it would have done so explicitly. *See Mitchell*, 224 N.C. App. at 177, 735 S.E.2d at 443

In the present case, while Defendant's status as the driver might, like in *Best*, be sufficient to uphold his conviction for possession of methamphetamine, the State also presented additional incriminating evidence to support an inference of constructive possession. Such evidence included (1) Defendant's frequent stops at hotels and a gas station – indicative of drug transactions, (2) Defendant's possession of other controlled substances, and (3) the backpack in which the methamphetamine was found contained Defendant's personal belongings. Viewed

in the light most favorable to the State, there was sufficient evidence to support each element of possession of methamphetamine.

Like possession of the methamphetamine, possession of a firearm can be actual or constructive. *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318. Since the firearm in the present case was found under the passenger seat of the truck, and not in Defendant's physical or personal custody, the State was required to show constructive possession. As with possession of a controlled substance, Defendant's dominion and control as the driver of the truck was sufficient to give rise to an inference of constructive possession of the firearm. *Mitchell*, 224 N.C. App. at 177, 735 S.E.2d at 443.

Defendant argues that his nonexclusive control over the truck required the State to provide additional incriminating evidence. As discussed above, Defendant's status as the driver is sufficient to give rise to an inference of possession. *Best*, 214 N.C. App. at 53, 713 S.E.2d at 565. Nevertheless, the State presented additional incriminating evidence sufficient to support a finding of constructive possession of the firearm, including Defendant's proximity to the firearm – both while in the driver's seat and while sitting directly above the gun when he was in the passenger's seat – and his behavior consistent with the sale of drugs. Viewed in the light most favorable to the State, there was sufficient evidence to support each element of possession of a firearm by a felon.

B. *Jury Charge*

[2] Defendant further expressly contends the trial court erroneously omitted the additional evidence standard from the jury instructions on constructive possession, misleading the jury. This Court reviews a challenge to a trial court's decision regarding jury instructions *de novo*, *State v. King*, 227 N.C. App. 390, 396, 742 S.E.2d 144, 149 (2009), and reviews the jury instructions in their entirety when determining if there was error. *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005).

> The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Id. (quoting *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002)).

Defendant contends the trial court's failure to instruct the jury on the additional incriminating evidence rule constitutes reversible error. Defendant argues the addition of the *Mitchell* standard and the omission of the additional evidence standard misled the jury because they were instructed Defendant's status as the driver alone would raise the inference of constructive possession. However, the State presented the trial court with the supporting case law and the trial court did not err in including the addition of the standard this Court articulated in *Mitchell*. Because the jury was presented with additional evidence to consider and the trial court instructed the jury that Defendant's position as the driver of the truck might, but did not necessarily, give rise to the inference of constructive possession, even assuming *arguendo* the omission constituted error, it was not likely to mislead the jury.

The trial court's instructions to the jury regarding constructive possession are as follows:

> Members of the jury, if you find beyond a reasonable doubt that a substance or article was found in close physical proximity to [] [D]efendant, that would be a circumstance from which, together with other circumstances, you may infer that [] [D]efendant was aware of the presence of the substance or article and had the power and intent to control its disposition or use. However, [] [D]efendant's physical proximity, if any, to the substance or article does not by itself permit an inference that [] [D]efendant was aware of its presence or had the power to control its disposition or use. Such an inference may be drawn only from this and other circumstances from which you find . . . from the evidence beyond a reasonable doubt.
>
> Further, I charge you, members of the jury, if you find beyond a reasonable doubt that a substance or article was found in a certain premises and that [] [D]efendant exercised control over those premises, whether or not [] [D]efendant owned it, this would be a circumstance from which you may infer that [] [D]efendant was aware of the presence of the substance or article and had the power and intent to control its disposition or use.
>
> An inference of constructive possession can arise from evidence which tends to show that a defendant was the custodian of a vehicle where the contraband was found. The driver of a borrowed car, like the owner of the car, has the power to control the content of the car. . . . Moreover,

> [] power to control the automobile where the contraband was found is sufficient in and of itself to give rise to the inference of knowledge and possession. Inference, members of the jury, means you may so find but you are not required to do so.

These instructions were based on the pattern jury instructions for constructive possession with additions from this Court's decision in *Mitchell* and a mutually agreed upon definition of the term inference.

The State does not argue that Defendant had actual possession of either the firearm or the illegal drugs. Therefore, if Defendant possessed the firearm or illegal drugs, he did so constructively and the trial court's inclusion of the pattern jury instructions is appropriate. The State presented the trial court with supporting case law for their requested addition of the *Mitchell* standard to the pattern jury instructions. " '[W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least[.]' " *Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013) (quoting *Calhoun v. Highway Com.*, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935)). The *Mitchell* standard, that the driver of a borrowed car has the requisite dominion and control over the vehicle to support an inference of possession of the vehicle's contents, has been applied and upheld consistently by this Court. *See Best*, 214 N.C. App. at 47, 713 S.E.2d at 562; *State v. Hudson*, 206 N.C. App. 482, 490, 696 S.E.2d 577, 583 (2010).

Defendant argues the trial judge should have included language articulating the additional evidence rule as described in the footnote of the pattern jury instructions. N.C.P.I. – Crim. 104.41. n.1. While Defendant objected to the addition of the *Mitchell* standard, he did not request that the additional evidence rule from the footnote be included when the trial court specifically asked Defendant's counsel if he had any other objections to the jury instructions.

Defendant argues that footnote 1 of the North Carolina Pattern Instructions for constructive possession requires the additional evidence rule instruction when a defendant's control over the premises is nonexclusive. The footnote cites to four cases, each of which are distinguishable from the present case, as none involve inferring possession by the driver of a vehicle. *State v. Thorpe*, 326 N.C. 451, 453, 390 S.E.2d 311, 313 (1990) involved illegal drugs found in a pool hall; *State v. Davis*, 325 N.C. 693, 695, 386 S.E.2d 187, 188 (1989) focused on illegal drugs found inside a mobile home; *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585,

587 (1984) involved illegal drugs located inside an apartment; and *State v. Harvey*, 281 N.C. 1, 6, 187 S.E.2d 706, 710 (1972) dealt with illegal drugs found inside a home. Defendant's status as the driver of the truck is more closely analogous to *Mitchell*; therefore, the trial court made proper additions to the jury charge.

Even assuming *arguendo* that the trial court erred in omitting the additional evidence rule from the instructions, the State presented sufficient additional evidence such that the omission was not likely to mislead the jury. As noted above, the State presented additional evidence that could lead a reasonable juror to believe that Defendant was in constructive possession of both the firearm and methamphetamine. Defendant was in close proximity to the handgun and was found with other illegal drugs. The methamphetamine was found in a backpack with Defendant's personal belongings, he was found in actual possession of other illegal drugs, and he made frequent stops at hotels, behavior commonly associated with drug activity. The jury considered all of this evidence, in addition to Defendant's status as the driver.

Further, the trial court instructed the jury that inference means "you may so find but you are not required to do so." "We presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (1993) (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)). The jury was specifically instructed that Defendant's status as the driver did not require that the jury find constructive possession. Because the trial court correctly instructed the jury that Defendant's status as the driver was sufficient to support an inference of constructive possession, and the jury was presented with additional evidence to consider that it could infer constructive possession, Defendant has failed to meet his burden of proving the jury instructions were likely to mislead the jury.

III. Conclusion

For the reasons stated above, we conclude there was sufficient evidence to support Defendant's convictions of possession of a firearm by a felon and possession of methamphetamine. The trial court's instructions on constructive possession were not misleading and, therefore, were not reversible error.

NO ERROR.

Judges ELMORE and ARROWOOD concur.

WALTON v. WALTON

[263 N.C. App. 380 (2018)]

THOMAS S. WALTON, PLAINTIFF
v.
JOSIE B. WALTON, DEFENDANT

No. COA18-410

Filed 18 December 2018

1. Appeal and Error—Rules of Appellate Procedure—multiple violations—analysis of sanctions

In an appeal from an alimony award, a husband's multiple violations of the Rules of Appellate Procedure, including failing to timely file the transcript and brief, would have subjected his appeal to dismissal had the opposing party filed a motion, but in the absence of a substantial or gross violation of the rules, the Court of Appeals declined to impose sanctions and instead reviewed the merits of the appeal.

2. Divorce—alimony—earning capacity—imputed income

In an action for alimony, the trial court did not err by imputing income to a husband from a side business repairing motorcycles where the trial court's determination that the husband deliberately suppressed his income in bad faith was supported by competent evidence.

3. Divorce—alimony—imputed income—bad faith required

In an action for alimony, the trial court did not err by declining to impute income to a wife for her earning capacity from an abandoned business to make and sell chocolate, since the trial court made no finding that she had acted in bad faith, and the husband did not argue on appeal that the trial court should have made such a finding.

4. Divorce—alimony—monthly expenses—determination of third-party contribution—sufficiency of findings

In an action for alimony, the trial court erred by imputing to a husband the contribution to his monthly living expenses that the trial court reasoned his live-in girlfriend should be making, without first finding the husband acted in bad faith to inflate his expenses or reduce his income by failing to seek contribution from his girlfriend, or making any findings regarding her income or ability to pay. The trial court also erred by reducing several of the husband's monthly expenses by half without explanatory findings of fact why one-half of the husband's claimed expenses were unreasonable.

Appeal by plaintiff from orders entered 16 August 2017 by Judge Robin W. Robinson in New Hanover County District Court. Heard in the Court of Appeals 29 November 2018.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for plaintiff-appellant.

No brief for appellee.

TYSON, Judge.

Thomas S. Walton ("Husband") appeals from the trial court's 16 August 2017 order requiring him to pay $2,750.00 per month in alimony to Josi B. Walton ("Wife"). We affirm in part, reverse in part, and remand.

I. Background

Husband and Wife were married on 3 October 1998 and separated with the intent to remain separate and apart on 8 December 2015. The parties bore no children during their marriage. On 18 December 2015, Husband filed a complaint for equitable distribution and a motion for an *ex parte* temporary order of sequestration of the former marital residence. An *ex parte* temporary order of sequestration granting Husband the exclusive use of the marital residence was entered that same day.

Wife filed an answer on 22 December 2015 and asserted counterclaims for post-separation support, alimony, equitable distribution, interim distribution, sequestration of the marital home, attorney's fees, and a temporary restraining order. The trial court entered an order on post-separation support on 23 February 2016.

The parties' claims for equitable distribution and alimony were heard before the trial court over multiple hearings on 11-13 January 2017, 14 February 2017, and 11 April 2017. On 16 August 2017, the trial court entered an order on alimony and attorney's fees ("the Alimony Order"). The Alimony Order requires Husband to pay $2,750.00 per month in alimony to Wife. Husband filed timely notice of appeal of the Alimony Order.

II. Jurisdiction

Jurisdiction lies in this court pursuant to N.C. Gen. Stat. § 50-19.1 (2017), which permits the immediate appeal of an order adjudicating a claim for alimony.

III. Appellate Rule Violations

[1] We initially note multiple appellate rule violations regarding the record on appeal. The first page of Husband's contract with the transcriptionist to order a portion of the trial transcript is included within the record, but the second page is missing and it is unclear whether Husband contracted for the transcript within fourteen days of filing his notice of appeal on 14 September 2017. N.C. R. App. P. 7(a) ("Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file").

On 30 November 2017, Husband filed a motion for extension of time to produce the transcript pursuant to Rules 7(b)(1) and 27(c) of the Rules of Appellate Procedure with the trial court. On the 15 December 2017, the trial court granted an extension until 26 December to produce the transcript. On 22 December, Husband filed a second motion with the trial court seeking an extension until 26 January 2018. The trial court allowed this second motion on the same day. The transcript was delivered on 24 January 2018.

Rule of Appellate Procedure 7(b)(1) provide, in relevant part:

> [T]he trial tribunal, in its discretion and for good cause shown by the appellant, may, pursuant to Rule 27(c)(1), extend the time to produce the transcript for an additional thirty days. *Any subsequent motions for additional time required to produce the transcript may only be made pursuant to Rule 27(c)(2) to the appellate court to which appeal has been taken.*

N.C. R. App. P. 7(b)(1) (emphasis supplied).

Based upon Rule 7(b)(1), the trial court did not have jurisdiction to allow Husband's subsequent 22 December motion for extension of time, and the transcript was not timely filed. *Id.*

As of 25 May 2018, Husband had not yet filed his appellant brief. On that date, Husband filed a motion for extension of time to file his brief, which this Court allowed by an order dated 29 May 2018. The Court's order gave Husband until 29 June 2018 to file his brief. On 25 June 2018, Husband filed a second motion for extension of time to file his brief. This motion indicated Husband had mistakenly only contracted to order transcripts for two of the five days of the trial on the parties' equitable distribution and alimony claims. Husband informed this Court that he had discovered his mistake and contracted with the transcriptionist to

obtain the transcript for the three additional days of trial. By an order entered the 25 June 2018, this Court granted Husband until 30 July 2018 to file his brief.

On 26 July 2018, Husband filed a third motion for extension of time to file his brief. Husband explained in his third motion that the transcriptionist informed him that she expected to deliver the complete transcript on the 26 or 27 of July. Once he obtained the complete transcript, Husband intended to file a motion to amend the record on appeal to incorporate the additional three days of testimony. By an order entered 30 July 2018, this Court granted Husband until 9 August 2018 to file his brief.

On 7 August 2018, Husband filed a motion to amend the record on appeal. This motion requested inclusion of the transcript for the three additional days of trial and Husband's financial standing affidavit that had been submitted at trial. Husband subsequently filed his brief on 9 August. By an order entered 21 August 2018, this Court allowed Husband's motion to amend the record.

The Supreme Court of North Carolina has emphasized that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). This Court has held the failure to timely produce a trial court transcript is a nonjurisdictional defect. *N.C. State Bar v. Sossomon*, 197 N.C. App. 261, 270, 676 S.E.2d 910, 917 (2009) ("Rule 7 is a nonjurisdictional defect"); *see Lawrence v. Sullivan*, 192 N.C. App. 608, 666 S.E.2d 175, 181 (2008) ("we do not deem these nonjurisdictional failures [under N.C. R. App. P. 7(a)(1)] on the part of plaintiff to be so egregious that they warrant dismissal of plaintiff's appeal").

Our Supreme Court also explained in *Dogwood* that an appellate court should impose a sanction only when a party's nonjurisdictional rules violations rise to the level of a "substantial failure" under N.C. R. App. P. 25 or a "gross violation" under N.C. R. App. P. 34. *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. Without a substantial or gross violation, this Court should not impose any sanction at all, but instead "the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible." *Id.*

Wife has not filed an appellee brief to argue Husband's rule violations are substantial or gross. Neither have Husband's rule violations hindered our ability to review the merits of the case. This Court previously held in *Sossomon* that an appellant's failure to timely file a trial transcript in not a "substantial failure" or "gross violation" to warrant

the imposition of sanctions. *Sossomon*, 197 N.C. App. at 273, 676 S.E.2d at 918.

Husband's failure to timely file the transcript and brief would have subjected his appeal to dismissal under Rule 25, had a motion to dismiss been filed by Wife. N.C. R. App. P. 25. In the absence of a substantial or gross violation of the appellate rules arising from Husband's failure to timely file the transcript and brief, and the absence of a filed motion to dismiss, we follow our Supreme Court's instruction in *Dogwood*, decline to impose sanctions, and "review[] the merits of the appeal to the extent possible." *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366.

We strongly emphasize the importance of complying with the appellate rules and urge counsel to timely file materials within the applicable deadlines and follow the procedures specified in Rules 7(b)(1) and 27(c)(1)-(2) for obtaining extensions of time. N.C. R. App. P 7(b)(1), 27(c)(1)-(2).

IV. Standard of Review

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citations and quotation marks omitted). A trial court abuses its discretion when it renders a decision that is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted). The trial court's conclusions of law are reviewable *de novo*. *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citation omitted).

V. Analysis

[2] Husband argues the trial court abused its discretion by imputing income to him based upon his earning capacity for past part-time motorcycle repair work. Husband asserts no competent evidence supports that he suppressed his income to disregard his spousal support obligation. We disagree.

The Alimony Order states, in relevant part:

> 13. Plaintiff is employed by Corning Industries and grossed an average of $9,455.00 per month from Corning. *In addition, Plaintiff grosses an average of $2,167.18 per month from his motorcycle repair business where Plaintiff charges a minimum of $35.00 per hour for labor, but, in 2015, Plaintiff charged $40.00 per hour 95% of the time for his labor rate.* Plaintiff is typically reimbursed for parts of supply costs incurred, but taking into account some reasonable and ordinary business expenses overhead, *the Court finds that Plaintiff has earned and has the ability to earn an average of $1,500 per month from motorcycle repair business. Plaintiff does not report [or] pay taxes upon his motorcycle repair income.* The court finds that Plaintiff's total gross monthly income was $10,955 per month at the time of trial. (Emphasis supplied).
>
> 14. Plaintiff testified that he stopped working on motorcycles January, 2016 due to no longer having possession of the marital home. The court finds that based from the evidence presented at trial in Plaintiff's Exhibit #13, the Plaintiff continued to purchase parts and other items from Chaparral Motorsports online. The court finds that Plaintiff continued to work on motorcycles or had the ability to do so and that his supplemental income should be added into his gross monthly income. Plaintiff went to the marital home numerous times after Defendant reoccupied it and same was evidence Plaintiff could have worked on motorcycles as usual. *His failure to do so was in bad faith and in attempt to depress his income at trial and the Court specifically rejects Plaintiff's contention that he stopped working on motorcycles at the marital home because he was afraid Defendant would go into his shop and damage the motorcycles.* Plaintiff had the only keys to the shop and Defendant never tried to get into the shop since the date of separation and never damaged any motorcycles. *The Court finds $1,500 per month should be imputed to Plaintiff as motorcycle repair income.* (Emphasis supplied).
>
> . . .

17. . . .

> a. Plaintiff is highly skilled as a motorcycle mechanic and [his] services are in high demand. He has the current ability to make at least $1,500 per month in motorcycle repairs.
>
> b. In 2015, working part time, Plaintiff grossed $26,004 from motorcycle repair and has limited expenses which reduce his gross.
>
> c. Plaintiff works from a converted building on his property and has no overhead, carries no stock, has no rents or salaries and charges 10% on all parts ordered.
>
> d. His "Income Summary" lists no income for motorcycle repair. The Court finds that adds an average of $1,500 gross and net to his monthly income.

A. *Bad Faith*

Alimony awards are " 'ordinarily determined by [the supporting spouse's] income at the time the award is made.' " *Lasecki v. Lasecki*, 246 N.C. App. 518, 535, 786 S.E.2d 286, 299 (2016) (emphasis omitted) (quoting *Quick v. Quick*, 305 N.C. 446, 457, 290 S.E.2d 653, 660 (1982)); *see also Moore v. Onafowora*, 208 N.C. App. 674, 678-79, 703 S.E.2d 744, 748 (2010) (holding trial court properly computed a husband's income from all sources, which included the husband's "side business producing parties").

The trial court may impute income based on the party's earning capacity if the trial court determines that the party suppressed his income in bad faith. *Megremis v. Megremis*, 179 N.C. App. 174, 182, 663 S.E.2d 117, 123 (2006). Bad faith within the context of alimony means "that the spouse is not living up to income potential in order *to avoid or frustrate* the support obligation." *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citation and quotation marks omitted and emphasis supplied). However, "evidence of a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith." *Pataky v. Pataky*, 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003) (citations omitted), *aff'd in part*, *review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).

Bad faith may be found "from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business

or employment; [or] intentionally depressed income to an artificial low." *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219 (citation and quotation marks omitted).

Pursuant to a sequestration order entered 23 February 2016, the marital home was sequestered in favor of Wife. The sequestration order allowed Husband to use a detached garage located at the marital residence as a repair shop.

Husband asserts that "[t]he testimony at trial was clear that no motorcycle repairs had been done since the separation of the parties." Husband also asserts "It is not unreasonable that [he] would not have come onto the premises to work on a motorcycle when the house was sequestered to [Wife]."

The testimony from the hearing provides competent evidence to support the challenged portion of the trial court's findings of fact 13 and 14. Husband testified that he normally charged $40.00 per hour for motorcycle repair work. The last time Husband did motorcycle repair work was a couple of weeks before he left the marital home. Husband had begun offering his motorcycle repair services for hire in "early 2001/2002[.]" Husband distributed flyers to advertise his motorcycle repair business. Husband testified that he formed the decision to not do any motorcycle repair work "[o]nce [he] moved out" of the marital home.

He testified he did not continue his motorcycle repair business despite having access to his workshop because he did not feel safe leaving a customer's bike unattended where Wife could damage it. Husband also testified he keeps the workshop locked up and he was the only one who has a key. Plaintiff testified he had been to the workshop multiple times since the date of separation and he stored multiple items in the workshop including "[w]ood tools, battery chargers, jumper cables" and "electrical supplies, cleaning supplies, [and] air tanks."

Wife testified she had not been in the detached garage workshop since the date of separation, does not have a key to the workshop, and has not done any damage to the exterior or interior of the workshop. Wife stated Husband has been to the workshop almost every day since the date of separation, sometimes two or three times a day, and that she has observed Husband bringing his and his girlfriend's vehicles to the workshop to work on them, but not motorcycles.

The testimony elicited at the hearing provides competent evidence to support the challenged portions of findings of fact 13 and 14, including the trial court's finding Husband had acted in bad faith to depress his

income. *Williamson*, 217 N.C. App. at 390, 719 S.E.2d at 626. The testimony provided a basis for a finding of bad faith because it constitutes competent evidence Husband had deliberately not applied himself to his motorcycle repair business after the date of separation or intentionally depressed his income. *See Works*, 217 N.C. App. at 347, 719 S.E.2d at 219; *Pataky*, 160 N.C. App. at 307, 585 S.E.2d at 416. Finding of fact 14 indicates the trial court expressly rejected Husband's contention that he had stopped working on motorcycles because he was afraid Wife would go into his workshop and damage customers' motorcycles.

The decision by Husband to cease his motorcycle repair business contemporaneously with the decision by the parties to separate, in conjunction with the evidence that Wife could not access or damage his clients' motorcycles, is competent evidence to support an inference of bad faith. *Williamson*, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626; *see Works*, 217 N.C. App. at 347, 719 S.E.2d at 219; *see also Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (listing a spouse's "deliberately not applying himself to his business" and "intentionally depressing his income to an artificial low" as among several factors a court can consider to find bad faith).

Husband may disagree with the credibility determination of the trial court, but "it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). Husband's argument is overruled.

B. *Wife's Earning Capacity*

[3] Husband also argues the trial court should have imputed income to Wife based upon her earning capacity from making and selling chocolate.

According to unchallenged finding of fact 32 in the Alimony Order:

> Defendant was a stay home wife and worked part time as a [Certified Nursing Assistant] when work became available. Defendant also started her own chocolates business but had to cease its operations when Plaintiff became bedridden for over a year recovering from a serious motorcycle accident. It was at this time that Defendant had to sacrifice the development and the career potential of her chocolate business in order to aid the Plaintiff in his recovery. . . .
>
> During their marriage, part of the marital home was converted into a motorcycle repair shop for Plaintiff.

> . . . During this time Plaintiff was able to build up business while continuing to work out of the marital home. Defendant was not provided the same opportunity to continue to operate her chocolate business or convert part of the marital home into a work space.

The trial court is only permitted to impute income by considering a party's earning capacity if it finds that party has acted in bad faith. *Megremis*, 179 N.C. App. at 182, 633 S.E.2d at 123. The trial court made no finding that Wife had acted in bad faith and did not err by failing to impute income to Wife. *See id*. Husband does not argue the trial court should have found Wife had acted in bad faith. Husband's argument that the trial court should have imputed income to Wife from her ability to make chocolate is without merit and overruled.

C. *Husband's Girlfriend's Contribution*

[4] The trial court's findings of fact and the evidence from the hearing show Husband resides with a girlfriend ("Girlfriend"). In its Alimony Order, the trial court reduced several of Husband's claimed monthly expenses by one-half by imputing to him what the court deemed he should be receiving as contribution from Girlfriend. Finding of fact 17 states, in relevant part:

> 17. . . . The Court finds Plaintiff's "Income Summary" introduced at TAB 7 of his trial notebook to be very problematic because it does not include motorcycle repairs shop income or any contribution toward household expenses from Plaintiff's live in girlfriend . . . . The Court also finds Plaintiff's financial standing affidavit introduced at Tab 8 of his trial notebook to be very problematic as it contains several expenses the amounts of which the Court finds not to be reasonable, and others for which Plaintiff *should be* receiving contribution from [Girlfriend]. Examples are:
>
> . . .
>
> f. Does not include Plaintiff voluntarily paying all of the following expenses for himself and [Girlfriend] *with no regular contribution from [Girlfriend]*:
>
> 1. Mortgage $714 = 1/2
> 2. Homeowner's insurance $112 = 1/2
> 3. Water/Trash $25 = 1/2
> 4. Cable $81 = 1/2

5. Trash collection $46 = 1/2
6. Laundry/Dry cleaning $63 = 1/2
7. Groceries $225 = 1/2
8. Meals out $150 = 1/2

$1,416 = ½ [Girlfriend] should have to pay

Said contribution by [Girlfriend] would add $1,416 back to Plaintiff's monthly net income. (Emphasis supplied)

Husband testified at the hearing that Girlfriend does help him pay some expenses, but she does not contribute a regular percentage, and "She helps me as best she can." The trial court also made no findings regarding Girlfriend's income or ability to contribute the one-half of Husband's expenses the trial court had found she "should be" paying. *See Broughton v. Broughton*, 58 N.C. App. 778, 786, 294 S.E.2d 772, 778 (1982) (holding it was proper for the trial court to consider husband's new wife's income to determine his ability to pay alimony to former wife, because she was a member of the husband's household (citing *Wyatt v. Wyatt*, 35 N.C. App. 650, 652, 242 S.E.2d 180, 181 (1978)).

It appears the trial court has questioned both the reasonableness of Husband's expenses because of his live-in Girlfriend and imputed what it believed to be her share of the expenses as income. While the trial court could have reduced the reasonable expenses by the amount that it found Husband's expenses were increased by having Girlfriend live with him, it cannot reduce his expenses by that amount and impute that as income that should be paid by Girlfriend. This would be double penalizing Husband; the trial court must choose one option or the other. Additionally, the trial court erred by imputing to Husband the amount Girlfriend should be paying without finding Husband acted in bad faith to inflate his expenses, or reduce his income, by failing to seek contribution from her. *See Lasecki*, 246 N.C. App. at 535, 786 S.E.2d at 299 ("The trial court may impute income to a party *only upon* finding that the party has deliberately depressed his income or deliberately acted in disregard of his obligation to provide support[.]" (citation and quotation marks omitted and emphasis supplied)).

The portion of finding of fact 17 indicating Girlfriend should be contributing $1,416 monthly to Husband for expenses is not supported by any competent evidence. The trial court calculated Husband's net monthly income to be $9,133.76, which includes the $1,416 the trial court found Girlfriend should be contributing monthly.

We remand the matter to the trial court to determine whether Husband inflated his monthly expenses in bad faith by failing to seek contribution from Girlfriend or, if not, to determine Husband's monthly income, expenses, and alimony obligation without imputing $1,416 to him as a monthly contribution from Girlfriend. *See Works*, 217 N.C. App. at 348, 719 S.E.2d at 219-20; *Nicks v. Nicks*, 241 N.C. App. 487, 504, 774 S.E.2d 365, 378 (2015) (remanding for trial court to determine whether spouse acted in bad faith before it imputed income).

Finding of fact 17 also indicates the trial court reduced by one-half seven other monthly expenses Husband had claimed in his financial standing affidavit:

> g. Plaintiff has the following questionable expenses which the Court finds are not reasonable or are not being paid in their current amount, and reduces down to ½:
>
> 1. Cell Phone $183
> 2. Hair/Nails $100
> 3. Vacation $154
> 4. Gifts $83
> 5. Gas $362
> 6. Uninsured medical bills $141
> 7. Church pledge $42
>
> $1,065 reduced to $533

"The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and [the judge] is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32-33 (1982) (citing *Clark v. Clark*, 301 N.C. 123, 131, 271 S.E.2d 58, 65 (1980)). "Implicit in this is the idea that the trial judge may resort to [her] own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Robinson v. Robinson*, 210 N.C. App. 319, 329, 707 S.E.2d 785, 793 (2011) (alteration in original and citation omitted).

Although, the trial court was not required to accept Husband's claimed expenses at face value, finding of fact 17(g) provides no basis for why the trial court determined one-half of those expenses were not reasonable. *See id.*; *Williamson*, 217 N.C. App. at 390, 719 S.E.2d at 626 ("the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact"). By reducing

Husband's claimed expenses by one-half without any finding explaining why they were unreasonable, and by imputing income to Husband based upon the girlfriend's failure to pay her share, the trial court effectively penalized Husband without a finding of bad faith.

Upon remand, the trial court must make findings of fact explaining why one-half of Husband's claimed expenses were unreasonable

VI. Conclusion

The trial court did not err in imputing income to Husband after finding he had acted in bad faith by failing to continue the operation of his motorcycle repair business. The trial court did not err by declining to impute income to Wife. The trial court erred by imputing to Husband's income the amount it determined Girlfriend should be contributing without finding bad faith on Husband's part by not seeking contribution or considering Girlfriend's ability to pay.

We remand the matter to the trial court to determine whether Husband inflated his expenses in bad faith by failing to seek contribution from Girlfriend or, if not, to re-compute the amount of his alimony obligation in accordance with this opinion. The trial court is to also make findings of fact explaining why it determined half of Husband's claimed expenses were not reasonable. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges INMAN and ARROWOOD concur.

WATSON v. JOYNER-WATSON

[263 N.C. App. 393 (2018)]

LEOLA S. WATSON, PLAINTIFF
v.
JANICE R. JOYNER-WATSON, DEFENDANT

No. COA18-524

Filed 18 December 2018

Jurisdiction—claim for unpaid distributive award—deceased spouse—excluded from estate—correct court

In plaintiff's action to recover an unpaid distributive award from a military survivor benefit plan pursuant to an equitable distribution (ED) order, plaintiff's attempt to recover the award by filing a Chapter 28A claim against the estate of her deceased ex-spouse was properly dismissed by the superior court pursuant to Civil Procedure Rule 12(b)(1) for lack of jurisdiction. Since the assets of a decedent's estate do not include marital assets awarded to a former spouse under an ED order, plaintiff's claim should have been made in the district court as part of a Chapter 50 proceeding to enforce the ED order.

Judge DILLON dissenting.

Appeal by plaintiff from order entered 23 February 2018 by Judge James G. Bell in Cumberland County Superior Court. Heard in the Court of Appeals 19 September 2018.

Sharon A. Keyes for plaintiff-appellant.

Lewis, Deese, Nance & Briggs, LLP, by Renny W. Deese, for defendant-appellee.

ELMORE, Judge.

Plaintiff Leola S. Watson appeals from an order granting defendant Janice R. Joyner-Watson's motions to dismiss plaintiff's claims for breach of contract, quantum meruit, constructive fraud, and constructive trust pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On appeal, plaintiff contends the trial court erred in concluding that it lacked jurisdiction over the action. We affirm.

I. Background

On 6 January 2017, plaintiff filed a claim against the estate of Richard D. Watson ("decedent") pursuant to a 1999 equitable distribution order ("ED order") in which the decedent agreed to place plaintiff as sole primary beneficiary of his survivor benefit plan (SBP) with the military. The ED order further provided that if decedent failed to make said election, "an[ ] amount equal to the present value of SBP coverage for [plaintiff] shall, at the death of [decedent], become an obligation of his estate." Defendant, as executrix of decedent's estate, rejected plaintiff's claim to the SBP benefits on 6 April 2017.

On 7 June 2017, plaintiff commenced this action to enforce her claim against the estate. On 27 June 2017, defendant filed motions to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, which the trial court granted in an order entered 23 February 2018. Plaintiff appeals.

II. Discussion

In response to plaintiff's appeal, defendant contends the trial court properly dismissed the underlying action pursuant to Rule 12(b)(1) because plaintiff failed to file her claims with the appropriate division of the general court of justice. According to defendant, the superior court lacked subject matter jurisdiction over plaintiff's claims because they implicated an order of equitable distribution. Defendant specifically contends that "[w]here the District Court has entered a judgment of equitable distribution" as it had here, "enforcement jurisdiction remains exclusively with that court." Thus, the superior court "legitimately dismissed Plaintiff's claims" for lack of "subject matter jurisdiction over a District Court proceeding." We agree.

Subject matter jurisdiction refers to "the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *Catawba Cty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 88, 804 S.E.2d 474, 478 (2017) (quoting *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006)). Rule 12(b)(1) requires the dismissal of any action "based upon a trial court's lack of jurisdiction over the subject matter of the claim." N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2017); *Catawba Cty.*, 370 N.C. at 87, 804 S.E.2d at 477. "Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citation omitted).

The jurisdiction and powers of the trial court division, which consists of the superior and district courts, are governed by Chapter 7A of

our General Statutes. *See* N.C. Gen. Stat. § 7A-240 *et seq*. (2017). Pursuant to N.C. Gen. Stat. § 7A-241, the superior court maintains "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates[.]" N.C. Gen. Stat. § 7A-241 (2017). Under the auspice of the superior court, the personal representative of a decedent's estate "must follow the requirements of Chapter 28A, which include . . . paying claims against the estate," among other responsibilities. *Painter-Jamieson v. Painter*, 163 N.C. App. 527, 530, 594 S.E.2d 217, 219 (2004); *see generally* N.C. Gen. Stat. § 28A (2017).

In contrast, the district court exercises subject matter jurisdiction over "civil actions and proceedings for . . . equitable distribution of property . . . and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof." N.C. Gen. Stat. § 7A-244 (2017). Equitable distribution is a process that occurs upon the dissolution of a marriage whereby the district court divides "property acquired during the marriage" among former spouses "in recognition that marital property and divisible property are species of common ownership." *Painter-Jamieson*, 163 N.C. App. at 532, 594 S.E.2d at 220 (quoting N.C. Gen. Stat. § 50-20(k)). In addition to liquid assets, equitable distribution applies to deferred forms of compensation, including "[t]he award of nonvested pension, retirement, or other deferred compensation benefits[.]" N.C. Gen. Stat § 50-20.1(b) (2017). Thus, the entire equitable distribution process—including the enforcement of an unpaid distributive award—is governed by N.C. Gen. Stat. § 50 *et seq*. and is under the authority of the district court pursuant to N.C. Gen. Stat. § 7A-244.

Difficulty arises in determining which division of the trial court maintains subject matter jurisdiction over claims involving the enforcement of an equitable distribution order against the estate of a deceased former spouse—a dispute that implicates the subject matter jurisdiction of both the superior and district courts. With respect to equitable distribution orders entered on or after 1 January 2003, the legislature addressed this issue by amending N.C. Gen. Stat. § 50-20 to include the following language: "[t]he provisions of Article 19 of Chapter 28A of the General Statutes shall be applicable to a claim for equitable distribution against the estate of the deceased spouse." N.C. Gen. Stat. § 50-20(*l*)(2) (2017). This amendment strives to "allow a claim for equitable distribution to not only survive the death of one of the spouses, but also to be filed after the death of one of the spouses[.]" North Carolina Bill Summary, 2003 Reg. Sess. S.B. 394 (June 12, 2003). Notably, the amendment "modifies the normal estate administration procedure

as it relates to equitable distribution actions" by establishing that "[t]he provisions of the estate administration law applicable to contingent claims, and satisfaction of claims other than by payment, do not apply to these equitable distribution actions." *Id.* However, the amendment "does not state it is applicable to pending actions," and therefore cannot be "retroactively applied to impinge vested rights" arising from distributive awards entered prior to 1 January 2003. *Painter-Jamieson*, 163 N.C. App. at 533, 594 S.E.2d at 221.

In *Painter-Jamieson v. Painter*, this Court addressed "the obvious conflict between the policy of equitable distribution and the application of Chapter 28A to unpaid distributive awards ordered pursuant to an Equitable Distribution Order" prior to the amendment to N.C. Gen. Stat. § 50-20. *Id.* at 531, 594 S.E.2d at 220. The district court in that case had ordered the plaintiff, as the personal representative of the decedent's estate, to pay a distributive award owed by the decedent to the defendant, who was the decedent's former spouse. *Id.* at 528, 594 S.E.2d at 218. The plaintiff appealed, arguing that the district court lacked subject matter jurisdiction over the matter. *Id.* at 528–29, 594 S.E.2d at 218. According to the plaintiff, the dispute should have been brought before the superior court because "the distributive award is like any other claim against the estate" that is subject to the priority schedule for claims set forth in N.C. Gen. Stat. § 28A. *Id.* In response, the defendant asserted that her claim was properly before the district court because "the distributive award represents her portion of the marital property, does not constitute a claim against the estate, and is not governed by North Carolina estate law." *Id.* at 529, 594 S.E.2d at 218.

This Court affirmed the district court order, reasoning that N.C. Gen. Stat. § 28A "provides that *decedent's* estate is comprised of decedent's assets," which "do not include those marital assets awarded to his former spouse." *Id.* at 531, 594 S.E.2d at 220. Because "[a] party's right to an equitable distribution of property from a marital estate 'vests at the time of the parties separation' . . . possession of the distributive award at the time of his death does not grant [the decedent] the authority to consider the award as a portion of his estate." *Id.* (quoting N.C. Gen. Stat. § 50-20(k)). We further explained that the application of N.C. Gen. Stat. § 28A to distributive awards would prejudice the decedent's former spouse by reducing the distributive award to "a mere claim against the possessor's estate"—a result that "conflicts with the essence of equitable distribution." *Id.* at 532, 594 S.E.2d at 220–21. Thus, this Court held that "under Chapters 28A and 50 . . . [w]here payment is due from a decedent to a former spouse" pursuant to an equitable

distribution order, the personal representative must separate the surviving spouse's distributive award prior to "determin[ing] decedent's assets" and distributing the remaining estate. *Id.* at 532–33, 594 S.E.2d at 221. As a surviving former spouse's rights arising from a distributive award against a deceased former spouse are the property of the surviving spouse, the distributive award owed to the surviving spouse is neither part of the deceased spouse's estate nor subject to the traditional procedures governing claims against the estate. *Id.* at 532–33, 594 S.E.2d at 221.

In the instant case, plaintiff cannot recover her unpaid distributive award from the proceeds of the decedent's estate. Although plaintiff correctly asserts that defendant, as executrix of the estate, "assumed the role as the party against whom Plaintiff would seek enforcement of the award of payments in the equitable distribution order between the parties," plaintiff incorrectly cites to N.C. Gen. Stat. § 28A-18-3 as the mechanism for enforcement. Pursuant to N.C. Gen. Stat. § 50-20(k), rights under an order of equitable distribution "vest[ ] at the time of the parties' separation." Thus, as plaintiff and decedent formally separated from each other on 30 September 1992, plaintiff owned "an[ ] amount equal to the present value of SBP coverage" pursuant to the ED order as of that date.

In sum, plaintiff already owns her distributive award and must attempt to enforce her rights through the underlying equitable distribution action, as was the procedure affirmed by our Court in *Painter-Jamieson*, rather than by seeking to collect sums that are excluded from the decedent's estate. As explained in *Painter-Jamieson*, the assets of a decedent's estate "do not include those marital assets awarded to [a] former spouse" pursuant to an equitable distribution order. *Painter-Jamieson*, 163 N.C. App. at 531, 594 S.E.2d at 220. Unlike the surviving former spouse in *Painter-Jamieson*—who properly recovered her unpaid distributive award by filing a motion for contempt with the district court—plaintiff in the instant case attempts to improperly recover her distributive award from the proceeds of decedent's estate. Our holding in *Painter-Jamieson* makes it clear that plaintiff's distributive award is her property and is therefore excluded from the proceeds of decedent's estate.

III. Conclusion

Because the district court maintains authority over the enforcement of an order of equitable distribution, and because plaintiff's portion of the SBP is excluded from the decedent's estate, the superior court

properly dismissed plaintiff's claims for lack of subject matter jurisdiction. Accordingly, we affirm the trial court's dismissal of plaintiff's claims pursuant to Rule 12(b)(1), and in light of our holding we decline to address plaintiff's argument as to Rule 12(b)(6).

AFFIRMED.

Judge DAVIS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Based on *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), our panel is required to follow our holding in *Painter-Jamieson v. Painter*, 163 N.C. App. 527, 532-33, 594 S.E.2d 217, 221 (2004), that a distributive award is not part of the payor-spouse's estate. Our panel is following *Painter*, as we should. However, I write separately to dissent because I believe *Painter* was wrongfully decided and, in following *Painter*, Plaintiff has no remedy.

This matter involves two actions between the same parties, both of which are on appeal before our Court. Both parties were married to the same man (the "Decedent") at different times.

Plaintiff ("First Wife") was the Decedent's first wife. Defendant ("Second Wife") was Decedent's second wife and is his widow. When First Wife divorced Decedent, the district court entered an equitable distribution order awarding First Wife the survivor benefits from a military survivor benefit plan (the "SBP") in their divorce proceeding which was commenced in 1994. The order also provided that if Decedent failed to effect the transfer of the SBP benefits to First Wife, First Wife would be entitled to a distributive award from Decedent's estate in the amount equal to the SBP benefit.

Decedent never effectuated the transfer of the SBP benefits to First Wife; rather, he named Second Wife as the beneficiary of his SBP benefits.

Second Wife is the executor of Decedent's estate. First Wife made a claim in Decedent's estate proceeding for the distributive award. Second Wife, in her role as executor, denied the claim. So First Wife brought this action (which is the subject of *this* appeal – COA 18-524) to enforce her claim. Her claim was dismissed. Because of *Painter*, we are compelled

to affirm based on *Painter's* holding that her distributive award is not part of Decedent's estate, but is rather *her* property that Decedent happened to be holding at the time of his death.

First Wife, though, also filed a contempt motion in the 1994 district court action to hold her already-deceased husband in contempt for failing to name her as a beneficiary of the SBP. First Wife served the motion on Second Wife, as executor of Decedent's estate. The district court entered an order directing Second Wife to turn over the SBP benefits to First Wife. Second Wife appealed in a separate appeal (COA 18-341). In that appeal, we are reversing the district court's order based on the fact that federal law dictates that the SBP benefits are the property of Second Wife and that the district court is, therefore, powerless to direct Second Wife to part with her property to satisfy an obligation of Decedent.

For the reasons explained below, I believe *Painter* was wrongfully decided. And in this case, *Painter* leaves First Wife with essentially no remedy.

The purpose of an equitable distribution proceeding under Chapter 50 is to identify, classify, and distribute marital/divisible property. N.C. Gen. Stat. § 50-20 (1994). Once marital/divisible property has been distributed, that property becomes the sole property of the spouse to whom it was distributed. *Id.*

The purpose of an estate proceeding under Chapter 28A is to distribute the assets owned by the deceased. *See* N.C. Gen. Stat. § 28A-22-1 (1994); *accord Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App 376, 390, 675 S.E.2d 122, 131 (2009).

But where the deceased has marital/divisible property that is subject to an ongoing Chapter 50 equitable distribution proceeding, it is first the duty of the district court to divide the marital/divisible property between the deceased spouse and his widow. *See* N.C. Gen. Stat. § 50-20(l) (1994); *see also* N.C. Gen. Stat. § 28A-19-19 (1994). Once the marital/divisible property has been divided, *then* it is the duty of the executor of the deceased spouse in the Chapter 28A proceeding to distribute the deceased spouse's assets, including the assets which were his separate property and the marital/divisible assets which were distributed to him in the Chapter 50 proceeding. *Id.*

Turning to my issue with *Painter*, under Chapter 50, the district court divides marital/divisible property. As the *Painter* court recognized, in the process of equitable distribution, an "in-kind" distribution of property is preferred. *Painter*, 163 N.C. App. at 529, 594 S.E.2d at

219. An "in-kind" distribution means that the district court has been able to achieve an equitable distribution simply by distributing some of the marital/divisible property to one spouse and the rest of the marital/divisible property to the other spouse.

But in some circumstances, an equitable distribution cannot be achieved because of the nature of the marital/divisible property. For instance, the marital/divisible property may include a large asset which cannot be divided and which should not be sold; e.g., an interest on a family business or the marital home. In those circumstances, the trial court is allowed to make an "inequitable" distribution of the marital/divisible property – by distributing a larger portion of those assets to one of the spouses – and then provide for a "distributive award," whereby the spouse receiving a greater share of the marital/divisible property (the "payor-spouse") is required to pay money to the other spouse (the "payee-spouse"), either up front or over time, to make up the difference. N.C. Gen. Stat. § 50-20(b)(3) (1994).

A "distributive award," however, does not represent a distribution of any specific marital/divisible property, as all of the marital/divisible property has already been distributed. And the award cannot represent a distribution of the payor-spouse's separate property, as the district court does not distribute separate property in an equitable distribution proceeding. Rather, the distributive award is *an obligation* of the payor-spouse to pay money out from *his*[1] assets, whether from his separate property,[2] from marital/divisible property he was distributed,[3] or from income he earns/receives in the future.

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1. The masculine pronoun is used here, as the payor-spouse in the present case is the Decedent husband.

2. The trial court may consider the payor-spouse's separate property when making a distributive award to the payee-spouse. *Comstock v. Comstock*, 240 N.C. App. 304, 321, 771 S.E.2d 602, 614 (2015) (holding that though payor-spouse's IRA was not marital property, and therefore was not subject to equitable distribution, the IRA "was available a resource [of the payor-spouse] from which the trial court could order a distributive award").

3. The trial court may consider the payor-spouse's ability to refinance the marital home he was awarded to provide cash to pay a distributive award to his ex-wife. *Peltzer v. Peltzer*, 222 N.C. App. 784, 791-92, 732 S.E.2d 357, 362-63 (2012). The point being is that the payor-spouse can pay the award from any of his sources, but that in making the award, the trial court determined that the husband had the ability to pay it through one source, the refinance of the marital home he received. Of course, if the payor-spouse had failed to make the payment, his ex-wife could have moved in the cause for a contempt order, compelling her ex-husband to pay her the award. And if at any such contempt hearing, her ex-husband is able to show that he, in fact, had no present ability to pay the award because he was unable to refinance the house (due to bad credit, etc.), the

Therefore, if a payor-spouse dies still owing payments under a distributive award, the payee-spouse can enforce the payor-spouse's obligation by making a claim from the assets of the payor-spouse's estate. The payee-spouse would, though, have to stand in line with the other creditors of the payor-spouse pursuant to Chapter 28A. The district court has no jurisdiction in a Chapter 50 action to compel the distribution of property in the payor-spouse's estate.[4]

This seems to have been of concern in *Painter*, that the payee-spouse in that case would have to stand in line with other claimants and that she, therefore, might not be fully paid her award out of the assets in her ex-husband's estate. The *Painter* court, therefore, created a remedy in that case by holding that some of the assets held by the payor-spouse at death would be deemed to actually be the assets of the payee-spouse, and, therefore, not part of the payor-spouse's estate subject to Chapter 28A. I believe that this "remedy" is not proper for a number of reasons.

First, the remedy ignores the statutory scheme of equitable distribution, that all of the marital/divisible property has already been distributed. The distributive award itself is not an award of any specific property. Rather, it is merely an obligation of the payor-spouse to pay money from *his* assets.

Second, the General Assembly has already provided a means to protect a payee-spouse from non-payment of a distributive award. Specifically, the trial court can *secure* the distributive award by placing a lien on specific property owned by the payor-spouse. N.C. Gen. Stat. § 50-20(e) ("The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.")[5] The trial court can secure the award *at the time* the award is made. For instance, if the payor-spouse is being distributed the marital home and

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ex-wife could perhaps sue to reduce the award obligation to a judgment, which could be docketed. Further, in making the award, the trial court in its equitable distribution order could secure the future award obligation with the marital home or other assets of the payor-spouse. N.C. Gen. Stat. § 50-20(e) ("The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.")

4. Of course, if the district court in a Chapter 50 proceeding has already awarded some *specific* asset to the surviving spouse in the equitable distribution order and that asset is still held by the deceased spouse at the time of his death, that asset would not be part of the estate but would be the property of the surviving spouse.

5. The fact that the General Assembly provides that a lien may be placed on assets to secure a distributive award is a strong indication that the General Assembly intended a distributive award to be considered an obligation of the payor-spouse to pay out of his assets.

there are not enough other marital/divisible assets to achieve equity, the trial court may make a distributive award and secure that award with a lien on the marital home; if the payor-spouse or his estate falls behind on paying the award, the payee-spouse could enforce the lien to satisfy the obligation. Alternatively, the trial court can secure the award sometime after the award is made. For instance, if the payor-spouse inherits an asset after the divorce, the payee-spouse can move the trial court in the cause to secure a previously unsecured obligation to pay a distributive award with the inherited asset.

Third, the remedy required by *Painter* would be unworkable or produce unintended outcomes in many instances. Specifically, *Painter* directs that the administrator of the payor-spouse's estate must separate out a portion of the assets that were held by the payor-spouse at death and to treat that portion as the property of the payee-spouse. Where the estate contains illiquid assets, which assets would belong to the payee-spouse and not be part of the estate?

Consider, if a payor-spouse who owed $100,000 of a distributive award and died owning two assets worth $100,000; one, he is leaving to his brother and the other to his sister. Would both buildings have to be sold, with $50,000 coming from the proceeds of each asset? Or could one be sold to satisfy the obligation? Which heir would be forced to lose out? Is it up to the executor? In other words, the distributive award is not tied to any specific property.

Or consider if the payor-spouse died with a $200,000 asset (e.g., building or stock account) with a $150,000 lien against it? Would the payee-spouse be entitled to the first $100,000 from the sale of that asset under the fiction that this portion is *her* property, leaving the lienholder undersecured?

Equitable distribution is intended to distribute specific marital/divisible property. But a distributive award is not tied to any specific property (though it may be secured by specific property) and is paid out of the payor-spouse's own property or future income. And when the payor-spouse dies, it would not be uncommon for most or all of the assets held by him at death to be assets that he acquired well after the divorce.

Painter has only been cited once, in an unpublished North Carolina decision; and it was *not* cited for the issue which I discuss here. *In re Estate of Van Lindley*, 2007 N.C. App. LEXIS 1731, *19-20 (N.C. Ct. App. Aug. 7, 2007).

In the present case, Decedent's estate has the obligation to pay First Wife an "amount equal to the present value of the SBP coverage[.]" But for the *Painter* decision, I believe First Wife has followed the proper procedure. She made a claim in Decedent's estate pursuant to Chapter 28A, to seek some of the assets of Decedent to satisfy her claim. And when her claim was rejected by the executor, she filed this action against the executor, as required under Chapter 28A. As her claim was not secured by the trial court in the Chapter 50 proceeding in the equitable distribution action, though, she would presumably have to stand in line with the other creditors who may also have a claim against Decedent, as provided under Chapter 28A.

I do not believe First Wife has any meaningful remedy in the Chapter 50 action. It is unclear exactly what the district court could order the executor to do as it has no jurisdiction to direct Second Wife to distribute any specific asset belonging to Decedent's estate.[6]

I encourage our Supreme Court to bring clarity to the application of Chapter 28A where a "distributive award" has been made in a previous Chapter 50 action. And if this matter is not appealed to the Supreme Court, I encourage the General Assembly to consider the law in light of *Painter*.

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6. Of course, as stated above, had Decedent died *before* marital/divisible property had been distributed under Chapter 50, then it is the role of the district court in a Chapter 50 action to divide the marital/divisible property. And once divided, then it would be the role of the executor under Chapter 28A to further distribute that property along with Decedent's separate property. But here, the marital/divisible property was distributed under Chapter 50 in 1999.

WATSON v. WATSON

[263 N.C. App. 404 (2018)]

RICHARD D. WATSON, DECEASED, JANICE JOYNER-WATSON, EXECUTRIX, PLAINTIFF
v.
LEOLA SANDERS WATSON, DEFENDANT

No. COA18-341

Filed 18 December 2018

Divorce—equitable distribution—military retirement—federal preemption

The trial court erred by ordering an executrix to make defendant (a former spouse) the sole beneficiary of plaintiff's military survivor benefit plan (SBP) pursuant to an equitable distribution order where the equitable distribution order was not submitted to the Defense Finance and Accounting Services within the year it was entered, as required by the U.S. Code. Federal law preempts state law as to a former spouse's right to claim entitlement to an SBP annuity.

Appeal by executrix from order entered 20 December 2017 by Judge Robert J. Stiehl III in Cumberland County District Court. Heard in the Court of Appeals 19 September 2018.

Lewis, Deese, Nance & Briggs, LLP, by Renny W. Deese, for executrix-appellant.

Sharon A. Keyes for defendant-appellee.

ELMORE, Judge.

Janice Joyner-Watson ("executrix"), the second wife and executrix of the estate of Richard D. Watson ("plaintiff" or "decedent"), appeals from an order in which the trial court (1) concluded plaintiff was in contempt for failure to abide by the terms of a 1999 equitable distribution order, and (2) directed the executrix "to take whatever measures necessary to correct the military record and place the Defendant, Leola Sanders Watson, as sole beneficiary" of plaintiff's survivor benefit plan with the military.

For the reasons stated herein, we reverse the order of the trial court.

I. Background

Plaintiff and defendant are formerly husband and wife, having been married in 1968 and divorced in 1994. In an equitable distribution order

entered with the parties' consent in June 1999 ("ED order"), the trial court distributed to defendant nonvested benefits earned as a result of plaintiff's military service. The ED order included the following language:

> [Plaintiff] agrees to place the Defendant as sole primary beneficiary of the Survivor Benefit Plan (SBP) and to provide a copy of said election to Defendant at the appropriate time. Plaintiff shall elect the spouse-only portion and shall select as the base amount the full amount of his monthly retired pay. If Plaintiff fails to make said election, an[ ] amount equal to the present value of SBP coverage for the Defendant shall, at the death of Plaintiff, become an obligation of his estate. In addition, the Defendant shall be entitled to such remedies for breach as are available to her in a court of law, and DFAS [Defense Finance and Accounting Services] shall treat this [or]der as the "deemed election" of the Plaintiff for SBP purposes.

Plaintiff remarried in October 2002. On 6 July 2017—approximately ten months after plaintiff's death—defendant filed a motion to hold plaintiff in contempt for failure to comply with the ED order. In the motion, which defendant filed without first substituting the executrix or the estate as party plaintiff and captioned by simply adding the executrix and listing plaintiff as deceased, defendant alleged that plaintiff had retired from the military in May 2010 and died in September 2016; that plaintiff was in contempt for failing to name defendant as the beneficiary of the SBP; and that the executrix, as the personal representative of plaintiff's estate, had previously rejected defendant's claim to the SBP benefits.

In an order entered 20 December 2017, the trial court made the following relevant findings of fact:

> 4. The [ED] Order was not submitted to DFAS by Plaintiff or Defendant within the year it was entered . . . .
>
> 5. Plaintiff retired from the military on May 31, 2010. The [ED] Order containing the deemed election wording was submitted to DFAS on or about August 15, 2009, prior to the Plaintiff's retirement from the military.
>
> 6. The [ED] Order was modified by this Court for correction of the military division of retirement formula and resubmitted to DFAS on or about July 8, 2010, containing the same deemed election wording.

> 7. Upon his retirement, Plaintiff did not name Defendant as the sole primary beneficiary and instead placed Janice Joyner-Watson, the Executrix for his estate as the beneficiary of the SBP.

Based on its findings, the trial court concluded as a matter of law that it had jurisdiction over the parties and the subject matter of the action, and that

> 2. Plaintiff is in contempt of Court by failing to name Defendant as the SBP recipient pursuant to the previous Orders of this Court.
>
> 3. DFAS was put on notice of the deemed election when served with the Orders on or about August 15, 2009 and July 8, 2010.
>
> 4. Defendant, Leola Sanders Watson is the rightful beneficiary of the SBP of Plaintiff.

In its decretal, the trial court provided only that

> 1. The Defendant, Leola Sanders Watson shall be named as the Plaintiff's sole SBP beneficiary[, and]
>
> 2. The Executrix for Plaintiff is ordered to take whatever measures necessary to correct the military record and place the Defendant, Leola Sanders Watson, as sole beneficiary of the SBP.

The executrix entered timely notice of appeal.

II. Discussion

On appeal, the executrix makes several arguments in support of her contention that the trial court erred in holding her in contempt. However, because the trial court did not in fact hold the executrix in contempt, we conclude that these arguments are meritless. We thus limit our discussion to whether the trial court erred in ordering the executrix to take whatever measures necessary to place defendant as the sole beneficiary of the SBP. The standard of review applicable to an order entered after a non-jury trial is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001).

The executrix contends 10 U.S.C. § 1448(a) "mandates that if a retiree is married at the time they become eligible to participate in the

[SBP], the spouse *must* be designated as beneficiary of the Plan, unless the spouse concurs in a different designation." Beneficiary status by "deemed election" is offered as an alternative to the mandatory spousal designation, but the Code requires that the election be made in writing and received by the secretary of the appropriate branch of the military within one year after entry of the order directing the same. 10 U.S.C. § 1448(b). As there is no North Carolina case addressing this issue, the executrix relies on case law from Virginia, Georgia, and South Carolina to support her argument that the time limitations of the Code must be strictly interpreted based on the doctrine of federal preemption.

In *Dugan v. Childers*, 261 Va. 3, 539 S.E.2d 723 (2001), the Supreme Court of Virginia considered whether 10 U.S.C. § 1450 preempted state law "on the subject of a former spouse's entitlement to the survivor benefits of a military retiree[.]" *Id.* at 7, 539 S.E.2d at 724. The former spouse in *Dugan* sought to impose a constructive trust on SBP annuities that a retiree's surviving spouse had received on the basis that, when the former spouse and the retiree divorced, the retiree had agreed to name the former spouse as the beneficiary of his SBP. When the retiree remarried, however, he changed the SBP beneficiary to his new wife. The trial court in *Dugan* found the retiree in contempt and directed him to reinstate the former spouse as the beneficiary, but the retiree died before doing so. *Id.* at 5–6, 539 S.E.2d at 723–24.

In its preemption analysis, the Virginia Court in *Dugan* found persuasive the following language from a Georgia Court of Appeals opinion addressing a similar factual situation:

> "The right to the annuity asserted by [the former spouse] pursuant to the divorce decree clearly conflicts with the express provisions of the SBP under which [the military retiree's] surviving spouse is the beneficiary of the annuity. In providing the means by which former spouses may become entitled to SBP annuity benefits, Congress enacted plain and precise statutory language placing conditions and limits on that right and made clear that any annuity benefits paid in compliance with the provisions of the SBP are not subject to legal process. Since the provisions of the SBP unambiguously preclude the rights asserted under the divorce decree, we further conclude that the consequences of enforcing the conflicting state law principles sufficiently injures the objectives of the SBP so that federal law preempts the authority of state law."

Id. at 8, 529 S.E.2d at 725 (quoting *King v. King*, 225 Ga. App. 298, 301, 483 S.E.2d 379, 383 (1997)). The Virginia Court in *Dugan* then found, as did the Georgia Court in *King*, that the provisions of federal law pertaining to the SBP made clear that Congress intended "to occupy the field" under the circumstances. *Dugan*, 261 Va. at 9, 539 S.E.2d at 725 (quoting *Silva v. Silva*, 333 S.C. 387, 391, 509 S.E.2d 483, 485 (App. 1998)). Accordingly, the Virginia Court held that federal law preempted state law as to a former spouse's right to claim entitlement to an SBP annuity. *See also Silva*, 333 S.C. at 391, 509 S.E.2d at 485 (holding that a South Carolina state court did not have the authority to preempt provisions of federal law pertaining to the SBP under circumstances similar to those in *Dugan*).

In response to the executrix's argument, defendant concedes that the former spouses in *Dugan*, *King*, and *Silva* "also did not make [their] deemed election[s] within one year." However, she asserts that the cases relied upon by the executrix are distinguishable because the former spouse in each of those cases "was seeking an order for a constructive trust on the SBP payments which could [ ] then be assigned to the ex-spouse. . . . . Defendant-appellee is not requesting a constructive trust." We are not persuaded by defendant's argument, which ignores the ultimate holding of each case: that federal law preempts state law as to a former spouse's right to claim entitlement to an SBP annuity.

Here, the trial court found as a fact that the ED order "was not submitted to DFAS by Plaintiff or Defendant within the year it was entered" as required by the U.S. Code in order to make a deemed election. Accordingly, because it lacked the authority to preempt these time restrictions of the Code, we hold that the trial court erred in ordering the executrix to nevertheless place defendant as the sole beneficiary of the SBP.

III. Conclusion

Pursuant to the ED order, defendant is entitled to "an[ ] amount equal to the present value of SBP coverage," which is an obligation of plaintiff's estate. However, because the trial court lacked authority to preempt the SBP provisions of the U.S. Code, we reverse its order directing the executrix to take whatever measures necessary to place defendant as the sole beneficiary of the SBP.

REVERSED.

Judges DILLON and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 DECEMBER 2018)

AM. EXPRESS BANK, FSB v. VOYKSNER No. 18-319	Chatham (14CVD427)	Affirmed
BRINKLEY PROPS. OF KINGS MOUNTAIN, LLC v. CITY OF KINGS MOUNTAIN No. 18-615	Cleveland (17CVS212)	Affirmed
BRUNSON v. 12TH JUDICIARY No. 18-569	N.C. Industrial Commission (TA-26222)	Dismissed
BRUNSON v. 12TH JUDICIARY No. 18-573	N.C. Industrial Commission (TA-26238)	Dismissed
BRUNSON v. DIST. ATTORNEY FOR THE 12TH PROSECUTORIAL DIST. No. 18-568	N.C. Industrial Commission (TA-26221)	Dismissed
BRUNSON v. DIST. ATTORNEY FOR THE 12TH PROSECUTORIAL DIST. No. 18-570	N.C. Industrial Commission (TA-26223)	Dismissed
BRUNSON v. DIST. ATTORNEY FOR THE 12TH PROSECUTORIAL DIST. No. 18-572	N.C. Industrial Commission (TA-26225)	Dismissed
BRUNSON v. DIST. ATTORNEY FOR THE 12TH PROSECUTORIAL DIST. No. 18-658	N.C. Industrial Commission (TA-25775)	Affirmed
BRUNSON v. GOVERNOR OF N.C. No. 18-571	N.C. Industrial Commission (TA-26224)	Dismissed
BRUNSON v. N.C. DEP'T OF PUB. SAFETY No. 18-657	N.C. Industrial Commission (TA-25705)	Affirmed
BRUNSON v. N.C. GEN. ASSEMBLY No. 18-567	N.C. Industrial Commission (TA-26220)	Dismissed
BRUNSON v. N.C. INNOCENCE INQUIRY COMM'N No. 18-659	N.C. Industrial Commission (TA-25828)	Affirmed

CAREY v. CHERUBINI No. 18-678	Pender (16CVD691)	Affirmed in part and remanded for additional findings.
FISCHER v. FAGAN No. 18-713	Polk (15CVS122)	Affirmed in Part; Dismissed in Part.
GEE v. DENZER No. 18-146	Mecklenburg (17CVD14143)	Affirmed
GLASGOW v. PEOPLEASE CORP. No. 18-348	N.C. Industrial Commission (15-031891)	Affirmed
HOWARD v. ORTHOCAROLINA, P.A. No. 18-71	Mecklenburg (08CVS13045)	Affirmed
IN RE A.K.J. No. 18-510	Forsyth (17J19)	Reversed
IN RE B.A.S. No. 18-511	Rockingham (16JT10-11)	Affirmed
IN RE B.W. No. 18-437	Wake (17JB431)	Reversed in part; Vacated in part.
IN RE E.B.J. No. 18-633	Alleghany (14JT7)	Vacated and Remanded
IN RE ESTATE OF TOULOUSE No. 18-635	Greene (13E70)	Affirmed
IN RE I.N.S. No. 18-647	Surry (16JT64)	Dismissed
IN RE R.L.O. No. 18-593	Iredell (17JT117) (17JT118) (17JT119)	Affirmed in part, reversed in part, vacated in part and remanded.
MARTIN v. LANDFALL COUNCIL OF ASS'NS, INC. No. 18-505	New Hanover (16CVS2284)	Dismissed
REID v. STERRITT No. 18-323	Pasquotank (16CVS766)	Reversed and remanded.
ROBERTS v. LOCKE No. 18-86	Catawba (13CVS2607)	Affirmed
ROSEN v. CLUB AT LONGVIEW, LLC No. 18-364	Mecklenburg (17CVS7595)	Affirmed

SCHNEEMAN v. FOOD LION, LLC No. 18-246	N.C. Industrial Commission (15-029812)	Affirmed
SIDES v. ASHLEY FURNITURE INDUS., INC. No. 18-588	N.C. Industrial Commission (16-004856)	Affirmed
SIMMONS v. NEW HANOVER CTY. SCH. SYS. No. 17-1329	New Hanover (17CVS1737)	Modified and Affirmed
STATE v. ACOSTA No. 17-1307	Wake (16CRS208707)	No error in part; Affirmed in part.
STATE v. ANTHONY No. 18-403	Mecklenburg (15CRS245327) (15CRS245331) (15CRS245332) (15CRS245334)	Vacated and Remanded
STATE v. CLARK No. 17-1356	Cleveland (15CRS54509)	No error in part; No prejudicial error in part.
STATE v. COOMBER No. 17-1416	Mitchell (16CRS50531)	No Error
STATE v. DAW No. 18-117	Onslow (16CRS52399)	No Error
STATE v. DELAIR No. 18-124	Cabarrus (16CRS53970)	No Error
STATE v. FLOARS No. 18-699	Pitt (16CRS55645)	Affirmed in part; reversed in part; remanded for further proceedings
STATE v. GROSS No. 18-701	Pitt (15CRS3447)	Affirmed in part; reversed in part; remanded for further proceedings
STATE v. HAYWARD No. 18-650	Mecklenburg (16CRS247411)	No Error
STATE v. HILL No. 18-702	Pitt (14CRS2669) (14CRS2673-74)	Affirmed in part; reversed in part; remanded for further proceedings

STATE v. JARVIS No. 18-296	Mecklenburg (16CRS215435) (17CRS8563)	No Error
STATE v. JEFFERSON No. 18-372	Johnston (01CRS51693)	Affirmed
STATE v. JONES No. 18-700	Pitt (15CRS56923)	Affirmed in part; reversed in part; remanded for further proceedings
STATE v. JOYNER No. 18-703	Pitt (14CRS4386) (14CRS59716)	Affirmed in part; reversed in part; remanded for further proceedings
STATE v. LANGLEY No. 16-1107-2	Pitt (14CRS3412) (14CRS3452) (14CRS3454) (14CRS57851-54)	No Error
STATE v. McABEE No. 18-25	Gaston (16CRS58357) (16CRS58364-67)	Reversed in Part; Vacated in Part
STATE v. ORR No. 18-424	Mecklenburg (17CRS15715) (17CRS205845-47)	No Prejudicial Error
STATE v. RIVERA-MARQUEZ No. 17-1319	Mecklenburg (15CRS12708)	No Error
STATE v. SAMUEL No. 18-91	Perquimans (12CRS50124) (17CRS118)	Reversed and Remanded
STATE v. STANCIL No. 18-346	Wayne (15CRS51463)	No Error
STATE v. STANCILL No. 18-528	Pitt (16CRS426)	Affirmed in part; reversed in part; remanded for further proceedings
STATE v. TAYLOR No. 17-1284	Gaston (15CRS1557) (15CRS2945) (15CRS5353)	New Trial

STATE v. TAYLOR No. 18-55	Robeson (11CRS52162)	Affirmed
STATE v. TIMMONS No. 18-618	Mecklenburg (16CRS242889) (16CRS242891) (17CRS34630)	Dismissed
STILES v. SWINGING BRIDGE, LLC No. 18-238	Buncombe (16CVS2735)	AFFIRMED IN PART; VACATED IN PART; REMANDED.
WILKIE v. CITY OF BOILING SPRING LAKES No. 16-652-2	Brunswick (14CVS919)	Affirmed in part; Remanded in part

MEINCK v. CITY OF GASTONIA

[263 N.C. App. 414 (2019)]

JOAN A. MEINCK, Plaintiff
v.
CITY OF GASTONIA, a North Carolina Municipal Corporation, Defendant

No. COA16-892-2

Filed 2 January 2019

Immunity—government entity—purchase of insurance—negligence claim—whether policy acts as waiver

An insurance policy purchased by a city did not act as a waiver against a claim for negligence by a tenant injured on a city-owned property, where the policy did not unambiguously exclude coverage for claims for which sovereign immunity would otherwise be waived by the purchase of insurance. Ambiguous exclusions in insurance policies are strictly construed in favor of coverage.

Appeal by plaintiff from order entered 1 June 2016 by Judge Lisa Bell in Gaston County Superior Court. Originally heard in the Court of Appeals 22 February 2017. *Meinck v. City of Gastonia*, __ N.C. App. __, 798 S.E.2d 417 (2017). Upon remand from the Supreme Court of North Carolina by opinion issued 26 October 2018. *Meinck v. City of Gastonia*, __ N.C. __, 819 S.E.2d 353 (2018).

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for plaintiff-appellant.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Ryan L. Bostic for defendant-appellee.

TYSON, Judge.

This case returns to this Court upon remand by the opinion of our Supreme Court. As stated in the Supreme Court's opinion:

> Because the Court of Appeals determined that defendant was not entitled to governmental immunity, it did not address whether the trial court correctly ruled that defendant did not waive governmental immunity by purchasing liability insurance. We remand this case to the Court of Appeals to address that issue.

Meinck, __ N.C. at __, 819 S.E.2d at 367. Pursuant to the Supreme Court's instructions, we review whether the City of Gastonia (the "City" or

"Defendant") waived governmental immunity by the purchase of insurance. We reverse the trial court's ruling and remand for further proceedings.

I. Background

The facts underlying this case are set forth in detail in our previous opinion and the Supreme Court's subsequent opinion. *Meinck v. City of Gastonia*, __ N.C. App. __, 798 S.E.2d 417 (2017), *rev'd in part, disc. review improvidently allowed in part, and remanded*, __ N.C. __, 819 S.E.2d 353 (2018). We briefly summarize below.

The City is a local body politic, chartered as a public municipal corporation by the General Assembly in 1877. Public Laws 1876-77, c. 52, § 1. The City and surrounding Gaston County are named for the Honorable William Joseph Gaston, a former Justice of the Supreme Court of North Carolina, who also served as a United States Congressman. Justice Gaston is also the author of the official North Carolina state song: "The Old North State". Public Laws, 1927, c. 26; N.C. Gen. Stat. § 149-1 (2017).

The City acquired and owns an historic commercial building located at 212 West Main Avenue in Gastonia. In 2013, Defendant leased the building to the Gaston County Art Guild ("the Art Guild"), which is a private not-for-profit entity. As owner, Defendant remained responsible under the lease for maintaining the exterior of the premises and the right to inspect the building at any time.

The Art Guild utilized and subleased the building to attract artists' studios, and for use as an art gallery and gift shop. The lease agreement provided the Art Guild was empowered to sublease portions of the building to subtenants to use as art studios. Joan Meinck ("Plaintiff") was one such artist and a subtenant.

On 11 December 2013, Plaintiff was leaving through the rear exterior exit of the subject building while carrying several large pictures. She lost her balance while on a set of steps and fell. As a result of her fall, Plaintiff suffered a broken hip, required hospitalization, and incurred medical expenses. Portions of the cement on the steps had allegedly cracked and eroded. The large pictures she was carrying may have prevented her from seeing where she was stepping.

On 4 February 2015, Plaintiff filed a complaint alleging Defendant had negligently failed to maintain the exit stairs of the building or to warn her of the dangerous condition of the steps and stairs. Plaintiff's complaint alleged Defendant had waived governmental immunity by purchasing liability insurance and also alleged Defendant's tortious conduct,

while Defendant was engaged in a proprietary function, rather than a governmental function, deprived Defendant of governmental immunity.

On 12 January 2016, Defendant filed a motion for summary judgment asserting that the City was entitled to governmental immunity, that Defendant was not negligent as a matter of law, and that Plaintiff was contributorily negligent as a matter of law. The trial court determined that Defendant's liability insurance policy "contained an express non-waiver provision" and that Defendant had not waived governmental immunity. The trial court also determined Defendant was engaged in a governmental function, was entitled to governmental immunity, and granted summary judgment to Defendant on that basis. Plaintiff appealed to this Court.

In this Court's unanimous prior opinion, we held Defendant was engaged in a proprietary function and, as such, was not entitled to governmental immunity. *Meinck*, __ N.C. App. at __, 798 S.E.2d at 424. We also held Defendant was not entitled to summary judgment on the issue of Plaintiff's contributory negligence. *Id.* Because we concluded Defendant was engaged in a proprietary function, we did not further address Plaintiff's argument that the City's non-waiver provision in its liability insurance contract did not preserve the City's sovereign or governmental immunity.

Defendant sought discretionary review with our Supreme Court seeking review of this Court's unanimous decision on 20 April 2017. Plaintiff filed a conditional petition for discretionary review on 28 April 2017, seeking review of the issue of Plaintiff's contributory negligence. Our Supreme Court allowed both petitions on 8 June 2017.

By an opinion filed 26 October 2018, the Supreme Court reviewed this Court's decision and held "the trial court correctly determined that defendant was engaged in a governmental function[.]" *Meinck*, __ N.C. at __, 819 S.E.2d at 367. The Supreme Court remanded the issue of "whether the trial court correctly ruled that defendant did not waive governmental immunity by purchasing liability insurance" to this Court. *Id.* at __, 819 S.E.2d at 367. The Supreme Court also held discretionary review of this Court's decision on the issue of Plaintiff's contributory negligence was improvidently allowed. *Id.* We address whether Defendant waived governmental immunity by purchasing liability insurance.

II. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

In reviewing a motion for summary judgment, the trial court must "view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011). "The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

We review a trial court's summary judgment order *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

III. Analysis

Plaintiff asserts the trial court erred by granting summary judgment to Defendant on the grounds Defendant did not waive governmental immunity by purchasing liability insurance. Defendant contends it did not waive governmental immunity by purchasing insurance because of an exclusionary provision contained within an endorsement to its general liability policy.

"Under the doctrine of governmental immunity, a county or municipal corporation 'is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.' " *Estate of Williams v. Pasquotank Cty.*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (internal quotation marks omitted)).

"A municipality may, however, waive its governmental immunity to the extent it has purchased liability insurance." *Hart v. Brienza*, 246 N.C. App. 426, 433, 784 S.E.2d 211, 216 (internal quotation marks and citation omitted), *review denied*, 369 N.C. 69, 793 S.E.2d 223 (2016); *see* N.C. Gen. Stat. § 160A-485(a) (2017) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). "A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy." *Hart*, 246 N.C. App. at 433, 784 S.E.2d at 217 (internal quotation marks and citation omitted).

A. *Interpretation of Insurance Policies*

"Our courts have long followed the traditional rules of contract construction when interpreting insurance policies." *Dawes v. Nash Cty.*, 357 N.C. 442, 448, 584 S.E.2d 760, 764, *reh'g denied*, 357 N.C. 511, 587 S.E.2d 417-18 (2003). "When interpreting provisions of an insurance policy, provisions that extend coverage are to be construed liberally to 'provide coverage, whenever possible by reasonable construction.' " *Plum Properties, LLC v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, __ N.C. App. __, __, 802 S.E.2d 173, 175-76 (2017) (quoting *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)).

"If the language in an exclusionary clause contained in a policy is *ambiguous*, the clause is '*to be strictly construed in favor of coverage*.' " *Daniel v. City of Morganton*, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997) (emphasis supplied) (quoting *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 201-02, 415 S.E.2d 764, 765 (1992)).

"As a general rule, ambiguities in insurance policies are to be strictly construed against the drafter, the insurance company, and in favor of the insured and coverage since the insurance company prepared the policy and chose the language." *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 11, 527 S.E.2d 328, 335 (2000) (citations, internal quotation marks, and alterations omitted). Exclusions from coverage in insurance policies are disfavored under North Carolina law, and are narrowly construed. *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 114, 314 S.E.2d 775, 779 (1984).

" 'If the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.' " *Dawes*, 357 N.C. at 449, 584 S.E.2d at 764 (citation and internal quotation marks omitted). With these principles of insurance policy interpretation in mind, we analyze the general liability policy purchased by Defendant.

B. *The City's Insurance Policy*

Defendant's general liability insurance policy expressly provides for coverage up to a limit of $1,000,000 for "bodily injury." The insurance policy specifically states, in part:

> **1. "Bodily Injury" and "Property Damage" Liability**
>
> We will pay on behalf of the insured those sums in excess of the "retained limit" that the insured becomes

> legally obligated to pay as "loss" because of "bodily injury" or "property damage" to which this insurance applies. However; we will have no duty to pay any "loss" for "bodily injury" or "property damage" to which this insurance does not apply.

The coverage provisions of Defendant's general liability policy unambiguously provide coverage to Defendant for the bodily injuries sustained by Plaintiff. *See Dawes*, 357 N.C. at 449, 584 S.E.2d at 764.

In support of its motion for summary judgment, Defendant submitted the affidavit of Gastonia's City Manager, Edward C. Munn. Munn's affidavit referenced an endorsement of exclusion of coverage provided by Defendant's general liability insurance policy, entitled "Sovereign Immunity and Damages Caps". The endorsement states:

> 12. Sovereign Immunity and Damages Caps
>
> *For any amount for which the Insured would not be liable under applicable governmental or sovereign immunity but for the existence of this Policy*; the issuance of this insurance shall not be deemed a waiver of *any statutory immunities* by or on behalf of any insured, nor of *any statutory limits* on the monetary amount of liability applicable to any Insured were this Policy not in effect; and as respects to any "claim", we expressly reserve any and all rights to deny liability by reason of such immunity, and to assert the limitations as to the amount of liability as might be provided by law. (Emphasis supplied)

The City contends the quoted endorsement "clearly and unambiguously retains Gastonia's governmental immunity." The City does not dispute that it has purchased general liability insurance or that its general liability policy would otherwise provide coverage for claims attributable to Plaintiff's injuries, but for the exclusionary language of the endorsement.

In analyzing the endorsement, the emphasized language of the first clause is ambiguous. It is ungrammatical and does not clearly convey whether governmental immunity is waived under the policy. It is not a complete sentence or clause, and does not convey any clear meaning on its own. Moreover, this provision is one of fourteen separate provisions contained in the endorsement entitled "North Carolina Common Policy Conditions." Each of the other thirteen provisions is listed with a similarly numbered heading. Unlike this provision, the others all begin with complete, grammatical sentences.

Were this opening clause a complete sentence or independent clause, the *entire* provision could be interpreted as clear and unambiguous. Consider for example, the following hypothetical version of the same policy provision, with the first clause written as a complete, grammatical clause that mirrors other, similar exclusions elsewhere in the policy:

> 12. Sovereign Immunity and Damages Caps
>
> *This policy does not apply to any amount for which the Insured would not be liable under applicable governmental or sovereign immunity but for the existence of this Policy*; the issuance of this insurance shall not be deemed a waiver of any statutory immunities by or on behalf of any insured, nor of any statutory limits on the monetary amount of liability applicable to any Insured were this Policy not in effect; and as respects to any "claim", we expressly reserve any and all rights to deny liability by reason of such immunity, and to assert the limitations as to the amount of liability as might be provided by law. (Emphasis supplied).

This hypothetical clause clearly excludes coverage in two separate circumstances: first, where the purchase of liability coverage otherwise would waive sovereign immunity or governmental immunity, which are long-standing common law doctrines; and, second, where the purchase of liability coverage otherwise would waive immunities and damages caps created by statute.

The title of this provision is "Sovereign Immunity and Damages Caps" and demonstrates that it necessarily addresses both common law sovereign immunity concepts and statutory limits on liability. "Sovereign immunity" is a common law concept. A "damages cap" is a statutory law concept. *Lovelace v. City of Shelby*, 351 N.C. 458, 460, 526 S.E.2d 652, 654 (2000) ("As early as this Court's decision in *Hill v. Aldermen of Charlotte*, 72 N.C. 55 (1875), the state and its agencies have been immune from tort liability under the common law doctrine of sovereign immunity."); *Davis v. Town of S. Pines*, 116 N.C. App. 663, 673, 449 S.E.2d 240, 246 (1994) ("Under the common law doctrine of governmental immunity, a municipality is immune from liability for the torts of its officers committed while they were performing a governmental function." (citation and quotation marks omitted)); N.C. Gen. Stat. § 1D-25 (2017) (providing a statutory damages cap on punitive damages).

Defendant asserts the endorsement is similar to exclusions from three other cases where this Court had determined local governments

did not waive immunity. The controlling provisions in those cases are clearly distinguishable from the ambiguous exclusionary endorsement presented here.

In *Hart v. Brienza*, Gaston County had a liability insurance policy containing a provision entitled "Preservation of Governmental Immunity—North Carolina", which stated:

> 1. The following is added to each Section that provides liability coverage: This insurance applies to the tort liability of any insured only to the extent that such tort liability is not subject to any defense of governmental immunity under North Carolina law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
>
> 2. . . . . Your purchase of this policy is not a waiver, under North Carolina General Statute Section 160A–485 or any amendments to that section, of any governmental immunity that would be available to any insured had you not purchased this policy.

Hart, 246 N.C. App. at 434, 784 S.E.2d at 217 (emphasis omitted).

In *Estate of Earley v. Haywood Cty. Dep't of Soc. Servs.*, Haywood County had purchased a liability insurance policy that specifically and explicitly excluded coverage for "[a]ny claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina Law." 204 N.C. App. 338, 342, 694 S.E.2d 405, 408-09 (2010). The policy also contained a specific provision clarifying the intentions of the parties, which stated:

> The parties to this Contract intend for *no coverage* to exist under Section V (Public Officials Liability Coverage) as to *any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law*. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

Id. (emphasis supplied).

In *Patrick v. Wake Cty. Dep't of Human Servs.*, Wake County purchased a liability insurance policy that contained a provision stating:

> This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A–435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, *this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable* or for which, after the defense[] is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

188 N.C. App. 592, 596, 655 S.E.2d 920, 923 (2008) (emphasis supplied).

This Court recognized and concluded the relevant language was unambiguous in the policies of *Hart*, *Earley*, and *Patrick* and those policies did not cover claims for which sovereign immunity would otherwise be waived by the purchase of insurance. *Hart*, 246 N.C. App. at 434, 784 S.E.2d at 217; *Earley*, 204 N.C. App. at 342, 694 S.E.2d at 408-09; *Patrick*, 188 N.C. App. at 596, 655 S.E.2d at 923.

Unlike the clear and explicit contract exclusionary provisions in *Hart*, *Earley*, and *Patrick*, the endorsement at issue here is ambiguous. *See id*. *Hart*, *Earley*, and *Patrick* provide prominent examples for how exclusionary clauses have been drafted to be clear and unambiguous. Under the endorsement at issue, it is unclear whether the exclusion for coverage applies to claims for which sovereign or governmental immunity would apply.

With the ambiguous language in the endorsement, we "strictly construe" the insurance policy Defendant purchased as providing coverage for claims which clearly stated provisions preserving governmental immunity would otherwise bar. *See Daniel*, 125 N.C. App. at 53, 479 S.E.2d at 267 ("If the language in an exclusionary clause contained in a policy is ambiguous, the clause is to be strictly construed in favor of coverage." (citation and internal quotation marks omitted)).

With the purchase of liability insurance coverage, Defendant has waived governmental immunity up to the amount of its general liability policy limits of $1,000,000. *See* N.C. Gen. Stat. § 160A-485(a) ("Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability."). The ambiguous exclusionary endorsement, strictly construed in favor of coverage and against the

drafter, does not exclude the express coverage the City obtained when it purchased the liability insurance policy. Furthermore, the unambiguous provisions of the City's general liability policy clearly provides coverage for "bodily injury" up to a limit of $1,000,000.

Following our precedents and construing the coverage provisions of the policy liberally and the ambiguous exclusionary provision narrowly, Defendant has not preserved governmental immunity to the extent of the $1,000,000 coverage limit. *See Lambe Realty*, 137 N.C. App. at 11, 527 S.E.2d at 335; *Stanback*, 68 N.C. App. at 114, 314 S.E.2d at 779.

The trial court's grant of summary judgment to Defendant, partly on the basis the City did not waive governmental immunity by purchasing liability insurance through the exclusionary provision, is reversed.

IV. Conclusion

Applying well-established canons of contract interpretation, in the light most favorable to the non-moving party, the trial court's entry of summary judgment upholding Defendant's non-waiver of governmental immunity, notwithstanding the City's purchase of liability insurance, is reversed. We remand this cause to the trial court for further proceedings. *It is so ordered.*

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

Judge ELMORE concurred in this opinion prior to 31 December 2018.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
CRYSTAL HAMNER COX, JOSEPH CAIN PICKARD,
AND JESSICA LITTLEFIELD, DEFENDANTS

No. COA18-225

Filed 2 January 2019

Insurance—duty to defend—negligent infliction of emotional distress—terms of policy

An insurance company had the duty to defend a homeowner against a claim for negligent infliction of emotional distress (NIED) where the homeowner's alleged negligent acts constituted an "occurrence" that caused "bodily injury" to the victim pursuant to the terms of the general personal liability portion of the homeowner's insurance policy. The claimant, a fifteen-year-old girl, was allowed to stay at her friend's house upon assurances from the friend's mother (the homeowner) that she would be safe and supervised. During the overnight visit, the girl was sexually assaulted by the homeowner's adult son who was known by the homeowner to exhibit violent behavior when drunk but had been recently allowed to resume staying at the house. None of the insurance policy's exclusions were triggered to exclude the NIED claim from coverage, and the trial court's order granting summary judgment to the insurer on this claim was reversed.

Judges CALABRIA and DIETZ concurring in result only.

Appeal by Defendant Jessica Littlefield from orders entered 12 September 2017 by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Court of Appeals 17 September 2018.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for Plaintiff-Appellee.

Douglas S. Harris for Defendant-Appellant Jessica Littlefield.

McGEE, Chief Judge.

I. Factual and Procedural Background

Jessica Littlefield ("Littlefield") appeals from an order entering summary judgment for North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Farm Bureau") and from an order denying Littlefield's motion pursuant to Rule 60(b) and Rule 55 to set aside entry of default with respect to the other parties named as defendants in this action. We reverse the order granting summary judgment.

Because summary judgment was granted in favor of Farm Bureau and we are construing an insurance policy, we present the alleged facts that support Littlefield's argument as true, and we present them in the light most favorable to Littlefield. *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010); *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 408, 742 S.E.2d 535, 541 (2012). These alleged facts are taken from the pleadings, depositions, and other materials considered by the trial court, and they are presented in great depth and detail due to the unique nature of the present case and appeal. The issues involved in this appeal arise from events that occurred on 11 and 12 June 2013, including a sexual assault of Littlefield by Joseph Cain Pickard ("Pickard") that resulted in Pickard pleading guilty to taking indecent liberties with a child ("the events"). The following, therefore, are solely the alleged facts, and reasonable inferences therefrom, that support Littlefield's argument. Although we present Littlefield's version of the alleged facts as "true," this should not be viewed as an endorsement of these allegations.

Littlefield was a fifteen year-old girl raised in a religious family with very strict rules who, in June of 2013, lived with her mother Darie Wyatt ("Wyatt") and sisters in Greensboro. Because Littlefield's "mom [was] very religious," Littlefield had led a very sheltered life. Wyatt testified: "I have a policy that my girls don't spend the night away from home. I don't care if they have 10 friends spend the night with them [at my house], but they don't spend the night away from home." Wyatt's rules for Littlefield were: "No boys, no alcohol, no drugs, [no supervising adult could go to sleep] until [Littlefield was] asleep," and she "wasn't allowed to go outside . . . past dusk without an adult." Littlefield had never consumed any alcohol or used any kind of illegal drugs.

In June 2013, Wyatt needed to help care for a close family friend in Virginia who was dying of cancer.[1] Because Wyatt would not leave Littlefield home alone, she planned to take Littlefield with her as she

1. Littlefield referred to this family friend as her "grandmother."

commuted back and forth to Virginia. A classmate of Littlefield's, C., invited Littlefield to stay with her during this difficult period. C. lived with her mother, Crystal Hamner Cox ("Cox");[2] Cox's husband—C.'s stepfather; and her sister. However, unbeknownst to Littlefield or Wyatt, Pickard, Cox's nearly twenty-one-year-old son, had just been allowed to resume living in Cox's house ("the house" or "Cox's house") after a long period of banishment. Wyatt was familiar with both Cox and C.—from Littlefield's school, and because C. had spent the night with Littlefield at Wyatt's home on several occasions. Wyatt spoke with Cox several times on the phone, deliberating whether to allow Littlefield to spend the night away from home without supervision from any adult family member.

Because Wyatt was strict and protective, she always had long discussions with any adult who might be supervising Littlefield—even for short periods of time during the day—in order to determine if they would abide by her rules. Wyatt was not hesitant to refuse to allow Littlefield to spend time with her friends if Wyatt was not confident her rules would be followed. In Wyatt's conversations with Cox, she thoroughly explained her rules and expectations, and gave Cox "clear examples of what was not permitted." Wyatt testified that Cox assured her "that's no problem. There's no one here. There's no one going to be here, just me, my husband, and the girls. I don't work. It'll be fine." Based upon Cox's repeated assurances, Wyatt finally agreed to permit Littlefield to stay overnight at Cox's house. Specifically, Cox's assurances that Cox would closely supervise Littlefield; that Littlefield would not be allowed to fraternize with any boys, even under Cox's supervision; that there would be no alcohol or drugs consumed around Littlefield; and that Cox would not allow Littlefield to become involved in any kind of inappropriate behavior. Neither Wyatt nor Littlefield knew that Cox had an adult son, much less that he would be sleeping at the house. Littlefield's stay at Cox's home on 11 and 12 June 2013 "was the one and only time [Wyatt] ever let [her] stay at anyone else's house."

Cox met Wyatt at a parking lot, halfway between Greensboro and Cox's house in Gibsonville, to pick up Littlefield. At this parking lot meeting, Wyatt again discussed, in Littlefield's presence, all Wyatt's rules and expectations. Cox reassured Wyatt that Cox would follow her rules, and that Littlefield would be in a safe and constantly monitored environment.

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2. Although all the pleadings and other court documents, as well as the briefs of both parties, refer to this Defendant as "Crystal Hamner Cox," in her deposition "Cox" testified that her name at birth was "Crystal Lee Hamner," and that she had never changed it. It is unclear why her last name is referred to as "Cox" throughout the record, but in order to conform with the record, we will continue to refer to her in this manner.

Littlefield testified that, during this conversation, Cox reassured Wyatt that the only other occupants of Cox's house that night would be Cox, Cox's husband, and Cox's daughters—and that Cox would provide close adult supervision throughout the night to make sure there was not any "mischief." Cox assured Wyatt and Littlefield that there would be "no alcohol and no boys, that they were not expecting any visitors, and that they [Cox and her husband] would not be leaving for any purpose." Cox told Wyatt she would be with the girls constantly, and that they "were going to watch Disney movies that night." Cox "said there was never a lot of riffraff in her house. She had two little girls, so she didn't like drama in her house. So we were just going to be relaxing."

Cox testified that all three of her children, including Pickard, had "special needs," but it is unclear what Pickard's "special needs" were. However, it is clear Pickard had a troubled past. Cox testified Pickard started dating his girlfriend when they were both sixteen, and that Pickard "left home at 16 and [had] not returned."[3] Cox believed Pickard's relationship with his girlfriend to be a source of Pickard's defiant behavior. Cox "didn't see a whole lot of [Pickard] for a long time" after he left her house when he was sixteen. Cox "worried" about Pickard over the years because when she spoke with him on the phone she "could tell that he was drinking." Cox stated that "[b]y this time . . . it kind of became apparent that, you know, he was drinking. And it didn't matter what I did or what I said . . ., he was going to drink." Despite the fact that Cox tried to intervene, "even when the kids were in high school[,]" she could not control Pickard's drinking problem. Cox agreed that Pickard's drinking was "really far in excess[,]" and stated "you know, when you have someone drinking at the age that he was, not compliant at all with house rules, . . . it was worrisome. It was worrisome."

Cox testified that at some point in time before 11 June 2013, "for whatever reason, problems at [his girlfriend's] house, [Pickard] asked if he could come home." Cox let Pickard return home, but would not allow his girlfriend to enter the house. When Pickard did move back home "he wasn't the same. He wasn't the same." Pickard kept drinking, and Cox "tried everything[;]" she tried to reason with him "so many different ways." She told him: " 'We can't have this. We can't have this at the house. It's not good for your sisters.' " Finally, Cox made a compromise with Pickard because "compromise is what adults do." Cox told Pickard

3. Cox seemed to have been testifying in a more general sense, as it is clear that Pickard had returned to live in Cox's house on trial bases at least twice prior to Cox's deposition.

that his girlfriend could come to the house, but that she had to leave by " '8:30 or when we [Cox and her husband] go to bed.' " Although Cox believed she had compromised to reach a mutually acceptable solution, she testified that "unfortunately, I was the only one giving all the time. So [Pickard's girlfriend was again totally banished from the house, and] had not been allowed really in the house for a year." Pickard was also either banned from sleeping in the house for most of this period, or had voluntarily removed himself, until just before 11 June 2013. Pickard "had been staying with his grandparents, . . . and then . . . there was some argument that required him to leave there" and so he "went back to [Cox's] house and was only there" a few days before 11 June 2013.

Cox "feared that [Pickard] would drink too much and die. . . . . I was afraid that . . . he gets belligerent towards the wrong person and gets really hurt." At the hearing for Pickard's guilty plea for taking indecent liberties with a child, Pickard, through his attorney, admitted that he was a heavy drinker, and "in certain respects he has a serious alcohol addiction[.]" Pickard's attorney further stated: "I think everybody in his family would concur that things were just spiraling in a very downward direction as far as [Pickard] was concerned in terms of both the substance abuse issues and just the instability that he was finding himself in at that time."

Cox testified that Pickard's alcohol of choice was "hard liquor such as vodka[.]" She stated that she did not permit him to drink in the house, but she knew that he ignored her and regularly drank when he was staying at her house. Cox would know when Pickard had been drinking "[b]ecause he would become belligerent" "and angry acting[.]" When he was drinking, "[h]e would yell[,]" and sometimes "he would just kind of get in my face and those types of things." "There was one point he decided he wasn't going to listen to me anymore and shoved past me and slammed the bathroom door like he was a two-year old, . . . those types of things." Pickard would often leave his liquor in his girlfriend's car when the car was parked in front of the house, go out to drink it there, "and com[e] in and act[] belligerent[.]" Cox knew that Pickard had been arrested for possession of marijuana and paraphernalia prior to 11 June 2013.

When asked if she would expect to be warned if C. was going to spend the night at a house with a twenty-year-old man who had problems with alcohol, belligerence, and abiding by rules, Cox initially demurred. Cox rationalized her failure to inform Wyatt or Littlefield about Pickard's issues by saying that Pickard "was good when he was good. He was really good." She admitted, however, that Pickard was also

"bad when he was bad." Cox further rationalized that she anticipated better behavior by Pickard on 11 and 12 June 2013 since he had only just been allowed back in her house, stating: "So, you know, he was trying to be good. And I don't know what happened after I went to bed [on the night of the events], but that situation changed."

While at Cox's house on 11 June 2013, Littlefield and C. played video games in C.'s bedroom for a while until Cox fixed dinner for the girls. Cox first mentioned Pickard while they were in the kitchen, saying that he was a "troubled child" with a history of "acting out[,]" who "do[es] bad things." This was when Littlefield learned C. had a brother. Pickard arrived at the house with his girlfriend and some other people while Littlefield was still eating, though initially none of them entered the house. She heard "a lot of noise in the back [yard] and things like that." She could tell that there were a number of people in the back yard, and Cox told Littlefield that "they were out in the back, having a little party" by the fire pit. Pickard came into the house through the back door and had a brief conversation with Cox in the kitchen. According to Littlefield, Cox told Pickard "not to do anything to crazy but to have fun." At approximately 8:30 p.m., Cox announced that she was going to bed, and she and her husband went into their bedroom and locked the door. Littlefield could hear people outside, and heard multiple male voices "hollering and going on" near the fire pit.

When C. finished eating, she returned to her room to chat with people on her computer, leaving Littlefield alone in the kitchen. At some later time, Pickard came into the kitchen carrying a large clear bottle containing a clear liquid. Littlefield did not know what the liquid was, but Pickard "smelled like alcohol" so she assumed it was vodka. Pickard appeared to be intoxicated and "[h]e looked high. He looked like he was up on something, jittery, wide-eyed." Pickard's eyes were "[v]ery glassy . . . but wide, really jittery like – not just like normal jitters, . . . shaky and like too much energy almost, and very high[,]" "very, very, very high."

Pickard sat down next to Littlefield on one of the bar stools at the kitchen counter, and he "smelled like weed." He started talking to Littlefield about his difficult childhood, and told her that "he had weed and how he had a history of cocaine usage, just bragging." Pickard said that "from a young age he really didn't care about school. He would just go out and get really drunk and get really high[,]" and that when he did so "he'd get in trouble." Pickard told Littlefield that he had been "thrown in the back of a couple of cop cars when he'd go out and act out." Outside, Littlefield could hear "whooping and hollering and listening to music, getting high and drunk[,]" like "how boys get along, screaming

obscenities, acting out, running around." Pickard offered Littlefield some of the clear liquid she believed was vodka, but she declined.

Littlefield was thirsty, so she started to get up to go to the refrigerator, but Pickard offered her a can of Sprite. Although it was open and not full, she did not want to appear rude so she took "a big gulp." The drink tasted "funny." She did not believe it smelled like alcohol, or tasted "that off[,] [b]ut . . . it tasted weird[,]" "like somebody put something in it." Pickard told her maybe it had been open for too long and was "just flat[.]" Littlefield did not drink any more from the Sprite can, but she began to feel strange soon after. Pickard left the kitchen, and Littlefield could hear Pickard and his girlfriend screaming at each other in the front yard. When Littlefield tried to get up and off of the stool, she "went right back down." Littlefield felt certain that Pickard had put something in the can of Sprite. Her "mind was really blank" and when she tried to get off the stool again she "fell off it[.]" She stated I: "kind of like drug myself . . . towards the [back] door because there was cold air out there. And I felt really, really sick." She stated that she "was really dizzy and nauseated," that she "had a hard time moving," that she "felt too hot and like [she] just needed to get some cool air." She further stated that "it was like somebody turned up the lights and started taking flashing pictures[,]" and all she could see "was bits and pieces."

There was a laundry room area connecting the kitchen to the back door. As Littlefield was dragging herself toward the back door, she was feeling sick, confused, and frightened, so she "just kept hollering" for help, but nobody came. Littlefield further stated that "[she] got scared" because Pickard and his girlfriend "were screaming." Because nobody came when she yelled for help, Littlefield continued to the back porch and "pulled" herself up by the railing and "leaned over it and tried to breath." She stated: "I was trying to holler for somebody, but my voice was and my mind was kind of going." After reviving herself on the back porch, Littlefield went back inside and drank some water.

Pickard was arguing with his girlfriend because she wanted to drive home drunk. In response to the continued screaming, which woke a neighbor, C. came out of her room. Littlefield and C. heard Pickard's girlfriend "scream[] because [Pickard] punched her," so they went outside and saw Pickard's girlfriend leaning against her car "holding her face." Littlefield testified that Pickard's girlfriend "hit the side of the car after he hit her, so she was holding her face, lean[ing] against the car." Pickard then threw his girlfriend's car keys into the yard, and C. told Littlefield to go get them. Littlefield went to get the keys, and Pickard "yelled at [them] to get the f_ck back inside." Littlefield picked up the

keys, "limped and hobbled" back to the front door, and both she and C. went back inside.

C. returned to her room, and Littlefield returned to the back porch to both breath cool air, and to get away from the volatile situation in the front yard. The door from the porch to the laundry room was propped open, so Littlefield could see into the house while she was on the porch. While Littlefield was on the porch breathing in the cold air to make herself feel better, Pickard and his girlfriend, still screaming at each other, came back into the house. Pickard had gotten increasingly intoxicated, and was violent. Littlefield testified: "He was punching his girlfriend and screaming. And what just seemed like he was a little erratic at first got to the point to where he was running around and fighting and acting crazy." At some point as she was on the back porch, she was "yelling for help," but "[n]o one came out." Littlefield stated: "[A]t first I was . . . more inside [the laundry room] than outside, and I was looking around. But once they started getting louder, after I yelled, 'Help,' I stepped out more" "onto the porch because I didn't want to be seen." Pickard was using "very obscene language" and, at approximately 2:00 a.m. or 3:00 a.m. on 12 June 2013, he told his girlfriend "to go to the bedroom and wait for him." When asked if she was scared at this time, Littlefield replied: "I was terrified." Her phone was in C.'s bedroom, and Pickard was between her and that bedroom, so Littlefield remained hiding on the porch. Littlefield was still feeling sick and disoriented at this time, and "didn't feel right."

Littlefield testified: "After [Pickard] told [his girlfriend] to go to sleep, he walked through and came [into the laundry room]. And I was leaning on the outside of the door. And he made some obscene comment about my feet." Littlefield, who was barefoot, testified that Pickard told her that her feet "were really sexy and he wanted to suck on [her] toes." This disgusted her, and she said so. Pickard then used force to rape Littlefield in the laundry room. As Pickard was assaulting her, Littlefield "screamed really loud[,]" causing Pickard to step back slightly, and Littlefield managed to kick him in his genitals. Pickard fell back against the wall, and Littlefield escaped. As Littlefield went to get her phone from C.'s bedroom, she ran by Cox's bedroom "crying very loudly" and screaming for help. However: "No one did anything[.]" Littlefield did not try knock on Cox's bedroom door for help as she "was scared to tell them or talk to them at first" because she "felt like the family would be mad at me, which I was right. They were. And they would blame me."

Littlefield ran out of Cox's house and a short distance down the street, "threw [herself] down in a bunch of rocks" in the yard of Cox's next-door neighbor, and called her "boyfriend" who lived in the area,

telling him she had been raped. Her boyfriend arrived a few minutes later, on foot, along with another male friend who was staying with him at that time. Littlefield testified: "I was just crying really hysterically," "on the ground, and I was pretty busted up. I was busted up pretty bad because I was slammed into a washer and slammed into a wall and things like that." The two boys physically lifted Littlefield off the ground, where she was "freaking out," and they carried her to the house of an adult female friend ("Molly") who lived nearby. Littlefield did not know Molly, but Molly comforted Littlefield, cleaned her up, and tended to her "bumps and bruises."

Littlefield did not want anyone to call the police or her mother because she feared that people would blame her and think she was a "whore." **R247-48**, **238-39** The police were not called at that time, and Littlefield stayed at Molly's house until approximately 4:00 a.m. on 12 June 2013. **R249-50** Littlefield told them that she thought she should talk with Cox "and tell her what happened." She expected Cox "would call the cops," but she was worried that if the police were called, "it would just cause a lot of drama and people wouldn't understand." **R171** Littlefield returned to Cox's house and "hid" in C.'s room—sitting in the corner on her bed, awake and terrified. When she finally heard Pickard and his girlfriend leave the house, Littlefield went to the kitchen and waited for Cox to wake up.

Cox eventually came out of her bedroom and started making up the bed in the room where Pickard and his girlfriend had slept. Littlefield joined her, and told her what Pickard had done to her. Littlefield testified she then told Cox "that I had been given something, and that I was attacked [by Pickard]. I was [sexually assaulted], and I was hurt. I had been hurt. I was covered in bruises. I showed her them." "I kept telling her that [Pickard] had hurt me and that . . . something was given to me . . . I couldn't stand right." "I wasn't in my right mind and that he had hurt me, and he had hit me. And details[.]" "I told her everything. I was like, 'All of these things happened.' "

Littlefield testified that Cox did not show concern or compassion for the sexual assault Littlefield has just endured, stating: "And like I expected, she didn't believe me. [S]he patronized me. Which is the reason why I didn't try to ask anyone else for help, because I knew I would be patronized." Cox told her: "People aren't going to understand.' " Littlefield said: "[Cox] told me that . . . no one would believe me and that he didn't mean it, and that is was just an accident. And patronized me, saying . . . 'people will assume things.' " Cox was "condescending" and said: "People will think bad things [of me,]" that people would "think

something happened that didn't." C. was in the room with Littlefield and Cox during most of this conversation, listening to Cox's response to the fact that her brother had sexually assaulted Littlefield, but did not say anything. Littlefield said that at this time she still felt "really sick to my stomach, and my head hurt really bad. And I was still really dizzy[.]"

Following this discussion, Cox did nothing to comfort or assist Littlefield, instead acting as if nothing had happened, and attempting to ensure that Littlefield continued to stay at her house instead of returning to Wyatt's house. Littlefield did not know if she was going to have to spend another night at Cox's house, or if Pickard would return. Wyatt testified that she called Littlefield that afternoon, and "something sounded odd about her. She said that she had a stomach ache, and . . . something didn't feel right." Wyatt testified: "[S]o I called [Cox] and said, 'I'm going to come and get [Littlefield] when I leave work this evening." However, Cox's response contained lies to keep Wyatt from taking Littlefield home: "No. Let her stay. We're going to go to the water park tomorrow. She'll be fine. They ate too much sweets, stayed up late last night watching movies. Let her stay another night." Wyatt then called Littlefield again to make sure she was okay and wanted to stay, and Littlefield responded " '[m]om, it's just a stomach ache. Let me stay.' And so I did." Littlefield testified she did not want to have her mother come get her because: "My grandmother was dying. My mom needed to be there[,]" and explained that neither of her sisters "lived close enough to do anything." Littlefield "sat around the house" and stated that they "were going to watch a movie, and that's when the police came and got me and took me home."

Apparently, one of the boys who had helped Littlefield after she had been raped told his mother about it, and she called the police. It appears someone also called the Guilford County Department of Social Services ("DSS"), saying that Littlefield had been abandoned. Further, someone other than Pickard told DSS, at some point prior to Pickard's guilty plea, that the sexual contact between Littlefield and Pickard had been consensual. It appears that this report may have originated from Cox's house. The police—and perhaps someone from DSS—arrived at approximately 9:00 p.m. on 12 June 2013, and an officer drove Littlefield back to Wyatt's house. Littlefield refused the suggestion of the police officer that she get a "rape kit" because she was "scared." She did not want her mother or family to know that she "had been penetrated[.]" Wyatt testified that the police officer gave her a brief summary of what had happened, stating that Littlefield had been "sexually violated by [Pickard], [who] I never knew existed. In almost a year [of having known Cox], I had never heard

mention of a son, period." Littlefield initially told Wyatt: "You have to believe me, Mom. Nothing happened, and I don't want to go get any test[.]" Wyatt stated that Littlefield "was scared. She didn't want to talk about it. [She said that] she hadn't done anything wrong. She didn't want me to be mad at her. That she just wanted to be . . . left alone."

Littlefield "refused to talk about it with anyone for a long time." Although she told the police that Pickard had sexually assaulted her in some manner, she did not tell them she had been raped because she was "terrified" "[o]f what people would say at school, what people would think of me, about the fact that [her boyfriend] would probably leave [her.]" When asked about the initial reaction of her sisters when she told them she was sexually assaulted, Littlefield answered: "I told you I come from a religious family. They said I asked for it." Littlefield was also worried that Wyatt wouldn't believe that Pickard had raped her, and would assume any positive results from a rape kit were from Littlefield having had sex with her boyfriend.

According to Littlefield, Wyatt soon accepted that Littlefield had been sexually assaulted, and arranged therapy for her "when she came to understand that it wasn't my fault." However, Littlefield did not tell Wyatt that the assault had included rape "until about a year" prior to her deposition, which was in January of 2017. Littlefield had no history of any kind of mental or physical ailments prior to the events, and "had perfect grades for most of my life[.]" However, after the events, she showed immediate signs of traumatization, leading to repeated panic attacks, emotional breakdowns, self-harm, and suicide attempts. She started engaging in frequent self-mutilation, including cutting and burning herself—and she attempted suicide five times. Littlefield stated that, following the events, her grades "really slipped. I was lucky to graduate." She required counseling and medication for her diagnoses of PTSD, anxiety disorder, depression, agoraphobia, insomnia, night terrors, and ADHD triggered or exacerbated by her emotional trauma. Littlefield was taken to the emergency room a couple of times because her "mental breakdowns" were so severe. Littlefield became anorexic and bulimic following the events, "lost close to 60 pounds," "and became very, very unhealthy." She testified: "I like chopped a bunch of my hair off and stuff, and I just wanted to stay home and didn't want to go around people. And it took a huge emotional toll on me, mentally and physically."

Wyatt testified that "right after school started" C. and Cox "had been discussing it [what C. and Cox would have described as false allegations of sexual assault] at school. Subsequently, [in response to what Cox and C. had been telling people at school, Littlefield] was being attacked by

other people." Littlefield testified that at school, C. "began to blame me relentlessly. Verbally, mainly just telling people awful things. Saying that I wanted to have sex with her brother and that I said something to put him in jail[.]" Other kids at Littlefield's school, in response to C.'s allegations, also started to bully her and call her names. Someone opened the same website page of an article about Pickard's arrest on every monitor in one of the classrooms. Littlefield testified that "[t]he worst of it came from [Cox] following me in school, coming to all of my things, watching me when I was doing things, coming to school almost every day to stare me down."[4]

Wyatt spoke to the detective assigned to the case, school counselors, teachers, the principal, and the school board about how Cox, C. and the rest of their family was treating Littlefield. Eventually, Cox and her family were prohibited from interacting with Littlefield directly. C. and Littlefield were also placed in different classes—though C. and her family were not prevented from attending school functions that also included Littlefield. Wyatt testified that the detective assigned to the case "had to get involved" and that "there was a gag order put on all of it" to prevent Cox and her family from discussing the matter. Even after Cox stopped confronting Littlefield directly, because "[s]he would have gotten in legal trouble[,]" Cox would stare at her and "she would block [Littlefield's] way when [she] was walking."

Because of the harassment, and Littlefield's increasingly fragile mental state, she was often unable to attend school. Littlefield testified: "I attempted to kill myself from the stress of it all. I couldn't handle it. I was going home three or four times a week early from school, breaking down in tears[,]" so "at that point my mother pulled me out [of school], and I was on suicide watch. I wasn't allowed to have any doors [on my room]. I wasn't allowed to shower alone. Someone always ha[d] to be in the room, no sharp objects." Wyatt testified that she "had to have [Littlefield] transferred out of the school because she was harassed so badly by [Cox's] daughters." After Littlefield's transfer to another school in the district, things initially went well. However, because her new school was a rival school to her old school, word of the sexual assault soon spread to her new school and the bullying and name calling resumed. As a result of the events, Littlefield ended up transferring two more times before her graduation from high school.

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4. In Cox's deposition, Cox confirmed that she "was always present . . . in the school[,]" that she "was there at least twice a day and sometimes more."

Littlefield did not want to have to confront the events of that night, so she did not participate in Pickard's criminal prosecution beyond the statement she made on 12 June 2013. She was told that Pickard had signed a statement alleging that he had engaged in "consensual" sex with Littlefield, that he was charged with statutory rape, and that he pled guilty to some lesser offense that allowed him to be released on probation for time served.[5] The fact that Pickard's conviction was based on his claim that Littlefield had "consented" to having sex with him—when in reality Pickard had raped her—caused her additional anxiety—as did Pickard's sentence, which Littlefield felt did not reflect the seriousness of what Pickard had done to her.

As noted above, Cox was also deposed in this action. Additional relevant testimony by Cox was as follows: According to Cox, Pickard and his girlfriend came to the house on 11 June 2013 before Cox had gone to bed, and Cox did not know if Pickard had been drinking before they arrived. Cox told Pickard at approximately 8:30 p.m. that she was about to go to bed, so his girlfriend would have to leave. Pickard walked his girlfriend out to her car, Cox went upstairs to bed, and that was the last time Cox saw Pickard that night. Cox believed that Pickard would stay the night, but assumed that his girlfriend would go home. Cox agreed that it would not have been unusual for Pickard to drink with his girlfriend in her car before returning to the house. Cox testified that she was a "very light sleeper," so if anyone had screamed inside the house, she would have heard it, "reacted very quickly and strongly," and "jumped out my door" to determine what was going on. Cox testified that she didn't hear anything unusual that night, and she woke up at approximately 4:00 a.m. on the morning of 12 June 2013, which was the normal time she awoke, because her husband's work shift started early.[6]

Cox's husband told Cox that, at approximately 4:00 a.m. the morning of 12 June 2013, while Cox was still in her bedroom, "as soon as he opened up the door from the bedroom," "[h]e saw [Littlefield] passing the door" and "then when he went to the bathroom he saw [Pickard and his girlfriend] asleep in the bed." Cox's husband told her "that it scared

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5. Pickard pleaded guilty on 17 December 2013 to one count of taking indecent liberties with a child, and charges of statutory rape and statutory sex offense were dismissed. He was given probation with a split sentence, but because he was in jail until his guilty plea, the credit he was given for time served was sufficient to cover the active portion of his split sentence, and he was released following his plea.

6. Because we presume the alleged facts supporting coverage to be true, we must presume Cox's testimony that she did not hear anything was not truthful.

him because usually there aren't kids up at that hour." Cox's husband then "found a liquor bottle on the table." Because of these violations of Cox's rules, Pickard got "in big trouble" and "that was a third strike, and he was not able to stay in the house [anymore]." At approximately 4:30 a.m., Cox's husband "took care of" telling Pickard and his girlfriend to leave the house, and that Pickard was no longer welcome to live there. Because Pickard had been kicked out of the house for his conduct, Cox did not see him again for a while.

Cox was asked if, on 12 June 2013, Littlefield seemed "upset or anything like that?" Cox testified, "you know, I don't remember anything in particular."[7] Cox explained that she did not see Littlefield much on 12 June 2013 because she left for work before Littlefield woke up, and when she returned from work after 5:00 p.m. Littlefield was in C.'s room most of the time. Cox testified that Littlefield had asked her if she could spend another "couple" of nights at Cox's house, and Cox told her she would have to call Wyatt, which Littlefield did. Wyatt then called Cox to see if it was okay with her, and Cox said that would be fine.

At approximately 9:00 p.m. on 12 June 2013, after Cox had gone to bed, the police knocked on her door and asked to speak with Littlefield. Cox testified that "a lot of craziness" ensued, and that someone from "Child Protective Services" was with the police. She testified: "I know [C.] spoke with the Child Protective Service worker because [Littlefield] had told [C.] . . . that [Wyatt] had, like, physically abused her. And [C.] thought that Child Protective Services should know that[,]" "so [C.] talked to [the social worker] about that."[8] Cox said that the word "rape" was brought up at some time in the conversations with the police and the social worker. Cox said she believed the reason Littlefield was taken away was because she had been reported as abandoned. Cox testified that after Littlefield had left with the police, she came back in the house and told Cox, " 'I'll get all of this straightened out, and I'll be back over tomorrow.' "

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7. Again, we must presume Cox was not being truthful in her testimony concerning Littlefield's state of mind.

8. At Pickard's plea hearing, the State, in its recitation of the factual basis for the plea, told the trial court: "[Littlefield] denied to [Wyatt] that anything had happened and seemed apprehensive about her mother . . . finding out. *At least one of the people that reported through DSS indicated that they believed that the reason for that was because it was consensual on her part and she didn't want her mom to know that, you know, that had occurred, and they referenced some – what they believed to be some tension between her and her mother[.]*" (Emphasis added).

Although Cox had testified that she didn't remember "anything in particular" about Littlefield's demeanor, and that she had hardly seen Littlefield that day, she subsequently testified that Littlefield "did tell me that she thought that [Pickard] had slipped something in her drink." When Cox asked Littlefield why Pickard would have done that, Littlefield said, " 'I don't know.' " Cox testified that the following conversation ensued:

> And I said, "You know, do you feel weird? Are you okay?" And she goes, "No, I'm fine." I said, "I think we need to call" – I said, "Maybe – should we call your mom?" You know, "Is this – do we need to call your mom? I mean, are you – what's happened here?" And she said, "No." She goes, "I don't think it's anything. He probably didn't. It's" – you know. And then she just kept backtracking on it. And then I just let it go. She said, "Well, I'm going to take a shower." I said, "Okay."

Cox spoke with Pickard on the phone after he had been arrested, but he did not tell her that anything sexual had occurred between him and Littlefield. When Cox told Pickard the word "rape" had been mentioned when the police took Littlefield away, he replied: " '[Littlefield] did tell me that she was raped by an uncle.' He said, 'Maybe that's it. Maybe that's why they want to speak with me.' " Pickard eventually told Cox that he had "kissed" Littlefield, and "made out a little bit[.]" Cox was asked who she blamed for Pickard's conviction and she replied that "at that point" she "didn't know what to think[,]" but that Pickard "did not make good decisions when he was drinking." She further testified that Littlefield "acted very grown," that she "came off as more – as an adult, you know." When asked if she felt "as though [Littlefield] tempted [Pickard] into a situation that he got caught up in," Cox replied: "I feel that, yes, he – that that's part of what happened, yes."

Littlefield's attorney asked Cox:

> [W]ouldn't you want a heads up from [] Wyatt if the situation had been reversed and [Littlefield] had a brother that was drinking like that and having those kind of problems and getting angry when drunk? Wouldn't you have wanted a, "by the way, there's a – I just want to give you a heads up, my son is here and he's got a drinking problem. So you can decide yourself if you want to put your daughter in that situation?" Wouldn't you have wanted that?

Cox agreed that she would have wanted that.

Cox further agreed that when some men get drunk they are more likely to act out sexually and do things they might not otherwise do. Cox was asked to respond to the statement "and you know that alcohol just flat out feeds that. It's a known risk, isn't it?" She answered "Yes." Cox stated that she was not fully aware of how much Pickard was drinking at that particular point in time because he had just been invited to move back into her house.

Littlefield initiated an action against Pickard and Cox in Guilford County on 13 June 2016 (the "Guilford Action"). Relevant to this appeal, Littlefield's sole claim against Cox was negligent infliction of emotional distress ("NIED"), based upon Cox's alleged failure to take reasonable actions to protect Littlefield from, and support Littlefield after, the events leading up to her sexual assault by Pickard, the sexual assault itself, and the events following the assault. Littlefield alleged that the events resulted in "severe emotional distress," which required "hospitalization" and "extensive physical and psychological treatment[.]" Farm Bureau, pursuant to the "Homeowners Policy" ("the policy") it had issued to Cox, initially defended Cox and Pickard in the Guilford Action.[9] However, Farm Bureau initiated the present action by filing a "Complaint for Declaratory Relief" in Wake County on 10 February 2017. In its request for a declaratory judgment, Farm Bureau admitted that Littlefield had been "sexually assaulted" by Pickard in Cox's home on 11 or 12 June 2013, but argued that pursuant to the terms of the policy, including certain express exclusions from coverage, it had no "duty to defend or indemnify" Pickard or Cox in the Guilford Action. Farm Bureau therefore requested the trial court enter a judgment declaring that, pursuant to the policy, Farm Bureau had no obligations to Pickard or Cox related to the events of 11 and 12 June 2013—including no duty to defend or indemnify for any of Littlefield's claims.

Farm Bureau filed a "Motion for Summary Judgment" on 24 July 2017, arguing that, as a matter of law, it had no duty to defend or indemnify either Pickard or Cox under the policy. Farm Bureau's motion was heard 28 August 2017, and summary judgment in favor of Farm Bureau was granted by order entered 12 September 2017. By its 12 September 2017 order, the trial court ruled that, pursuant to the terms of the policy, Farm Bureau had no duty to defend or indemnify Pickard or Cox in the Guilford Action. Littlefield appeals.

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9. There is no dispute that the policy was in effect when the events relevant to the present case occurred.

II. Standard of Review

Although this is a declaratory judgment action, in "an action for declaratory judgment[] . . . decided by summary judgment, [this Court] appl[ies] the standard of review applicable to summary judgment." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Paschal*, 231 N.C. App. 558, 563, 752 S.E.2d 775, 779 (2014). "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." *Integon Nat'l Ins. Co. v. Helping Hands Specialized Transp., Inc.*, 233 N.C. App. 652, 654, 758 S.E.2d 27, 30 (2014) (citations and quotation marks omitted). "[S]ummary judgment is an appropriate procedure for the resolution of [] declaratory judgment action[s]" involving insurance coverage *if "none of [the] factual issues are material to the issue of whether [the] policy of insurance provides coverage [for the alleged] liability.*" *Id.* (citations omitted) (emphasis added).

> "On a motion for summary judgment the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial." " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' "

Austin, 224 N.C. App. at 408, 742 S.E.2d at 540–41 (citations omitted); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986) ("Only those pleadings and other materials that have been considered by the trial court for purposes of summary judgment and that appear in the record on appeal are subject to appellate review.").

Although Farm Bureau argues that it has neither the duty to defend nor indemnify Cox, our review on summary judgment is limited to whether Farm Bureau has a duty to defend Cox—review of the duty to indemnify is appropriate *after* the facts have been determined at trial. *Wilkins v. American Motorists Ins. Co.*, 97 N.C. App. 266, 269, 388 S.E.2d 191, 193 (1990). The trial court in the present case ruled that Farm Bureau had no duty to defend Cox against Littlefield's NIED claim.[10]

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10. Littlefield concedes on appeal that her claims against Pickard are excluded from coverage, and therefore no duty to defend can exist with respect to these claims. The only remaining claim is Littlefield's NIED claim against Cox.

> In determining whether an insurer has a duty to defend the underlying lawsuit, "our courts employ the so-called 'comparison test.' " That test requires us to read the pleadings in the underlying suit side-by-side with the insurance policy to determine whether the alleged injuries are covered or excluded.
>
> An insurer is excused from its duty to defend only "if the facts [alleged in the pleadings] are not even arguably covered by the policy." Any doubt as to coverage must be resolved in favor of the insured. If the "pleadings allege multiple claims, some of which may be covered by the insurer and some of which may not, *the mere possibility* the insured is liable, and that the potential liability is covered, may suffice to impose a duty to defend."

Pulte Home Corp. v. American S. Ins. Co., 185 N.C. App. 162, 171, 647 S.E.2d 614, 620 (2007) (citations omitted). Our Supreme Court has described the "comparison test" as requiring "reading the policies and *the complaint* 'side-by-side . . . to determine whether the events as alleged are covered or excluded.' [*Waste Management*, 315 N.C.] at 693, 340 S.E.2d at 378." *Harleysville*, 364 N.C. at 6, 692 S.E.2d at 610 (emphasis added). Although our Supreme Court used the word "complaint" in this citation from *Harleysville*, the Court clearly did not intend to limit our review to the actual third-party complaint itself—and thereby overrule *Pulte*, *Waste Management*, and plenary additional precedent.[11] In *Harleysville*, it appears "complaint" was used to mean the factual basis supporting the relevant third-party claims—*i.e.* the pleadings, depositions, answers to interrogatories, and other documents—that were properly before the trial court on summary judgment. *See Austin*, 224 N.C. App. at 408, 742 S.E.2d at 540–41. In fact, the *Harleysville* Court cited to the following language from *Waste Management*:[12]

> In order to determine whether [the alleged acts] are covered by the provisions of [the] liability insurance . . ., the policy provisions must be analyzed, then *compared with the events as alleged*. This is widely known as the "comparison test": the *pleadings* are read side-by-side with the policy to determine whether *the events as alleged* are

11. We raise this issue because use of the above language from *Harleysville* out of context could result in application of an incorrect standard.

12. *Harleysville*, 364 N.C. at 6, 692 S.E.2d at 610.

> covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured.

Waste Management, 315 N.C. at 693, 340 S.E.2d at 378 (citations omitted) (emphasis added). Further, the Court in *Waste Management* held: "Resolution of this issue [duty to defend] involves construing the language of the coverage, its exclusions and exceptions, and determining whether *events as alleged in the pleadings and papers before the court* are covered by the policies." *Id.* at 691, 340 S.E.2d at 377; *see also Id.* at 690, 340 S.E.2d at 377 ("Only those pleadings and other materials that have been considered by the trial court for purposes of summary judgment and that appear in the record on appeal are subject to appellate review."); *Id.* at 692, 340 S.E.2d at 378 (our Supreme Court, in conducting the "comparison test," considered "three third-party complaints and a deposition" as well as the fact that "counsel for [the insurer] said in response to our question during oral argument that it had denied the allegations in the complaints"); *and Harleysville*, 364 N.C. at 6–7, 692 S.E.2d at 610-11 (citing cases in support).

In fact, our review is not always limited to the allegations presented to the trial court: "Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage." *Waste Management*, 315 N.C. at 691, 340 S.E.2d at 377 (citation omitted); *see also Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 280, 708 S.E.2d 138, 145–46 (2011) (citations omitted) ("[A]ffidavits filed by the plaintiff explaining what actually occurred during an accident—contrary to allegations in the underlying complaint—were 'relevant to the determination of defendant's duty to defend.' Since *Harleysville* did not overrule this portion of *Waste Management* . . . we remain bound by this authority."). However, our Supreme Court has clarified that the reviewing court is not to consider *hypothetical* facts in this analysis, only those facts actually alleged in the pleadings. *Harleysville*, 364 N.C. at 7, 692 S.E.2d at 611.

Therefore, we review the facts as alleged in the pleadings, depositions, and other documents properly presented to the trial court, alongside the provisions of the policy, in order to determine whether the policy requires Farm Bureau to defend Cox against Littlefield's NIED claim. Our review of the factual allegations is done in the light most favorable to Littlefield, as the non-moving party, *Austin*, 224 N.C. App. at 408, 742 S.E.2d at 540–41, and any doubts or ambiguities raised by the policy must be decided in favor of coverage—including the duty to defend.

Wilkins, 97 N.C. App. at 272, 388 S.E.2d at 195; *see also Harleysville*, 364 N.C. at 7, 692 S.E.2d at 610 ("the facts as alleged . . . are to be taken as true and compared to the language of the insurance policy").

III. Analysis

As noted above, the sole question before us is whether Farm Bureau has a duty to defend Cox against Littlefield's claim for NIED. We hold that it does.

A. *General Liability Coverage*

We must first determine whether Littlefield's injury is covered by the general liability section of the policy—Section II. Pursuant to the "Conditions" provisions of Section II, the policy "applies separately to each 'insured[.]' This condition will not increase our limit of liability for any one "occurrence[.]" The general liability provision of Section II of the policy states in relevant part:

> **A. Coverage E – Personal Liability**
>
> If a claim is made or a suit is brought against an "**insured**" for damages because of "**bodily injury**" . . . caused by an "**occurrence**" to which this coverage applies, we will:
>
> . . . .
>
> 2. *Provide a defense* at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. (Emphasis added).

There is no dispute that Cox's house was an insured location under the policy, nor that both Cox and Pickard were "insured" persons. Therefore, under the policy, Farm Bureau has a general "duty to defend" if Cox's alleged acts constituted an "occurrence" that caused "bodily injury" to Littlefield. "Bodily injury" is defined in the policy as "bodily harm, sickness or disease, including required care[.]"[13] In Littlefield's complaint, she alleges that Cox's negligent acts caused Littlefield "to suffer severe emotional distress including hospitalization, extensive physical and psychological treatment, medical bills, pain and suffering, both physical and mental and permanent injury[.]" We hold that Littlefield's allegations are sufficient to allege a "bodily injury" as

13. We note that in its brief, Farm Bureau limits its argument that no "occurrence" was properly alleged to the claims against Pickard, and does not argue that Cox's acts did not constitute an "occurrence" under the policy.

defined by the policy. *See, e.g.*, *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Phillips*, __ N.C. App. __, __, 805 S.E.2d 362, 366 (2017), *disc. review denied*, 370 N.C. 580, 809 S.E.2d 594 (2018).

Relevant to this appeal, the policy defines "occurrence" as "an accident . . . which results . . . in . . . 'bodily injury[.]' " Although the policy does not define "accident," for purposes of liability coverage, our Supreme Court "has defined 'accident' as 'an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty.' " *Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379 (citation omitted). When an insurance policy that does not define "accident" includes an exclusion for acts by an insured that were "expected or intended," our analysis does not materially change—because we must determine that an alleged "bodily injury" was "unexpected or unintended" by the insured:

> [I]n determining whether . . . alleged injuries were caused by an "occurrence," the focus should be on whether [the] damages were unexpected and unintended. In other words, we should not focus on the nature of [the insured's] alleged . . . acts of negligence in determining whether [the] alleged damages were caused by an "occurrence."

Davis v. Dibartolo, 176 N.C. App. 142, 148, 625 S.E.2d 877, 882 (2006); *see also id.* at 146–48, 625 S.E.2d at 881–82. " 'The ultimate focus is on the *injury*, i.e., whether it was expected or intended, not upon the act and whether it was intended. Even intentional acts can trigger a duty to defend, so long as the injury was "not intentional or substantially certain to be the result of the intentional act." ' " *Id.* at 148, 625 S.E.2d at 881–82 (citation omitted).

Littlefield's allegations, taken as true, would support a finding that Cox committed acts of negligence on the date in question; that Cox's negligence was a proximate cause of "bodily injury" to Littlefield; and that the injury to Littlefield was " 'an unforeseen event, occurring without the will or design of' " Cox. *Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379 (citation omitted). "Additionally, even if we were unable to conclusively determine whether [Littlefield's] damages were caused by an 'accident,' we are required to construe any ambiguities within an insurance policy in favor of the insured." *Davis*, 176 N.C. App. at 150, 625 S.E.2d at 883 (citations omitted). We hold that Littlefield's alleged "bodily injury" was the result of a properly alleged "occurrence," and therefore was covered by the general liability provisions of the policy.

B. *Exclusions*

Although we have held that, under the general liability provisions of the policy, Farm Bureau would have a duty to defend Littlefield's NIED claim, the policy also includes specific "exclusions" from coverage that Farm Bureau argues apply to Littlefield's claim. Specifically, Farm Bureau contends that the "sexual molestation" exclusion and the "expected or intended injury" exclusion each serve to defeat any duty to defend in the present case. As we discussed above in the "General Liability" section of this opinion, this Court has held that, when "accident" is not defined in an insurance policy, an "expected or intended injury" exclusion is considered in the same analysis in which we determine whether the alleged facts are sufficient to allege an "occurrence" under the policy. *See Davis*, 176 N.C. App. at 146–48, 625 S.E.2d at 881–82. In *Davis*, relying on *McCoy v. Coker*, 174 N.C. App. 311, 620 S.E.2d 691 (2005), and other precedent, this Court conducted a thorough analysis of insurance policy language in all relevant respects identical to that in the policy currently before us—including an "expected or intended" exclusion from the general liability coverage. *Davis*, 176 N.C. App. at 145–48, 625 S.E.2d at 880–82. Due to the thorough review conducted by this Court in *Davis*, we do not need to repeat that analysis here. *Id.*

As in *Davis* and *McCoy*, the relevant language in the policy provides that Farm Bureau will defend an "insured" "[i]f a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' . . . caused by an 'occurrence' to which this coverage applies[.]" *See Davis*, 176 N.C. App. at 145, 625 S.E.2d at 880; *McCoy*, 174 N.C. App. at 314, 620 S.E.2d at 694. Just as in *Davis* and *McCoy*, the policy in the present case covers damages for "bodily injury" caused by an "occurrence," which the policy defines as "an accident." *See Davis*, 176 N.C. App. at 145-46, 625 S.E.2d at 881; *McCoy*, 174 N.C. App. at 314–15, 620 S.E.2d at 694.[14] Just as in *Davis* and *McCoy*, "accident" is not defined in the policy, so we apply its regular meaning as set forth in prior appellate opinions. *See Davis*, 176 N.C. App. at 146, 625 S.E.2d at 880; *McCoy*, 174 N.C. App. at 315, 620 S.E.2d at 694. Just as in *Davis* and *McCoy*, the policy does not contain the following italicized language within its definition of "occurrence:" "[W]hich results in bodily injury . . . *neither expected nor intended from the standpoint of the insured*[.]" *Davis*, 176 N.C. App. at 147, 625 S.E.2d at 881 (citation and quotation marks omitted) (emphasis added). However, just as in *Davis* and *McCoy*, the policy

14. The insurance policy in *McCoy* uses the term "event" instead of "occurrence," but these terms are synonymous as defined in all three insurance policies.

does include an "expected or intended" exclusion that "exclude[s] from coverage '[b]odily injury' . . . expected or intended from the standpoint of any insured." *See Davis*, 176 N.C. App. at 147, 625 S.E.2d at 881 (citation and quotation marks omitted).

This Court in *Davis*, relying on *McCoy* and other precedent, held, based upon the insurance policy as written and described above, that the "expected or intended" exclusion folded into the definition of "occurrence" such that, if the alleged facts constituted an "occurrence" as required by the language of the insurance policy, those alleged facts would necessarily *also* allege an "injury" that was neither "expected" nor "intended" by the insured. *Id.* at 147–48, 625 S.E.2d at 881–82. Therefore, having already conducted the appropriate analysis and held that Littlefield has alleged an "occurrence" pursuant to the policy, we have also necessarily held that her alleged injuries were neither "expected nor intended" by Cox. *Id.* This also means we have held that the "expected or intended" exclusion does not apply in the present case. *Id.* Having determined that the allegations in support of Littlefield's NIED claim are sufficient to demonstrate an "occurrence," and therefore render the "expected or intended" exemption inapplicable in this case, we hold Farm Bureau has a duty to defend pursuant to the terms of the *general personal liability section* of the policy. Therefore, we now limit our review to the "sexual molestation" exclusion.

Farm Bureau argues that it has no duty to defend Cox because the "sexual molestation" exclusion serves to exclude Littlefield's NIED claim from coverage and, therefore, absolve Farm Bureau of any duty to defend Cox against this claim. The sexual molestation exclusion states that the coverages set forth in the general personal liability provisions of the policy "do not apply" to any " '[b]odily injury' . . . arising out of sexual molestation[.]" Farm Bureau contends that Littlefield's "bodily injury" arose *solely* out of Pickard's sexual assault and, therefore, Littlefield's "bodily injury" cannot be the basis of any claim requiring Farm Bureau to provide a legal defense under the policy. Because we hold that Littlefield has alleged facts that could constitute an "occurrence" that resulted in "bodily injury" to Littlefield, even if we do not consider any "bodily injury" sustained as a result of Pickard's sexual assault of Littlefield, we hold that the "sexual molestation" exclusion does not relieve Farm Bureau of its duty to defend.

Initially, we address the language "arising out of," which is not defined in the policy. Our Supreme Court has held that when, as in the present case, the term "arising out of" is not defined in the policy, it is "ambiguous" and, therefore, "is one of proximate cause[,]" and that

"when an accident has more than one cause, one of which is covered by an . . . insurance policy and the other which is not, the insurer must provide coverage." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 73-74 (1986) (citations omitted). In other words, coverage will only be denied if the *sole* proximate cause of the alleged injury is the specifically excluded event or action—in the present case, "sexual molestation." *Id.* at 546-47, 350 S.E.2d at 73-74. When "arising out of" is left undefined by the policy, the analysis for whether a "bodily injury" "arises out of" an excluded cause, in a manner that also excludes the duty to defend, *does not change* depending on what the particular excluded cause is—whether it is "sexual molestation," "use of an automobile," or any other cause—a "bodily injury" will be found to have "arisen out of" an excluded cause, such that an insurer has no duty to defend, if the excluded cause is the *sole* proximate cause of the bodily injury alleged.

Our Supreme Court has identified two controlling principles in determining whether exclusionary provisions in an insurance policy should apply:

> (1) ambiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries *so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability.* Stating the second principle in reverse, *the sources of liability which are excluded* from homeowners policy coverage *must be the sole cause* of the injury in order to exclude coverage under the policy.

Id. at 546, 350 S.E.2d at 73 (emphasis added); *see also Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88–89, 637 S.E.2d 528, 530-31 (2006). Therefore, we must determine whether, taken as true and construed in favor of coverage, Littlefield's allegations could allow a determination that Cox was negligent, and that Cox's negligence was a concurrent proximate cause of Littlefield's "severe emotional distress."[15] *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (NIED is proven when "a plaintiff has established that he or she has suffered severe emotional distress as a proximate [and foreseeable] result of the defendant's negligence"). When making this determination, we

15. We presume that the sexual assault itself was one proximate cause of Littlefield's alleged "bodily injury."

must strictly construe this standard of causation against Farm Bureau and in favor of coverage. We must also strictly construe any ambiguous terms or provisions in favor of coverage. *State Capital*, 318 N.C. at 546-47, 350 S.E.2d at 73-74; *see also Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981) ("[e]xclusions from and exceptions to undertakings by [an insurance company] are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy").

We hold that, even excluding the sexual assault, the allegations in support of the NIED claim were sufficient to survive summary judgment on the issue of whether Cox's negligence constituted an "occurrence" that resulted in "bodily injury" to Littlefield. This distinction is important because Farm Bureau relies heavily on this Court's opinion in *Phillips*, which held that all the claims of the insured for injuries resulting from the sexual molestation of his daughter, including negligence claims against non-perpetrator defendants for failing to prevent the sexual molestation, "ar[o]se out of the sexual molestation of his daughter and [we]re not included under the definition of a 'bodily injury' as defined under the policy." *Phillips*, __ N.C. App. at __, 805 S.E.2d at 367. Farm Bureau argues that because "Littlefield's claims against . . . Cox are all based entirely on the admitted fact that she was sexually molested by [] Pickard[,]" *Phillips* requires this Court to hold that the NIED claim against Cox *solely* alleges "bodily injury" "arising out of sexual molestation" such that the "sexual molestation" exclusion bars recovery. In reaching its conclusion in *Phillips*, this Court did not appear to rely on the "proximate cause" standard of construction set forth in *State Capital* and its progeny—instead looking to foreign jurisdictions and applying what it termed "but for" causation. The question that arises from the reasoning in *Phillips* is whether—construing the language "arising out of" when that language is not defined in an insurance policy—we are compelled to treat the "but for" language in *Phillips* as intending to introduce a new and different standard of causation from that set forth in *State Capital*. *See State Capital*, 318 N.C. at 546-47, 350 S.E.2d at 73-74.

In the event a holding in a matter determined by this Court is in conflict with an opinion of our Supreme Court, the Supreme Court's opinion must control. *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014). However, because of the facts in this case, we are not required to determine whether *Phillips* conflicts with *State Capital* in order to decide the case before us.

In *Phillips*, this Court held, on the facts before it:

> Defendant John Doe's claims are *entirely based upon the sexual molestation of his daughter* and would not exist "*but for*" the "molestation of a person[,]" his daughter. Whatever name, title, or label defendant John Doe seeks to assign to his claims, they arise out of the sexual molestation of his daughter and are not included under the definition of a "bodily injury" as defined under the policy.

Phillips, __ N.C. App. at __, 805 S.E.2d at 367 (citation omitted) (emphasis added). In light of this holding concerning the specific allegations before it, this Court's disposition in *Phillips* would have almost certainly been the same whether it applied a true "but for" analysis, or it was merely using the "but for" language to mean "proximate cause" as set forth in *State Capital*.

In the present case, even if we were to apply a straightforward "but for" analysis to the facts before us, we would still reach the same result. Events that *precede* another event cannot be considered the direct result of the later occurring event. Littlefield alleges facts *preceding* the sexual assault that could constitute a proximate cause of her "bodily injury." Taking Littlefield's allegations as true, we cannot say that Pickard's drugging and subsequent terrorization of Littlefield, *prior to* his rape of Littlefield in his family's laundry room, would not have occurred "*but for*" his rape of Littlefield. These events *had already occurred* when Littlefield was raped. Therefore, any alleged "bodily injury" that Littlefield suffered as a result of Cox's alleged negligence in failing to properly supervise Littlefield, in the time period leading up to the sexual assault, cannot constitute a "but for" result of any "sexual molestation."[16] *See Phillips*, __ N.C. App. at __, 805 S.E.2d at 367.

That Farm Bureau might conceivably argue the events leading up to the sexual assault were all part of Pickard's ultimate plan to sexually assault Littlefield does not change our analysis. We need not address the legal questions that might arise from such an argument, since the argument would be based upon factual determinations and issues of credibility that are inappropriate to consider on summary judgment review. Because these alleged facts precede the "sexual molestation"

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16. We specifically address the events preceding the rape and the events following the rape separately, and hold that each set of events independently supplies sufficient allegations of an "occurrence" resulting in "bodily injury."

of Littlefield, the relevant analysis and holding in *Phillips* do not apply. *Phillips* could not be binding precedent for these non-"sexual molestation" allegations, even absent any conflict between *Phillips* and *State Capital*. Therefore, we can apply the standard of causation as set forth in *State Capital*—without the need to consider how *Phillips* might impact an analysis of other allegations that would not have occurred "but for" the sexual assault.

However, we also consider events *following* Pickard's rape of Littlefield in order to further support our ultimate decision in this opinion. Although we hold that the alleged events preceding the rape were sufficient to survive summary judgment on the issue of whether Cox's negligence constituted an "occurrence" that resulted in "bodily injury" to Littlefield, we recognize that were we to apply *Phillips* to the events following the rape, and read *Phillips* as requiring strict "but for" causation when applying the "comparison test," we might reach a different conclusion—but only with regard to our analysis of Cox's alleged negligence subsequent to the rape. To the extent, if any, that *Phillips* purports to require application of a causation standard different than the "proximate cause" standard set forth in *State Capital*, we must reject that proposed standard and follow our Supreme Court's holdings in *State Capital* and its progeny.

The trial court was presented with the following allegations, which we must accept as true: Littlefield was a fifteen year-old girl brought up in a religious family with very strict rules. She had never had sexual relations, had never consumed alcohol or taken any illegal drugs, and had never spent the night outside of the care and supervision of a family member. Cox fully understood that Littlefield was a young, sheltered girl. Wyatt explained all this to Cox, and clearly explained that Wyatt would only allow Littlefield to stay overnight at Cox's house if Cox agreed that Wyatt's rules would be enforced. Cox accepted this duty freely and reassured both Wyatt and Littlefield that Wyatt's rules would be followed, and that Littlefield would be closely supervised at all times. Littlefield went to Cox's house under the reasonable assumption that Cox would follow through with her assurances, and that Cox's house would be a safe place to spend the night.

Cox not only ignored most of the rules she had specifically agreed to enforce, she also knew, at the time she had made her reassurances, that her adult son, Pickard, had recently been allowed to resume living at the house after a long "banishment." Cox knew that Pickard was an alcoholic who got belligerent and angry when he was drinking, that he drank frequently, and that he had a tendency to do whatever he

pleased—in defiance of Cox's attempts to control his behavior. Despite this knowledge, on the night of 11 June 2013, Cox left the vulnerable fifteen-year-old Littlefield unsupervised with the alcoholic and unpredictable twenty-year-old Pickard. Cox knew or should have known that Pickard would likely consume alcohol that night, and act consistently with his past behavior when under the influence.

As a direct consequence of Cox's abandonment of her duties to Littlefield, Littlefield was left alone with Pickard, and Pickard was able to drug Littlefield, which made Littlefield feel physically ill, frightened, and unable to walk. Littlefield then endured the events we have described in great detail in the "facts" section of this opinion—events which "terrified" her in general, as well as in response to specific conduct by Pickard. Cox ignored Littlefield's repeated "screamed" calls for help, even though Cox could hear Littlefield. Because Cox provided no supervision or assistance, Littlefield eventually ended up hiding on the back porch as Pickard continued to physically assault his girlfriend inside the house, in a position that blocked Littlefield's pathway to C.'s room. She then heard Pickard order his girlfriend to go to his bedroom and wait for him there, and realized that she was going to be alone and in close proximity to this drunk, violent, and out-of-control man who had drugged her. She then realized, with increasing terror, that Pickard knew where she was "hiding," and was coming toward her. Littlefield—while mentally and physically impaired—was trapped and alone with Pickard, and she knew that none of her previous screams for help had been effective. Pickard then made "disgusting" sexual comments to Littlefield, and she therefore knew she was confronted not only with a drunk and violent man, but one who had expressed a sexual interest in her. Finally, feeling terrified, abandoned, and alone, Littlefield could do nothing as Pickard advanced toward her, grabbed her arm, and pulled her into the laundry room.

If the facts as alleged above, leading up to the sexual assault, are taken as true, a trier of fact could reasonably determine that Cox's negligence was a proximate cause of Littlefield's emotional distress even before Pickard sexually assaulted her. In other words, Cox's negligence prior to the sexual assault was a non-"sexual molestation" proximate cause of Littlefield's "bodily injury," *State Capital*, 318 N.C. at 546, 350 S.E.2d at 74, and, therefore, Pickard's "sexual molestation" of Littlefield was not the sole proximate cause of her emotional distress. *See Builders Mutual*, 361 N.C. at 89, 637 S.E.2d at 530. Because Cox's alleged negligence could be found to be a *separate* proximate cause of Littlefield's alleged "bodily injury," the sexual molestation exclusion does not absolve Farm Bureau from its duty to defend Cox.

Further, alleged facts concerning Cox's actions *subsequent to* the sexual assault also support this holding. A review of the relevant testimony, as presented above in detail, are also sufficient to support a finding that Cox's alleged failure to respond to Littlefield with any semblance of concern or care—when Littlefield informed her of Pickard's actions, including the sexual assault—was also a proximate cause of Littlefield's injuries independent of the sexual assault itself. Cox's alleged abuse of Littlefield's trust in her, as well as Cox's alleged breach of her continuing duty to protect Littlefield, were the result of decisions Cox made subsequent to the sexual assault. She could have made different choices. The injuries that allegedly resulted from Cox's actions were not the same as the injuries that resulted from the sexual assault itself. In fact, it is not clear that Cox initially believed that any sexual contact between Pickard and Littlefield had occurred, and it is not at all clear Cox ever believed that Pickard had forcefully raped Littlefield.[17] It is Cox's dismissal of Littlefield's allegations—in whole or in part—that is at the core of events that allegedly followed and caused Littlefield additional and independent emotional distress.

Cox could have chosen to support Littlefield, and counseled C. to do the same. Instead, it is alleged that Cox "condescended" to Littlefield; told her that nobody would believe her; told her she should forget the assault and not tell anyone; insinuated that either Littlefield was to blame, or that insuring that Pickard not have to face any consequences was more important than Littlefield's well-being; and encouraged C.—through her actions and inaction, if not expressly—to bully Littlefield at school—thereby causing other schoolmates to follow suit. The bullying Littlefield allegedly endured at school factors significantly in her alleged emotional distress, which manifested in self-mutilation and suicide attempts. These independent actions by Cox could also be deemed sufficient by a trier of fact to show that Cox's actions following the sexual assault constituted an "occurrence" that was a proximate cause of Littlefield's emotional distress.

When we compare the alleged facts—taken as true and reviewed in the light most favorable to Littlefield—side-by-side with the sexual molestation exclusion, and the policy as a whole, we hold that the sexual molestation exclusion does not serve to absolve Farm Bureau from

17. "Sexual molestation" is not defined in the policy. A jury could determine that, as Pickard contended, his conduct with Littlefield was "consensual" except for the age difference involved. Because "sexual molestation" is not defined, it is conceivable a jury could determine that no "sexual molestation" occurred as meant under the policy, but that Cox's actions, alone, caused Littlefield emotional distress. *I.e.*, that Cox's actions were the *sole* proximate cause of Littlefield's "bodily injury."

its duty to defend Cox from Littlefield's NIED claim. Farm Bureau's argument is predicated on its contention that no trier of fact could determine from the alleged facts that any of Littlefield's emotional distress was the result of *any conduct other than Pickard's sexual assault*. We hold that, even excluding the sexual assault, there are plenary factual allegations that could support a determination that Cox's actions and inaction, on both 11 and 12 June 2013, were a proximate cause of Littlefield's emotional distress. Further, to the extent that our application of the "comparison test" results in any doubt concerning Farm Bureau's duty to defend Cox, "[a]ny doubt as to coverage must be resolved in favor of the insured." *Pulte*, 185 N.C. App. at 171, 647 S.E.2d at 620 (citation omitted). Because the "factual issues are material to the issue of whether [the] policy of insurance provides coverage [for the alleged] liability[,]" summary judgment was not "an appropriate procedure for the resolution of this declaratory judgment action" based upon the "sexual molestation" exclusion. *Integon*, 233 N.C. App. at 654, 758 S.E.2d at 30 (citations omitted).

C. *Conclusion*

Having held that the general personal liability provisions of the policy include a duty for Farm Bureau to defend Cox against Littlefield's NIED claim, and that none of the exclusions in the policy apply on the facts as alleged, we reverse the trial court's grant of summary judgment in favor of Farm Bureau on this claim, and order Farm Bureau to defend Cox should Littlefield pursue her NIED claim against Cox. We affirm the grant of summary judgment in favor of Farm Bureau for the claims against Pickard, as Littlefield has abandoned any arguments related to the grant of summary judgment on these claims.

Although Littlefield makes a number of additional arguments on appeal, because we have held that Farm Bureau has a duty to defend Cox against Littlefield's NIED claim, we need not address her additional arguments beyond the following: Littlefield also appeals from the trial court's 12 September 2017 order denying her motion "to set aside the entries of default against Crystal Hamner Cox and Joseph Cain Pickard." However, in light of our holdings above, Littlefield cannot demonstrate any prejudice that results from entry of the 12 September 2017 order, and we do not consider the merits of her argument.

AFFIRMED IN PART; REVERSED IN PART.

Judges CALABRIA and DIETZ concur in result only.

Judge Calabria concurred in result only prior to 31 December 2018.

PROPST BROS. DISTRIBS., INC. v. SHREE KAMNATH CORP.

[263 N.C. App. 454 (2019)]

PROPST BROS. DISTS., INC., PLAINTIFF
v.
SHREE KAMNATH CORP., DEFENDANT, AND
MCDONALD'S CORP., THIRD PARTY INTERVENOR

No. COA18-519

Filed 2 January 2019

1. Real Property—covenants—restrictive—strict construction—sale of gasoline

A restrictive covenant—that prohibited the sale of motor vehicle fuel from a lot (Lot 3) so long as the grantor or its grantee sold motor vehicle fuel on a neighboring lot (Lot 1)—did not prohibit Lot 3's owner from constructing a driveway and parking spaces on Lot 3 to service the "QuickTrip" convenience store and gas station located on another neighboring lot (Lot 2). Restrictive covenants are strictly construed such that any ambiguity is resolved in favor of the unrestrained use of land, and the plain language of the covenant indicated no intent to restrict anything other than the sale of motor vehicle fuel.

2. Real Property—covenants—restrictive—strict construction—food services

A restrictive covenant—that prohibited the operation of a "drive-thru type food service restaurant" on a lot (Lot 3) so long as the grantor or its successors operated a "drive-thru type food service restaurant" on a neighboring lot (Lot 1)—did not prohibit Lot 3's owner from constructing a driveway and parking spaces on Lot 3 to service the "QuickTrip" convenience store and gas station located on another neighboring lot (Lot 2). Even assuming that the driveway and parking spaces on Lot 3 would be part of the QuickTrip located on Lot 2 for purposes of the restrictive covenant, the covenant's language was too ambiguous to restrict the QuickTrip's proposed food service operation, which involved customers exiting their vehicles to use touch screens to order foods. Restrictive covenants are strictly construed such that any ambiguity is resolved in favor of the unrestrained use of land, and the plain language of the covenant indicated no intent to restrict anything other than the sale of motor vehicle fuel.

Appeals by Defendant and Third Party Intervenor from declaratory judgment entered 5 February 2018 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 15 October 2018.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Kip D. Nelson, for Plaintiff-Appellee.

Helms Robison Lee & Bennett, P.A., by R. Kenneth Helms, Jr. and Stephen M. Bennett, for Defendant-Appellant.

Womble Bond Dickinson (US) LLP, by Mark P. Henriques and Michael A. Ingersoll, for Third Party Intervenor.

McGEE, Chief Judge.

I. Factual and Procedural History

Central Distributing Company sold a 6.31-acre tract of real property (the "Tract"), located in Cabarrus County, to Catawba Oil Company, Inc. ("Catawba Oil"), on 8 June 1990. The Tract was located directly northeast of the intersection of North Carolina Highway 73 and Interstate 85. Catawba Oil subdivided the Tract in February 1998, which resulted in three separate lots: Lot 1, consisting of 3.06 acres; Lot 2, consisting of 2.55 acres; and Lot 3, consisting of 0.67 acres. The Tract is bisected by a non-exclusive private right-of-way granted to a landowner whose property borders the north end of the Tract. Lots 2 and 3 are on the western side of the right-of-way, while Lot 1 is on the eastern side. Lot 3 is adjacent to Lot 2, and makes up the easterly part of the southern border of Lot 2. The southern border of Lot 3 adjoins Highway 73. The 1998 survey of the subdivision of the Tract indicates that Propst Brothers Distributors, Inc. ("Propst") owned property adjoining the western border of Lot 3 and the southern border of Lot 2 at that time.

Catawba Oil conveyed the entirety of Lot 3 to Hillcrest Foods, Inc. ("Hillcrest") on 23 February 1998. The general warranty deed conveying Lot 3 to Hillcrest included two restrictive covenants (the "Deed Restrictions"):

> Grantee, or Waffle House, Inc., . . . or any subsequent grantee of theirs may not operate a drive-thru type food service restaurant on the real property granted by this deed so long as Grantor, or its successors, operates a drive-thru type food service restaurant in its convenience store on the tract adjacent to this property [Lot 1].

> No motor vehicle fuels may be sold or disposed from this real property so long as Grantor or any Grantee of Grantor sells or disposes motor vehicle fuels on [Lot 1.[1]]

At the time Lot 3 was conveyed to Hillcrest, Catawba Oil was operating a drive-thru type restaurant in a convenience store and selling motor vehicle fuels on Lot 1. A Waffle House was built on Lot 3 and operated for a number of years. Hillcrest then conveyed Lot 3 to the North Carolina Department of Transportation ("DOT") on 2 October 2013, and a portion of the southernmost part of Lot 3 was used by DOT for a "new right of way," and a "permanent utility easement for [a] N.C. Highway Project" involving Highway 73 and I-85. At some point in time, the Waffle House building and all related structures were razed.

Catawba Oil conveyed Lot 1 to Shree Kamnath Corp. ("Shree") on 10 March 2015. Shree operates a convenience store that sells motor vehicle fuels and includes a McDonald's Corporation ("McDonald's") restaurant franchise on Lot 1.

Catawba Oil conveyed Lot 2 to Propst on 28 May 2015. Catawba Oil did not add any restrictive covenants to the general warranty deed conveying Lot 2 to Propst. DOT conveyed the remaining portion of Lot 3 to Propst on 13 June 2017—being 0.434 acres that was not used for the "Highway Project." Therefore, at the time of this action, Propst owned all of the Tract on the western side of the private right-of-way. Propst anticipated that development of Lot 2 would involve construction of a "QuickTrips" convenience store and gas station, which might include a "QT Kitchen" ("QT")—a walk-in made-to-order food service business located inside the convenience store.[2] Although the QuickTrips would be located entirely on Lot 2, a portion of Lot 3 would be used for ingress and egress, and include some parking spaces for QuickTrip's use.

Propst filed a complaint for declaratory judgment on 9 August 2017, seeking a declaration that its proposed uses of Lot 3—the construction of a driveway and parking spaces to service the QuickTrip on Lot 2—would not violate the Deed Restrictions. Shree filed an answer and

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1. The wording of the Deed Restrictions would also include Lot 2. However, for the purposes of this appeal we only need to consider Lot 1.

2. Propst's attorney informed the trial court that the exact nature of the development of Lot 2 was uncertain, stating that it was possible that "it could be just a gas station," but if the sale of made-to-order food was included, it would either be a QT, or some other arrangement that required the customer to walk into the convenience store to order and collect the food. For the sake of this appeal, we will assume the development of Lot 2 will involve a QuickTrips that both sells motor vehicle fuels and includes a QT.

counterclaim on 25 September 2017 seeking a declaratory judgment that the Deed Restrictions prohibited Propst's proposed uses of Lot 3. McDonald's alleged that, as a tenant of Lot 1, it had a substantial legal interest in the proceeding, and was allowed to intervene in this action with the consent of Propst and Shree. The matter was heard on 9 October 2017. The trial court entered a declaratory judgment on 5 February 2018, ruling that the Deed Restrictions did not prohibit Propst's proposed uses of Lot 3. Shree and McDonald's appeal.

II. Standard of Review

"Our standard of review of a declaratory judgment is the same as in other cases." *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 596, 632 S.E.2d 563, 571 (2006) (citing N.C. Gen. Stat. § 1-258). "Accordingly, in a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. . . . . We review the trial court's conclusions of law *de novo*." *Id.* at 596–97, 632 S.E.2d at 571 (citations omitted). In the present case, the relevant facts have been stipulated to by Propst, Shree, and McDonald's.

III. Shree's Appeal

[1] Shree's sole argument is that Propst's "proposed use of Lot 3 as access and parking to serve the sale or disposal of motor vehicle fuels on Lot 2 violates the Deed Restrictions" and, therefore, the trial court erred in ruling otherwise in the declaratory judgment. We disagree.

It is undisputed that the Deed Restrictions apply to Lot 3. Therefore, our review is limited to whether the Deed Restrictions prevent the intended use of Lot 3. The Deed Restriction relevant to Shree's appeal reads as follows: "No motor vehicle fuels may be sold or disposed from [Lot 3] so long as Grantor or any Grantee of Grantor sells or disposes motor vehicle fuels on [Lot 1]" (the "Fuel Restriction"). Shree has stipulated that "[t]he intended construction on Lot 3 by Propst [] will only establish parking and egress for Lot 2." Therefore, the intended uses of Lot 3—parking, ingress, and egress—standing alone, do not violate the Fuel Restriction. Propst intends to sell "motor vehicle fuels" on Lot 2; however, Lot 2 is unencumbered by any restrictive covenants relevant to this appeal, and Propst is free to sell motor vehicle fuels on Lot 2.

This Court is ever cognizant that determinations concerning restrictive covenants are fact specific. As our Supreme Court has made clear: "Each case must be determined on its own particular facts." *Long v. Branham*, 271 N.C. 264, 274, 156 S.E.2d 235, 242–43 (1967) (citation

omitted). Shree's argument is that, even though Propst is free to operate a gas station on Lot 2, use of Lot 3 to help facilitate the sale of motor vehicle fuels would violate the Fuel Restriction. Shree states that "the trial court overlooked the purpose of the [Fuel] Restriction[] in favor of an overly strict construction." In support of its argument, Shree relies heavily on three cases from our Supreme Court: *Long*, 271 N.C. 264, 156 S.E.2d 235; *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964); and *Starmount Co. v. Memorial Park*, 233 N.C. 613, 65 S.E.2d 134 (1951).

We first note there are two kinds of restrictive covenants that may encumber real property—"affirmative" and "negative." Our Supreme Court in *Long*, *Realty Company*, and *Starmount*, was considering "affirmative" covenants. In *Long*, the restrictive covenant provided: "[N]o lot in Timbercrest Subdivision 'shall be used *except for* residential purposes[.]' " *Long*, 271 N.C. at 268, 156 S.E.2d at 238 (emphasis added). In other words, the covenant in *Long* "affirmatively" allowed use of the encumbered property for *solely* "residential purposes," and thereby prohibited *any* use of the encumbered property that was *not* for residential purposes. *Id.* When, for example, this Court construes an "affirmative" covenant that restricts use of real property to "residential purposes," use of that encumbered property for any commercial or other non-residential purpose, *even if the encumbered property is used for a residential purpose as well*, would violate the "affirmative" restriction:

> While conceding the drainage system may serve a commercial purpose, [the appellant] argues that since it also serves the residential community by preventing flooding, it should be considered a residential use of the property. We find this argument unconvincing when the plain language of the covenant states: "This property shall be used for residential purposes *only*." (emphasis added). The expression "shall be used for residential purposes only" is not ambiguous. As used in this covenant, the word "only" is synonymous with the word "solely" and is the same as the phrase "and nothing else."

Buie v. High Point Associates Ltd. Partnership, 119 N.C. App. 155, 159, 458 S.E.2d 212, 215 (1995).

Our Supreme Court in *Long* held:

> It is quite clear that the use or grant of a right-of-way across property restricted to residential use to reach property used for business, commercial, or other forbidden enterprises violates the restrictive covenants. Restricted property

> cannot be made to serve a forbidden use even though the enterprise is situated on adjacent or restricted land.

Long, 271 N.C. at 269, 156 S.E.2d at 239 (citations omitted). We expressly disavow Shree's contention, concerning the "affirmative" covenant opinions cited above, that this "line of cases have treated restrictive covenants as barring not just literally listed uses, but also uses that are integrally related. This line of cases demonstrates that when a covenant prohibits a retail business, it prohibits parking for and access to that business as well." Contrary to Shree's assertions, this line of cases stands for the proposition that whether the use of a property encumbered by an "affirmative" covenant is permissible will sometimes be determined by the nature of the use of an adjacent property—*so long as the encumbered property is being used*, *in some relevant manner*, *in service of the adjacent property*. *Id*. A parking lot servicing a business is being used for a commercial purpose; a parking lot that *only* services a *solely* residential development is likely not.[3] "[O]rdinarily the opening or maintenance of a street or a right-of-way 'for the better enjoyment of residential property as such does not violate a covenant restricting the property to residential purposes[.]' " *Riverview Property Owners Assoc. v. Hewett*, 90 N.C. App. 753, 754, 370 S.E.2d 53, 54 (1988) (citation omitted). "[W]hether traveling over a lot restricted to residential purposes in getting to adjacent property violates the restriction *depends upon the circumstances involved*." *Id*. (citation omitted) (emphasis added). *Long*, *Realty Company*, and *Starmount* did not determine that "restrictive covenants" bar "not just literally listed uses, but also uses that are integrally related[,]" because no such determination was necessary to reach the holdings in those opinions. A determination that the use of certain property for a driveway servicing a business is not a residential use of that property—and therefore violates an "affirmative" covenant limiting use of that property to solely residential purposes—is not a determination that the driveway of a business must be treated as if it is the business itself when construing restrictive covenants.

In the present case, the Fuel Restriction is not an "affirmative" covenant. It is a "negative" covenant, because, instead of *mandating* that Lot 3 *only* be used *for* a specific purpose—e.g. "residential purposes only"—it includes a *single prohibited use*—sale of "motor vehicle fuels . . . from [Lot 3]." *See Russell v. Donaldson*, 222 N.C. App. 702, 706, 731 S.E.2d 535, 538 (2012). The Fuel Restriction does not interfere with

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3. Sometimes the grantor's intent, discernable from amendments or other relevant documents, may clearly demonstrate that a more restrictive meaning of "residential purposes" applies to a restrictive covenant. *See Long*, 271 N.C. at 274, 156 S.E.2d at 243.

any other potential uses of Lot 3. Because of these significant differences, this Court has found opinions construing "affirmative" covenants "not sufficiently similar [to opinions construing 'negative' covenants] . . . to be binding authority."[4] *Id.* Pursuant to a plain reading of the Fuel Restriction, every use of Lot 3 *other* than the "sale" or "disposal" of "motor vehicle fuels . . . from [Lot 3]" is permitted. On its face, construction and use of a driveway and parking spaces do not constitute sale of "motor vehicle fuels . . . from [Lot 3]."

However, Shree argues, because the intended uses of the driveway and parking spaces are to service a business that—among other things—sells "motor vehicle fuels," we should consider these intended uses of Lot 3 to be functionally equivalent to the actual sale of "motor vehicle fuels . . . from [Lot 3]." We find *Long*, *Realty Company*, and *Starmount* inapposite, as the Fuel Restriction does not mandate that Lot 3 be used *for* a particular purpose that Propst's proposed use violates.

Shree also cites this Court's opinion in *Charlotte Pavilion Rd. Retail Inv., LLC v. N.C. CVS Pharmacy, LLC*, 238 N.C. App. 10, 767 S.E.2d 105 (2014), that involved a "negative" covenant that stated the encumbered property "shall not 'be used for the purpose of a health and beauty aids store, a drug store, a vitamin store or a pharmacy.' " *Id.* at 13, 767 S.E.2d at 108. This Court explained:

> This covenant must be construed according to the plain ordinary meaning of its words. [Appellant] CVS argues that the restrictive covenant . . . prohibits the construction of a parking lot that would serve Walmart. It is CVS's position that the purpose of the restrictive covenant is to prohibit the construction of a pharmacy on the restricted parcel that would compete with CVS—this includes the prohibition of a parking lot which would serve a prohibited use. CVS notes that because the city of Charlotte's ordinance requires Walmart to provide parking for its customers, parking is integral to the store's operation and therefore falls within the purview of the restrictive covenant.

Id. at 13–14, 767 S.E.2d at 108. However, construing any ambiguities in the restrictive covenant against enforcement, this Court in *Charlotte*

4. Shree attempts to dismiss the relevance of the "affirmative" covenant and "negative" covenant distinction by pointing out that the same rules of construction apply to both. However, the distinction lies not in what rules of construction apply, but in how the prohibited activities are defined, and in how that might impact application of the relevant rules of construction.

Pavilion rejected CVS's argument and held that the restrictive covenant did not prevent the use of the encumbered property as a parking lot in service of the competing Walmart:

> In the instant case, we interpret the restrictive covenant to prohibit exactly what it purports to ban on the face of the restriction—the erection of a *structure* on the . . . tract that operates as a prohibited type of retail store, namely a pharmacy. Thus, a developer may not build a store—four walls and a roof—that constitutes a vitamin store, beauty aid store, or pharmacy. We do not believe that the intent of the grantor . . . was to outlaw the construction of those things which are integral or essential to the *operation* of a retail business. *If such prohibition was intended, the drafter could have said as much by incorporating phrases such as "used for store purposes" or "used for purposes incidental to a store.*" However, *without more*, we conclude the construction of a parking lot and access easement on the restricted property is not a prohibited use.

Id. at 15, 767 S.E.2d at 108–09 (some emphasis added).[5] The rules of construction for restrictive covenants as recognized by our appellate courts compelled the outcome in *Charlotte Pavilion*. "While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land." *Hobby & Son*

5. We recognize that, in *dicta* considering an opinion from Texas, this Court noted the Texas opinion held that a restrictive covenant banning the "*activity*" of operating a business on the encumbered property also banned that property from being used for any "'integral part of the proposed'" business—even when the actual business was located on an adjacent lot. The Texas court further held that a parking lot was such an "integral part" of the prohibited business, and subject to the restrictive covenant. *Id.* at 14-15, 767 S.E.2d at 108 (citation omitted). However, as well as being a non-binding opinion from another jurisdiction, this Court determined that the Texas case was inapposite on its facts—because the restrictive covenant in *Charlotte Pavilion* banned the *physical presence* of a business on the encumbered property, not the *operation of* that business. *Id.* at 15, 767 S.E.2d at 108-09. Shree incorrectly asserts that this Court's discussion of the Texas opinion constituted "accept[ance of] the idea of parking as an integral use to a retail business." Instead, this Court in *Charlotte Pavilion* merely noted that the restrictive covenant at issue could have been drafted in a manner that excluded uses "integral" to the operation of the prohibited business, but was not so drafted. *Id.* We believe whether a parking lot is "integral" to a business, and how that determination will impact the application of a restrictive covenant in a particular case, will depend on the specific facts of that case—including how the restrictive covenant in question was drafted. *Long*, 271 N.C. at 274, 156 S.E.2d at 242-43 (citation omitted) ("Each case must be determined on its own particular facts.").

v. Family Homes, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) (citations omitted). "The rule of strict construction is grounded in sound consideration of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent." *Id.* at 71, 274 S.E.2d at 179 (citations omitted). " 'The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.' " *Russell*, 222 N.C. App. at 705, 731 S.E.2d at 538 (citation omitted).

There was no necessity to read any unwritten intent into the "affirmative" covenants at issue in *Long*, *Realty Company*, *Starmount*, and *Buie* in order to find violations of those covenants. "A restriction of the enjoyment of property must be created in express terms, or by plain and unmistakable implication." *Starmount*, 233 N.C. at 616, 65 S.E.2d at 136 (citation omitted). By contrast, for this Court to hold that the intended use of Lot 3 violated the Fuel Restriction, we would have to read an intent into the Fuel Restriction that does not exist in its plain language. *Russell*, 222 N.C. App. at 705, 731 S.E.2d at 538.

It is correct that "the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long*, 271 N.C. at 268, 156 S.E.2d at 238 (citation omitted). However:

> "Such restrictions *will not be aided or extended by implication or enlarged by construction to affect lands not specifically described*, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. *Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.*"

Id. at 268, 156 S.E.2d at 239 (citation omitted) (emphasis added).

We hold that there is, at a minimum, doubt concerning whether the proposed uses of Lot 3 violate the Fuel Restriction. Even assuming, *arguendo*, the Fuel Restriction can be read as prohibiting Propst's proposed uses of Lot 3, it can also be read as permitting them. Therefore, our rules of construction dictate that we hold in favor of the free use of

Lot 3, and affirm the trial court. *Id.*; *see also Starmount*, 233 N.C. at 616, 65 S.E.2d at 136.

IV. McDonald's Appeal

[2] McDonald's argues "the trial court erred in concluding that [Propst's] proposed development does not violate the Deed Restrictions." We disagree.

The relevant restrictive covenant (the "Restaurant Restriction") states:

> Grantee, or Waffle House, Inc., . . . or any subsequent grantee of theirs may not operate a drive-thru type food service restaurant on [Lot 3] so long as Grantor, or its successors, operates a drive-thru type food service restaurant in its convenience store on [Lot 1].

It is undisputed that Propst is a subsequent grantee of Lot 3, that McDonald's is currently operating "a drive-thru type food service restaurant . . . on [Lot 1,]" that Propst's proposed development will not include a "restaurant . . . with a drive-thru type food service window" on Lot 2 or Lot 3, and that "[t]he purpose of the improvements to Lot 3 shall be an entry and exit drive and limited parking[.]" Propst intends "to improve Lots 2 and 3 such that Lot 3 will provide parking and ingress/egress for the benefit of Lot 2 and a convenience store will be constructed on Lot 2. The convenience store will not have a drive-thru type food service window," but "may use touch screens to sell made-to-order fast foods which are consumed in the car or at home" that will require customers to "exit their vehicle[s] to order and get food prepared and/or sold on Lot 2."

McDonald's argues that the language "drive-thru type food service restaurant" does not specifically limit the Restaurant Restriction to restaurants that provide actual drive-thru service. Although "the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions[,]" *Long*, 271 N.C. at 268, 156 S.E.2d at 238 (citation omitted), considering all the relevant documents in this case, it is not at all clear that "the plain and obvious purpose[] of [the Restaurant R]estriction" was to exclude the type of food service operation proposed by Propst.[6] *Id.* at 268, 156 S.E.2d at 239 (citation and quotation marks omitted).

6. We also note that when Propst granted the roadway easement that bisects the Tract to the northerly adjacent property owner, the easement included a restrictive covenant stating the northerly adjoining property could "not be used for restaurant purposes

McDonald's fundamental argument is that the Restaurant Restriction bans the operation of any fast food type restaurant on Lot 3, and that the proposed QT

> is essentially a new drive-thru-type restaurant because of the way you go in, push something on the screen, get your food, you know, as you're paying for your gas and you've got that, essentially fast food restaurant exactly competitive with what McDonald's does whether it's a biscuit or the sandwich, you're getting it that same way that's different than a sit-down restaurant, it's different than a Waffle House, and our argument is it is a drive-thru-type restaurant.

Apparently, there are not tables in the QT for the purpose of eating its food in-store. We hold that the term "drive-thru type food service restaurant" is too ambiguous to prohibit the type of restaurant Propst proposes to operate on Lot 2—one in which customers must park and enter the convenience store in order to place an order, purchase, and pick up their food. *Id.* at 268, 156 S.E.2d at 239. "Drive-thru type" is not defined in the deed, and it can reasonably be read as prohibiting *only* traditional fast food restaurants that have drive-thru windows—such as Burger King, Bojangles', or McDonald's. A reasonable argument could also be made that the Restaurant Restriction also prohibits restaurants that do *not* serve fast food, but that have a drive-thru window from which customers could pick up their "takeout" orders.

Even if we were to hold that "drive-thru type food service restaurant" could reasonably be interpreted as meaning "fast food type restaurant," and that QT is a "fast food type restaurant," McDonald's argument still fails. "[W]here the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land." *Id.* (citation and quotation marks omitted). Applying the appropriate rules of construction, we adopt the construction of "drive-thru type food service restaurant" that limits its application solely to those restaurants that include an actual "drive-thru" service. We hold that the Restaurant Restriction

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for on site preparation, sale, and consumption of food" for a period of fifteen years. Propst was clearly capable of drafting a more expansive restrictive covenant than the one encumbering Lot 3.

would not prohibit the proposed QT or its equivalent from being built on *Lot 3*. Therefore, even if we assume, *arguendo*, that the driveway and parking spaces proposed for Lot 3 *would be a part of the QT* for the purposes of the Restaurant Restriction, Propst's proposed use of Lot 3 does not violate the Restaurant Restriction.

V. Conclusion

Upon our *de novo* review, we hold that the trial court's findings of fact are supported by stipulation and competent evidence. *Calhoun*, 178 N.C. App. at 596-97, 632 S.E.2d at 571. We further hold that the trial court did not err in concluding:

> 6. [T]hat the term "drive-thru type food service restaurant" [in the Restaurant Restriction] means a restaurant with a traditional drive-thru window through which food is served. . . . .
>
> 7. Based on the specific facts stipulated here, . . . the proposed convenience store is not a "drive-thru type food service restaurant."
>
> 8. The restrictions on Lot 3 do not prohibit . . . parking and ingress and egress for the benefit of Lot 2 or any other property owned by the owner of Lot 2 when Lot 2, or any other property owned by the owner of Lot 2, is used as a convenience store with no drive-thru type food service restaurant, but sells or disposes of motor vehicle fuels.
>
> . . . .
>
> 10. The [trial court] further concludes that the proposed convenience store to be developed on Lot 2 does not violate the restriction on the sale or disposal of motor vehicle fuels from the restricted Lot 3.[7]

This Court cannot "rewrit[e] [a] restrictive covenant to add a limitation not currently there." *Winding Ridge Homeowners Ass'n v. Joffe*, 184 N.C. App. 629, 638, 646 S.E.2d 801, 807 (2007), *rev'd per curiam for*

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7. In Conclusion 9., the trial court stated that if "the proposed convenience store . . . qualified as a drive-thru type food service restaurant, the use of Lot 3 for parking and ingress/egress supporting the convenience store . . . would clearly violate the [Restaurant R]estriction." We make no determination regarding the legal correctness of Conclusion 9., because it has not been challenged on appeal.

the reasons stated in the dissent, 362 N.C. 225, 657 S.E.2d 356 (2008) (J. Geer, dissenting). Therefore, we affirm the trial court's judgment that "Lots 2 and 3 can be improved as proposed by [Propst]."

AFFIRMED.

Judges ELMORE and ARROWOOD concur.

Judge Elmore concurred in this opinion prior to 31 December 2018.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JANUARY 2019)

BORDINI v. DONALD J. TRUMP FOR PRESIDENT, INC. No. 18-409	Mecklenburg (16CVS14300)	Affirmed

DILL v. LOISEAU

[263 N.C. App. 468 (2019)]

ELFORD C. DILL, PLAINTIFF
v.
GERARD G. LOISEAU AND WIFE JENNIFER O. LOISEAU, APRIL B. COTTRILL AND HUSBAND SHANNON L. COTTRILL, ERIC B. THOMPSON, WILIAM E. KELLAR, LORI BETH HIRSBERG, GERALDINE C. MCALISTER, SHIRLEY BEACHLER, TRUSTEE, STEPHEN MATTHEW WILFONG AND WIFE LISA MAYO WILFONG, HELEN M. WHITE, LISA L. AYERS AND HUSBAND, CHARLES W. AYERS, AND DAVID LEE EDWARDS, DEFENDANTS

No. COA18-361

Filed 15 January 2019

1. Deeds—restrictive covenants—subdivision of lots—general scheme of development

The trial court did not err by determining that a general plan of development existed for a tract of land for which a plat map was recorded. Of seven properties on the original map, lots 1-5 were divided for sale, lot 6 was the home of the landowner, who had recorded the map; and lot 7 was a larger tract of undeveloped land. Lots 1-5 were subject to identical restrictive covenants prohibiting further subdivision, while lots 6 and 7 were not initially subject to restrictive covenants. Lot 7 was later sold as three smaller parcels with the same restrictive covenants as lots 1 through 5.

2. Deeds—restrictive covenants—abandonment of intent

In an action involving restrictive covenants on the first five of seven lots, any intent to develop pursuant to a general plan was not abandoned. Although lot 7 was later sold as three smaller parcels, those parcels were all conveyed with the same restrictive covenants as lots 1 through 5. And, although the owner of lot 1 engaged in a land swap with a neighbor so that the neighbor could build a driveway, the trial court correctly determined that the land swap did not effect any substantial change in the character of the neighborhood and did not therefore render the covenants unenforceable.

3. Deeds—restrictive covenants—waiver of right to enforce

Defendants did not waive their rights to enforce restrictive covenants where two of the seven lots were not subject to the covenants originally and the owner of a lot subject to the "no subdividing" covenants engaged in a land swap with a neighbor so that the neighbor could build a driveway. As for the two lots not subject to restrictions at the time the map was recorded, defendants could not waive a right they did not possess. The long strip of land that was swapped with

a neighbor did not constitute a change so radical as to effectively destroy the essential purposes of the general development scheme.

Appeal by plaintiff from order entered 8 November 2017 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2018.

Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies and G. Brian Ernst, for plaintiff-appellant.

Alexander Ricks PLLC, by Louis G. Spencer and Ryan P. Hoffman, for defendants-appellees.

DAVIS, Judge.

In this appeal, we consider the circumstances under which (1) restrictive covenants demonstrate a common scheme of development within a residential subdivision; (2) changes to the character of a covenanted area can render otherwise valid restrictive covenants unenforceable; and (3) the right to enforce a restrictive covenant is waived by a failure to object to prior violations. Elford C. Dill brought this action seeking a declaratory judgment that restrictive covenants prohibiting the subdivision of certain lots in the neighborhood where he lived were unenforceable. The trial court entered an order concluding that the restrictive covenants at issue remain enforceable. We affirm.

Factual and Procedural Background

In 1945, Katherine Melton and her husband Guyton Melton acquired a 12.95-acre tract of land in Mecklenburg County. On 3 September 1953, Mrs. Melton recorded a plat map ("the Melton Map") entitled "Property of Mrs. Guy Melton" with the Mecklenburg County Register of Deeds that divided the land into seven separate lots numbered 1-7 (the "Melton Map Properties"). Lots 1-5 were subdivided for sale, Lot 6 contained Mrs. Melton's home, and Lot 7 consisted of a larger tract of undeveloped land.

Over the next three years, Mrs. Melton sold Lots 1-5. All five of the lots were purchased subject to identical restrictive covenants stating that "[n]o subdivision shall be made of the herein conveyed lot." On 22 March 1963, Mrs. Melton sold Lot 6. This sale was not subject to any restrictive covenants. Lot 7, which was not encumbered by any restrictive covenants prohibiting subdivision at the time the Melton Map was recorded, was later divided by Mrs. Melton into three separate parcels for sale. Between 1960 and 1964, these parcels were conveyed subject

to the same restrictive covenants prohibiting subdivision as those applicable to Lots 1-5.

On 5 May 1977, the owners of Lot 1 conveyed a small portion of the lot consisting of .199 acres to the owner of an adjoining lot that was not depicted on the original Melton Map. That same day, the owners of the adjoining lot conveyed .046 acres of their property to the owners of Lot 1. The purpose of this exchange of land (the "Lot 1 Land Swap") was to provide the owners of the adjacent lot with sufficient land upon which to build a driveway. On 3 December 1993, Dill purchased a tract of land that encompassed the majority of Lot 1 and the entirety of Lot 2.

Lot 6 was acquired by real estate developer K.V. Partners on 10 November 1999. K.V. Partners subsequently recorded a plat map with the Mecklenburg County Register of Deeds entitled "Bella Brown Preserve" in 2002. This map subdivided Lot 6 into three parcels that were subsequently purchased for residential use.

On 24 June 2016, Dill filed a civil action in Mecklenburg County Superior Court against all of the other owners of lots contained on the Melton Map. The named defendants were Gerard G. Loiseau, Jennifer O. Loiseau, April B. Cottrill, Shannon L. Cottrill, Eric B. Thompson, William E. Kellar, Lori Beth Hirsberg, Geraldine C. McAlister, Shirley Beachler, Stephen Matthew Wilfong, Lisa Mayo Wilfong, Helen M. White, Lisa L. Ayers, Charles W. Ayers, and David Lee Edwards (collectively "Defendants").[1] In his complaint, Dill sought a declaratory judgment that the restrictive covenants prohibiting subdivision contained in the deeds to Lots 1-5 were invalid and unenforceable. Specifically, he alleged that (1) Mrs. Melton "failed to establish any uniform scheme of development[;]" (2) a "substantial change in usage" had occurred since the creation of the restrictive covenants; and (3) Defendants had waived their right to enforce the covenants.

A bench trial was held beginning on 6 June 2017 before the Honorable Forrest D. Bridges. On 8 November 2017, the trial court entered a declaratory judgment in favor of Defendants "declaring that the subdivision restrictions . . . present in the chain of title for Lots 1 and 2 of the Melton Subdivision are consistent with a common scheme of development, and therefore, these restrictive covenants are valid and enforceable[.]" Dill filed a timely notice of appeal on 5 December 2017.

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1. Dill later voluntarily dismissed his claims against Lisa Ayers, Charles Ayers, Helen White, and Eric Thompson.

Analysis

On appeal, Dill argues that (1) "the restrictive covenants pertaining to the Melton Properties failed to evidence a common or general scheme of development;" (2) even assuming a general plan of development existed at some point, it was later abandoned by Mrs. Melton; and (3) Defendants are estopped from enforcing the restrictive covenants against Dill by virtue of their failure to object to prior violations of the covenants. We address each argument in turn.

I. General Plan of Development

[1] Dill first contends that the restrictive covenants prohibiting subdivision imposed upon the Melton Map Properties failed to establish a common plan of development. As a result, he asserts, they do not run with the land and may not be enforced against him by Defendants. We disagree.

It is well established that where "an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against any other grantee." *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 665, 268 S.E.2d 494, 497 (1980). Restrictions imposed "under a general plan of development may be enforced against subsequent purchasers of the land who take with notice of the restriction. The test for determining whether a general plan of development exists is whether substantially common restrictions apply to all similarly situated lots." *Medearis v. Trs. Of Myers Park Baptist Church*, 148 N.C. App. 1, 5-6, 558 S.E.2d 199, 203 (2001) (citation omitted), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002).

Our appellate courts have held that restrictions need not be imposed upon every lot in a subdivision in order to demonstrate a general scheme of development. However, a general development scheme will not be recognized where a substantial proportion of lots lack similar restrictive covenants. *Compare Franklin v. Elizabeth Realty Co.*, 202 N.C. 212, 217, 162 S.E. 199, 201 (1932) (holding omission of restriction from single lot in subdivision did not destroy general plan of development), *with Sedberry v. Parsons*, 232 N.C. 707, 711-12, 62 S.E.2d 88, 91 (1950) (concluding no general plan of development existed where only 11 out of 21 lots contained similar restrictions).

In *Rice v. Coholan*, 205 N.C. App. 103, 695 S.E.2d 484, *disc. review denied*, 364 N.C. 435, 702 S.E.2d 303 (2010), this Court determined that

a general plan of development existed where 14 out of 18 total lots in a subdivision "contained the same or similar restrictions, while the deeds to four lots were not similarly restricted." *Id.* at 113, 695 S.E.2d at 491. In *Rice*, the four lots that were not subject to similar restrictive covenants were those retained by the family that initially owned the entire acreage that formed the basis for the subdivision. *Id.* We concluded that "there are substantially common restrictions applicable to all lots of like character" and that "there was a general plan of development for the lots in Jefferson Park[.]" *Id.* at 114, 695 S.E.2d at 492.

In the present case, the Melton Map was recorded in 1953 and consisted of seven lots in total. Lots 1-5 were all conveyed between 1953 and 1956 and were each subject to identical restrictive covenants prohibiting subdivision. Lot 6, which contained Mrs. Melton's home, was not subject to any restrictive covenants either at the time the Melton Map was recorded or when Mrs. Melton sold the property in 1963. Lot 7, which consisted of a large undeveloped tract of land, was similarly unencumbered by covenants at the time Lots 1-5 were conveyed. However, Lot 7 was later subdivided into three small parcels and sold between 1960 and 1964 subject to the same restrictions prohibiting subdivision as Lots 1-5.

We believe our decision in *Rice* controls the determination of this issue in the present case. There, as discussed above, a general plan of development was found to exist where 14 out of 18 total lots in a subdivision contained "substantially common restrictions." *Id.* Notably, the four unrestricted lots remained in the possession of the family that owned the land prior to the creation of the subdivision. Similarly, here Lots 1-5 were all conveyed by Mrs. Melton subject to identical restrictive covenants prohibiting subdivision. As in *Rice*, Mrs. Melton retained ownership of the lots that were not initially subject to any restrictive covenants. Furthermore, when Lot 7 was later sold as three smaller parcels, those parcels were all conveyed subject to the same restrictive covenant prohibiting subdivision as Lots 1-5.

Thus, we are satisfied that the trial court did not err in determining that a general plan of development existed for the Melton Map Properties. Accordingly, Dill's argument to the contrary is overruled.

II. Abandonment of Intent

[2] Dill next argues "[e]ven assuming *arguendo* that Mrs. Melton intended to develop pursuant to a general plan, she abandoned this intent by taking actions inconsistent with any such plan." As a result, he contends, the restrictive covenants affecting the Melton Map Properties

are no longer enforceable. In support of this proposition, he directs our attention to the Lot 1 Land Swap and the fact that Lots 6 and 7 were subsequently subdivided following the sale of Lots 1-5.

This Court has held that otherwise valid restrictive covenants may "be terminated when changes within the covenanted area are so radical as practically to destroy the essential objects and purposes of the agreement." *Medearis*, 148 N.C. App. at 6, 558 S.E.2d at 203 (citation and quotation marks omitted).

> Where a residential subdivision is laid out according to a general scheme or plan and all the lots sold or retained therein are subject to restrictive covenants, and the value of such development to a large extent rests upon the assurance given purchasers that they may rely upon the fact that the privacy of their homes will not be invaded by the encroachment of business, and that the essential residential nature of the property will not be destroyed, the courts will enforce the restrictions and will not permit them to be destroyed by slight departures from the original plan.
>
> On the other hand, when there is a general scheme for the benefit of the purchasers in a development, and then, either by permission or acquiescence, or by a long chain of violations, the property becomes so substantially changed that the whole character of the subdivision has been altered so that the whole objective for which the restrictive covenants were originally entered into must be considered at an end, then the courts will not enforce such restrictive covenants.

Logan v. Sprinkle, 256 N.C. 41, 47, 123 S.E.2d 209, 213 (1961) (internal citations omitted). Our Supreme Court has stated that "[w]hether the growth and general development of an area represents such a substantial departure from the purposes of its original plan as equitably to warrant removal of restrictions formerly imposed is a matter to be decided in light of the specific circumstances of each case." *Hawthorne*, 300 N.C. at 667, 268 S.E.2d at 499.

It is well established that violations of restrictive covenants must be substantial in order to constitute the type of radical change sufficient to render the covenants unenforceable. For example, in *Hawthorne* a public library was constructed and a branch bank office opened within a subdivision in violation of a covenant restricting the property

to residential uses. *Id.* at 668, 268 S.E.2d at 499. Our Supreme Court held that these violations did not constitute a radical change, concluding that "the library and the . . . bank office represent no more than minor intrusions upon the quiet enjoyment of an area otherwise residential in nature." *Id.* at 668-69, 268 S.E.2d at 500; *see also Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 39-40, 120 S.E.2d 817, 828 (1961) (use of six lots in a residential subdivision as parking space for an office building was not "such a radical or fundamental change or substantial subversion as practically to destroy the essential objects and purposes of the restriction agreement"); *Williamson v. Pope*, 60 N.C. App. 539, 544, 299 S.E.2d 661, 664 (1983) (residential covenant remained enforceable despite fact that 11 out of 69 blocks were used for commercial purposes).

Conversely, in *Medearis* this Court held that a radical change had, in fact, rendered a residential restriction unenforceable where six out of twelve lots were used for commercial purposes, four were vacant, and only one lot currently contained a residential structure. *Medearis*, 148 N.C. App. at 9, 558 S.E.2d at 205. In that case, we concluded that "the changes have destroyed the uniformity of the plan and the equal protection of the restriction." *Id.* (citation and quotation marks omitted).

In determining whether the Melton subdivision has undergone a radical change since the recordation of the Melton Map, we first examine the Lot 1 Land Swap. As noted above, the land swap was undertaken to provide the owners of property adjacent to Lot 1 with sufficient space to build a driveway. In its findings of fact, the trial court found that the parcel totaled .199 acres and "consisted of a long, thin strip of land that proceeds along Rosemary Lane to Sharon Hills Road. No structures have been constructed on the Lot 1 Land Swap property."

Thus, although the Lot 1 Land Swap constituted a technical violation of the restriction against subdivision, it ultimately had little to no impact upon the character of the neighborhood. Accordingly, the trial court correctly determined that the Lot 1 Land Swap did not "have any substantial change upon the character of the subdivision[.]"

With regard to the subdivision of Lots 6 and 7, we observe that no restrictive covenants were ever placed upon Lot 6. Furthermore, while Lot 6 was ultimately subdivided into three smaller parcels, those parcels were intended for residential use. Although Lot 7 originally consisted of an unencumbered tract of undeveloped land, it was later divided by Mrs. Melton into three smaller residential lots. These lots were conveyed subject to restrictive covenants prohibiting their subdivision identical to those applicable to Lots 1-5.

Based upon our thorough review of the record and applicable case law from our appellate courts, we are unable to agree with Dill's contention that the subdivision of these lots constituted a change radical enough "as practically to destroy the essential objects and purposes of the scheme of development." *Williams v. Paley*, 114 N.C. App. 571, 578, 442 S.E.2d 558, 562 (1994) (citation and quotation marks omitted). If anything, these changes arguably served to reinforce the original purpose of Melton's scheme of development. We hold that the trial court did not err in determining the actions relied upon by Dill did not have the effect of invalidating the covenants at issue.

III. Waiver of Right to Enforce Covenants

[3] In his final argument, Dill contends that Defendants have waived their right to enforce the subdivision restriction against him by their failure to object to "numerous prior subdivisions within the Melton Properties." Once again, he cites the Lot 1 Land Swap and the subdivisions of Lots 6 and 7 as support for this argument.

"A waiver may be express or implied." *Medearis*, 148 N.C. App. at 11, 588 S.E.2d at 206 (citation omitted). A waiver is implied "when a person dispenses with a right by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Id.* at 12, 588 S.E.2d at 206-07 (citation and quotation marks omitted). This Court has held that "[a]n acquiescence in a violation of restrictive covenants does not amount to a waiver of the right to enforce the restrictions unless changed conditions within the covenanted area are so radical as practically to destroy the essential objects and purposes of the scheme of development." *Williams*, 114 N.C. App. at 578, 442 S.E.2d at 562 (citation and quotation marks omitted).

As an initial matter, we observe that neither Lot 6 nor Lot 7 was subject to a restriction against subdivision at the time of the recordation of the Melton Map. Thus, Defendants could not have waived their right to object to the subdivision of Lots 6 and 7 because they never possessed such a right in the first place. Moreover, our conclusion that the Lot 1 Land Swap did not constitute a change so radical as to effectively destroy the essential purposes of the development scheme applies with equal force to Dill's waiver argument. *See Williamson*, 60 N.C. App. at 544, 299 S.E.2d at 664 (holding that failure to object to minor violation of restrictive covenant did not waive "right to enforce the covenant against . . . a much more radical departure from the permitted use"). Accordingly, we conclude the trial court did not err in ruling that Dill has

failed to show Defendants waived their right to enforce the subdivision restrictions against him.[2]

Conclusion

For the reasons stated above, we affirm the trial court's 8 November 2017 order.

AFFIRMED.

Judges HUNTER, JR. and MURPHY concur.

IN THE MATTER OF E.M.

No. COA18-685

Filed 15 January 2019

Juveniles—delinquency—evidence of mental illness—statutory mandate—referral to area mental health services director

In a juvenile delinquency action, the trial court erred by failing to refer the juvenile to the area mental health services director as required by N.C.G.S. § 7B-2502(c) before entering the disposition, where substantial evidence was presented that the juvenile had mental health issues.

Appeal by juvenile from order entered 30 January 2018 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 13 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Marie H. Evitt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for juvenile.

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2. Dill also argues that the trial court's 8 November 2017 order contained several findings of fact that were unsupported by evidence of record. Based on our careful review of the record, we are satisfied that even assuming *arguendo* portions of the court's findings were erroneous, any such error was harmless. *See In re E.M.*, __ N.C. App. __, __, 790 S.E.2d 863, 869 (2016) ("[T]he inclusion of an erroneous finding of fact is not reversible error where the court's other factual findings support its determination." (citation omitted)).

ZACHARY, Judge.

Evan Miller[1] appeals from an order committing him to placement in a youth development center and transferring his legal custody to the Mecklenburg County Department of Social Services, Youth and Family Services Division. The trial court was presented with evidence that Evan was mentally ill and failed to refer him to the area mental health services director for appropriate action as prescribed by statute. As a result, we vacate the trial court's order and remand for further action.

Background

On 20 July 2017, the State filed petitions against Evan Miller for common-law robbery and being an undisciplined juvenile. The State filed two more petitions against Evan on 6 September 2017 alleging common-law robbery and conspiracy to commit common-law robbery. Evan admitted to the offense of conspiracy to commit common-law robbery in exchange for dismissal of all other charges at a delinquency hearing on 23 October 2017 in Mecklenburg County District Court before the Honorable David H. Strickland. Judge Strickland entered a Level 2 disposition and placed Evan on probation for 12 months. The conditions of Evan's probation were to: (1) "Remain on good behavior and not violate any . . . law"; (2) "Not violate any reasonable and lawful rules of the juvenile's parent, guardian, or custodian"; and (3) "Attend school each and every day, all classes, not have any unexcused tardies, and not be suspended or excluded from school."

A motion for hearing was filed on 14 November 2017 alleging that Evan violated his probation by being suspended from school, together with leaving his home without permission and being away for up to three days. The motion for review was continued until January 2018. The Honorable Louis A. Trosch heard the motion for review on 26 January 2018. At the hearing, Evan admitted the probation violations. That same day, Judge Trosch entered a Level 3 disposition and committed Evan to a Youth Development Center for a minimum period of six months, and continuing until his eighteenth birthday at the maximum. Judge Trosch also ordered that the Mecklenburg County Department of Social Services, Youth and Family Services Division assume custody of Evan. Evan filed timely notice of appeal on 2 February 2018.

1. We use a pseudonym to protect the identity of the minor involved in this case.

Discussion

Evan argues on appeal that the trial court erred by: (1) entering a disposition against Evan without referring him to the area mental health services director for appropriate action after being presented with evidence that Evan was mentally ill; (2) making a finding that Evan had been involved in criminal activity while on probation when no competent evidence supported that finding; and (3) transferring Evan's legal custody to the Department of Social Services. After review, we conclude that the trial court failed to refer Evan to the area mental health services director, as prescribed by statute, after being presented with evidence that Evan was mentally ill.

The Juvenile Code governs management of cases involving undisciplined and delinquent juveniles. *See* N.C. Gen. Stat. §§ 7B-1500 to 7B-2706 (2017). The purpose of these procedures is to, *inter alia*, "deter delinquency and crime, including patterns of repeat offending . . . [b]y providing appropriate rehabilitative services to juveniles." *Id.* § 7B-1500(2)(b). Disposition of cases involving juveniles should "[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.* § 7B-2500(3). When a juvenile comes before a trial court, "the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert *as may be needed* for the court to determine the needs of the juvenile." *Id.* § 7B-2502(a) (emphasis added). However, when evidence of mental health issues arise, the authority to order the evaluation of a juvenile by certain medical professionals is no longer discretionary, but is required:

> If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court *shall* refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. . . . The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.

Id. § 7B-2502(c) (emphasis added).

The use of the word "shall" indicates a statutory mandate that the trial court refer the juvenile to the area mental health services director for appropriate action, and failure to do so is error. *See In re J.R.V.*, 212 N.C. App. 205, 208, 710 S.E.2d 411, 413 (2011) ("The use of the word

'shall' by our Legislature [is] . . . a mandate, and failure to comply with this mandate constitutes reversible error."), *disc. review improvidently allowed*, 365 N.C. 416, 720 S.E.2d 387 (2012). When a juvenile argues to this Court that the trial court failed to follow a statutory mandate, the error is preserved and is a question of law reviewed *de novo*. *In re G.C.*, 230 N.C. App. 511, 515-16, 750 S.E.2d 548, 551 (2013). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 516, 750 S.E.2d at 551.

In *In re Mosser*, 99 N.C. App. 523, 393 S.E.2d 308 (1990), a juvenile was committed to confinement despite evidence presented to the trial court that he was mentally ill. At the juvenile's dispositional hearing, the trial court heard evidence that "the juvenile had been diagnosed as manic-depressive and was being treated with the drug lithium," *id.* at 524, 393 S.E.2d at 309, and the trial court included that evidence in its findings of fact. *Id.* at 525, 393 S.E.2d at 310. The only basis for this evidence was "a statement made to the trial court by the mother of the juvenile." *Id.* at 528, 393 S.E.2d at 311. While this Court in *Mosser* was applying the former juvenile code, the statute in that case and the one in this case are substantially similar. *Compare* N.C. Gen. Stat. § 7A-647(3) (1989) ("If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the area mental health, mental retardation, and substance abuse director for appropriate action.") *with* N.C. Gen. Stat. § 7B-2502(c) (2017) ("If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action."). The only difference between the two statutes is the elimination of the gender-specific term "him" and more appropriate language referring to those with mental disabilities. Thus, *Mosser*'s analysis and reasoning are applicable to this case. This Court held that "the record does not reflect a genuine inquiry into the nature of the needs of the juvenile," *Mosser*, 99 N.C. App. at 528, 393 S.E.2d at 311, and that the "evidence of mental illness compels further inquiry by the trial court *prior to entry of any final disposition*." *Id.* (emphasis added). The trial court's failure to "gain the advice of a medical specialist . . . precludes commitment to the Division of Youth Services." *Id.* at 528, 393 S.E.2d at 311-12. As a result, this Court vacated the juvenile's commitment and remanded for another dispositional order. *Id.* at 529, 393 S.E.2d at 312.

Here, the record before the trial court revealed the following mental health issues with regard to Evan: 1) a Risk and Needs Assessment filed

19 October 2017 indicated that a facility holding Evan entertained the idea of having him involuntarily committed but decided against it and that Evan had received "a plethora of treatment services"; 2) a Risk and Needs Assessment filed 5 December 2017 stated that "[Evan] has been exposed to a number of services to address his mental health needs, development of appropriate social skills, [and] pro-social activities"; 3) a Risk and Needs Assessment filed 25 January 2018 advised that Evan's behavior indicated "a need for additional mental health . . . treatment"; and 4) a Clinical Disposition Report prepared by a specialist hired by Evan's counsel asserted that Evan was "having major behavioral issues" and had been diagnosed with Conduct Disorder, Attention Deficit Disorder, Unspecified Depressive Disorder, and Cannabis Use Disorder.

At the hearing on the motion for review, substantial evidence was presented to the trial court establishing Evan's mental health issues. Evan's adoptive father testified that Evan had been "discharged from intensive therapy," and has "been in five different clinical homes. He's had therapists, outpatient, inpatient, [and] intensive in-home" services. Evan's attorney noted that "behavioral health and mental health services" were offered to Evan and that "his trauma [had] not [been] adequately treated." Evan's counsel also stated, "he has had a lot of treatment options at this point, but they just haven't worked." Even the trial court acknowledged that Evan had been to "twelve different mental facilities," and contemplated ordering the Youth Development Center to provide mental health services to Evan.

The trial court was presented with a plethora of evidence demonstrating that Evan was mentally ill—much more evidence than was presented in *Mosser*. Faced with any amount of evidence that a juvenile is mentally ill, a trial court has a statutory duty to "refer the juvenile to the area mental health . . . services director for appropriate action." N.C. Gen. Stat. § 7B-2502(c). It is possible that the trial court was under the misapprehension that such a referral was unnecessary, because Evan had already received significant mental health services prior to this disposition and because the trial court recognized that it could order mental health services for Evan during his commitment. However, the statute envisions the area mental health services director's involvement in the juvenile's disposition and "responsib[ility] for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs." *Id.* That did not happen in this case, and the area director was unable to participate in crafting an appropriate disposition for Evan. Therefore, we vacate Evan's disposition and remand for a new dispositional hearing, and do not address his second and third assignments of error.

Conclusion

The trial court failed to refer Evan to the area mental health services director after being presented with evidence that Evan was mentally ill, as required by statute. Accordingly, we vacate Evan's disposition and remand for a new hearing that includes a referral to the area mental health services director. Evan's custody shall remain with the Department of Social Services.

VACATED AND REMANDED.

Judges BRYANT and DILLON concur.

IN THE MATTER OF I.R.L.

No. COA18-427

Filed 15 January 2019

1. Termination of Parental Rights—abandonment—willfulness—findings not sufficient

The trial court erred in a termination of parental rights proceeding based on abandonment where the trial court did not address willfulness. The child was three years old and any communication with her, gifts to her, or requests to visit would have been directed to the mother, but there was a domestic violence prevention order (DVPO) that specifically prohibited the father from harassing the mother and required him to stay away from her. The DVPO effectively kept the father from visiting or trying to visit the child.

2. Termination of Parental Rights—failure to pay child support—findings

The trial court erred in a termination of parental rights proceeding by concluding that the father was subject to termination based on willful failure to pay child support. The termination order did not have findings indicating that a child support order existed or that the father failed to pay support as required by the child support order.

3. Termination of Parental Rights—grounds—notice

The trial court could not terminate a father's parental rights based on failure to pay support where the mother did not allege a "willful" failure to pay as required by a support or custody agreement.

The mother's bare allegation that the father failed to provide substantial financial care or consistent care was insufficient to put the father on notice of the specific statutory ground for termination.

Appeal by Respondent-Father from order entered 12 February 2018 by Judge Herbert Richardson in Robeson County District Court. Heard in the Court of Appeals 6 December 2018.

Jennifer A. Clay for Petitioner-Appellee Mother.

Richard Croutharmel for Respondent-Appellant Father.

DILLON, Judge.

This appeal arises from a termination of parental rights action between two parents. Respondent-father ("Father") appeals from the trial court's order terminating his parental rights to the minor child, I.R.L. ("Ivey").[1] We hold that Father did not receive sufficient notice that his parental rights were subject to termination and that the trial court failed to make sufficient findings of fact and conclusions of law regarding the willfulness of Father's conduct. Therefore, we reverse and remand to the trial court.

I. Background

Petitioner-mother ("Mother") and Father were in a relationship, but not married, when Ivey was born in February 2014. The parties lived together from January 2015 until 31 March 2015, when Father forced Mother to leave the home with Ivey. Mother has had sole custody of Ivey since her birth.

In April 2016, Mother obtained a domestic violence protective order ("DVPO") against Father. According to the DVPO, on 18 March 2016, Father went to Mother's home late at night unannounced, banged on her door, and threatened to kill her. Father assaulted Mother by hitting and choking her. The DVPO was in effect for one year, until April 2017. The DVPO ordered Father not to have any contact with Mother, but did not forbid contact with any minor children residing with her.

In March 2017, one month before the DVPO was set to expire, Father filed a pro se civil complaint for visitation with Ivey. That same day, Mother filed a petition to terminate Father's parental rights to Ivey

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

alleging the grounds of failure to establish paternity, failure to pay support, and abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(5), (4), and (7) (2017). Mother alleged Father had not contacted or seen Ivey since March 2015 and had not paid any financial support.

In February 2018, following a hearing on the matter, the trial court entered an order terminating Father's parental rights to Ivey, concluding that Father had failed to pay child support and had abandoned Ivey and that termination of Father's parental rights was in Ivey's best interests. Father timely appealed.

II. Standard of Review

We review a trial court's termination of parental rights "to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re C.J.H.*, 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015). When the trial court's findings of fact "are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). We review the trial court's conclusions of law *de novo*. *See In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

III. Analysis

On appeal, Father argues that the trial court erred in two ways: (1) in concluding that his actions, or lack thereof, amounted to abandonment of Ivey, and (2) in concluding that his parental rights were subject to termination based on his alleged willful failure to pay child support.

A. Abandonment

[1] Father argues the trial court erred by concluding his parental rights were subject to termination based on the ground of abandonment. More specifically, Father argues that the evidence and findings failed to show his lack of contact was willful in order to support a finding that this ground existed. We agree.

A trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1111(a)(7) (2017). Abandonment is "a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997). "[I]f a parent

withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

Here, the relevant six month period is 20 September 2016 to 20 March 2017. The trial court made the following findings regarding the ground of abandonment:

> 6. That [Father] has not seen the child since March 31, 2015. That he has not visited the child or made any inquires to [Mother] about the child. [Father] has not provided any substantial financial support for the child.
>
> . . .
>
> 8. That [Father] never bought the child any birthday presents or acknowledged the child on [her] birthday.
>
> . . .
>
> 10. That [Father] has made no effort to visit the child even though he knew where the child was.
>
> . . .
>
> 13 That on April 22, 2016, [Mother] obtained a [DVPO] against [Father] for one year.
>
> 14. That [Father] filed for visitation on March 20, 2017 in file 17 CVD 721, Robeson County, North Carolina.

The court then concluded that grounds for termination existed in "[t]hat [Father] has not seen the child since March 31, 2015. That he has not visited the child or made any inquiries to [Mother] about the child. [Father] has not provided any substantial financial support for the child."

The trial court's order fails to address the willfulness of Father's conduct, a required element under N.C. Gen. Stat. § 7B-1111(a)(4) and (7). *In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 80 (2007); *see also In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) ("Because '[willful] intent is an integral part of abandonment and . . . is a question of fact to be determined from the evidence[,]' a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent."). The finding of willfulness was especially important given that the court found that during the entirety of the relevant six month period, Father was subject to a DVPO, in which he was ordered to stay away from and have no contact with Mother, who had custody of Ivey.

Because Ivey was only three years old, any communication with, gifts to, or requests to visit her would have necessarily been directed to Mother; but the DVPO specifically prohibited Father from harassing or interfering with Mother and required him to stay away from her home and workplace. The only way Father could establish a way to see Ivey or communicate with her, without the risk of violating the DVPO, was to obtain a custody order establishing his visitation rights. Father did file a complaint seeking visitation with Ivey in March 2017, before the DVPO expired. While the DVPO did not prevent Father from providing financial support to Ivey, it did effectively prevent him from visiting, or trying to visit, Ivey as contact or communication with Mother was prohibited.

Without a finding of willfulness, we conclude that the trial court failed to enter adequate findings of fact and conclusions of law to demonstrate that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to terminate Father's parental rights. *See In re T.M.H.*, 186 N.C. App. 451, 455-56, 652 S.E.2d 1, 3 (vacating the trial court's termination order and remanding where the order did not contain a finding that the respondent's abandonment of the juvenile was willful), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

B. Failure to Pay Child Support

[2] Father also argues that the trial court erred in concluding that his parental rights were subject to termination based on his willful failure to pay child support because the evidence and findings failed to support this ground. We agree.

A trial court may terminate a parent's parental rights when

> [o]ne parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, *as required by the decree or custody agreement*.

N.C. Gen. Stat. § 7B-1111(a)(4) (2017) (emphasis added). "In a termination action pursuant to [Section 7B-1111(a)(4) of our General Statutes], petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed." *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990).

Here, while both parties testified that a child support order was entered in December 2014 ordering father to pay $50.00 per month in child support, the trial court's termination order is devoid of any findings indicating that a child support order existed or that Father failed to pay support "as required by" the child support order. Accordingly, the trial court's findings are insufficient to support a conclusion that Father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(4).

[3] Further, the trial court could not terminate Father's parental rights based on this ground because the petition was insufficient to put Father on notice that his parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(4). *See In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 258, *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008) ("[W]here a respondent lacks notice of a possible ground for termination, it is error for the trial court to conclude such a ground exists.").

In her petition to terminate Father's parental rights, Mother did not allege a "willful" failure to pay support as required by a support or custody agreement. Mother alleged only that Father "[h]as failed to provide substantial financial support or consistent care for the minor child[.]" The petition makes no reference to the specific statutory ground of N.C. Gen. Stat. § 7B-1111(a)(4) and the petition is entirely silent as to whether a judicial decree or support order required Father to pay for Ivey's care or support. The petition also fails to include any allegations asserting Father's failure to pay was willful.

An allegation that a parent failed "to provide financial support or consistent care" may be an assertion under the ground of abandonment. *See In re C.J.H.*, 240 N.C. App. at 504, 772 S.E.2d at 92 (affirming termination of the respondent-father's parental rights based on abandonment where the trial court found that "during the relevant six-month period, [the respondent-father] did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile"). Indeed, in its conclusion of law pertaining to the ground of abandonment, the trial court concluded that Father "has not provided any substantial financial support for the child." Thus, Mother's bare allegation in the petition that Father "failed to provide substantial financial support or consistent care" is insufficient to put Father on notice that his parental rights could be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(4), and this ground cannot serve as a basis to terminate Father's parental rights. Accordingly we reverse the portion of the trial court's order concluding this ground existed.

IV. Conclusion

We vacate the trial court's order and remand the matter to the trial court with instructions to make appropriate findings as to the willfulness of Father's conduct regarding abandonment. On remand, we leave to the discretion of the trial court whether to hear additional evidence. *In re T.M.H.*, 186 N.C. App. at 456, 652 S.E.2d at 3. We reverse the portion of the order concluding that grounds existed to terminate Father's parental rights based on his failure to pay support.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and BERGER concur.

BETTY BURDEN JACKSON, NANCY BURDEN ELLIOTT; JAMES BURDEN, REBECCA BURTON BELL, DARREN BURTON, CLARENCE BURTON, JR. AND JOHN BURDEN, PLAINTIFFS

v.

DON JOHNSON FORESTRY, INC. AND EAST CAROLINA TIMBER, LLC, AND NELLIE BURDEN WARD, ALBERT R. BURDEN, LEVY BURDEN, CLARENCE L. BURDEN AND BRENDA B. MILLER, OTHER GRANDCHILDREN DEFENDANTS,

AND

EAST CAROLINA TIMBER, LLC, THIRD-PARTY/COUNTERCLAIM PLAINTIFF,

v.

ESTATE OF WILLIAM F. BAZEMORE BY AND THROUGH ITS EXECUTORS, NELLIE WARD AND TARSHA DUDLEY, AND ESTATE OF FLORIDA BAZEMORE BY AND THROUGH ITS ADMINISTRATOR, MARIA JONES, THIRD-PARTY/COUNTERCLAIM DEFENDANTS.

No. COA18-354

Filed 15 January 2019

1. Estates—life tenancy—timber rights

This action involved the alleged unauthorized cutting of timber from land subject to a life estate where the fee simple owner bequeathed to the life tenant more timber rights than are normally held by a life tenant. Under the terms of the life estate, the deceased holder of the life estate had the unfettered right during her life tenancy to profit from any large tree (defined as 12 inches or more in diameter). Her right to the smaller trees during the life tenancy was limited to that of a life tenant.

2. Estates—life tenancy—timber rights—unauthorized cutting —remaindermen—standing

In a case involving a deceased life tenant, remaindermen, and timber rights, the grandchildren-remaindermen had standing to seek relief for damage caused by any unauthorized timber cutting on the property which occurred during the life tenancy. It is irrelevant whether the grandchildren-remaindermen's interest in the property was vested or contingent under the will. They did not bring suit until after the life tenant's death; contingent remaindermen may bring suit for damages after their interest vests, even for acts committed during the life tenancy.

3. Estates—life tenancy—timber harvesting—waste—no claim by remaindermen

Grandchildren-remaindermen had no claim for waste of their inheritance where rights to large trees (defined as 12 inches or more in diameter) had been expressly granted to the life tenant, even if some of those trees were cut without the life tenant's authorization, because any damages would have accrued to the life tenant.

4. Estates—life tenancy—timber rights—remaindermen

In a case involving a life tenant, remaindermen, and timber rights, the grandchildren-remaindermen were entitled to any damage from the cutting of trees less than 12 inches in diameter (small trees) where the fee simple holder (the grandfather) had expressly conveyed rights in large trees (more than 12 inches in diameter) to the life tenant. The life tenant's interest in the small trees was only that of a life tenant, as the fee simple holder had not granted her any additional rights to those trees in the will. There was no evidence that small trees were cut for any reason other than for profit, which is not permissible for a life tenant to enjoy.

5. Estates—remaindermen—cutting timber—third party liability

A timber buyer was liable to grandchildren-remaindermen for any damage caused by the cutting of trees less than 12 inches in diameter (small trees) where the remaindermen's interest in the small trees had vested. Even if a third party contracts with the life tenant to cut timber, the third party was still liable to the remaindermen if any cutting was unauthorized. However, this timber buyer was not liable for double damages pursuant to N.C.G.S. § 1-539.1, because the timber company was lawfully on the land.

6. Estates—life tenancy—timber sale—third party liability

The estates of a life tenant and her spouse, who had acted under her power of attorney, were liable to indemnify a timber buyer with whom they had contracted.

7. Estates—life tenancy—timber rights—unauthorized cutting

A timber broker was not liable to grandchildren-remaindermen as a matter of law where the timber broker relied on a power of attorney when contracting to harvest timber from land subject to a life estate while the life tenant was alive. There was no evidence of actionable negligence or bad faith by the broker, who acted reasonably and in good faith.

Appeal by Plaintiffs, appeal by Defendant East Carolina Timber, LLC, and appeal by Third-Party Defendant Estate of Florida Bazemore, all from judgment entered 9 November 2017 by Judge Wayland J. Sermons, Jr., in Bertie County Superior Court. Heard in the Court of Appeals 3 October 2018.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis and Casey L. Peaden, for the Plaintiff.

Yates, McLamb & Weyher, L.L.P., by Christopher J. Skinner and Denaa J. Griffin, for Defendant Don Johnson Forestry, Inc.

McAngus Goudelock & Courie, PLLC, by Elizabeth H. Overmann, and Ward and Smith, P.A., by E. Bradley Evans, for Defendant and Third-Party/Counterclaim Plaintiff East Carolina Timber, LLC.

Dixon & Thompson Law PLLC, by Paul Faison S. Winborne, for the Third-Party/Counterclaim Defendant Estate of Florida Bazemore.

DILLON, Judge.

This is an appeal and cross-appeal by a number of parties from a summary judgment order in this case involving alleged damages caused by the unauthorized cutting of timber from a certain tract of land.

I. Background

In 1982, Z. J. Burden died, bequeathing a large tract of land (the "Property") to his lineal descendants. Specifically, pursuant to Mr. Burden's will, Mr. Burden's five children, or the survivor(s) of them,

received a life estate in the Property; and the remainder interest was held by Mr. Burden's grandchildren *per stirpes* in fee simple absolute. That is, the Property would not pass in fee simple absolute to Mr. Burden's grandchildren until *all* of his children had died.

Mr. Burden's will also granted to his children, or the survivor(s) of them, during the life tenancy, the right to sell any timber growing on the Property that was at least twelve (12) inches in diameter for any reason they saw fit, without having to share the proceeds from the sale with the remaindermen-grandchildren.

In early 2014, Florida Bazemore was the sole surviving child of Mr. Burden and, therefore, was the sole owner of the life estate in the Property. After entering a nursing home, Mrs. Bazemore signed a General Power of Attorney, naming her husband, William Bazemore, and two others as her attorneys-in-fact.

Shortly thereafter, Mr. Bazemore entered into a broker's agreement with Defendant Don Johnson Forestry, Inc. (the "Broker"), to procure a buyer for the timber growing on the Property. The Property had not been timbered since the mid-1980s. The Broker procured an offer from Defendant East Carolina Timber, LLC, (the "Timber Buyer") to purchase the timber growing on the Property.

In March 2014, Mr. Bazemore signed an agreement to sell the timber growing on the Property to the Timber Buyer.

During the summer of 2014, the Timber Buyer cut a number of trees from the Property, paying $130,000; $122,000 of this money was paid to Mr. Bazemore, and the remainder was paid to the Broker for its brokerage commission.

In May 2015, Mr. Bazemore died. Two months later, in July 2015, Mrs. Bazemore died. Upon her death, the Property passed to Mr. Burden's grandchildren *per stirpes* in fee simple absolute.

In October 2015, several of Mr. Burden's grandchildren[1] (the "Grandchildren") commenced this action against the Broker and the Timber Buyer for cutting timber from the Property during Mrs. Bazemore's life tenancy. The Grandchildren sought double the value of the timber cut, pursuant to N.C. Gen. Stat. § 1-539.1.

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1. The remaining grandchildren were subsequently made parties, denominated in the caption as "Other Grandchildren Defendants."

The Broker and Timber Buyer each answered denying liability. And the Timber Buyer asserted a third-party complaint against the estates of Mr. and Mrs. Bazemore for indemnity.

In November 2017, after a hearing on summary judgment motions, the trial court entered a summary judgment order, which did three things: (1) it granted the Broker's motion for summary judgment, thereby dismissing the Grandchildren's claims against it; (2) it granted the Grandchildren's motion for summary judgment on their claims against the Timber Buyer, awarding $259,596 in damages; and (3) it granted the Timber Buyer's motion for summary judgment against Mr. and Mrs. Bazemore's estates for indemnity. Each part of the summary judgment order was timely appealed. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

II. Analysis

A. Mrs. Bazemore's Rights in the Trees During Her Life Tenancy

[1] Rights in a particular piece of property have been described as a "bundle of sticks"[2] or "bundle of rights,"[3] where various people/entities could own different rights in that property. These rights include the right to timber the property.

Mr. Burden, as the fee simple absolute titleholder, owned substantially all of the "sticks" or "rights" in the Property. When Mr. Burden died, he left some of the "sticks" to Mrs. Bazemore, as a life tenant, and other "sticks" to the Grandchildren, as remaindermen. Important to the present case are the sticks owned by Mrs. Bazemore and by the Grandchildren relating to the timber on the Property.

Mr. Burden bequeathed to Mrs. Bazemore a life estate, which carries with it some rights in the trees. Specifically, our Supreme Court has held that, absent some other express grant, a life tenant's right to cut timber from her land is limited. That is, a life tenant is allowed to "clear tillable land to be cultivated for the necessary support of [her] family," and she may "also cut and use timber appropriate for necessary fuel" or to build structures on the property. *Dorsey v. Moore*, 100 N.C. 41, 44, 6 S.E. 270, 271 (1888). Further, a life tenant is permitted to harvest and sell sufficient timber needed to maintain the property. *Fleming v. Sexton*, 172

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2. *See U.S. v. Craft*, 535 U.S. 274, 278 (2002); *Everett's Lake Corp. v. Dye*, ___ N.C. App. ___, ___ n.1, ___ S.E.2d ___, ___ n.1, 2018 WL 4996362 (2018).

3. *In re Greens of Pine Glen*, 356 N.C. 642, 651, 576 S.E.2d 316, 322 (2003).

N.C. 250, 257, 90 S.E. 247, 250 (1916). However, a life tenant commits waste if she cuts timber "merely for sale,–to sell the timber trees, and allow them to be cut down and manufactured into lumber for market[:]"

> It would take from the land that which is not incident to the life-estate, and the just enjoyment of it, consistently with the estate and rights of the remainder-man or reversioner. The law intends that the life-tenant shall enjoy his estate in such reasonable way as that the land shall pass to the reversioner, as nearly as practicable unimpaired as to its natural capacities, and the improvements upon it.

Moore, 100 N.C. at 44, 6 S.E. at 271 (citations omitted).[4]

Mr. Burden, however, bequeathed to Mrs. Bazemore more "sticks" in the timber than that normally held by a life tenant, as was his right as the fee simple owner. *See Fletcher v. Bray*, 201 N.C. 763, 767-68, 161 S.E. 383, 385-86 (1931). Specifically, in addition to bequeathing to Mrs. Bazemore the "sticks" in the timber normally reserved for a life tenant, Mr. Burden bequeathed to Mrs. Bazemore the *unfettered* right to cut and sell any tree with a diameter of twelve (12) inches or more (hereinafter the "Large Trees") during her life tenancy. This arrangement was similar to that in *Fletcher v. Bray*, where the fee simple owner bequeathed a life estate in certain property to his wife *and* the right to dispose of the trees thereon *for any reason* during her life tenancy, with the remainder to his nephews and nieces in fee simple. *Id.* Our Supreme Court held that this arrangement was lawful:

> The court holds the opinion that the standing timber was severed by the testator from the fee and the absolute dominion thereof given the wife, and such severance was designed for her benefit rather than for the benefit of [the remaindermen]. Therefore, [wife], upon the sale of the timber, was entitled to hold the proceeds in her own right as her own property [and had the right to bequeath the proceeds as she saw fit].

Id. at 768, 161 S.E. at 386.

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4. In an opinion written by Judge John Haywood in 1800, the Court of Conference, which was our State's appellate court prior to the establishment of our Supreme Court in 1818, defined waste by a life tenant as "an unnecessary cutting down and disposing of timber, or destruction thereof upon wood lands, where there is already sufficient cleared land for the [life tenant] to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils and the like[.]" *Ballentine v. Poyner*, 3 N.C. 268, 269 (1800).

Therefore, Mrs. Bazemore had the unfettered right *during her life tenancy* to profit from any Large Tree, pursuant to Mr. Burden's will. However, her right to the smaller trees during her life tenancy was limited to that of a life tenant.

B. The Grandchildren's Right to Seek Relief as Remaindermen

[2] Where there is an unauthorized cutting of trees during a life tenancy, the remaindermen may seek relief. But the type of relief that a remainderman can seek depends on whether his interest is vested or contingent.

Our Supreme Court has held that a *vested* remainderman or reversioner "has his election either to bring trover for the value of the tree after it is cut, or an action [for trespass] on the case in the nature of waste, in which, besides the value of the tree considered as timber, he may recover damages for any injury to the inheritance which is consequent upon the destruction of the tree." *Burnett v. Thompson*, 51 N.C. 210, 213 (1858). Indeed, the right to bring an action for waste has been codified in Chapter 1, Article 42 of our General Statutes. *See* N.C. Gen. Stat. § 1-42 (2017).

However, the owner of a *contingent* future interest "cannot recover damages for waste already committed, [but] they are entitled to have their [contingent] interests protected from [future] threatened waste or destruction by injunctive relief." *Gordon v. Lowther*, 75 N.C. 193, 193 (1876); *see also Peterson v. Ferrell*, 127 N.C. 169, 170, 37 S.E. 189, 190 (1900) (holding that both vested and contingent remaindermen have the right to seek an injunction to protect against future waste); *Edens v. Foulks*, 2 N.C. App. 325, 331, 163 S.E.2d 51, 54 (1968) (stating that "[i]t is well settled in this State, as in other states, that a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste").

In the present case, the Timber Buyer argues that the Grandchildren have no standing to sue *for damages* because they were mere contingent remaindermen when the trees were cut. We conclude, though, that it is irrelevant whether the Grandchildren's remaindermen interest in the Property was vested or contingent under Mr. Burden's will: They did not bring suit until after Mrs. Bazemore's death, after their interest became a vested fee simple interest. Though neither party cites a case on point on this issue, we conclude that once a contingent remainderman's interest vests, he may bring suit for damages, even for acts committed during the life tenancy. Indeed, in discussing the limited right of a contingent remainderman to seek only injunctive relief, our Supreme Court

stated that a contingent remainderman "could not maintain [an] action [for damages] *during the life of the first taker*." *Latham v. Roanoke R. & Lumber Co.*, 139 N.C. 9, 51 S.E. 780, 780 (1905) (emphasis added). Our Supreme Court reasoned that, during the life tenancy, it is impossible to know what, if any, damage any particular contingent remainderman will suffer or which remainderman will vest and actually will suffer the damage. *Id.* at 11-12, 51 S.E. at 780-81.[5] But once the life tenancy terminates, this concern goes away.[6]

Further, our General Assembly has provided that *any* remainderman whose interest has become a vested present interest may sue for damages for timber cut during the preceding life tenancy. N.C. Gen. Stat. § 1-537 (2017) ("Every heir may bring action for waste committed on lands . . . of his own inheritance, as well in the time of his ancestor as in his own.")

Therefore, we conclude that the Grandchildren do have standing to seek relief for damage caused by any unauthorized cutting of timber on the Property which occurred during Mrs. Bazemore's life tenancy.

C. The Large Trees

[3] The Grandchildren argue that they are entitled to damages for the trees which were cut, contending that the contract between Mr. Bazemore (purportedly signed on behalf of Mrs. Bazemore) and the Timber Buyer was not validly executed.

We conclude that the Grandchildren have no claim regarding the Large Trees. Even if the contract was not valid, any claim pertaining to the cutting of Large Trees which occurred during the life tenancy of Mrs. Bazemore belonged to Mrs. Bazemore alone, and now to her estate. That is, the Large Trees belonged to Mrs. Bazemore during the life tenancy

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5. Our holding on this issue is the rule in other jurisdictions as well. *See, e.g.*, *Fisher's Ex'r v. Haney*, 180 Ky. 257, 262, 202 S.W. 495, 497 (1918) (holding that though a contingent remainderman can only seek injunctive relief during the life tenancy, this limiting rule has no application once the remainderman becomes vested at the death of the life tenant); *In re Estate of Hemauer*, 135 Wis. 2d 542, 401 N.W.2d 27, 1986 Wisc. App. LEXIS 3973, *3 (1986) (holding "that the [contingent] remaindermen's cause of action for waste did not accrue until [the life tenant's] death because the remaindermen had no right to enforce prior to her death").

6. Neither party makes any argument that the Grandchildren's claims are time-barred, and it does not appear that they are. But we note that claims of a remainderman for waste committed during the life tenancy but brought after the death of the life tenant may be time-barred. *See, e.g.*, *McCarver v. Blythe*, 147 N.C. App. 496, 499, 555 S.E.2d 680, 683 (2001).

pursuant to the express grant in Mr. Burden's will, and they were cut during the life tenancy. Unlike typical remaindermen, because of Mr. Burden's express grant to Mrs. Bazemore (and the other life tenants), the Grandchildren had no rights in the Large Trees during the life tenancy, *see Fletcher*, 201 N.C. at 768, 161 S.E. at 386; and, therefore, they had no rights in the Large Trees which were severed from the Property during the life tenancy. Therefore, assuming that the Large Trees were cut without Mrs. Bazemore's authorization, it is Mrs. Bazemore who suffered. The Grandchildren can make no claim for waste of their inheritance since Mr. Burden had "severed" the Large Trees from the fee that they were entitled to inherit. *Id.* And they have no claim for trover, as the Large Trees, once cut, belonged to Mrs. Bazemore.

D. The Small Trees

[4] We conclude that the Grandchildren are entitled to any damage caused by the cutting of trees less than twelve (12) inches in diameter (hereinafter the "Small Trees") by the Timber Buyer. Mrs. Bazemore's interest in the Small Trees was only that of a life tenant, as Mr. Burden did not expressly grant her any additional rights in the Small Trees in his will. And there was no evidence offered at summary judgment suggesting that the Small Trees were cut for any reason other than for profit, which, as explained above, is not permissible for a life tenant to enjoy.

The Timber Buyer argues that it is entitled to summary judgment, in any event, because the Grandchildren failed to put on any evidence showing that any of the trees cut by the Timber Buyer were, in fact, Small Trees. However, we conclude that there was *enough* evidence presented to survive summary judgment on this point. Specifically, the contract with the Timber Buyer provided that the Property would be "clear cut," suggesting that *all* of the marketable trees on the Property would be cut, not just the Large Trees. Further, the evidence identifies the types of trees which were actually cut by the Timber Buyer, including trees used for "pulp" and "chip-in-saw," which are typically made from smaller trees, less than twelve (12) inches in diameter. It certainly would have been better if the Grandchildren had offered an affidavit of a witness who expressly stated that at least one Small Tree was cut. However, we conclude that the record was sufficient to create an issue of fact that at least one Small Tree was cut, and therefore sufficient to reach the jury on the question of damages.

E. Liability of Timber Buyer

[5] Our Supreme Court has held that a third party may be liable to a remainderman whose interest has vested for wrongfully cutting timber,

specifically, for trover (the value of the trees) or for "an action on the case in the nature of waste" (the damage to the land). *Burnett*, 51 N.C. at 213.

Our Supreme Court has held that even if the third party contracts with the life tenant to cut timber, the third party is still liable to the remaindermen if any cutting is unauthorized. *Dorsey*, 100 N.C. at 45, 6 S.E. at 272. That is, it is no excuse that the third party acted under a contract with the life tenant, where the life tenant, otherwise, had no right to have the timber cut:

> The judgment, it seems, is founded upon the supposition that the contract between the life-tenant in possession and the [third party], purporting to give them the right to cut and remove the timber, had the legal effect to exempt [the third party] from liability to the [remaindermen] on such account. *This was a misapprehension of the law applicable.*

Id. at 45-6, 6 S.E. at 272.

Therefore, we conclude that the Timber Buyer is liable to the Grandchildren for any damage caused by the cutting of the Small Trees.

But we further conclude that the Timber Buyer is not liable for double damages pursuant to N.C. Gen. Stat. § 1-539.1. Specifically, our Court has held that a third party is not liable for double damages under this statute if the third party was not trespassing on the land itself when the cutting occurred. *Matthews v. Brown*, 62 N.C. App. 559, 561, 303 S.E.2d 223, 225 (1983). In *Matthews*, a timber company had the contractual right to enter upon a tract of land and cut some trees, but the evidence demonstrated that the company cut more trees than it was authorized to cut. *Id.* at 560, 303 S.E.2d at 224. We held that the award of damages for the unauthorized cutting of trees was appropriate, but that the doubling of the award was not since the company was lawfully on the land. *Id.* at 561, 303 S.E.2d at 225 (holding that N.C. Gen. Stat. § 1-539.1 does not apply unless the defendant was a "trespasser to the land"). In the present case, the Timber Buyer was authorized by Mr. Bazemore, who was acting within his apparent authority as Mrs. Bazemore's agent, to enter the Property and was therefore not a trespasser.

F. Indemnity from the Estates of the Bazemores

[6] The trial court concluded that the estates of Mr. and Mrs. Bazemore are liable to indemnify the Timber Buyer, as a matter of law. We agree.

As to Mrs. Bazemore's liability, the third party may be entitled to indemnity from the life tenant with whom he contracted. N.C. Gen. Stat. § 1-539.1(c). And, here, we conclude that the evidence establishes, as a matter of law, that Mr. Bazemore was acting as Mrs. Bazemore's agent when he contracted with the Timber Buyer.

As to Mr. Bazemore's liability, our Supreme Court has held that "[a]n agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity." *Howell v. Smith*, 261 N.C. 256, 258-59, 134 S.E.2d 381, 383 (1964).

G. The Broker

[7] The Grandchildren argue that the Broker, with whom Mr. Bazemore contracted to procure a buyer, was liable to them for any unauthorized cutting.

The trial court held that the Broker was not liable, as a matter of law. We agree. Section 32A-40[7] of our General Statutes provides that a person who relies in good faith on a power of attorney is not responsible for the misapplication of property, even where the attorney-in-fact exceeds or improperly exercises his authority.

Here, there was no evidence of actionable negligence or bad faith on the part of the Broker in this case. The evidence shows that the Broker reasonably acted in good faith to ensure that Mr. Bazemore had the authority to sell the timber on the Property: Mr. Bazemore assured the Broker of his authority to sell all of the timber on the Property; the Broker spoke to the Bazemores' attorney to confirm Mr. Bazemore's authority to sell the timber; the Broker communicated with all of Mrs. Bazemore's attorneys-in-fact; and the Broker checked the tax card to ensure that Mrs. Bazemore was the record owner of the Property. We believe that it is too much to ask this Broker, who is not an attorney, to have reviewed Mr. Burden's will and to have done any more to understand the exact rights Mrs. Bazemore had in the trees on the Property.

III. Conclusion

As a matter of law, the Grandchildren are entitled to damages from the Timber Buyer for any Small Trees they are able to prove on remand were cut by the Timber Buyer, but not for double damages pursuant to N.C. Gen. Stat. § 1-539.1.

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7. N.C. Gen. Stat. § 32A-40 (2017) has since been recodified as N.C. Gen. Stat. § 32C-1-119(c), effective as of 1 January 2018.

As a matter of law, the Grandchildren are not entitled to any damages from the Timber Buyer for any Large Trees which were cut.

And since whether the Grandchildren are entitled to any damages is still to be determined on remand, it was error for the trial court to award costs to the Grandchildren in its summary judgment order. The trial court may consider whether an award of costs in favor of the Grandchildren would be appropriate at the appropriate time on remand.

The Grandchildren are not entitled to any damages from the Broker for any of the trees (whether Large or Small) which were cut, as a matter of law. And the trial court did not err in awarding the Broker its costs.

The estates of Mr. and Mrs. Bazemore are liable to Timber Buyer for indemnity for any liability of the Timber Buyer to the Grandchildren for damage caused by any wrongful cutting of the Small Trees, as a matter of law. And the trial court properly awarded costs to the Timber Buyer.

AFFIRMED IN PART, REVERSED IN PART, REMANDED IN PART.

Judges STROUD and BERGER concur.

MARLIN LEASING CORP., PLAINTIFF
v.
WALID ESSA, DEFENDANT

No. COA18-610

Filed 15 January 2019

Constitutional Law—Full Faith and Credit—out-of-state default judgment—service of process

In an action to recover damages for a default on an equipment lease contract, a default judgment entered against defendant in Pennsylvania was not entitled to full faith and credit in North Carolina where defendant was not properly served with process in accordance with Pennsylvania law.

Appeal by defendant from order entered 27 February 2018 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 14 November 2018.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Byron L. Saintsing, for plaintiff-appellee.

Sharpless & Stavola, P.A., by Peter F. O'Connell and Eugene E. Lester, III, for defendant-appellant.

DAVIS, Judge.

The Full Faith and Credit Clause of the United States Constitution provides that a judgment entered in one state must be given the same effect in another state that it possesses in the state where it was rendered. A foreign judgment must, however, meet the criteria for a valid judgment under the laws of the rendering state — including the requirement of proper service of process upon the defendant — before it will be afforded full faith and credit.

Defendant Walid Essa appeals from an order in which the trial court found that a default judgment rendered against him in Pennsylvania was entitled to full faith and credit in North Carolina. Because we conclude that Essa was never properly served with process under Pennsylvania law and lacked a full and fair opportunity to litigate the action in Pennsylvania, we reverse.

Factual and Procedural Background

On 19 February 2011, Essa, who operates a restaurant called The Dugout in Archdale, North Carolina, entered into an equipment lease contract (the "Lease") with Trinity Data Systems ("Trinity"). The Lease provided that Trinity was to install a point-of-sale system at The Dugout. The terms and conditions of the Lease provided that it was to be governed by the laws of Pennsylvania, any lawsuit arising out of the Lease would be brought in Pennsylvania, and Essa would be subject to jurisdiction in Pennsylvania. Trinity subsequently assigned the Lease to Marlin Leasing Corporation ("Marlin").

On 18 April 2013, Marlin filed a complaint against Essa in municipal court in Philadelphia, Pennsylvania. In its complaint, Marlin alleged that Essa was in default under the Lease and claimed damages of $8,562.75. On 15 August 2014, Marlin filed with the municipal court a document captioned "Affidavit of Service by Mail" in which counsel for Marlin stated that (1) he "sent a certified letter (return receipt requested) to the defendant and the receipt was returned marked either 'UNCLAIMED' or 'REFUSED' "; (2) he then sent a letter by regular mail to Essa at the same address where the original certified letter had been mailed, which was

2104 Francis St., High Point, NC 27263 (the "High Point Address"); and (3) the letter was never returned to him despite the fact that his return address was listed thereon.[1] In fact, the letter sent by certified mail had been returned to Marlin with the notation that it had been "unclaimed."

A hearing was held in municipal court for which Essa was not present. A default judgment (the "Pennsylvania Judgment") was entered by the court on 3 September 2014. On 20 January 2015, Marlin filed a complaint in Wake County District Court in which it asserted that the Pennsylvania Judgment was entitled to full faith and credit in North Carolina and requested that the judgment be enforced. Essa filed an answer on 7 July 2017 in which he argued that the Pennsylvania Judgment was not entitled to full faith and credit due, in part, to the fact that Essa had not received notice of the Pennsylvania action.

On 3 January 2018, Marlin filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure along with a supporting affidavit from Karen Shields, Vice President and Deputy General Counsel for Marlin. The affidavit stated, in pertinent part, as follows:

> Service on the Defendant was made in accordance with 231 Pa. Code Rule 403(1) by mailing the documents by ordinary mail via U.S. Postal Service and by U.S. Postal Service, Certified Mail, Return Receipt Requested as evidenced by the Affidavit of Service. Defendant refused to accept service by certified mail sent to 2104 Francis Street, High Point, NC 27263 and therefore Plainitf [sic] mailed a copy of the Relisted Pennsylvania Suit to the same address which was not returned to Marlin by the U.S. Postal Service.[2]

Essa filed a cross-motion for summary judgment supported by his own affidavit on or about 5 January 2018. Essa's affidavit stated, in pertinent part, as follows:

> 4. I am the owner of The Dugout restaurant located at 11246 N. Main St., Archdale, NC 27263. . . .

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1. While it is not entirely clear from the affidavit, it appears that a copy of the complaint was included with the letter sent to Essa.

2. As discussed in more detail below, the assertion in this affidavit that the letter sent by certified mail had been "refused" was incorrect. Instead, the receipt for the letter had been marked "unclaimed."

> 5. The Dugout has been continuously located at the address stated in the preceding paragraph since prior to February 2011.
>
> 6. I was not served with a copy of a Summons and Complaint in the Commonwealth of Pennsylvania, Philadelphia Municipal Court, First Judicial District of Pennsylvania, Case No. SC-13-04-18-4746 (the "Pennsylvania Action").
>
> 7. I did not refuse service of a copy of a Summons and Complaint in the Pennsylvania Action.
>
> 8. Prior to the commencement of this civil action, I had no knowledge of the Pennsylvania Action.

A hearing was held on both motions in Wake County District Court on 22 February 2018 before the Honorable Ned W. Mangum. On 27 February 2018, the trial court issued an order granting Marlin's motion for summary judgment and denying Essa's cross-motion. In the order, the court stated that "the Plaintiff's Pennsylvania judgment against the Defendant is entitled to full faith and credit in the State of North Carolina and . . . the Defendant had a full and fair opportunity to litigate any issues regarding jurisdiction in the Commonwealth of Pennsylvania." Essa filed a timely notice of appeal with this Court.

Analysis

Essa contends that the trial court erred in granting summary judgment in favor of Marlin because the Pennsylvania Judgment is not entitled to full faith and credit in North Carolina in that it was entered despite the lack of valid service of process upon Essa. We agree.

"On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*." *Mitchell*, *Brewer*, *Richardson*, *Adams*, *Burge & Boughman v. Brewer*, __ N.C. App. __, __, 803 S.E.2d 433, 443 (2017) (citation and quotation marks omitted), *disc. review denied*, 370 N.C. 693, 811 S.E.2d (2018). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted).

It is well established that "[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to

judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

This Court has recently summarized the effect of the Full Faith and Credit Clause:

> The Full Faith and Credit Clause requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered. Because a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit.

Tropic Leisure Corp. v. Hailey, __ N.C. App. __, __, 796 S.E.2d 129, 131 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 369 N.C. 754, 799 S.E.2d 868, *cert. denied*, __ U.S. __, 199 L. Ed. 2d 385 (2017). We review *de novo* the issue of whether a trial court has properly extended full faith and credit to a foreign judgment. *Id.*

"[T]he test for determining when the Full Faith and Credit Clause requires enforcement of a foreign judgment focuses on the validity and finality of the judgment in the rendering state." *DoxRx, Inc. v. EMI Servs. of N.C.*, 367 N.C. 371, 375, 758 S.E.2d 390, 393 (citation omitted), *cert. denied*, __ U.S. __, 190 L. Ed. 2d 390 (2014). Our Supreme Court has made clear that North Carolina courts will not enforce foreign judgments in circumstances where "the rendering state lacked personal or subject matter jurisdiction." *Id.* at 382, 758 S.E.2d at 397.[3]

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3. Improper service of process results in a lack of personal jurisdiction under both North Carolina and Pennsylvania law. *See Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998) ("[I]t is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods."), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999); *Cintas Corp. v. Lee's Cleaning Servs.*, 549 Pa. 84, 91, 700 A.2d 915, 917 (1997) ("Service of process is a mechanism by which a court obtains jurisdiction over a defendant[.]").

In addressing this issue, we find instructive our Supreme Court's decision in *Boyles v. Boyles*, 308 N.C. 488, 302 S.E.2d 790 (1983), in which the Court determined that a default judgment rendered by a federal court applying Florida law was not entitled to full faith and credit because the defendant was not given proper notice of the action. *Id.* at 489, 302 S.E.2d at 792. *Boyles* concerned a claim to recover alimony arrearages by the plaintiff from her ex-husband. *Id.* The plaintiff attempted to serve the defendant by certified mail, which was returned "bear[ing] a postal stamp indicating . . . that the letter was 'unclaimed.' " *Id.* Subsequently, "two notices were left at [the defendant's] Pennsylvania address informing him that the post office had the letter." *Id.* A hearing was held in a Florida circuit court that the defendant did not attend. *Id.* The circuit court granted a default judgment in favor of the plaintiff, finding that service upon the defendant had been proper under Florida law. *Id.*

Ten years later, the plaintiff filed a complaint in Wake County Superior Court, "asking that full faith and credit be accorded to the Florida default judgment." *Id.* at 490, 302 S.E.2d at 792. The defendant, who had become a resident of North Carolina, argued that the default judgment was not entitled to full faith and credit because of insufficient notice with regard to the Florida action. *Id.* The defendant filed an affidavit in which he "specifically denied he was ever aware" of the Florida default judgment and stated that he had never "been served with a complaint for [the] alimony arrearages while living in Pennsylvania." *Id.*

In determining whether the default judgment was entitled to full faith and credit, our Supreme Court looked to Florida law governing service of process, which provided that notice sent by mail was sufficient "only if the affected party received actual notice or there was affirmative evidence that he or she had refused the notice." *Id.* at 496, 302 S.E.2d at 796. The Supreme Court concluded that the evidence of the plaintiff's attempts to serve the defendant (which included a receipt indicating that the letter had been "unclaimed" and notations that two notices had been left at the defendant's address) was not sufficient to support an inference that the defendant had actual notice "in light of [his] assertion that he was never aware of the Florida proceeding." *Id.* at 498, 302 S.E.2d at 797.

Although *Boyles* applied Florida law rather than Pennsylvania law, it is nevertheless helpful in guiding our analysis of the similar issue presented in the case currently before us. Like the defendant in *Boyles*, Essa argues the Pennsylvania municipal court that entered the default judgment lacked jurisdiction over him because he was not properly served under Pennsylvania law. He further asserts that he never received

notice of the Pennsylvania Judgment until the North Carolina lawsuit was filed by Marlin. Therefore, in order to analyze Essa's arguments we must first examine Pennsylvania law to determine whether he was properly served with process under the laws of that jurisdiction.

I. Service of Process under Pennsylvania Rules of Civil Procedure

As an initial matter, we note that the Pennsylvania Supreme Court has explained the jurisdictional significance of service of process as follows:

> Service of process is a mechanism by which a court obtains jurisdiction of a defendant, and therefore, the rules concerning service of process must be strictly followed. Without valid service, a court lacks personal jurisdiction of a defendant and is powerless to enter a judgment against him or her. Thus, improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of the action against him or her.

Cintas, 549 Pa. at 91, 700 A.2d at 917-18 (internal citations omitted). Thus, under Pennsylvania law, "[i]f there is no valid service of initial process, a subsequent judgment by default must be deemed defective." *U.K. LaSalle, Inc. v. Lawless*, 421 Pa. Super. 496, 500, 618 A.2d 447, 449 (1992).

Rule 404 of the Pennsylvania Rules of Civil Procedure governs service of process upon persons outside of Pennsylvania, stating that "[o]riginal process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint or the reissuance or the reinstatement thereof." Pa. R.C.P. No. 404. Rule 404 further provides that process may be served "by mail in the manner provided by Rule 403." Pa. R.C.P. No. 404(2). Rule 403, in turn, states as follows:

> If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon the delivery of the mail.
>
> (1) If the mail is returned with notation by postal authorities that the defendant *refused* to accept the mail, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by ordinary mail with the return address of the sender appearing thereon. Service by ordinary mail

> is complete if the mail is not returned to the sender within fifteen days of mailing.
>
> (2) If the mail is returned with notation by the postal authorities that it was *unclaimed*, the plaintiff shall make service by another means pursuant to these rules.

Pa. R.C.P. No. 403 (emphasis added).

Courts applying Pennsylvania law have consistently differentiated between the terms "refused" and "unclaimed" in this context. *See Kucher v. Fischer*, 167 F.R.D 397, 398 (E.D. Pa. 1996) (distinguishing between notations "refused" and "unclaimed" for purposes of Rule 403); *Carson v. Carson*, 28 Pa. D. & C.3d 281, 283 (1983) ("[I]t seems clear that 'unclaimed' is not the same as 'refused.' "); *Harris v. Kaulius*, 18 Pa. D. & C.3d 636, 639 (1981) ("[A] serious question of due process [will arise where a] plaintiff produce[s] nothing except proof that the letter [went] unclaimed[.]").

In *Kucher*, the plaintiff filed a complaint against the defendants in an effort to recover damages for injuries she received in a car accident. *Kucher*, 167 F.R.D. at 397. After the defendants failed to make an appearance, the plaintiff sought a default judgment in which she claimed that the defendants had been properly served with process under Pennsylvania law. *Id.* In support of this motion, the plaintiff asserted that (1) after a copy of the complaint was sent by certified mail to the defendants' address, it was returned to the plaintiff with the notation "unclaimed;" and (2) the plaintiff had subsequently sent additional copies of the complaint "by regular first class mail," which were not returned. *Id.* In denying the plaintiff's motion for a default judgment, the court applied Rule 403 as follows:

> Pennsylvania law authorizes service by ordinary mail upon satisfaction of the following steps: (1) the mailing of the original process to the defendant by a form of mail requiring a receipt, such as certified or registered mail; (2) the return of that mail impressed with a notation by the postal authorities that the mail had been "refused"; and (3) the re-mailing of the "refused" mail to the defendant by ordinary mail.
>
> Here, plaintiff has established that steps 1 and 3 have been fulfilled, i.e., that process was mailed to defendant initially by certified mail and later by ordinary mail. However, because the certified letters returned by the

> postal authorities contain notations impressed upon them indicating that the mail went "unclaimed" rather than that it was "refused," plaintiff has failed to demonstrate satisfaction of step 2.
>
> A notation by the postal authorities that certified or registered mail went "unclaimed" rather than "refused" is generally insufficient to satisfy the requirements of service by ordinary mail under Pennsylvania law. Similarly, certified or registered mail that is returned because the intended recipient has moved can not be said to have been deliberately refused.
>
> The importance of the distinction between "refused" and "unclaimed" mail reflects the common sense notion that a defendant's failure to claim mail may stem from a multitude of reasons, including that the defendant has moved to a new address. Unlike a refusal, which is intentional, a failure to claim does not alone give rise to the implication that the defendant has deliberately sought to avoid receipt of process.

Id. at 397-98 (internal citations and quotation marks omitted).

Like the plaintiff in *Kucher*, Marlin has failed to satisfy the second step under Rule 403. Despite the statement in the affidavit filed by Marlin asserting that the certified mail receipt sent to Essa came back bearing the notation "refused," the record before us makes unmistakably clear that the certified letter was instead returned with the notation "unclaimed." Thus, based on unambiguous Pennsylvania law, we conclude that Marlin failed to properly serve Essa under Rule 403.

Marlin contends, however, that even assuming service was improper under Rule 403, service was effectuated "pursuant to the controlling local rules of the Philadelphia Municipal Court, Civil Division, which rendered the judgment in the Pennsylvania Action." In support of this argument, Marlin cites Local Rule 111.C which states, in pertinent part, as follows:

> (1) A complaint may be served by certified mail if defendant's last known address is . . . outside the County of Philadelphia . . . .
>
> (2) If the certified mail is returned with notation by the postal authorities that it was *refused or unclaimed*, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by first class mail with

> the return address of sender appearing thereon. Service by ordinary mail is complete if the mail is not returned to sender within 15 days after mailing.

Phila. M.C.R. Civ.P. No. 111.C (emphasis added).

Thus, while Rule 403 materially differentiates between a notation of "unclaimed" on a certified mail receipt as opposed to a notation of "refused," no such distinction exists under Local Rule 111.C. Therefore, if — as Marlin argues — Local Rule 111.C applies on these facts, service upon Essa was proper under Pennsylvania law based on the fact that the letter Marlin subsequently sent to Essa by regular mail was not returned within fifteen days. Conversely, if Essa is correct that Rule 403 governs, then no proper service was made.

In resolving this conflict, we are guided by Pennsylvania Rule of Civil Procedure 239, which provides that "[l]ocal rules shall not be inconsistent with any general rule of the Supreme Court or any Act of Assembly." Pa. R.C.P. 239(b)(1). *See also Sanders v. Allegheny Hosp. – Parkview Div.*, 2003 PA Super 349, 833 A.2d 179, 183 (Pa. Super. 2003) ("Local courts have the power to formulate their own rules of practice and procedure. These rules have equal weight to those rules established by the Pennsylvania Supreme Court *provided that the local rules do not abridge, enlarge, or modify the substantive rights of a party*." (internal citation and quotation marks omitted, emphasis added)).

We believe that Local Rule 111.C is facially inconsistent with Rules 404 and 403 with regard to non-resident defendants such as Essa in that its application would diminish their rights to adequate service of process. As noted above, Rule 404 specifically cross-references Rule 403 and expressly states that with regard to defendants outside of Pennsylvania service pursuant to Rule 403 is appropriate. Pa. R.C.P. No. 404(2). Rule 403, in turn, provides that service may be made by regular mail *only* in cases where a letter previously sent by certified mail has been returned as "refused" and that, conversely, "if the mail is returned with notation by the postal authorities that it was unclaimed, the plaintiff shall make service by another means pursuant to *these* rules" — not pursuant to rules established by local courts. Pa. R.C.P. No. 403(1), (2) (emphasis added). *See In re Elfman*, 212 Pa. Super. 164, 167, 240 A.2d 395, 396 (Pa. Super. 1968) ("When notice in a specified manner is prescribed by a statute, that method is exclusive.").

Thus, whatever applicability Local Rule 111.C may have with regard to service upon local defendants, we are unable to agree with Marlin that it applies to non-resident defendants such as Essa. *See, e.g.*, *Baez v. Rivers*, 2007 Phila. Ct. Com. Pl. LEXIS 21, *6 (applying Rules 403 and

404 to service on out-of-state defendant).[4] Accordingly, we conclude that Essa was never properly served with process under Pennsylvania law.

II. Full and Fair Opportunity to Litigate

Finally, we address Marlin's argument that the Pennsylvania Judgment should be deemed enforceable in North Carolina even if service was not proper under Pennsylvania law on the theory that Essa nevertheless had a full and fair opportunity to litigate the service of process issue in Pennsylvania yet essentially waived that right.[5] However, as Marlin concedes, this principle would apply *only if* Essa had actually received notice of the Pennsylvania action in which the judgment sought to be enforced was rendered. *See Boyles*, 308 N.C. at 491-92, 302 S.E.2d at 793 (An inquiry into whether a "jurisdictional issue was 'fully and fairly litigated' . . . rests on the presupposition that the requirement of adequate notice had been met in the original proceeding. Indeed, if a litigant has no notice of a court proceeding, *a fortiori*, the litigant could not 'fully and fairly' litigate any issue in the case.").[6]

As noted above, Essa submitted an affidavit in support of his motion for summary judgment in which he stated that he was wholly unaware of the existence of the Pennsylvania action until he was served with process in the North Carolina action. Marlin makes several arguments in its brief as to why an inference can be drawn that Essa *may* have been aware of the Pennsylvania action prior to the entry of the Pennsylvania Judgment, but as Marlin's counsel conceded at oral argument nothing in the record affirmatively demonstrates that Essa possessed actual knowledge of the Pennsylvania lawsuit.

First, in support of its contention that Essa had actual notice of the Pennsylvania action Marlin has requested that we take judicial notice of a deed — a copy of which is attached to Marlin's brief — naming Essa

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4. While Marlin cites *Leight v. Lefkowitz*, 419 Pa. Super. 502, 615 A.2d 715 (Pa. Super. 1992), to support its argument that Pennsylvania courts do, in fact, apply Local Rule 111.C, its reliance on that case is misplaced. *Leight* involved Pennsylvania defendants rather than an out-of-state defendant such as Essa. *Id.* at 507, 615 A.2d 753. Therefore, we do not find *Leight* to be applicable to the present case.

5. This appears to be the ground underlying Judge Mangum's 27 February 2018 order granting summary judgment in favor of Marlin.

6. As noted above, Pennsylvania caselaw — while not entirely clear on the issue — seems to suggest that even actual notice is not enough to remedy the effects of improper service. *See U.K. LaSalle*, 421 Pa. Super. at 500, 618 A.2d at 449. In any event, for the reasons set out herein the question of whether actual notice could ever be sufficient under Pennsylvania law to excuse improper service is moot because Marlin has failed to rebut Essa's evidence that he *lacked* actual notice of the Pennsylvania Judgment until the North Carolina lawsuit was filed.

as the grantee of the property located at the High Point Address. It is true that "this Court can take judicial notice of certain documents even though they were not included in the record on appeal" and that we have previously taken judicial notice of information contained within recorded deeds. *In re Hackley*, 212 N.C. App. 596, 601-02, 713 S.E.2d 119, 123 (judicially noting a conveyance of property reflected on a recorded deed attached to a party's brief), *disc. review denied*, 365 N.C. 351, 718 S.E.2d 376 (2011). The mere fact, however, that Essa may own the property listed at the High Point Address is by itself insufficient to show that Essa had actual notice of the Pennsylvania Action. Thus, the existence of the deed — without more — is not sufficient to rebut Essa's sworn affidavit denying any prior knowledge of the Pennsylvania Action.

Second, Marlin contends that a 2 July 2013 entry on the docket sheet for the Pennsylvania Action raises an inference that Essa had actual notice of the Pennsylvania Action. This entry states that the "case was amended to add as [defendant] Walid Essa at 11246 N. Main St. Ste 304, Archdale, N.C. 27263" — the address of The Dugout. Although Marlin contends this docket entry suggests that a "Statement of Claim" in connection with the Pennsylvania Action was, in fact, mailed to The Dugout, the record before us contains no indication that any documents were actually mailed to that address. Therefore, it would be pure speculation for us to assume that Essa had actual notice of the Pennsylvania Action, and such conjecture is insufficient to rebut Essa's sworn statement to the contrary.

* * *

Thus, because Marlin failed to properly serve Essa with process under Pennsylvania law and has not shown that Essa had a full and fair opportunity to litigate in Pennsylvania the jurisdictional issue resulting from the lack of service, we hold that the trial court erred in granting summary judgment in favor of Marlin and in denying Essa's cross-motion. *See Boyles*, 308 N.C. at 497, 302 S.E.2d at 796-97 (declining to extend full faith and credit to Florida judgment where plaintiff did not follow Florida service requirements and evidence did not support finding of actual notice).

Conclusion

For the reasons stated above, we reverse the trial court's 27 February 2018 order and remand for entry of an order granting summary judgment in favor of Essa.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judges HUNTER, JR. and BERGER concur.

STATE v. CASEY

[263 N.C. App. 510 (2019)]

STATE OF NORTH CAROLINA
v.
TIMOTHY RAY CASEY, DEFENDANT

No. COA18-269

Filed 15 January 2019

1. Evidence—sexual abuse of minor—no physical evidence—expert opinion—impermissible credibility vouching

In a prosecution for multiple sexual offenses against a minor, testimony offered by the State's expert witness that the minor had, in fact, been sexually abused despite the absence of any physical evidence was inadmissible because it could have been construed by the jury as vouching for the victim's credibility.

2. Appeal and Error—preservation of issues—effective assistance of trial counsel—failure to raise claim on appeal

In a prosecution for multiple sexual offenses against a minor, where a determination could be made from the cold record that defendant's trial counsel provided ineffective assistance—by failing to move to strike inadmissible testimony by the State's expert witness who opined that the victim had been subjected to sexual abuse, despite the absence of any physical evidence—appellate counsel could have raised the issue on appeal, and the failure to do so constituted a waiver. Defendant's motion for appropriate relief based on that issue was therefore procedurally barred.

3. Constitutional Law—effective assistance of counsel—appellate counsel—failure to raise claim on appeal

On appeal from convictions for multiple sexual offenses against a minor, defendant's appellate counsel provided ineffective assistance for failing to argue that the performance of defendant's trial counsel was deficient for failure to object to clearly inadmissible testimony by the State's expert that the victim had, in fact, suffered sexual abuse despite the absence of any physical evidence. The expert's opinion was outside the scope of defense counsel's questions and did not constitute invited error, but even if it did, appellate counsel should have raised the issue on appeal, and the failure to do so was prejudicial.

Judge BERGER concurring in part and dissenting in part.

Appeal by Defendant from an order entered 26 May 2017 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 3 October 2018.

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

North Carolina Prisoner Legal Services, Inc., by Lauren E. Miller, for the Defendant.

DILLON, Judge.

This present appeal is the second to our Court in this matter. In the first appeal, we found no error in the judgment convicting Defendant Timothy Ray Casey ("Defendant") of various sexual crimes. In this present appeal, Defendant seeks review of the trial court's order denying his Motion for Appropriate Relief ("MAR") seeking a new trial for ineffective assistance of his trial counsel and of his appellate counsel. For the reasons explained herein, we reverse the trial court's order and remand with instructions to enter an order granting Defendant's MAR.

I. Background

Defendant was indicted on one count of statutory sexual offense and two counts of taking indecent liberties, stemming from alleged encounters with the minor daughter ("Kim")[1] of his then live-in girlfriend.

The evidence at trial tended to show as follows: In 1996, when Kim was five years of age, Defendant moved in with Kim and her mother. Nine years later, on 1 January 2006, when Kim was fourteen years of age, Defendant broke up with Kim's mother and moved out. Two days later, on 3 January 2006, Kim told her mother, who was upset about the breakup, that Defendant had molested her during the nine-year period he had lived with them.

The State offered no physical evidence of the alleged sexual abuse or that Kim had told anyone of the abuse prior to telling her mother.

The State did call other witnesses, including a clinical psychologist, qualified as an expert. This expert opined on direct examination that Kim exhibited signs consistent with being sexually abused. During cross-examination, however, the expert went further and made statements

1. A pseudonym.

that Kim had, in fact, been sexually abused. Defendant's trial counsel made no motion to strike these statements.

The jury found Defendant guilty of all charges. Defendant appealed to this Court. During the first appeal to our Court, Defendant argued, in part, that the expert's testimony *offered on direct* – that Kim exhibited signs consistent with sexual abuse – amounted to impermissible vouching. Defendant's appellate counsel made no argument concerning the expert's statements made during cross-examination that Kim had been sexually abused. We found no error, never addressing any issues concerning the expert's statements made during cross-examination.[2]

Defendant subsequently filed a MAR with the trial court, alleging ineffective assistance by both his trial counsel and his appellate counsel. The trial court issued an order denying Defendant's MAR.

Defendant petitioned this Court for a writ of *certiorari* to review the order. We granted Defendant's petition and now review the merits of his arguments.

II. Standard of Review

We review the trial court's Order denying Defendant's MAR for "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). Based on the following, we reverse and remand for a new trial.

III. Analysis

Defendant argues that the trial court should have granted his MAR based on the ineffective assistance of counsel he received at the trial level and at the appellate level. For the following reasons, we conclude that (1) the testimony offered by the State's expert that Kim had, in fact, been sexually abused was inadmissible; (2) Defendant has waived any argument concerning whether he was denied effective assistance of *trial* counsel; and (3) Defendant was denied effective assistance of *appellate* counsel in his first appeal when counsel failed to make any argument in the first appeal concerning the expert's testimony that Kim had, in fact, been sexually abused. Accordingly, Defendant is entitled to a new trial.

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2. This appeal is before us for the second time; for a more detailed account of the facts in the underlying case, see *State v. Casey*, 2009 N.C. App. LEXIS 144*, *2-7 (N.C. Ct. App. Feb. 17, 2009).

A. Testimony by the State's Expert at Trial

[1] Regarding expert opinions offered in sexual offense prosecutions involving a child victim, our Supreme Court has instructed as follows: An expert may offer an opinion as to whether a child presents symptoms or characteristics *consistent with* those exhibited by children who have, in fact, been sexually abused. *See State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987). However, where there is no physical evidence of sexual abuse, an expert may not offer an opinion "that sexual abuse has *in fact* occurred" in that case. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (reasoning that "absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility"). And an expert's opinion which bolsters the child's credibility *may* constitute plain error. *State v. Towe*, 366 N.C. 56, 62-63, 732 S.E.2d 564, 568 (2012).

During the trial in this matter, the State offered no physical evidence that Kim had been sexually abused.

The State did tender an expert who opined on direct that Kim exhibited characteristics consistent with that of a sexual abuse victim, as generally allowed under our case law, though the basis of his opinion does not seem particularly compelling. That is, he did not base his opinion on the presence of emotional or psychological trauma that he observed in Kim that may also be found in a sexual abuse victim, as he testified that Kim did not exhibit any such signs. Rather, he based his opinion essentially on his belief that Kim was credible, listing two factors: (1) Kim's ability to describe various sexual acts at such a young age and (2) Kim had no reason to lie. We note, though, that Kim was actually fourteen (14) years old when she first reported the abuse and further that Defendant had ended his decade-long relationship with Kim's mother just two days before Kim first reported the abuse:

> Q: Doctor, do you have an opinion satisfactory to yourself as to whether or not [Kim] exhibited characteristics of someone who had been sexually abused? . . . Could you tell us what that is and your basis for that?
>
> A: My opinion is that she does display characteristics consistent with a child, young adult, adolescent adult who has been sexually abused. The characteristics that would be germane in this case are first that she describes in a plausible way sexual acts. That she describes those acts in a way that are consistent with other sources of information. That she has a – had an

> age-inappropriate sexual knowledge. [Second] [t]hat she did not have what would appear to be obvious alternative reasons for making a disclosure. . . . That she did not have obvious reasons for making a false disclosure . . . . That would be the extent of my basis.
>
> Q: Thank you, Doctor. No further questions.

In any event, as noted in the trial court's MAR order, Defendant's counsel during the jury trial did properly object to the opinion offered by the State's expert *on direct*. And Defendant's appellate counsel challenged this opinion in the first appeal. However, as we stated in the first appeal, the State's witness *on direct* never expressly opined that Kim had, in fact, been sexually abused, just that the manner in which she was able to describe the abuse was consistent with someone who had been sexually abused, an opinion which is generally allowed even where there is no physical evidence of sexual abuse.

Defendant argues in this current appeal that *on cross-examination*, the State's expert went further by opining that though Kim did not exhibit any characteristics of psychiatric trauma, she had, in fact, been sexually abused:

> Q: Well now according to your report, wasn't there – You said that you – you comment on her performance on the Rorschach test and you say there was no indication of any acute psychiatric disturbance.
>
> A: I apologize. I did misspeak. I did conduct evaluation involving the Rorschach, the TAT, and I had [Kim]'s father complete the CAB regarding her.
>
> Q: As a matter of fact, you found nothing unusual about this young lady, did you?
>
> A: Nothing unusual **other than my opinion that she had been sexually abused**.
>
> Q: And that's your opinion. But now when you are talking about characteristics of sexually abused children that's when you're talking about such things as post-traumatic stress syndrome, are you not?
>
> A: Possibly. Possibly.

(Emphasis added).

And Defendant argues that the State's expert *on re-direct* again opined that Kim's sexual abuse was a fact. Defendant points to testimony where the State's expert conceded that Kim did not exhibit anxiety, depression, or personality disorders which would be consistent with a sexual abuse victim, but that he still had his "psychiatric concerns" because of "the fact that [Kim] was abused":

> Q: What does psychiatric concern, what are you talking about?
>
> A: Well, you know, we've got a big read [sic] book that has all of our psychiatric diagnoses in it which include anxiety and depression and personality disorders and all of those things, and we – she does not fit the diagnostic criteria for any of those disorders. The closest she comes is what's called a V-Code diagnosis, which is not a diagnosis. It's sexual abuse of a child. And so it doesn't have to do in essence with her, that's why it's not a diagnosis of her. **It has to do with the fact that she was abused**.

(Emphasis added.) The State's expert explained immediately *on re-cross* what he meant by this statement, specifically that his statement was based on his superior ability as a trained professional to determine whether Kim was being truthful:

> Q: And [your statement made on re-direct is] based on her comments to you and nothing else?
>
> A: It's based on her statements to me being consistent with information provided by other individuals, being consistent over time, being detailed, being plausible, so I would say it's nothing else. It is her statements to me, but you know, that's what my education is about is being able to make inferences based on individual statements to me.

In its MAR order, the trial court found that the State's expert was not vouching for Kim's credibility when he stated that he found nothing unusual in Kim "other than [his] opinion that she had been sexually abused." Specifically, the trial court found:

> While it is clear that [the expert] could have said "except that in my opinion her symptoms are consistent with a child who suffered from sexual abuse", it is also equally clear and the court so finds that [the expert] was not

> issuing a diagnosis or vouching for [Kim's] credibility but redirecting Defendant's counsel to the overarching concern of the examination and disagreeing with counsel's underlying assertion that nothing was wrong with [Kim].

We conclude that this finding does not go far enough to support the trial court's order denying Defendant's MAR and is otherwise not supported by the evidence. The issue is not what the trial judge may have thought the expert intended by his testimony; the issue is whether the testimony, as stated, could be reasonably construed by at least one juror to be an opinion regarding Kim's credibility. And the finding is not otherwise supported by the evidence. It is not "clear" that the jury would not have construed the expert's statement as witness vouching. A plain reading of the expert's testimony is that even though Kim showed no signs of psychiatric or psychological disorder consistent with sexual abuse victims, it was the expert's opinion that Kim had been sexually abused *because* of his evaluation of her credibility. Perhaps, as the trial court states, the expert *meant* merely to repeat his opinion made on direct, but that is not what was heard by the jury.

Also, in its MAR order, the trial court found that the State's expert was not opining about Kim's credibility when he stated on re-direct that "[i]t has to do with the fact that she was sexually abused" but was merely explaining the coding in his records showing why Kim had been referred to him. Specifically, the trial court found as follows:

> Here again the Court finds that while the [expert]'s words are inartful, when understood in context, he states that [Kim] is not diagnosed with being sexually abused and that does not in essence have to do with her. He then in an effort to explain why [she] was being seen states in a shorthand. "It has to do with the fact [that] she was abused." While there is no doubt the [expert] could have removed all ambiguity by saying, [Kim] was referred to me to investigate her claims of improper sexual contact and while I did not make a diagnosis under the Diagnostic and Statistical Manual, we did code her visit showing that she was seen for investigation of sexual abuse. There is also no doubt that the [expert] was not rendering a formal opinion that [Kim] was sexually abused, or vouching for her credibility, but explaining both that [Kim] did not have a formal diagnosis and the charting number assigned to the [her] visit using the Diagnostic and Statistical Manual or big red book was sexual abuse.

We conclude that this finding is internally inconsistent and not supported by the evidence. The finding is internally inconsistent in that the finding states that the statement was "inartful" and ambiguous but also states that there was "no doubt" what the expert meant. Further, the finding contradicts the evidence: the expert explained that his statement regarding the "fact that she was abused" was not a mere coding issue but was based on Kim's statements "being consistent over time," "being plausible," and his ability to "make inferences based on [Kim's] statements." In other words, the evidence shows that there was tremendous doubt as to what the expert meant.

We have reviewed the testimony of the State's expert and conclude that in the absence of physical evidence of sexual abuse, this testimony was not admissible under our Rules of Evidence. His statements are similar to those determined to amount to plain error by our Supreme Court in *State v. Towe*, where the expert testified that the minor was in a category of children who have been sexually abused but who showed "no abnormal findings" or "physical findings of abuse." *Towe*, 366 N.C. at 59-60, 732 S.E.2d at 566. It is, indeed, reasonably probable that at least one juror construed the statements made by the State's expert, no matter his intent, as vouching for Kim's credibility.

We are not saying that Kim was not being truthful in her testimony. She very well may have experienced years of horrible abuse at the hands of Defendant. Or she may have been making untruthful comments about Defendant, either to get back at Defendant for leaving her mother or to cause her mother to be more focused on their mother-daughter relationship rather than her mother's relationship with Defendant. Or the truth may lie somewhere in between. But Kim's credibility was for the jury to assess in a fair trial, without the influence of an opinion by a doctor who had examined Kim that Kim was being truthful despite the absence of physical evidence of abuse.

B. Ineffective Assistance Of Counsel

It is axiomatic that a defendant's right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985). When a defendant attacks his conviction on the basis that his counsel was ineffective, he must show two things: (1) his "counsel's performance . . . fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced [him]." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). We must be highly deferential to counsel's strategy and performance as "there is a presumption

that . . . counsel acted in the exercise of reasonable professional judgment." *State v. Gainey*, 355 N.C. 73, 112-13, 558 S.E.2d 463, 488 (2002).

At the MAR hearing, Defendant argued that he received ineffective assistance of counsel ("IAC") by both his trial counsel and by his appellate counsel in failing to address the impermissible opinion testimony by the State's expert witness. We address the issue with respect to his trial counsel and his appellate counsel in turn.

1. IAC by Trial Counsel

[2] Defendant argues that his trial counsel's assistance was ineffective by failing to move to strike the opinion of the State's expert that Kim had, in fact, been sexually abused. We note that Defendant's appellate counsel did make an IAC argument in the first appeal but that it was not based on the trial counsel's failure to object to the State's expert opinion that Kim had, in fact, been sexually abused. Therefore, for the reasons stated below, we hold that any IAC challenge based on the Defendant's trial counsel is waived.

Our Supreme Court has instructed that a defendant's trial counsel should object to a witness' answer "as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." *State v. Chatman*, 308 N.C. 169, 178, 301 S.E.2d 71, 76 (1983). Failure to object results in a waiver of the error. *Id.* Such error at trial is one readily available to argue on appeal.

Thus, our General Statutes provide that a motion for appropriate relief may be denied where "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3) (2009). Our Supreme Court has affirmed this rule. *See State v. Hyman*, 371 N.C. 363, 382-83, 817 S.E.2d 157, 169-70 (2018).

In *Hyman*, our Supreme Court held that a defendant waives the right to assert IAC by his trial counsel after a first appeal where he could have raised it in that appeal. *Id.* But our Supreme Court recognized that such right is only waived if the IAC issue could have been resolved *by the appellate court* in the first appeal, based on the cold record, without having to remand the matter to the trial court for consideration:

> As an initial matter, we must address the validity of the State's contention that the claim asserted in defendant's [MAR] is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3) . . . [.] As we have previously indicated, N.C.G.S. § 15A-1419(a)(3) is not a general rule that any

> claim not brought on direct appeal is forfeited on state collateral review and requires the reviewing court, instead, to determine whether the particular claim at issue could have been brought on direct review.
>
> [IAC] claims brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing.
>
> . . .
>
> **As a result, in order to be subject to the procedural default specified in N.C.G.S. § 15A-1419(a)(3), the direct appeal record must have contained sufficient information to permit the reviewing court to make all factual and legal determinations necessary to allow a proper resolution of the claim in question.**

Id. (emphasis added) (internal marks and citations omitted).

Here, we conclude that the cold record from the first appeal was sufficient for our Court to determine in that first appeal that Defendant's trial counsel provided ineffective assistance of counsel. Defendant's trial counsel failed to object to the opinion offered by the State's expert that Kim had, in fact, been sexually abused. This testimony was clearly inadmissible. Defendant's trial counsel did have a duty to object to the testimony. *Chatman*, 308 N.C. at 178, 301 S.E.2d at 76 (1983) (holding that counsel should object to a witness' answer "as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it."). Failure to object results in a waiver of the error. *Id.*

We cannot fathom any trial strategy or tactic which would involve allowing such opinion testimony to remain unchallenged. Moreover, the trial transcript reveals that allowing the testimony to remain unchallenged was not part of any trial strategy. Indeed, a sidebar discussion between the trial judge and both attorneys indicates that it was not the intention or tactic of Defendant's counsel to introduce this into evidence.

Further, relying on precedent from our Supreme Court, we conclude that trial counsel's failure to object to the expert opinion was prejudicial. Again, the burden on Defendant was to show that there was a "reasonable probability that, but for counsel's [error], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Though this

burden is not a low one, the United States Supreme Court instructs that this standard is not so high as to require that a defendant "show that counsel's deficient conduct more likely than not altered the outcome[.]" *Id.* at 693.[3] Based on holdings from our Supreme Court finding similar testimony to amount to "plain error," we conclude that the cold record reveals that it is "reasonably probable" in a *Strickland* sense, that the failure of Defendant's counsel to object to the opinion testimony by the State's expert impacted the outcome of the trial.

Therefore, because we conclude that the cold record was sufficient for our Court to rule on an IAC claim in Defendant's first appeal, we hold that Defendant's MAR following that first appeal as it related to his trial counsel's performance is barred.

2. IAC by Appellate Counsel

[3] Defendant also argues that his appellate counsel's assistance was ineffective in failing to argue the correct portion of the State expert's opinion and by failing to cite to Defendant's trial counsel's performance. Defendant's IAC claim pertaining to his *appellate* counsel's performance is not procedurally barred. The trial court denied Defendant's MAR with respect to his appellate counsel's performance. For the reasons stated below, we hold that the trial court erred in denying Defendant's MAR in this regard.

Our Supreme Court has held that the two-pronged test for determining whether a defendant has received ineffective assistance of counsel, set out in *Strickland*, also applies to appellate counsel. *See State v. Todd*, 369 N.C. 707, 710-12, 799 S.E.2d 834, 837-38 (2017) (in order to prove that appellate counsel was ineffective, a defendant must show that his counsel's performance was deficient and that the deficiency was prejudicial).

In *Smith v. Murray*, the United States Supreme Court stated that "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,

3. The "reasonable probability" standard required by the United States Supreme Court for IAC claims should not be confused with the "reasonable probability" standard applied by our courts when reviewing for "plain error" under Rule 10 of our Rules of Appellate Procedure. It could be argued that a defendant's burden to show "plain error" is higher: To show IAC, the United States Supreme Court instructs that a defendant need not show that the error "more likely than not" affected the outcome. *Strickland*, 466 U.S. at 694. But to show "plain error," our Supreme Court requires that a defendant show that the error "tipped the scales" and was "fundamental" such that "justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

535 (1986); *see State v. Collington*, ___ N.C. App. ___, ___, 814 S.E.2d 874, 885 (2018). Indeed, not bringing a claim on appeal may be sound strategy as "winnowing out weaker arguments on appeal and focusing on" stronger arguments is the hallmark of appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). However, failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court is deficient performance. *Davila v. Davis*, ___ U.S. ___, ___, 137 S. Ct. 2058, 2067 (2017).

In the first appeal, Defendant's appellate counsel argued that the State's expert witness improperly vouched for the victim by testifying on direct that: "My opinion is that [the victim] does display characteristics consistent with a child, young adult, adolescent adult who has been sexually abused." However, appellate counsel's argument was clearly weak in light of the cases cited in its brief. *See State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith."); *see also State v. Hall*, 330 N.C. 808, 817-18, 412 S.E.2d 883, 887-88 (1992). Moreover, appellate counsel failed to make any argument concerning the portion of the State expert's testimony before us now, erroneously stating in Defendant's appellate brief that "neither witness directly opined that Kim was 'credible.' "

The State argues that Defendant's appellate counsel could not have made an argument in the first appeal about the opinion offered by the State's expert during cross-examination since any error would be "invited error." Indeed, our General Statutes prevent a defendant from complaining of error on appeal where the error was invited by the defendant. N.C. Gen. Stat. § 15A-1443(c) (2005). However, our Supreme Court instructs that where a witness, on cross-examination, answers outside of the scope of the question or fails to respond to the question, the testimony is not said to be "invited." *State v. Wilkerson*, 363 N.C. 382, 412, 683 S.E.2d 174, 192-93 (2009) (finding an expert witness's answers during cross-examination were not invited where the defense counsel asked two narrow questions and the witness's response was neither within the scope of the question nor given in response to the question). We conclude that the opinion offered by the State's expert was outside the scope of the question posed by Defendant's trial counsel. Specifically, the expert was asked two narrow questions: "you found nothing unusual about this young lady, did you?" and "[your opinion offered on direct that she exhibited characteristics of one who has been sexually abused is] based on her comments to you and nothing else?" Both questions are leading

questions which the witness could answer with "yes" or no," but instead he added to this answer by giving additional details on his reasons for his opinion. The expert's statements that Kim actually was abused were outside the scope of these questions. *See Id.* Since Defendant did not ask the State's expert his opinion as to whether Kim was, in fact, sexually abused, the opinion did not constitute invited error. But even if it was invited error, Defendant's appellate counsel should have raised this matter as part of the IAC argument made during the first appeal.

We conclude that the error by Defendant's appellate counsel in the first appeal was prejudicial. There is a reasonable probability, in the *Strickland* sense which does *not* require a "more likely than not" probability, that the outcome of the first appeal would have been different had appellate counsel made arguments concerning the expert's opinion that Kim had, in fact, been abused, rather than erroneously conceding that the expert never overtly offered such opinion and focusing only on the opinion offered on direct. Indeed, the thrust of the argument in the first appeal was that the expert's opinion that Kim exhibited characteristics of a sexual abuse victim – a type of opinion which our Supreme Court has repeatedly held is appropriate – amounted to witness vouching. Thus, both prongs of *Strickland* are met.

IV. Conclusion

The testimony by the State's expert following his testimony on direct did amount to vouching for Kim's credibility.

Defendant's MAR as it pertains to the deficient performance of his *trial* counsel, however, is procedurally barred since this IAC claim could have been raised in the first appeal.

Defendant's MAR as it pertains to the deficient performance of his *appellate* counsel by failing to make any argument about the expert's inadmissible vouching of Kim's testimony is not procedurally barred. We conclude that Defendant was prejudiced by the failure of his appellate counsel in the first appeal to make an argument concerning the witness vouching by the State's expert. The only direct evidence of sexual abuse was the testimony of the alleged victim, Kim. Kim may well be telling the truth. But, in the absence of physical evidence of abuse, Defendant is entitled to have Kim's credibility assessed by a jury free from the taint of an opinion by a medical expert that Kim's testimony is truthful. Therefore, Defendant's MAR seeking a new trial should have been granted. We, therefore, reverse the order denying Defendant's MAR and remand for entry of an order granting Defendant's MAR and for other proceedings consistent with this opinion.

REVERSED.

Judge STROUD concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, *concurring in part, dissenting in part.*

I concur with the majority that appellate counsel was ineffective. I concur in result only with the majority's conclusion that Defendant's motion for appropriate relief regarding trial counsel is procedurally barred. However, because Defendant was not prejudiced by the testimony of Dr. Sheaffer, I respectfully dissent from the remainder of the majority opinion.

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and quotation marks omitted). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation and quotation marks 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. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation and quotation marks omitted).

Here, the trial court's findings of fact were supported by competent evidence, and there has been no showing by Defendant, nor finding by the majority, that there was a manifest abuse of discretion related to the trial court's findings. Specifically, the trial court made the following relevant findings of fact:

> 12. Defendant's trial counsel did not object to the two instances set out above and contended to be plain error. Dr. Sheaffer's testimony . . . is clear to the Court and found as a fact not to be the rendering of expert opinion or vouching for the child's credibility, but rather disagreeing with counsel's assertion that nothing unusual was noted

about the child by Dr. Sheaffer and how the child's visit was coded by Dr. Sheaffer's office.

13. Dr. Sheaffer's testimony . . . on cross examination was an answer to Defendant's counsel's assertion that the Doctor had found nothing unusual with the child in the interview and testing. This cross testimony immediately followed the Doctor's testimony of the child's disclosure of sexual abuse to the Doctor as well as the Doctor's testimony that the child's symptoms were consistent with a child who had been sexually abused. The Defendant, by establishing that the child did not display mental or emotional problems sometimes associated with sexual abuse, was attempting to undermine the child's testimony of sexual abuse and Dr. Sheaffer's testimony that the child's symptoms were consistent with sexual abuse. Defendant's counsel asked, "you found nothing unusual about this young lady did you?" The Court finds both from watching the exchange and the record, the Doctor was attempting to answer Counsel's pointed question rather than vouch for the child's testimony. While it is clear that Dr. Sheaffer could have said "except that in my opinion her symptoms are consistent with a child who suffered from sexual abuse", it is also equally clear and the court so finds that Dr. Sheaffer was not issuing a diagnosis or vouching for the child's credibility but redirecting Defendant's counsel to the overarching concern of the examination and disagreeing with counsel's underlying assertion that nothing was wrong with the child. The record reveals as much as trial counsel did not object as she had when Dr. Sheaffer offered his expert opinion on direct. But again focused the questioning of the Doctor on the lack of the type of trauma sometimes displayed by children suffering sexual abuse, by asking "And that's your opinion but when you are talking about characteristics of sexually abused children that's when you're really talking about such things as post-traumatic stress syndrome, are you not?"

18. . . . Dr. Sheaffer explains why he found no reason for concern of the child's mental and emotional health during the interview and examination of the child. Dr. Sheaffer clarifies that he was referring to the lack of reason for psychiatric concern over the child to Defendant's counsel. He

is then asked by the State to explain psychiatric concern. Dr. Sheaffer explains under the "big red book" the child does not meet any diagnosis. Dr. Sheaffer explains that a V-Code diagnosis is not a diagnosis. "It is sexual abuse of a child. And so it doesn't have to do in essence with her, that's why it's not a diagnosis of her. It has to do with the fact she was abused."

19. Here again the Court finds that while the Doctor's words are inartful, when understood in context, he states that the child is not diagnosed with being sexually abused and that does not in essence have to do with her. He then in an effort to explain why the child was being seen states in a shorthand. "It has to do with the fact she was abused." While there is no doubt the Doctor could have removed all ambiguity by saying, the child was referred to me to investigate her claims of improper sexual contact and while I did not make a diagnosis under the Diagnostic and Statistical Manual [("DSM")], we did code her visit showing that she was seen for investigation of sexual abuse. There is also no doubt that the Doctor was not rendering a formal opinion that the child was sexually abused, or vouching for her credibility, but explaining both that the child did not have a formal diagnosis and the charting number assigned to the child's visit using the Diagnostic and Statistical Manual or big red book was sexual abuse.

. . .

25. The Court finds upon review of the record as to the evidence presented of the Defendant's guilt and the circumstances as revealed by the record under which Dr. Sheaffer's testimony, alleged to be plain error was presented to the jury that it is found by this Court that Dr. Sheaffer was not rendering his expert opinion that the child was abused or vouching for the child's credibility, but rather disagreeing with counsel's assertion that nothing unusual was noted about the child by Dr. Sheaffer and explaining inartfully how the child's visit was coded by Dr. Sheaffer's office.

26. This Court finds that the testimony of Dr. Sheaffer . . . did not have a probable impact on the jury's verdict. The

> testimony is therefore not prejudicial to Defendant in light of all the evidence at trial.

Based upon review of the transcript, the trial court's findings of fact are supported by competent evidence. Further, Defendant has failed to demonstrate that the trial court's findings of fact were "manifestly unsupported by reason or [are] so arbitrary that [they] could not have been the result of a reasoned decision." *Campbell*, 359 N.C. at 673, 617 S.E.2d at 19 (citation and quotation marks omitted).

It is also noteworthy that Judge Long, who ruled upon Defendant's motion for appropriate relief, also served as the presiding judge at Defendant's trial. He had the opportunity to review the cold record in this case in light of his experience as the presiding judge in this case. The majority, in essence, is telling the presiding judge that his review of the testimony is not as he recalls. Regardless, because the trial court's findings of fact are supported by competent evidence, they are binding on this Court. *Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35.

The trial court concluded as a matter of law that Defendant was not prejudiced by Dr. Sheaffer's testimony. When taken in context, the two portions of Dr. Sheaffer's disputed testimony, as found by the trial court, do not amount to vouching for the victim. Rather, Dr. Sheaffer was disagreeing with trial counsel's assertion that there was nothing wrong with the victim and attempting to explain coding decisions in his office based on the DSM. Had this argument been presented during the initial appeal, it is not reasonably probable that Defendant would have been granted a new trial.

STATE v. GONZALEZ

[263 N.C. App. 527 (2019)]

STATE OF NORTH CAROLINA
v.
FLORA RIANO GONZALEZ

No. COA18-228

Filed 15 January 2019

Child Abuse, Dependency, and Neglect—felony child abuse by prostitution—jury instruction—sexual act

The Court of Appeals found no plain error in a prosecution for felony child abuse by prostitution and sexual servitude of a child where the trial court's instruction to the jury regarding "sexual act" did not exclude vaginal intercourse. Although N.C.G.S. § 14-318.4(a2), under which defendant was charged, did not expressly define "sexual act," a prior case determined that the term included vaginal intercourse. *State v. McClamb*, 234 N.C. App. 753 (2014).

Appeal by defendant from judgments entered 27 April 2017 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 30 October 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

DIETZ, Judge.

Defendant Flora Riano Gonzalez appeals her conviction for felony child abuse, arguing that the trial court committed plain error by improperly instructing the jury on the definition of the term "sexual act." This argument is squarely precluded by our decision in *State v. McClamb*, 234 N.C. App. 753, 760 S.E.2d 337 (2014). But our review of this case became more difficult when, several months ago, this Court issued its opinion in *State v. Alonzo*, __ N.C. App. __, __, 819 S.E.2d 584, 587 (2018).

Alonzo effectively overruled *McClamb* after concluding that *McClamb* had effectively overruled another, earlier decision. We ordered supplemental briefing from the parties to address *Alonzo* and, specifically, to address the growing trend among panels of our Court to overrule or refuse to follow precedent based on principles arising from our

Supreme Court's decision in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

As explained below, *In re Civil Penalty* does not permit panels of this Court to disregard existing precedent because the panel believes that precedent improperly narrowed or distinguished other, earlier precedent. Thus, because the Supreme Court stayed the mandate in *Alonzo*—meaning it does not yet have any precedential effect—and because *McClamb* is controlling precedent that this Court must follow, we reject Gonzalez's arguments and find no error in the trial court's judgments.

Facts and Procedural History

Beginning in 2012, Flora Riano Gonzalez arranged for her twelve-year-old daughter to work as a prostitute, meeting men and having sexual intercourse in exchange for money. This continued for several years. Many men who had sex with Gonzalez's daughter used a condom but some did not. Gonzalez's daughter later became pregnant. Gonzalez reported her daughter's pregnancy to the police and claimed that she had been abducted and raped by four men. Law enforcement took Gonzalez's daughter to a health clinic where she was treated for chlamydia and underwent an abortion.

Gonzalez's daughter later began a steady relationship with a man when she was around sixteen years old. She became pregnant with her boyfriend's child. At that point, Gonzalez's daughter became concerned that Gonzalez would begin prostituting another of her children, who was now twelve years old. Gonzalez's daughter confided in a friend, who helped her meet with law enforcement to tell her story. The State arrested Gonzalez and charged her with felony child abuse by prostitution, felony child abuse by sexual act, human trafficking, and sexual servitude of a child. The case went to trial.

The jury acquitted Gonzalez of human trafficking, but found her guilty of both counts of felony child abuse and of sexual servitude of a child. The trial court sentenced her to consecutive terms of 25 to 39 months in prison for each of the child abuse convictions, and to another consecutive term of 92 to 120 months in prison for the sexual servitude conviction. Gonzalez timely appealed.

Analysis

Gonzalez argues that the trial court committed plain error when it instructed the jury that the phrase "sexual act" in the felony child abuse statute meant "an inducement by the defendant of an immoral or indecent touching by the child for the purpose of arousing or gratifying

sexual desire." Gonzalez contends that the court should have used a much narrower definition of "sexual act" that does not include vaginal intercourse. Gonzalez did not object to the court's instruction at trial and concedes that we review this issue for plain error.

The statute under which Gonzalez was charged, N.C. Gen. Stat. § 14-318.4(a2), is found in a portion of the criminal code addressing "Protection of Minors." The statute, titled "Child abuse a felony" provides as follows: "Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony." N.C. Gen. Stat. § 14-318.4(a2). Importantly, the statute does not define the term "sexual act" and that phrase is not defined anywhere else in the subchapter.

In a separate subchapter of the General Statutes, in an article titled "Rape and Other Sex Offenses," there is a definition of the phrase "sexual act" that applies "[a]s used in this Article." N.C. Gen. Stat. § 14-27.20(4). That definition includes various forms of sexual activity but expressly excludes "vaginal intercourse":

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

Id.

The distinction between vaginal intercourse and other sexual acts exists in this section of our criminal statutes because the crime of rape, which involves vaginal intercourse, is treated differently from other sex offense crimes. *Compare* N.C. Gen. Stat. § 14-27.21 (First-degree forcible rape) *with* N.C. Gen. Stat. § 14-27.26 (First-degree forcible sex offense).

In two earlier cases, this Court applied the definition of "sexual act" found in N.C. Gen. Stat. § 14-27.20(4) to the felony child abuse statute, without conducting an analysis of *why* that definition should apply.[1] First, in *State v. Lark*, 198 N.C. App. 82, 678 S.E.2d 693 (2009), the Court addressed a case involving a defendant who engaged in fellatio and anal intercourse with his juvenile son. The defendant argued that the trial court included sexual acts in the jury instructions that were not

1. The General Assembly recodified these statutes, so their statutory citations vary in these opinions, but the statutory language remains the same.

supported by the evidence. *Id.* at 87, 678 S.E.2d at 698. In its analysis, this Court cited the definition of "sexual act" in N.C. Gen. Stat. § 14-27.20(4) in its determination that both fellatio and anal intercourse were "sexual acts." *Id.* at 88, 678 S.E.2d at 698.

Next, in *State v. Stokes*, 216 N.C. App. 529, 718 S.E.2d 174 (2011), the Court addressed a case in which a defendant challenged the sufficiency of the evidence that he digitally penetrated his juvenile daughter's vagina. The Court again cited the definition of "sexual act" in N.C. Gen. Stat. § 14-27.20(4) to conclude that digital penetration of a vagina is a sexual act. *Stokes*, 216 N.C. App. at 532, 718 S.E.2d at 177–78. *Stokes* also involved allegations of vaginal intercourse but, in its analysis of the issue, the *Stokes* court discussed only the digital penetration. *Id.*

Then, in *State v. McClamb*, 234 N.C. App. 753, 760 S.E.2d 337 (2014), this Court squarely addressed the question of whether the phrase "sexual act" in the felony child abuse statute included vaginal intercourse. In a detailed analysis, the Court distinguished *Stokes*, explaining that "*Stokes* is controlling with respect to the meaning of the term 'sexual act' . . . only in light of the narrow factual circumstances and legal issue raised therein." *McClamb*, 234 N.C. App. at 758, 760 S.E.2d at 341. The Court concluded that *Stokes* only addressed the issue of digital penetration and "did not hold" that the definition of sexual act in the felony child abuse statute "exclude[s] vaginal intercourse as a sexual act." *Id.* The Court also distinguished *Lark* in a footnote, explaining that it "is similarly limited to an analysis of fellatio as a sexual act." *Id.* at 758 n.2, 760 S.E.2d at 341 n.2.

Finally, several months ago, this Court addressed this issue again in *State v. Alonzo*, __ N.C. App. __, __, 819 S.E.2d 584, 587 (2018). In *Alonzo*, the Court held that "there is a conflict between our precedent" in *McClamb*, *Stokes*, and *Lark*. *Id.* Applying principles that stem from our Supreme Court's decision in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), a breakthrough case that governs this Court's review of its own precedent, *Alonzo* declined to follow *McClamb*, concluding "we are bound by our earlier decision in *Lark*." *Alonzo*, __ N.C. App. at __, 819 S.E.2d at 587.

Our Supreme Court later stayed this Court's mandate in *Alonzo* and thus *Alonzo* does not yet have any precedential effect. *State v. Alonzo*, __ N.C. __, 817 S.E.2d 733 (2018). But Gonzalez urges us to adopt the same reasoning applied in *Alonzo*, and to hold that *McClamb* is not good law.

As explained below, we decline to do so because *In re Civil Penalty* does not empower us to overrule precedent in this way. What

occurred in *Lark*, *Stokes*, and *McClamb* is the same sequence of events that gave us *In re Civil Penalty*. In 1968, the Supreme Court decided a case that limited the power of state agencies to impose civil penalties under Article IV, Section 3 of the North Carolina Constitution. *State ex rel. Lanier v. Vines*, 274 N.C. 486, 497, 164 S.E.2d 161, 167–68 (1968). Later, this Court distinguished *Lanier* in a case upholding the power of a state agency to impose civil penalties under our Constitution. *N.C. Private Protective Servs. Bd. v. Gray, Inc.*, 87 N.C. App. 143, 146–47, 360 S.E.2d 135, 137–38 (1987). When the issue came before this Court again a few years later, we declined to follow *Gray*, holding that *Gray* "contradicts the express language, rationale and result of *Lanier*." *In re Civil Penalty*, 92 N.C. App. 1, 13, 373 S.E.2d 572, 579, *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

The Supreme Court reversed this Court, holding that "the effect of the majority's decision here was to overrule *Gray*. This it may not do. Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Thus, *In re Civil Penalty* stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

To be sure, our Supreme Court has authorized us to disregard our own precedent in certain rare situations. *See In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005). These arise when two lines of irreconcilable precedent develop independently—meaning the cases never acknowledge each other or their conflict, as if ships passing in the night. This typically occurs because the panel that decided the second case was unaware of the holding of the first. Ideally, this would never happen, but, given the size and complexity of our case law, it does. In that circumstance, the Supreme Court has authorized us to "follow[] . . . the older of the two cases" and reject the more recent precedent. *Id.*

This case is governed by *In re Civil Penalty*, not *In re R.T.W.* As explained above, the second of the conflicting decisions at issue here (*McClamb*) acknowledged and distinguished the first (*Lark* and *Stokes*).

McClamb, 234 N.C. App. at 758 n.2, 760 S.E.2d at 341 n.2. This means *In re R.T.W.* does not apply. Instead, under *In re Civil Penalty*, we must follow *McClamb* because it is the most recent, controlling case addressing the question. This, in turn, leads us to conclude that the trial court's instructions to the jury in this case were not erroneous, and certainly did not rise to the level of plain error.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
CAMERON LEE HINTON

No. COA18-530

Filed 15 January 2019

Sentencing—aggravating factors—found by trial court—probation violation during prior 10 years—harmless error

When sentencing defendant for two common law robbery convictions, any potential error in the trial court's finding of an aggravating factor—willful violation of probation during the 10 years preceding the crime for which he was being sentenced—was harmless. Although it is for the jury to find the existence of an aggravating factor, here defendant had admitted (at the time of a probation violation report, which was several years prior to this sentencing hearing) to violating his probation by committing another criminal offense, and there was no question that defendant had indeed been convicted of another offense while on probation within the past ten years.

Appeal by defendant by petition for writ of certiorari from judgments entered 20 November 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 13 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, Assistant Attorney General Daniel T.

Wilkes, and Assistant Attorney General Kimberly N. Callahan, for the State.

Irons & Irons, P.A., by Ben G. Irons II, for defendant-appellant.

ZACHARY, Judge.

Defendant Cameron Lee Hinton appeals by petition for writ of certiorari from judgments entered upon his two convictions for common law robbery. Defendant argues that the trial court erroneously sentenced him in the aggravated range because the jury did not find the existence of the aggravating factor beyond a reasonable doubt, in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and that his sentence should therefore be vacated and the matter remanded for resentencing. We conclude that any such error was harmless.

Background

A jury found Defendant guilty of two counts of common law robbery on 17 November 2017. Following the verdicts, the trial court dismissed the jury and held a sentencing hearing. The State had given timely notice of its intent to prove the existence of an aggravating factor in order to increase Defendant's sentences beyond the maximum statutory presumptive range of 25 to 39 months,[1] namely: that "during the 10-year period prior to the commission of the offense for which . . . [D]efendant is being sentenced," Defendant had been found in willful violation of the conditions of his probation, pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2017).

The State offered evidence in support of the aggravating factor at Defendant's sentencing hearing. State's Exhibit 31 established that Defendant was placed on probation in October 2013 pursuant to a suspended sentence following his conviction for assault on a female. The next month, Defendant's probation officer filed a probation violation report alleging that Defendant had willfully violated two conditions of his probation, in that he (1) "failed to make himself available for the mandatory initial home visit," and (2) "failed to provide the probation officer with documentation of enrollment in any abuser treatment program." Defendant's probation violation hearing was scheduled for 12 December 2013. That day, Defendant's probation officer amended the violation

1. Defendant was sentenced as a prior record level VI for the Class G felonies. *See* N.C. Gen. Stat. § 15A-1340.17 (2017).

report to include a third probation violation, alleging that Defendant had been convicted the previous day of possession with intent to sell or distribute cocaine, with an offense date of 15 November 2013. State's Exhibit 31 also revealed that Defendant "waived a violation hearing and admitted that he . . . violated each of the conditions of his . . . probation as set forth" in the violation report. Accordingly, on 12 December 2013, the trial court entered judgment revoking Defendant's probation due to willful violations of the conditions thereof and activated his suspended sentence. Thus, in the instant case, State's Exhibit 31 demonstrated that Defendant had, "during the 10-year period prior to the commission of the [common law robbery] offense[s] for which [he was] being sentenced, been found by a court of this State to be in willful violation of the conditions of probation." N.C. Gen. Stat. § 15A-1340.16(d)(12a).

On the basis of this aggravating factor, the State requested that the trial court sentence Defendant in the aggravated range of 31 to 47 months' imprisonment for his two common law robbery convictions. Defendant, however, citing N.C. Gen. Stat. § 15A-1340.16(a1) and *Blakely*, argued that the existence of the aggravating factor must be found by the *jury*, rather than the sentencing judge. After some discussion, the trial court ultimately found the existence of the aggravating factor, "as evidenced by State's Exhibit 31." The trial court thereafter sentenced Defendant in the aggravated range to two consecutive sentences of 31 to 47 months' imprisonment.

Although Defendant had given oral notice of appeal following the jury's guilty verdicts, he did not expressly give notice of appeal after sentencing because the trial court interjected, "I will allow—notice of appeal has been previously given in this case. We'll accept that notice of appeal. . . . I am going to appoint the appellate defender to represent [Defendant] from this point forward." An outburst by Defendant thereafter disrupted the proceedings. Nevertheless, Defendant filed a Petition for Writ of Certiorari with this Court, which we allowed by order entered 25 October 2018.

On appeal, Defendant argues that because the jury did not find the existence of the aggravating factor beyond a reasonable doubt, the trial court was not authorized to sentence him in the aggravated range. Defendant maintains that the matter should therefore be remanded for resentencing.

Discussion

The presumptive sentencing range by which trial courts are to sentence defendants is established by statute, based upon the classification

of the offense of which the defendant was convicted and the defendant's prior record level. *See* N.C. Gen. Stat. § 15A-1340.17. Nevertheless, a sentencing judge may deviate from the presumptive range and impose a sentence in the aggravated range pursuant to N.C. Gen. Stat. § 15A-1340.17(c)(4) if one or more enumerated aggravating factors are found to exist. *Id.* § 15A-1340.16(b).

N.C. Gen. Stat. § 15A-1340.16(d) sets forth thirty aggravating factors for sentencing purposes. For example, a defendant may be sentenced in the aggravated range if the underlying offense was committed "for the benefit of, or at the direction of, any criminal gang"; while the defendant was on "pretrial release on another charge"; or with the involvement of "a person under the age of 16." *Id.* § 15A-1340.16(d)(2a), (12), (13).

The aggravating factor at issue in the instant case is subdivision (12a), which provides that: "The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence." *Id.* § 15A-1340.16(d)(12a). In other words, a trial court may impose an aggravated sentence beyond the presumptive range if the defendant has been found in willful violation of the terms of his probation at any time within the previous ten years, even if such violation is unrelated to the offense for which the defendant is currently being sentenced.

The State must provide written notice to a defendant of its intent to prove the existence of an aggravating factor. *Id.* § 15A-1340.16(a6). Thereafter, "[t]he defendant may admit to the existence of [the] aggravating factor." *Id.* § 15A-1340.16(a1). However, "[i]f the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense[,]" *id.*, which the State will bear "the burden of proving beyond a reasonable doubt[.]" *Id.* § 15A-1340.16(a).

I. *Blakely v. Washington*

Before 2005, the State was not required to prove the existence of an aggravating factor beyond a reasonable doubt, but merely by a preponderance of the evidence. 2005 N.C. Sess. Laws 253, 253, ch. 145, § 1. In addition, the court, rather than the jury, determined whether the State had met that burden. *Id.* In 2005, the General Assembly revised the governing sentencing statutes in order to "conform with the United States Supreme Court decision in *Blakely v. Washington*." *Id.*

In *Blakely*, the United States Supreme Court addressed Washington's statutory regime, which allowed a trial judge to sentence a defendant

"beyond the standard maximum" sentencing range upon the trial judge's finding of one or more "statutorily enumerated ground[s] for departure" therefrom. *Blakely*, 542 U.S. at 300, 159 L. Ed. 2d at 411. The *Blakely* defendant had "pleaded guilty to the kidnapping of his estranged wife," and "[t]he facts admitted in his plea, standing alone, supported a maximum sentence of 53 months." *Id.* at 298, 159 L. Ed. 2d at 410. Nevertheless, "[p]ursuant to state law, the court imposed an 'exceptional' sentence of 90 months after making a judicial determination that he had acted with 'deliberate cruelty.' " *Id.* The issue presented to the Supreme Court was "whether this violated [the defendant's] Sixth Amendment right to trial by jury." *Id.* The Court concluded that it did.

"Taken together," the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment "indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477, 147 L. Ed. 2d 435, 447 (2000) (brackets and quotation marks omitted). *Apprendi* addressed the definition of an "element of the crime," *id.*, and established the following rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455. In light of this rule, the *Blakely* Court thus held "that a trial judge's sentencing of a defendant beyond the statutory maximum, based on the trial judge's finding [of an aggravating factor], violated the defendant's right to trial by jury under the Sixth Amendment to the United States Constitution." *State v. Blackwell*, 361 N.C. 41, 44, 638 S.E.2d 452, 455 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 114 (2007). The *Blakely* Court further established that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413. In North Carolina, the "statutory maximum" is "the presumptive range for a given offense and prior record level." *State v. Norris*, 360 N.C. 507, 514, 630 S.E.2d 915, 919, *cert. denied*, 549 U.S. 1064, 166 L. Ed. 2d 535 (2006).

The *Blakely* and *Apprendi* rules find their support both in history and in reason. At the time of our nation's founding, "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown." *Apprendi*, 530 U.S. at 478, 147 L. Ed. 2d at 448. There was an "invariable linkage of punishment with crime," and a defendant was therefore able "to predict with certainty [his] judgment from the face of the felony indictment[.]" *Id.* "[T]he judgment, though

pronounced or awarded by the judges, [was] not their determination or sentence, but the determination and sentence of the law." *Id.* at 479-80, 147 L. Ed. 2d at 448-49. "The judge was meant simply to impose that sentence . . . ." *Id.* at 479, 147 L. Ed. 2d at 448.

This history "highlight[s] the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83, 147 L. Ed. 2d at 450. In other words, where a defendant will face an aggravated punishment if the "offense is committed under certain circumstances but not others, . . . it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached." *Id.* at 484, 147 L. Ed. 2d at 451. As Justice Scalia explained in *Blakely*,

> [i]n a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 309, 159 L. Ed. 2d at 417.

Quite simply, the United States Constitution provides every defendant with "the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313, 159 L. Ed. 2d at 420 (original emphasis omitted). "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07, 159 L. Ed. 2d at 415-16. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306, 159 L. Ed. 2d at 415. The *Blakely* Court thus explained:

> Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving

> a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.

Id. at 313-14, 159 L. Ed. 2d at 420 (citation omitted).

Accordingly, following *Blakely*, trial judges are no longer authorized to "enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factors beyond a reasonable doubt." *Blackwell*, 361 N.C. at 45, 638 S.E.2d at 455. Our General Assembly therefore amended N.C. Gen. Stat. § 15A-1340.16 to require (1) that the jury determine whether an aggravating factor exists, thereby warranting an aggravated sentence, and (2) that the State bear the burden of proving the same beyond a reasonable doubt. 2005 N.C. Sess. Laws 253, 253, ch. 145, § 1.

II. Factor (12a) and *Blakely*

Nevertheless, "the Sixth Amendment was not written for the benefit of those who choose to forgo its protection." *Blakely*, 542 U.S. at 312, 159 L. Ed. 2d at 419. "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *Id.* at 308, 159 L. Ed. 2d at 417. Therefore, when the aggravating factor at issue is either admitted by the defendant or reflects the existence of a prior conviction, the trial court may determine whether that aggravating factor exists without invading the "province of the jury." *Id.*; *see also State v. Everette*, 361 N.C. 646, 653, 652 S.E.2d 241, 246 (2007) ("*Blakely* . . . specifically excluded several categories of aggravated sentences from the scope of the right it contemporaneously recognized: (1) those imposed on the basis of a prior conviction; (2) those imposed solely on the basis of the facts reflected in the jury verdict; and (3) those imposed solely on the basis of the facts admitted by the defendant, or to which the defendant stipulates . . . ." (ellipsis, internal citations, and quotation marks omitted)).

There are two aggravating factors that implicate the existence of a prior adjudication in this State. *See* N.C. Gen. Stat. § 15A-1340.16(d)(12a), (18a). At issue in the instant case is factor (12a): that Defendant had, within the past ten years, "been found . . . to be in willful violation of the conditions of probation." *Id.* § 15A-1340.16(d)(12a). Defendant did not admit to the existence of this aggravating factor at his sentencing hearing. *Cf. Everette*, 361 N.C. at 652, 652 S.E.2d at 245 ("[The State] argues . . . that the trial court's finding that [the] defendant was on pretrial release

at the time he committed the instant offenses comported with *Blakely* because [the] defendant admitted to the existence of this aggravating factor."). The other factor, (18a), allows for an aggravated sentence if "[t]he defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult." N.C. Gen. Stat. § 15A-1340.16(d)(18a).

Presumably under the supposition that the existence of a prior adjudication would satisfy the demands of due process, the General Assembly exempted (12a) and (18a) from the requirement that aggravating factors must be found by a jury: "If the jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(12a) or (18a), *the court*, finds that aggravating factors exist . . . , the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." N.C. Gen. Stat. § 15A-1340.16(b) (emphasis added).[2] As Defendant notes, however, the constitutionality of this regime warrants further consideration.[3]

Under factor (12a), it is not for the sentencing judge to decide *whether* the defendant committed a willful violation of his probation within the past ten years, but whether the defendant *has already been found* to have committed the same. Thus, under the statutory framework, even if it were the jury's task to find the existence of factor (12a) beyond a reasonable doubt, its determination would be limited to finding the existence of the *prior adjudication* alone. Whether the jury was satisfied that the defendant had in fact willfully violated the terms of his probation would be of no concern.

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2. Despite subsection (b)'s explicit exception for the (12a) aggravating factor, Defendant observes that subsection (d)'s final paragraph provides only that "the determination that an aggravating factor *under G.S. 15A-1340.16(d)(18a)* is present in a case shall be made by the court, and not by the jury." N.C. Gen. Stat. § 15A-1340.16(d) (emphasis added). Defendant appears to argue that because this provision does not also include the (12a) aggravating factor, the General Assembly must not have intended to except it from the jury's determination at all. However, as the State notes, "[t]o construe this as meaning that a court *cannot* make a finding under N.C. Gen. Stat. § 15A-1340.16(d)(12a) would directly contravene the statute's plain language and, in effect, delete terms from it, which is not a proper mode of statutory construction in North Carolina."

3. Initially, the State argues that "[D]efendant has waived any constitutional arguments" pursuant to Rule 10(a)(1) of the appellate rules "because his objection in the trial court was premised upon a violation of N.C. Gen. Stat. § 15A-1340.16 rather than any constitutional violation." However, Defendant explicitly cited and relied on *Blakely* in his argument before the trial court. It was thus "apparent from the context" that Defendant's argument was upon constitutional grounds, and this issue is preserved for appellate review. N.C.R. App. P. 10(a)(1).

As Defendant notes, "*Blakely* allowed courts to make determination[s] of previous convictions because the defendants in those cases had pled guilty or had been found guilty by a jury beyond a reasonable doubt. In other words, they would have already exercised their rights under the Sixth and Fourteenth Amendments or waived those rights." (Citation omitted). In North Carolina, however, a probation violation is found neither by a jury nor by proof beyond a reasonable doubt:

> A proceeding to revoke probation [for a willful violation of the conditions thereof] is often regarded as informal or summary, and the court is not bound by strict rules of evidence. *An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt.* All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (emphasis added) (brackets, internal citations, and quotation marks omitted). Thus, while Defendant was indeed "found by a court of this State to be in willful violation of the conditions of probation" in 2013, N.C. Gen. Stat. § 15A-1340.16(d)(12a), that judgment was entered pursuant to a lesser burden of proof than "beyond a reasonable doubt." *Tennant*, 141 N.C. App. at 526, 540 S.E.2d at 808.

III. Application

Given the standard of proof that applies in this State, it is arguable whether a judgment of a willful probation violation—be it by admission or court finding—is sufficiently tantamount to a "prior conviction" to allow a sentencing judge to use that previous finding as an aggravating factor justifying an increase in the length of a defendant's sentence beyond that authorized by the jury's verdict alone consonant with the demands of due process. *Compare Almendarez-Torres v. United States*, 523 U.S. 224, 240, 140 L. Ed. 2d 350, 366 (1998) ("Read literally, th[e] language [in *Mullaney v. Wilbur*], we concede, suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not . . . proved to a jury beyond a reasonable doubt. This Court's later case, *Patterson v. New York*[], however makes absolutely

clear that such a reading of *Mullaney* is wrong." (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975) and *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281 (1977)), *and State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986) ("[A] defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, the statute guarantees full due process before there can be a revocation of probation . . . ."), *with Apprendi*, 530 U.S. at 489, 490, 495, 147 L. Ed. 2d at 454, 455, 458 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided[.] . . . It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. . . . When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.' "), *and Blakely*, 542 U.S. at 311-12, 159 L. Ed. 2d at 418-19 ("Any evaluation of *Apprendi*'s 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant . . . would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted . . . from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." (internal citation omitted)).

As the State notes, this question "presents an issue of first impression for North Carolina's appellate courts." However, we need not decide that question today.

Error under *Blakely*—if error at all—is subject to harmless error review. *Blackwell*, 361 N.C. at 42, 638 S.E.2d at 453 (citing *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006)). Under that analysis, "our duty [is] to weigh the evidence supporting the aggravating factor and determine whether the evidence was so overwhelming and uncontroverted as to render any error harmless," *id.* at 46, 638 S.E.2d at 456 (quotation marks omitted), in that "any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458. "The defendant may not avoid a conclusion that evidence of an aggravating factor is uncontroverted by merely raising an objection at trial. Instead, the defendant must bring forth facts contesting the omitted element, and must have raised evidence sufficient to support a contrary finding." *Id.* at 50, 638 S.E.2d at 458 (internal citation and quotation marks omitted).

In the instant case, although Defendant did not admit to having willfully violated the conditions of his probation within the past ten years when the State submitted that as an aggravating factor at his sentencing hearing, Defendant clearly admitted the allegations contained in his probation violation report in 2013. We note with emphasis that the diminished standard of proof applicable to Defendant's probation violation report might well have induced Defendant's decision to forgo the time and expense of adjudicating the same. However, it is significant that Defendant's probation violation report alleged him to be in willful violation of the condition that he "commit no criminal offense" while on probation, pursuant to N.C. Gen. Stat. § 15A-1343(b)(1). Therefore, even if the aggravating factor were determined at Defendant's sentencing hearing as Defendant proposes it should have been under *Blakely*, the jury's task would have been confined to the simple determination of whether it was convinced—beyond a reasonable doubt—that Defendant had committed another offense while he was on probation within the past ten years. *Cf. Everette*, 361 N.C. at 654, 652 S.E.2d at 246 ("The aggravator at issue here concerned the objective question of whether 'the defendant committed the offense while on pretrial release on another charge' under N.C.G.S. § 15A-1340.16(d)(12)." (brackets omitted)). Defendant was indeed *convicted* on 11 December 2013 of another offense (possession with intent to sell/distribute cocaine), which Defendant committed while he was on probation, thus constituting a willful violation of the conditions thereof. Because Defendant had unquestionably been convicted of another offense while on probation within the past ten years, we necessarily conclude that Defendant cannot establish that any alleged *Blakely* error was not harmless.

NO ERROR.

Judges BRYANT and DILLON concur.

STATE v. JUENE

[263 N.C. App. 543 (2019)]

STATE OF NORTH CAROLINA
v.
DARIEUS ANDREW JUENE, DEFENDANT

No. COA18-526

Filed 15 January 2019

Identification of Defendants—pre-trial show-up—substantial likelihood of misidentification—reliability factors

A pre-trial show-up identification of defendant—while suggestive—did not create a substantial likelihood of misidentification where the three perpetrators (including defendant) of a robbery were shown from the back of a police car to the three victims approximately fifteen minutes after the crime, defendant matched the description given by the victims, and the victims spontaneously shouted, "That's him, that's him!" when they saw defendant and the other perpetrators.

Appeal by Defendant from judgments entered 15 February 2017 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 27 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

William D. Spence for the Defendant.

DILLON, Judge.

Defendant Darieus Andrew Jeune[1] appeals judgments against him for robbery with a dangerous weapon and other crimes based on a robbery which occurred at a shopping mall. Defendant argues that the trial court erred in denying his motion to suppress evidence because the pre-trial identification was impermissibly suggestive. We disagree and conclude that Defendant had a fair trial, free from prejudicial error.

I. Background

In September 2016, three victims were robbed in the Four Seasons Mall parking lot in Greensboro by three assailants. Defendant was

1. We note that the correct spelling of Defendant's last name is "Jeune." However, the indictments and judgments below all spell Defendant's last name as "Juene."

apprehended and identified by the victims as one of the assailants of the robbery. Defendant was indicted on robbery with a dangerous weapon and other charges.

In February 2017, Defendant filed a motion to suppress the show-up identification made by the three victims. In open court, the trial court denied Defendant's motion to suppress and made findings of fact and conclusions of law from the bench.

Defendant was found guilty of all charges by a jury and was sentenced in the presumptive range for each charge, to be served consecutively. Defendant gave oral notice of appeal in open court.

II. Analysis

On appeal, Defendant argues that the trial court erred in denying his Motion to Suppress Evidence. More specifically, Defendant argues that the show-up identification should have been suppressed.

A. Standard of Review

We review the trial court's denial of Defendant's motion to suppress for whether "competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Findings of fact are "conclusive and binding . . . when supported by competent evidence," while conclusions of law are reviewed *de novo*. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994).

B. Pre-Trial Identification of Defendant

Defendant argues that the show-up procedure was impermissibly suggestive and created a substantial likelihood of irreparable misidentification, thereby violating his due process rights under the United States and North Carolina constitutions.

Identification evidence, such as a show-up, "must be excluded as violating the due process clause where the facts of the case reveal a pretrial identification procedure so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification." *State v. Thompson*, 303 N.C. 169, 171, 277 S.E.2d 431, 433 (1981). Using a totality of the circumstances test, the central question is "whether . . . the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

Our Supreme Court has identified factors to consider when evaluating the reliability of the identification: "the opportunity of the

witness to view the criminal at the time of the crime; [] the witness's degree of attention; [] the accuracy of the witness's prior description of the criminal; [] the level of certainty demonstrated by the witness at the confrontation; and [] the length of time between the crime and the confrontation." *State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983) (citing *Manson v. Brathwaite*, 432 U.S. 98, 109-16 (1976)).

Show-ups, while potentially inherently suggestive, are not *per se* violative of a defendant's due process rights. *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) ("An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability."). For example, in *Turner*, our Supreme Court held that a one-man show-up was admissible, though suggestive, where the victim's identification of the defendant was based on the victim attentively observing the defendant in poor lighting conditions during the alleged crime, having seen the defendant in the neighborhood previously, and a general physical description given to the police. *Turner*, 305 N.C. at 365, 289 S.E.2d at 374.

In the present case, the facts and circumstances surrounding the show-up are as follows: Before the alleged robbery occurred, Defendant and the other perpetrators followed the victims around in the mall and the parking lot. Defendant was two feet away from one of the victims at the time of the robbery. The show-up occurred approximately fifteen minutes after the robbery. Prior to the show-up, the victims gave a physical description of Defendant to the police. All three victims were seated together in the back of a police officer's squad car during the show-up. Defendant and the other perpetrators were handcuffed during the show-up. Defendant and the other perpetrators were standing in a well-lit area of the parking lot, in front of the squad car, during the show-up. Defendant matched the physical description given by the victims. Upon approaching the area where Defendant and the other perpetrators were detained, all three victims spontaneously shouted, "That's him, that's him!" All the victims also identified Defendant in court.

While these procedures were not perfect, we conclude that there was not a substantial likelihood of misidentification in light of the reliability factors surrounding the crime and the identification. *Turner*, 305 N.C. at 364, 289 S.E.2d at 373.

III. Conclusion

The pre-trial identification of Defendant was reliable. Even though the show-up may have been suggestive, it did not rise to the level of

irreparable misidentification. As such, the trial court did not err in denying Defendant's motion to suppress.

NO ERROR.

Judges Bryant and Zachary concur.

STATE OF NORTH CAROLINA
v.
MICHAEL TYRONE MAYO, JR., DEFENDANT

No. COA18-331

Filed 15 January 2019

Attorney Fees—criminal case—right to be heard

A civil judgment for attorney fees entered after defendant pleaded guilty to felony fleeing to elude arrest was vacated and the matter remanded to the trial court, where defendant had not been informed of his right to be heard on the issue of attorney fees.

Appeal by defendant from judgment entered 6 September 2017 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Associate Attorney General Cara Byrne, for the State.

Warren D. Hynson for defendant-appellant.

BERGER, Judge.

On September 6, 2017, Michael Tyrone Mayo, Jr. ("Defendant") pleaded guilty to felony fleeing to elude arrest. Defendant was sentenced to an active term of seven to eighteen months in prison. On September 14, 2017, Defendant filed a written notice of appeal. Defendant filed a petition for writ of certiorari on May 2, 2018, seeking appellate review on the entry of a civil judgment against him for attorney's fees, and review pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). We grant Defendant's petition for writ of certiorari, remand for hearing on the issue of attorney's fees, and dismiss the remainder of Defendant's appeal.

Factual and Procedural Background

On June 26, 2017, Defendant was indicted for fleeing to elude arrest by motor vehicle and for resisting a public officer. Defendant pleaded guilty to felony fleeing to elude arrest on September 6, 2017. As part of the plea arrangement, other charges were dismissed. Defendant stipulated to a prior record level of II, and he was sentenced to an active term of seven to eighteen months imprisonment. He was also ordered to pay court costs in the amount of $1,572.50. Defendant filed a notice of appeal on September 14, 2017.

On May 2, 2018, Defendant filed a petition for writ of certiorari alleging Defendant did not have proper notice and opportunity to be heard on the amount of attorney's fees and costs. In the same petition, Defendant argued in the alternative that this Court conduct an independent review of the record pursuant to *Anders v. California* and *State v. Kinch*. Defendant's counsel also filed a brief with this Court pursuant to *Anders* stating that he "has carefully reviewed the transcript, the superior court file, and relevant law," and was "unable to identify an issue with sufficient merit to support a meaningful argument for reversal of [Defendant]'s conviction."

Analysis

"[A] defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002). Section 15A-1444 of the North Carolina General Statutes provides that

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.
>
> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.
>
> . . . .
>
> (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

N.C. Gen. Stat. § 15A-1444 (a1), (a2), (e) (2017).

Defendant's right of appeal was limited to the grounds set forth in Section 15A-1444. Because Defendant pleaded guilty, stipulated his prior record level was II, was sentenced in the presumptive range, and never filed a motion to suppress pursuant to N.C. Gen. Stat. § 15A-979, he has no right to appeal.

However, because Defendant filed a petition for writ of certiorari to conduct an independent review of the record in accordance with *Anders v. California* and *State v. Kinch*, "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." *Kinch*, 314 N.C. at 102-03, 331 S.E.2d at 667. Further, "we must examine any issue that defendant could have possibly raised." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 197 (1998).

Counsel for Defendant has been unable to identify any meritorious issue to support a meaningful argument for reversal of Defendant's

conviction and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, and *State v. Kinch*, by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so.

In his petition for writ of certiorari, Defendant contends that he did not receive notice and an opportunity to be heard on the amount of attorney's fees and costs. After review, we agree.

A criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs. *State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 905 (2018). The trial court may enter a civil judgment against an indigent defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel. N.C. Gen. Stat. § 7A-455(b) (2017). Before entering monetary judgments against indigent defendants for fees imposed by their court-appointed counsel,

> 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.

Friend, ___ N.C. App. at ___, 809 S.E.2d at 907 (vacated defendant's civil judgment for attorneys' fees and remanded for further proceedings on that issue).

In the present case, nothing in the record indicated that Defendant understood he had a right to be heard on the issue of attorney's fees, and the trial court did not inform Defendant that he had a right to be heard on the issue. The record reflects that the only mention of attorney's fees took place when the trial court stated "attorney's fees will be reduced to a civil judgment." Defendant was "not informed of the total amount of attorney's fees that would be imposed, nor given an opportunity to personally address the court." *State v. Morgan*, ___ N.C. App. ___, ___, 814 S.E.2d 843, 849 (2018) (vacating defendant's civil judgment imposing costs and attorneys' fees and remanded to the trial court). Accordingly, we vacate the civil judgment for attorney's fees and remand to the trial court for further proceedings on this issue only.

Conclusion

We vacate the civil judgment entered against Defendant by the trial court and remand for hearing on the issue of attorney's fees. The remainder of Defendant's appeal is dismissed.

DISMISSED IN PART; VACATED IN PART AND REMANDED IN PART.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
TRAVION SMITH

No. COA18-518

Filed 15 January 2019

1. Criminal Law—jury instructions—instructions requested by defendant—sufficiency of charge—jailhouse informant

In a first-degree murder prosecution in which a jailhouse informant testified against defendant in the hope of a charge reduction, the trial court did not err in providing the pattern jury instructions regarding interested witnesses, informants, and the jury's ability to consider a witness's interest, bias, prejudice, and partiality—while omitting defendant's requested instructions. The trial court's charge was sufficient to address the concerns about the informant's credibility that motivated defendant's request for a special instruction.

2. Evidence—relevance—jailhouse attack—defendant's guilt and informant's credibility

In a first-degree murder prosecution, the trial court did not err by admitting a jailhouse informant's testimony that he was threatened by defendant and then attacked by another inmate for "telling on" defendant when he returned to jail after testifying for the State in a pretrial hearing. The challenged testimony was relevant under Evidence Rules 401 and 402 on the issues of defendant's guilt and the informant's credibility, and the testimony's probative value was not outweighed by any danger of unfair prejudice, especially in light of similar unchallenged evidence of defendant's threats against the informant.

Appeal by defendant from judgment entered 22 February 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 29 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Lisa Miles for defendant-appellant.

TYSON, Judge.

Travion Smith ("Defendant") appeals from judgment entered following a jury's verdict finding him guilty of first-degree murder. We find no error.

I. Background

On the evening of 13 May 2013, the day following Mother's Day, Defendant, Ronald Anthony ("Anthony"), and Sarah Redden ("Redden") were together in the vicinity of North Hills shopping center in Raleigh. The trio had been walking around several neighborhoods in the area, breaking into unlocked cars and stealing GPS devices, headphones, cell phones, and other valuables. Eventually they arrived at the Allister Apartments complex. The Allister Apartments consisted of several unoccupied buildings that were under construction and one occupied building.

Melissa Huggins-Jones ("Huggins-Jones") and her eight-year-old daughter lived in one of the second-floor apartments of the occupied building. Huggins-Jones had recently moved to Raleigh from Tennessee to start a new job as a branch manager at a bank and to be closer to her mother, who lived in Wilmington. The front entrance of Huggins-Jones' apartment was located at the top of a set of stairs and down a breezeway. The back of the apartment had a balcony with a sliding glass door. The apartment located directly below Huggins-Jones' was being used as a temporary leasing office by the owner.

Huggins-Jones' air conditioning had not been working properly on 13 May and the previous weekend. Huggins-Jones had called the apartment building's maintenance worker several times to have the AC unit repaired. The night of 13 May, Huggins-Jones kept "the windows in the bedrooms" and the "sliding [glass] door to the balcony" "wide open" to try and keep the apartment cool. Huggins-Jones' daughter also had a large box fan operating in her bedroom.

After breaking into several cars, Defendant, Anthony, and Redden went to one of the unoccupied buildings of the Allister Apartments to look through their back packs at the items they had stolen. While Redden was charging her cell phone, Defendant and Anthony told her "they were going to go check something, and told [her] to wait there." Redden testified that she could not see where Defendant and Anthony went.

After waiting about ten minutes, Redden walked outside the unoccupied building to look around for Defendant and Anthony. Redden did not see Defendant and Anthony, so she went back inside the unoccupied apartment to continue charging her cell phone. After waiting five more minutes, Redden stepped outside the apartment and observed Defendant and Anthony walking from the direction of the occupied apartment building.

Defendant and Anthony again told Redden to stay at the unoccupied building, and they walked back in the direction of the occupied building. After waiting another ten minutes, Redden walked over to the occupied apartment. While Redden was outside the occupied apartment, a police car drove by and she hid in the breezeway of the building under the stairwell. Redden waited a minute until after the police car had left the area. She left the stairwell and heard a noise "like a shuffle" that made her look up.

Redden observed Defendant standing on the second-floor balcony of Huggins-Jones' apartment. Defendant was using his shirt to wipe off the balcony railing. Redden told Defendant they needed to leave and asked him where Anthony was. In response, Defendant indicated to the sliding glass door behind him.

A few minutes later, Redden saw lights from a car and she hid under the stairwell again. Redden observed a police car drive up and stop in the driveway of the apartment building for a "minute or so" and then leave. About five minutes later, Redden left the stairwell and walked to the other side of the apartment building. As she arrived at the other side of the building, Anthony ran up to her. Anthony told her "to just go" and that he was going to find Defendant.

Redden ran to a fence that was bordering the apartment complex and shortly thereafter observed Anthony and Defendant running towards her. Anthony was carrying water bottles and Defendant carrying two laptop computers. The three jumped the fence and ran along Six Forks Road to a parking lot at North Hills shopping center.

In the parking lot, Redden observed Anthony and Defendant wash their hands off with water from one of the water bottles. Anthony then called and asked an acquaintance to pick them up. Anthony referred to this acquaintance as "Reese." Reese arrived and picked up Defendant, Anthony, and Redden, and drove them to a nightclub called "Flashbacks." Redden testified that during the car ride, Anthony showed Reese an iPhone in a "woman's colored case" and a bloody knife. Redden stated that Defendant was not surprised by Anthony displaying the bloody knife. Redden observed Defendant "looked [to have] specs (sic) of blood on his shirt."

Upon arriving at the nightclub, Anthony and Reese went inside while Redden and Defendant waited outside. Redden asked Defendant, "What is going on?" Defendant told her "to let it go, don't ask questions, just forget about it."

After leaving the nightclub, Defendant, Anthony, and Redden checked into a Super 8 Motel at approximately 3:25 a.m. At the motel, Redden observed Defendant remove the two laptop computers from his back pack. Defendant kept a silver one and gave the other orange-colored one to Anthony. Redden testified that Defendant asked Anthony, "What the hell just happened?" Defendant then said, "Man, I got a son." Redden described Defendant as "nervous about not seeing his son."

Redden also testified that Defendant and Anthony had a conversation about "being happy that the little girl did not wake up." Huggins-Jones' daughter testified she kept a large, loud box fan in her bedroom to help her sleep and that she had it on that night. Huggins-Jones' daughter recalled "hear[ing] a screaming noise" that night, but went back to sleep because "[i]t didn't sound like it was in our apartment."

Redden never observed what Defendant and Anthony did with the knife, iPhone, or clothes they had worn earlier in the evening.

At approximately 7:00 a.m., Huggins-Jones' daughter discovered her mother's body. She went outside the apartment building and sought help from two construction employees working in the vicinity of the apartment complex. The two construction workers accompanied Huggins-Jones' daughter into the apartment unit and called 911. One of the construction workers observed Huggins-Jones dead upon the bed in her bedroom. He described her appearance in the bedroom: "I could tell she had blood all over her face and blood was everywhere, and I put three fingers on her wrist and there was no pulse, and she was cold as a block of ice[.]"

Shortly thereafter, emergency personnel arrived at the scene and confirmed Huggins-Jones had died from unnatural causes. Dr. Lauren Scott of the North Carolina Office of the Chief Medical Examiner performed the autopsy of Huggins-Jones and verified she had suffered at least eighteen separate blows to her face, neck, and upper chest area consistent with both blunt and sharp force trauma, in addition to multiple bruises.

Huggins-Jones injuries included, in part: a fractured skull, a broken jaw, a broken nose, a severed carotid artery, four dislodged teeth, "a chop wound" into her left shoulder, and puncture wounds in the left and right sides of her chest and shoulders. There were multiple bruises on her arms consistent with defensive wounds, in addition to several bruises on her face, back, and legs. Dr. Scott testified it took Huggins-Jones "anywhere from several minutes to an hour to die."

First responders and police investigators testified to the state of disarray in Huggins-Jones' apartment. Various items had been overturned on her dresser, her nightstand door had been torn off, window blinds had been pulled off the wall, a purse had been emptied on the kitchen table, a drawer from a jewelry armoire had been pulled out and blood found on one of the jewelry boxes.

Investigators discovered Huggins-Jones' blood on her bedroom doorknob, her daughter's bedroom doorknob, Huggins-Jones' purse, her wallet, two checkbooks, and a book cover in the hallway. A droplet of Huggins-Jones' blood was found on the apartment balcony, and a swabbing of the balcony railing tested positive for her blood.

Police investigators also discovered that the leasing office in the apartment unit immediately below Huggins-Jones' unit had been robbed. Various items were in disarray in the office and two Lenovo laptop computers, one silver and the other orange, were missing along with a Canon digital camera, charger, and camera bag.

Approximately a week later, on 20 May 2013, police found an orange Lenovo laptop bearing the same serial number as the one stolen from the leasing office beneath Huggins-Jones' apartment listed for sale on the Craigslist website. Detective Zeke Morse of the Raleigh Police Department posed as an interested buyer and contacted the seller of the laptop, Mike McCollum ("McCollum"), who lived in Wake Forest. Detective Morse offered to pay the listed price for the laptop and arranged to meet McCollum the afternoon of 20 May at a Wal-Mart store parking lot located in Wake Forest. McCollum became suspicious of the high offer price for the laptop. McCollum removed the listing for the

orange laptop from Craigslist, did not appear at the agreed upon location, and did not return further calls from Detective Morse.

Police began surveillance of McCollum's residence that same day and later obtained a warrant to search the residence on 21 May. During the execution of the search warrant, police discovered the stolen silver Lenovo laptop and arrested McCollum.

McCollum cooperated with the police and explained to them how had he obtained the silver laptop. Anthony had called and asked him to sell two Lenovo laptops that Anthony "was trying to get rid of" but had told him "they weren't stolen." Anthony text messaged McCollum pictures of the orange laptop, which McCollum used to list the laptop on Craigslist. Anthony used his girlfriend's, Amber Alberts' ("Alberts"), cellphone to send the text messages to McCollum. On 20 May 2013, McCollum posted the listing for the orange laptop, but he did not yet have possession of either the orange or silver laptops.

McCollum stated that on the morning of 21 May, he had received a phone call from Defendant. Defendant informed McCollum that he was at the Wal-Mart store in Wake Forest and had the silver laptop for McCollum to sell. McCollum sent his fiancée and her friend to pick up Defendant and bring him to McCollum's residence. Defendant provided McCollum with the silver laptop in exchange for McCollum giving him $50 up front. McCollum's girlfriend drove Defendant back to the Wal-Mart store in Wake Forest.

Undercover police officers conducting surveillance of McCollum's residence observed a person, who was later determined to be Defendant, leave the residence. The officers followed McCollum's fiancée's car as she drove Defendant back to the Wal-Mart store. McCollum's fiancée dropped Defendant off at the Wal-Mart store. One of the officers, Detective Gory Mendez of the Raleigh Police Department, remained behind at the Wal-Mart store to determine Defendant's identity. The other undercover officers followed McCollum's fiancée back to McCollum's residence.

Detective Mendez lost sight of Defendant for approximately thirty minutes, but eventually found him sitting inside a car with Anthony, Alberts, and another woman, in a parking lot near the Wal-Mart store. Detective Mendez observed the four individuals get out of the car and walk over to the Wal-Mart store. Detective Mendez made arrangements to have law enforcement officers with the Raleigh Police Department come pick up Defendant and Anthony and take them to the police station for questioning. During the time Detective Mendez was

following Defendant, other officers were executing the search warrant for McCollum's residence.

An officer requested Alberts to give him her phone for examination. The officer discovered pictures of the orange laptop on Alberts' phone and the text messages Anthony had sent McCollum. Law enforcement officers obtained a search warrant for Alberts' residence. The officers discovered a large bag that Alberts identified as Anthony's bag. Inside the bag were GPS devices, phone chargers, cords, and other items that were consistent with items reported stolen from cars in the neighborhood surrounding the Allister Apartments complex the night of 13 May 2013. When police took Defendant in for questioning, they requested he hand over his shoes, a pair of red and black Nike tennis shoes. A grand jury returned a true bill of indictment for the first-degree murder of Huggins-Jones against Defendant on 3 June 2013.

Defendant's capital murder trial began on 4 January 2016. Prior to Defendant's trial, Anthony pled guilty to first-degree murder and received a sentence of life imprisonment without the possibility of parole. Defendant stipulated at trial to being "involved with the other co-defendants in breaking into cars and was with the co-defendants before and after the incident and was involved in selling stolen items afterwards; i.e., the laptop."

Melvin Brown ("Brown") was called as a witness by the State. At the time of trial, Brown was serving a sentence for trafficking heroin. Brown met Defendant at the Wake County Jail, while Defendant was awaiting trial. Brown testified Defendant told him the reason he was in jail was because of a laptop. Brown stated that Defendant told him:

> [T]hey had broken into a house, [Defendant] and another guy, and that is how he got the laptop. He took the laptop, like $200, some jewelry.
>
> He told me while he was in a place robbing the place, that the lady confronted him. She started yelling at him and he told me he jumped on the lady. He was hitting her and she was screaming and stuff. And then he said that his co-defendant had stabbed the lady with a knife, stabbed her in the temple and stabbed her in the chest.

Defendant also told Brown that police did not have the knife, and that he was confident police would not find blood on the shoes he was wearing the night of the murder. Brown had provided the police and the prosecution with the information Defendant had allegedly

communicated to him in exchange for a twenty-month reduction in his prison sentence and a waiver of the mandatory $100,000 fine for trafficking heroin. Brown testified about threats he had received from Defendant in response to his cooperation with the prosecution. Brown also recounted a jailhouse attack against him in retaliation for speaking with the prosecution about Defendant.

Before the trial court charged the jury, Defendant requested a special instruction in writing regarding Brown's motivation for testifying. The trial court denied Defendant's requested special instruction.

Defendant did not present any evidence during the guilt-innocence determination phase of the trial. The trial court submitted to the jury the charges of: (1) first-degree murder under the theory of premeditation and deliberation and the alternative theory of felony murder; and (2) second-degree murder. The trial court also instructed the jury on the criminal liability theory of acting in concert with regards to each of Defendant's charges.

The jury found Defendant guilty of first-degree murder on the basis of premeditation and deliberation, as well as under the felony murder rule with burglary as the underlying felony. During the sentencing phase, the jury recommended a sentence of life imprisonment without the possibility of parole. The trial court entered judgment on 22 February 2016 and sentenced Defendant in accordance with the jury's recommendation. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court as of right from a final judgment in a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Defendant argues the trial court erred: (1) by not giving his requested special jury instruction regarding potential bias of the State's witness Brown; and, (2) by allowing Brown to testify about his belief that Defendant was involved in an attack upon Brown while they were in jail, over Defendant's objection.

IV. Jury Instruction

A. *Standard of Review*

Defendant and the State disagree over which standard of review this Court should apply to the issue of the trial court's refusal of Defendant's requested instruction. Defendant asserts the standard of review is

de novo and the State asserts this Court should review for an abuse of discretion. This Court has recognized "the proper standard of review depends upon the nature of a defendant's request for a jury instruction." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015).

Defendant cites *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009), to argue the proper standard of review is *de novo*. At issue in *Osorio* was whether sufficient evidence existed to support a jury instruction on acting in concert. *Id.* "Whether evidence is sufficient to warrant an instruction . . . is a question of law[.]" *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (2010). This Court reviews questions of law *de novo*. *Edwards*, 239 N.C. App. at 393, 768 S.E.2d at 621 (citations omitted).

Where the issue is not a question of law reviewed *de novo*, the appropriate standard of review is for an abuse of discretion. *State v. Lewis*, 346 N.C. 141, 145, 484 S.E.2d 379, 381 (1997) ("[w]hether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion.") (quoting *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988)); *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003) ("the choice of instructions given to a jury 'is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion.' ") (quoting *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002)).

The issue before us involves the trial judge's choice of language in the instructions given to the jury. We review the trial court's ruling for an abuse of discretion. *See Lewis*, 346 N.C. at 145, 484 S.E.2d at 381.

"A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (citation omitted), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). However, the trial court "need not give the requested instruction verbatim." *Id.* Instead, "an instruction that gives the substance of the requested instructions is sufficient." *Id.* To show that the refusal to give an instruction was error, the defendant "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Beck*, 233 N.C. App. 168, 171, 756 S.E.2d 80, 82 (2014) (citation omitted).

"[W]hen instructions, viewed in their entirety, present the law fairly and accurately to the jury, the instructions will be upheld." *State*

v. Roache, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004). "[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citations and brackets omitted).

"In order for a new trial to be granted, the burden is on the defendant to not only show error but to also show that the error was so prejudicial that without the error it is likely that a different result would have been reached." *State v. Owen*, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164 (1999) (citation omitted).

B. *Special Instruction*

[1] Defendant requested the following special jury instruction regarding Brown's testimony:

> There is evidence which tends to show that a witness testified with the hope that their testimony would convince the prosecutor to recommend a charge reduction. If you find that the witness testified for this reason, in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony, in whole or in part, you should treat what you believe the same as any other believable evidence.

The trial court denied the requested special instruction, and gave the jury the pattern jury instructions on interested witnesses and informants, as follows:

> You may find that a witness is interested in the outcome of this case. You may take the witness's interest into account in deciding whether to believe the witness. If you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence. [N.C.P.I.-Crim. 104.20 (2011)]
>
> . . .
>
> You may find that a State's witness is interested in the outcome of this case because of the witness's activity *as an informer*. If so, you should examine the testimony of the witness with care and caution. After doing so, if you believe the testimony in whole or in part, you should treat what you believe the same as any other believable evidence. (Emphasis supplied). [N.C.P.I.-Crim. 104.30 (2011)]

The trial court also gave the general pattern jury instruction concerning witness credibility:

> You're the sole judges of the believability of witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony.
>
> In deciding whether to believe a witness, you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness has testified; the manner and appearance of the witness; *any interest*, *bias*, *prejudice*, *or partiality a witness may have*; the apparent understanding and fairness of the witness; whether the testimony is reasonable; and whether the testimony is consistent with other believable evidence in this case.

N.C.P.I.-Crim. 101.15 (2011) (emphasis supplied).

Defendant contends his requested instruction regarding Brown was supported by the evidence because "Brown testified that, not only did he receive a benefit from providing this information to the State, he hoped for further reduction in his sentence after testifying."

Brown pled guilty to one count of trafficking in heroin on 20 August 2014. As part of his plea arrangement, the State agreed that Brown provided substantial assistance such that a departure was appropriate from the sentencing schedule for trafficking offenses. Sentencing in Brown's matter was continued until 17 March 2015, at which time Brown received a sentence which departed from the requirements of N.C. Gen. Stat. § 90-95(h)(3). At the time of Defendant's trial in January 2016, Brown had fulfilled all of the conditions for entry of his plea and judgment in Brown's case had been entered in Wake County Superior Court. Brown's plea to trafficking in heroin was not contingent upon his truthful testimony against Defendant, and he had no arrangement with the State to testify against Defendant. Defendant concedes that Brown received a reduced sentence for information he provided against Defendant.

Brown testified at trial that the prosecution had reduced his sentence for trafficking heroin by twenty months in exchange for the information he provided about Defendant. On direct examination, Brown further testified in the following exchange with the prosecution:

> Q. . . . So when you pled in, you got a benefit for talking to law enforcement, with Detective Brady back here?
>
> [Brown]. Yes, Ma'am.
>
> [Prosecutor]. And as a result of coming in here today, you don't automatically get any new benefit, is that right?
>
> [Brown]. No, Ma'am.
>
> [Prosecutor]. When we met with you this morning and with [your attorney], do you hope perhaps that you could get a benefit from this?
>
> [Brown]. Yes, Ma'am. I was under -- they told me that my lawyer could put a motion in.
>
> [Prosecutor]. At any point, have we agreed that you should get any additional time?
>
> [Brown]. No, Ma'am.
>
> [Prosecutor]. But your lawyer has said she might see if she can help you out?
>
> [Brown]. Yes, Ma'am.
>
> [Prosecutor]. So it's safe to say you hope that you can get a benefit?
>
> [Brown]. Yes, Ma'am.
>
> [Prosecutor]. But you are not guaranteed one as a result of coming in here today?
>
> [Brown]. No ma'am.

Defendant asserts "[t]here is a reasonable likelihood that, had the jury been properly directed to consider Brown's hope for further benefit after testifying, it would not have convicted [Defendant] of first-degree murder." We disagree.

The trial court's charge to the jury, taken as a whole, was sufficient to address the concerns motivating Defendant's requested instruction. The entire jury charge, including the instructions regarding interested witnesses, informants, and the jury's ability to take into consideration "any interest, bias, prejudice or partiality a witness may have" was sufficient to apprise the jury that they may consider whether Brown was interested, biased, or not credible. *See State v. Singletary*, 247 N.C. App.

368, 377, 786 S.E.2d 712, 719 (2016) (holding trial court's denial of defendant's requested instruction was not error because "[t]he trial court's jury charge was sufficient to address Defendant's concerns, as it left no doubt that it was the jury's duty to determine whether the witness was interested or biased"). The entire jury instruction given by the trial court was supported by the evidence and in "substantial conformity" with the instruction requested by Defendant. *State v. McNeill*, 346 N.C. 233, 239, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998).

Additionally, we note the State made no promises to Brown in exchange for his truthful testimony in this case. Defendant's requested instruction, that Brown "testified with the hope that [his] testimony would convince the prosecutor to recommend a charge reduction," was not supported by the law or the evidence as there was no possibility Brown could receive any such "charge reduction."

Brown had no pending charges at the time he testified against Defendant, and thus, there were no charges to reduce. When asked at oral argument before this Court how the State could make concessions to Brown, who was serving an active sentence with no pending charges, Defendant argued that a motion for appropriate relief could be filed on Brown's behalf. However, N.C. Gen. Stat. § 15A-1415(b) (2017), provides "the only grounds" for which Brown could have asserted a motion for appropriate relief. The exhaustive list set forth in that statute does not allow relief from entry of judgment for a defendant who subsequently provides truthful testimony. *See id.*

Even presuming the trial court erred by denying Defendant's requested instruction, Defendant cannot demonstrate prejudice to award a new trial. Defendant had ample opportunity to cross-examine Brown regarding his agreement with the State, as well as to argue to the jury that Brown's deal with the State, as well as Brown's hope for another future sentence reduction, motivated Brown's testimony and impacted his credibility and truthfulness.

In *State v. Mewborn*, this Court found no prejudice resulted from the trial court's refusal to give the pattern instruction on witnesses with immunity or quasi-immunity where the "defendant had the opportunity to cross-examine [the witness] about any alleged agreement and to argue to the jury regarding the impact of any alleged agreement upon [the witness'] credibility" and "the jury had before it evidence of [the witness'] arrest, the charges pending against [the witness], his cooperation with police, his plea agreement, and his pending sentencing hearing." *State*

v. Mewborn, 178 N.C. App. 281, 293, 631 S.E.2d 224, 232, *disc. review denied*, 360 N.C. 652, 637 S.E.2d 187 (2006).

Here, the jury was presented evidence of Brown's conviction and sentence for trafficking heroin, his testimony that he contacted the prosecution about the information he gained from Defendant because he "wanted to get substantial assistance for talking to them about the murder," and the details of the resulting agreement to reduce Brown's prison sentence.

Defendant has failed to show that the trial court's refusal to give the requested instruction had a likely impact on the jury's verdict or misled the jury. *See id.*

Defendant asserts the trial court's omission of the requested instruction was prejudicial because "[n]o physical evidence placed [Defendant] inside the apartment, much less implicate[s] him as an assailant."

The evidence showed there were clothes dryer vents on each side of Huggins-Jones' apartment balcony. Investigators found partial shoe prints atop the dryer vent on the right side of Huggins-Jones' balcony. City County Bureau of Investigation Agent Tracy Davis was admitted as an expert witness in the field of footwear examination at trial. Agent Davis testified the partial shoe prints atop the dryer vent had characteristics consistent with the black and red Nike tennis shoes Defendant was wearing on the night of the murder.

Redden observed Defendant standing on Huggins-Jones' apartment balcony, appearing to wipe off the railing. Redden testified she observed specks of blood on Defendant's shirt. A swabbing sample taken from Huggins-Jones' balcony railing tested positive for her blood. Redden recounted that Defendant and Anthony had a conversation the night of the murder that they were "happy that the little girl [Huggins-Jones' daughter] did not wake up."

Contrary to Defendant's assertion, there was substantial evidence, apart from Brown's testimony, from which the jury could have found Defendant was present inside Huggins-Jones' apartment with Anthony and participated in her murder which caused her blood to be upon his shirt.

We find no error in the trial court's ruling to omit Defendant's requested instruction. Presuming, *arguendo*, the trial court erred, Defendant cannot show the jury was misled by the omission of the requested instruction or that he was prejudiced. Defendant's argument is without merit and overruled.

V. Testimony On Jailhouse Attack

[2] Defendant also argues the trial court abused its discretion by permitting, over his objection, Brown 's testimony about a jailhouse attack.

Brown testified he was transferred to the Wake County Courthouse to testify for the State at a pretrial hearing in November 2015. Brown said that when he arrived at the courthouse, Defendant was present inside a holding cell. Brown stated Defendant threatened him and made a motion with his hands "like he was going to cut me. He was telling me I was dead."

After Brown testified at the pretrial hearing, he was taken back to the jail next door to the courthouse. Brown was placed in a pod across from Defendant, but separated by a glass window. Brown stated Defendant was staring at him through the window and appeared to be "talking trash." A few moments later "somebody came to him and threatened him" for testifying against Defendant. Brown returned to his cell. Shortly thereafter, the same person who had threatened him moments earlier came into the cell and assaulted Brown. Brown testified the assailant asked him if he was telling on "Tray." Brown stated "Tray" was a nickname for Defendant.

Defendant argues the evidence of the jailhouse attack, but not the threats made by Defendant, was both irrelevant and unduly prejudicial under Rules 401, 402, and 403 of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403 (2017).

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Irrelevant evidence is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, *disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992). Under Rule 402, relevant evidence is generally admissible at trial while irrelevant evidence is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402.

"Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citation omitted), *disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

In challenging the relevancy of Brown's testimony regarding the jailhouse attack under Rules 401 and 402, Defendant asserts "The State

presented no evidence tending to show that [Defendant] knew about, suggested or encouraged the attack on Brown; [Defendant] was in a different cell block from Brown at the time of the assault. The testimony was therefore without proper foundation and irrelevant[.]" We disagree.

Brown testified Defendant was staring at him through a glass window in the jail immediately before the assailant approached Brown and threatened him. The same assailant returned several minutes later, asked if he was telling on "Tray," and assaulted him. This testimony clearly suggests Defendant was, at minimum, aware of the attack upon Brown or may have encouraged it.

"Generally, evidence tending to show a defendant has attempted to induce a witness to testify falsely in his or her favor is relevant and admissible against the defendant." *State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (1992) (citing *State v. Minton*, 234 N.C. 716, 725, 68 S.E.2d 844, 850 (1952)). This evidence may consist of attempts to influence a witness by threats or intimidation. *State v. Smith*, 19 N.C. App. 158, 159, 198 S.E.2d 52, 53 (1973).

Evidence of threats against a witness may be relevant because it "may be construed as an awareness of guilt on the part of the defendant." *State v. Larrimore*, 340 N.C. 119, 151, 456 S.E.2d 789, 806 (1995) (citing *State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993) and *Minton*, 234 N.C. at 716, 68 S.E.2d at 844).

Brown testified he did not want to be at trial because he had concerns for his safety. Our Supreme Court has held a witness may testify about his fear of a defendant and the reasons for his fear, as this is relevant to the issue of the witness' credibility. *State v. Lamb*, 342 N.C. 151, 158, 463 S.E.2d 189, 193 (1995) ("Where, as here, the witness has been the subject of past acts of violence and thereby has reason to fear another individual, those past acts are relevant to the issue of the witness' character for truthfulness or untruthfulness." (quoting *Larrimore*, 340 N.C. at 152, 456 S.E.2d at 807)).

The challenged testimony was clearly relevant under Rules 401 and 402 because it was probative to both issues of Defendant's guilt and Brown's credibility. *See id.*; *Larrimore*, 340 N.C. at 152, 456 S.E.2d at 807; *Hicks*, 333 N.C. at 467, 428 S.E.2d at 167; *Minton*, 234 N.C. at 716, 68 S.E.2d at 844. Defendant has failed to show the testimony at issue is irrelevant under Rule 401. N.C. Gen. Stat. § 8C-1, Rule 401.

Defendant additionally argues the trial court abused its discretion by admitting the challenged testimony under Rule 403 because its

probative value was substantially outweighed by the danger of unfair prejudice. 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 . . . ." N.C. Gen. Stat. § 8C-1, Rule 403.

A trial court's ruling under Rule 403 is reviewed for an abuse of discretion. *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015). 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." *Id.* (citations omitted).

Defendant asserts: "Without Melvin Brown's irrelevant testimony that [Defendant] may have had something to do with some sort of assault on Brown, there is a reasonable likelihood the jury would have acquitted [Defendant] of first degree murder." "Certainly, the evidence was prejudicial to the defendant in the sense that any evidence probative of the State's case is always prejudicial to the defendant." *State v. Stager*, 329 N.C. 278, 310, 406 S.E.2d 876, 895 (1991) (citation omitted).

Defendant only challenges the portion of Brown's testimony regarding the threats and attack in the jail cell by the unknown assailant. Defendant does not challenge Brown's testimony that Defendant was "going to cut [Brown] . . . [and that Brown] was dead." Defendant cannot show he was prejudiced by the challenged testimony, much less that he was unfairly prejudiced in light of the similar unchallenged evidence of his threats to intimidate Brown.

The challenged testimony was relevant and its probative value significant to both the issues of Defendant's knowledge of his guilt and Brown's credibility, and was not substantially outweighed by any undue prejudice. Defendant has failed to demonstrate how the challenged testimony was unfairly prejudicial or how its prejudicial effect outweighs its probative value. Defendant has failed to show the trial court abused its discretion by admitting the challenged testimony.

VI. Conclusion

The trial court did not err in providing the jury instruction as given and omitting the instruction requested by Defendant. Defendant has failed to demonstrate how Brown's challenged testimony was irrelevant, unfairly prejudicial, or how its prejudicial effect outweighs its probative value under Rules 401, 402 or 403. N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403.

Defendant has not shown any abuse of discretion from the admission of Brown's testimony regarding the jailhouse attack. Defendant

received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges BERGER and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY LEVON WILSON

No. COA18-550

Filed 15 January 2019

1. Obscenity—dissemination to minor—movie—showing that material obscene—sufficiency of evidence

In a prosecution for disseminating obscene material to a minor under 13 years of age, the State presented sufficient evidence that the material was obscene. In addition to the victim's description of the movie that defendant had shown her (two people having sex, including penetration), the State introduced evidence about defendant's pornography collection, and the State's evidence was sufficient for the jury to reasonably infer that the material defendant had shown to the victim was of the same nature as that in his pornography collection and was therefore obscene under contemporary social standards.

2. Constitutional Law—unanimous verdict—multiple counts—instructions

The trial court's instructions did not deny defendant his constitutional right to a unanimous jury verdict in a prosecution for indecent liberties and other charges. The trial court instructed the jury that defendant was charged with multiple counts for each offense, provided a single instruction for each offense without describing the conduct underlying each charge, and instructed the jury to consider each charge individually. There was no indication that the jury's verdicts in this case were not unanimous, considering the factors in *State v. Lawrence*, 360 N.C. 368 (2006).

3. Constitutional Law—defendant's right to testify—no right to have case reopened

The trial court did not abuse its discretion by declining defendant's request to reopen his case after he reconsidered his decision not to testify. Defendant had informed the trial court at the close of the evidence that he was not going to testify, after being addressed by the court, taking time to think about it, and consulting with his attorney. The trial court thoroughly explained its reasoning in declining to reopen the case upon defendant's request after the charge conference, and nothing in its justification was manifestly unsupported by reason.

Appeal by defendant from judgments entered 6 November 2017 by Judge Martin B. McGee in Union County Superior Court. Heard in the Court of Appeals 27 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

ZACHARY, Judge.

Defendant Timothy Levon Wilson appeals from judgments entered upon jury verdicts finding him guilty of taking indecent liberties with a child, assault by strangulation, disseminating obscene material to a minor under 13 years of age, and first-degree statutory rape of a child under 13 years of age. Defendant argues that (1) the trial court erred in failing to dismiss the charge of disseminating obscene material to a minor due to insufficient evidence; (2) the trial court's jury instructions violated Defendant's constitutional right to a unanimous jury verdict; and (3) the trial court violated Defendant's state and federal constitutional rights when it denied his request to reopen the case upon changing his mind that he wished to testify. We conclude that there was no error.

Background

On 30 March 2015, Defendant was indicted for five counts of taking indecent liberties with a child, four counts of sex offense in a parental role, four counts of first-degree statutory rape of a child under 13, one count of disseminating obscenity to a minor under 13, and one count of assault by strangulation. Defendant was indicted for six additional counts of taking indecent liberties with a child on 1 June 2015.

Six of Defendant's charges for taking indecent liberties with a child involved Defendant's older stepdaughter, Q.R.,[1] who was born in August of 1998. However, Defendant's arguments on appeal only concern Defendant's conduct against his younger stepdaughter, Q.B.

The evidence at trial showed that Defendant engaged in a pattern of sexual conduct with Q.B., who was born in May 2003. She was the youngest child in the home and was the first to arrive home from school each day. Q.B. would thereafter remain alone with Defendant until Q.R. and Defendant's son returned home from school, with Q.B.'s mother returning home much later. Most of the incidents for which Defendant was charged occurred during the weekdays when Q.B. was alone in the house with Defendant. Each of the acts was alleged to have occurred between 15 May 2011 and 1 January 2015.

Q.B. testified that Defendant had touched her on her vagina "[m]ore than one time," but she was best able to remember the details of two particular incidents. During the first, Q.B. was in the master bedroom and Defendant had her sit "[o]n the edge of his bed" and "touched [her] vagina with his hands." Q.B. said that "[she] was scared, [and she] didn't know what to do." Q.B. also testified about an incident that occurred while she was in her bedroom. She was lying on the bottom bunk of her bed when Defendant came into her room wearing only his boxers, lay down next to her, and began inserting his fingers into her vagina.

Q.B.'s testimony also revealed that Defendant had penetrated her vagina with his penis on multiple occasions. Several of those incidents occurred in the master bedroom. Q.B. recalled that on one occasion, she was alone in the house with Defendant after school. Defendant was naked, told Q.B. to take her clothes off, put Q.B. on his bed, and retrieved the "Blue Magic" hair grease from the bathroom. Defendant then "put [the] grease on his penis and he just— . . . he stuck it inside my vagina." Q.B. said that Defendant "stuck it in and out" "[m]ore than one time," until "he heard something" and stopped. Q.B. also testified in detail about a second incident that took place in the master bedroom, during which Defendant inserted his penis into Q.B.'s vagina after applying a different type of grease from a pink strawberry container. On another occasion, Q.B. said that one morning before school, Defendant "told me like go take a shower and it was like after. And then like I didn't have no clothes on because I went to go take a shower and then he just told me to go in his room and that's when he just stuck his penis in my vagina."

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1. Pseudonyms are used throughout the opinion to protect the identities of the minor victims and for ease of reading.

Q.B. said that Defendant eventually stopped "[b]ecause my sister called my name."

Additionally, Q.B. testified that Defendant had penetrated her vagina with his penis "[m]ore than one time" in the "kids' living room" of the house. On one of the occasions, she was lying on the floor watching television when Defendant "told [Q.B.] to take off [her] clothes and then he only had his boxers on." After Q.B. took her clothes off, Defendant "told [her] to lay back down and then he stuck his penis in [her] vagina." Defendant eventually got off of her because "[h]e was hearing noises."

Similar incidents occurred "[m]ore than one time" in the "adult living room." On one of those occasions, Q.B. said that she was sitting on the couch and that Defendant came into the room in his boxers, "told [her] to take off [her] clothes[,]" put hair grease on his penis, got "[o]n top of [her,]" and put his penis "[i]n and out" of her vagina while still wearing his boxers. Q.B. said that she "was scared," and that "[i]t hurt." Q.B. testified about yet another particular incident of vaginal intercourse that took place in Defendant's son's bedroom.

Lastly, Q.B. testified about an incident wherein Defendant was watching a nude sex scene in his bedroom and called her into the room to watch. Defendant was charged with disseminating obscenity to a minor under 13 years of age for that incident. Defendant moved to dismiss this charge due to insufficiency of the evidence, which the trial court denied.

Defendant's indictments only alleged the general conduct underlying each charge. However, the jury verdict sheets indicated that Defendant's four counts each of sex offense in a parental role and first-degree statutory rape, along with four of his charges for taking indecent liberties, were based upon Defendant's alleged conduct of "engaging in vaginal intercourse" with Q.B. in four distinct locations: (1) "in the Defendant's bedroom"; (2) "in the 'kids' living room' "; (3) "in the 'adult's living room' "; and (4) "in [Defendant's son's] bedroom," respectively. The verdict sheets indicated that Defendant's fifth count of taking indecent liberties was for "touching [Q.B.'s] genitals with his hands." Six additional counts of taking indecent liberties were for conduct involving Q.R., two of which the State voluntarily dismissed.

Defendant presented no evidence at trial, and the jury found Defendant guilty of all nineteen charges. The trial court arrested judgment on the four counts of sex offense in a parental role and four counts of taking indecent liberties with a child because they involved the same underlying conduct as the four counts of first-degree statutory

rape, for which the jury had also found Defendant guilty. The trial court imposed consecutive sentences against Defendant, in all totaling 1,510 to 2,070 months' imprisonment. Defendant gave oral notice of appeal in open court.

Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of disseminating obscene material to a minor under 13 years of age because the State's evidence was insufficient to warrant the submission of that charge to the jury. In particular, Defendant contends that the State presented insufficient evidence to show that the material was "obscene material" within the meaning of the statute.

The standard of review upon a defendant's motion to dismiss is well established:

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. . . . Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). When a defendant's motion to dismiss challenges "the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). If so, then the defendant's motion to dismiss must be denied in order "for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *Id.*

In order to survive a motion to dismiss a charge of disseminating obscene material to a minor under N.C. Gen. Stat. § 14-190.8, the State must present substantial evidence to show (1) that the defendant is 18 years of age or older, and (2) that the defendant knowingly,

(3) disseminated, (4) to a minor under the age of 13, (5) any material which the defendant knew or reasonably should have known to be obscene within the meaning of section 14-190.1. N.C. Gen. Stat. § 14-190.8 (2017); *State v. Hill*, 179 N.C. App. 1, 14, 632 S.E.2d 777, 785 (2006).

Pursuant to N.C. Gen. Stat. § 14-190.1, material is considered to be "obscene" if:

> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section [as, *inter alia*, vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted]; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b) (2017); *see also id.* § 14-190.1(c)(1). Whether particular content is obscene is to "be judged with reference to ordinary adults." *Id.* § 14-190.1(d). Moreover, "[n]othing in section 14-190.1 requires the State to produce the precise material alleged to be obscene." *State v. Mueller*, 184 N.C. App. 553, 566, 647 S.E.2d 440, 450, *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

In the instant case, Defendant's argument is premised primarily upon the fact that "contemporary community standards must take into account the fact that television regularly depicts couples having sex." Because "Q.B.'s description of what she saw[] also describes what can be seen on contemporary television"—particularly on premium cable channels such as Showtime, HBO, and FX that regularly depict "sexual activity and nudity"—Defendant argues that "the State failed to provide substantial evidence that what [Q.B.] saw was obscene according to contemporary standards." Defendant therefore argues that the trial court erred in denying his motion to dismiss the charge of disseminating obscenity to a minor. We disagree.

Q.B. testified to the following circumstances regarding the alleged incident:

> Q. [W]as there ever a time when the Defendant showed you any movies that you didn't like?
>
> A. Yes.
>
> Q. Okay. Can you tell me about that, please?
>
> A. It was like he had helped me with my math homework and he like had TV in his room and like it was already set up and—
>
> Q. [Q.B.], let's just wait a minute for that to go back, okay. Okay. So you said there was a TV in [Defendant's] room and it was already set up?
>
> A. Yes.
>
> Q. And so tell me what happened from there.
>
> A. He had told me to go in his room and then I saw on the TV a guy and a girl.
>
> Q. And you saw on the TV a guy and a girl. Before we talk about that, you said that [Defendant] told you to go in his room?
>
> A. Yes.
>
> Q. So you didn't just wander in there?
>
> A. No.
>
> . . . .
>
> Q. What were the guy and the girl on the TV doing?
>
> A. They were having sex.
>
> . . . .
>
> Q. And when you say they were having sex, can you describe what you saw?
>
> A. The guy was on top of the girl and he just stuck his penis inside of her.
>
> Q. And did the guy and the girl on TV, did they have clothes on at all?

A. No.

Q. And when you went in [Defendant's] room and saw that, did [Defendant] go in the room with you?

A. Yes.

Q. Did [Defendant] say anything to you?

A. No.

Q. And did you watch the TV?

A. Yes.

Q. Okay. How long did you watch the TV?

A. Like for a little bit.

. . . .

Q. And when you—did you eventually leave the room?

A. Yes.

Q. And how did you leave the room?

A. Just walked out.

. . . .

Q. Okay. And how did watching that movie make you feel?

A. Scared and disgusted.

. . . .

Q. Why were you scared?

A. Because I never seen anything like it.

On cross-examination, Q.B. clarified that Defendant was already in the master bedroom with the scene playing when he called Q.B. into the room.

In addition to Q.B.'s description of the movie that Defendant had shown her, the State introduced a photograph of three pornographic DVDs that detectives found during their search of the master bedroom. Q.B.'s mother also testified that Defendant "had so many" pornographic DVDs that he kept in that room. According to Q.B.'s mother, however, when Q.B. approached authorities with her allegations concerning Defendant, Defendant "packed [his pornography collection] up and

got rid of it and he called his older children and sent some of it away." She said that Defendant had also taken a container full of his remaining pornography collection "out to the shed" behind their property. Q.B.'s mother later found that collection and gave it to detectives. At trial, various titles from Defendant's collection were read to the jury.

When viewed in the light most favorable to the State, we conclude that this evidence would allow a jury to reasonably infer that the material Defendant showed to Q.B. was of the same nature of that contained in Defendant's pornography collection and was, therefore, "obscene" material under contemporary community standards, the dissemination of which to children under the age of 13 is unlawful. Accordingly, the trial court properly denied Defendant's motion to dismiss the charge of disseminating obscene material to a minor, as the State presented substantial evidence of each element of that offense.

Unanimous Jury Verdict

[2] Next, Defendant argues that the trial court's jury instructions denied him of his constitutional right to a unanimous jury verdict. We disagree.

The trial court instructed the jury that Defendant was charged, *inter alia*, with nine counts of taking indecent liberties with a child,[2] four counts of first-degree rape of a child, and four counts of sex offense in a parental role. The trial court provided a single instruction for each offense, without describing the details of the conduct underlying each individual charge. The trial court did, however, instruct the jury that "[y]ou must consider each count individually," and the verdict sheets identified each count by victim and included a brief description of the particular conduct alleged by reference to the location in which it occurred. In addition, the trial court instructed the jury that "[a]ll 12 of you must agree upon your verdict. You cannot reach a verdict by majority vote." The trial court also instructed the jury to indicate on the verdict forms "when you have agreed upon unanimous verdicts as to each charge."

Defendant, however, argues that because the charges were "numerous, complex and for some charges based on the same evidence, the trial court's minimalist jury instruction in which the court failed to instruct the jury that they must be unanimous on each charge violated [his] constitutional right to unanimous jury verdicts." Defendant contends that "because the record does not establish that the jury verdicts . . . were

2. Defendant was initially charged with eleven counts of taking indecent liberties with a child, but the State voluntarily dismissed two of those charges that involved Q.R.

unanimous," his convictions for taking indecent liberties with a child and first-degree statutory rape of a child must be vacated.[3]

Article I, section 24 of the North Carolina Constitution requires that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24. In *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006), our Supreme Court enumerated several factors relevant to the determination of whether a defendant has been deprived of his right to a unanimous jury verdict by virtue of the trial court's jury instructions, including:

> (1) whether [the] defendant raised an objection at trial regarding unanimity; (2) whether the jury was instructed on all issues, including unanimity; (3) whether separate verdict sheets were submitted to the jury for each charge; (4) the length of time the jury deliberated and reached a decision on all counts submitted to it; (5) whether the record reflected any confusion or questions as to jurors' duty in the trial; and (6) whether, if polled, each juror individually affirmed that he or she had found [the] defendant guilty in each individual case file number.

State v. Pettis, 186 N.C. App. 116, 123, 651 S.E.2d 231, 235 (2007) (citing *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613), *disc. review denied*, 362 N.C. 369, 662 S.E.2d 387, *cert. denied*, 555 U.S. 975, 172 L. Ed. 2d 337 (2008).

In the instant case, Defendant did not raise an objection at trial regarding the jury instructions and factor one, the unanimity of the verdicts. As for the third *Lawrence* factor, the jury was provided with separate verdict sheets for each charge, and the sheets included specific details outlining the particular conduct upon which each individual count was based. *Cf. Lawrence*, 360 N.C. at 369, 627 S.E.2d at 609 ("[N]either the indictments, jury instructions, nor verdict sheets identified the specific incidents of the respective statutory rape and indecent liberties charges for which the jury found [the] defendant guilty."). Lastly, the record does not reflect any confusion or question regarding the jurors' duty in the trial (factor five).

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3. In his brief, Defendant states that his "convictions for sex activity with a minor over whom the defendant had assumed the position of a parent," rather than his convictions for taking indecent liberties with a child, should be vacated. However, this appears to be a typo, as the trial court arrested judgment on those four counts.

Nevertheless, Defendant contends that "factors two, four and six support a finding that the jury's verdict was not unanimous." However, the case at bar is no different from the facts underlying these factors in *Lawrence* and *Pettis*, upon which Defendant relies.

Regarding the second *Lawrence* factor, Defendant maintains that "the court's only instruction on unanimity came at the end of the charge: 'All 12 of you must agree upon your verdict.' " Defendant argues that "this generic unanimity instruction was not sufficient to assure that each of the nineteen verdicts was unanimous" given the "complexity of the charges." "At a minimum," Defendant maintains that "the instruction should have been: 'All 12 of you must agree upon each of your *verdicts*.' " (Emphasis added). However, Defendant cites no authority for his proposition that the trial court's manner of instructing the jury was insufficient. Moreover, Defendant ignores the trial court's instructions that the jurors "must consider each count individually" and notify the court when they had "agreed upon unanimous verdicts *as to each charge*." (Emphasis added). Thus, the jury was indeed instructed on unanimity, and the second *Lawrence* factor was satisfied.

Concerning the fourth *Lawrence* factor, Defendant asserts that because the jury's deliberation in the instant case lasted for only thirty-one minutes, this indicates "that the verdicts may not have been unanimous." Defendant's argument directly contradicts the significance that our Supreme Court ascribed to this factor in *Lawrence*, wherein "the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours." *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613. Just as in *Lawrence*, Defendant presented no evidence for the jury's consideration to contradict the victims' accounts. The fourth factor likewise tends to suggest that the jury's verdicts were unanimous.

Lastly, as to factor six, Defendant asserts that because "the jurors were not polled" in the instant case, "an opportunity to ascertain whether each verdict was unanimous was missed." However, Defendant's argument misrepresents the events. The jurors were in fact polled. After the jury rendered its verdicts, the trial court inquired: "I would like to ask, is that still—are those still your unanimous verdicts? If so, please raise your right hand." The transcript then reveals "that all 12 jurors . . . raised their right hand affirming that those are indeed their unanimous verdicts."

Accordingly, upon consideration of the *Lawrence* factors, we conclude that there is no indication in the present case that the jury's verdicts were not unanimous.

Moreover, the instant case is not one in which the risk of a non-unanimous verdict would have arisen by virtue of the trial court's instructions. Defendant argues that the jury instructions "contained no information for the jurors to decide how they were to proceed when the evidence could support various verdicts or could support a number of the verdicts." For example, Defendant notes that Q.B. testified that Defendant vaginally penetrated her in the "kids' living room" "[m]ore than one time[,]" but only detailed one particular incident in that location. Thus, Defendant argues that "one juror could have found that the detailed description met all of the elements for first degree statutory rape and then used Q.B.'s testimony that it happened more than one time to use the evidence of the other times for a guilty verdict on indecent liberties." Yet, "based on the same evidence another juror could have reasoned that the detailed description of the one incident supported a guilty verdict on indecent liberties [and] first degree statutory rape." Defendant maintains that "[t]his confusion would have been allayed if the court had instructed the jurors that they needed to be unanimous either on evidence supporting an individual offense or supporting numerous offenses."

The crimes with which Defendant was charged, however, do "not list, as elements of the offense, discrete criminal activities in the disjunctive." *Id.* at 375, 627 S.E.2d at 613 (quotation marks omitted) (citing *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990)). Instead, "the indecent liberties statute simply forbids 'any immoral, improper, or indecent liberties' " with any child under 13 years of age where such act is taken for the purpose of arousing or gratifying sexual desire. *Id.* at 374, 627 S.E.2d at 612 (quoting N.C. Gen. Stat. § 14-202.1(a)(1)). The particular act found to have been performed is immaterial to the unanimity inquiry "because the evil the legislature sought to prevent was the taking of any kind of sexual liberties with a child in order to arouse or gratify sexual desire." *State v. Lyons*, 330 N.C. 298, 306, 412 S.E.2d 308, 314 (1991). Thus, "even if some jurors [were to find] that [a] defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, the jury as a whole would [still have] unanimously f[ou]nd that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties." *Lawrence*, 360 N.C. at 374, 627 S.E.2d at 612 (internal quotation marks omitted).

Here, the trial court instructed the jury that Defendant had been charged with nine counts of taking indecent liberties with a child, five of which involved conduct against Q.B. The trial court properly instructed that what constitutes "[a]n indecent liberty is an immoral, improper or

indecent touching or act by the Defendant upon the child." Pursuant to those instructions, the jury found Defendant guilty of all five counts of taking indecent liberties with Q.B. Indeed, Q.B. testified to at least five particular incidents that would have constituted indecent liberties as reflected in the verdict sheets: (1) touching and digital penetration of Q.B.'s vagina in the master bedroom; (2) penile penetration of Q.B.'s vagina using Blue Magic hair grease in the master bedroom; (3) penile penetration of Q.B.'s vagina using strawberry hair grease in the master bedroom; (4) penile penetration of Q.B.'s vagina in the master bedroom after Q.B. showered; (5) penile penetration of Q.B.'s vagina in the "kids' living room"; (6) penile penetration of Q.B.'s vagina in the "adult living room"; and (7) penile penetration of Q.B.'s vagina in Defendant's son's bedroom. It is irrelevant that Q.B. testified about some incidents having happened "more than one time" in a particular location. Quite simply, "while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred." *Id.* at 374, 627 S.E.2d at 612-13.

Similarly, the jury convicted Defendant of four counts of first-degree statutory rape of a child, and Q.B. testified to at least four specific incidents that constituted statutory rape and occurred in each of the four locations indicated on the verdict sheets. The record therefore reveals no danger that the four first-degree statutory rape verdicts were not unanimous. *See id.* at 376, 627 S.E.2d at 613 ("[D]efendant was indicted on five counts of statutory rape; Lucy testified [that she had sexual intercourse with the defendant thirty-two separate times, but testified] to five specific incidents of statutory rape, and five verdicts of guilty were returned to the charge of statutory rape. We conclude that defendant was unanimously convicted by the jury."); *see also State v. Wiggins*, 161 N.C. App. 583, 593, 589 S.E.2d 402, 409 (2003) ("As to the [five] charges of statutory rape, R.B. testified to four specific occasions she could describe in detail during which defendant had sexual intercourse with her . . . . R.B. also testified that defendant had sexual intercourse with her five or more times a week during this . . . period. Thus, where [five statutory rape] offenses . . . were charged in the indictments, and based on the evidence presented at trial, the jury returned [five] guilty verdicts, there was no danger of a lack of unanimity between the jurors with respect to the verdict."), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004).

Thus, not only does an examination of the *Lawrence* factors indicate that the jury's verdicts were unanimous, but the instant case is also not one in which the risk of a non-unanimous jury verdict would arise

by virtue of the trial court's instructions. Accordingly, we conclude that Defendant was unanimously convicted of the counts for which the trial court imposed judgment.

Defendant's Reconsideration of His Decision Not to Testify

[3] Lastly, Defendant argues that the trial court violated his "right to testify by denying [his] request to testify after the State and [he] had rested and by failing to ask [him] if he agreed with his attorney's decision not to make a proffer of this testimony[.]" We find no such error.

It is axiomatic that "[t]he right of a defendant . . . to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution and by Article I, Sections 19 and 23 of the North Carolina Constitution." *State v. Miller*, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996). Also well established, however, is that "there is no constitutional right to have a case reopened." *State v. Perkins*, 57 N.C. App. 516, 520, 291 S.E.2d 865, 868 (1982). Where a defendant expresses a desire to testify after having already waived his right to do so, the decision whether to reopen the case and hear the defendant's testimony is within the sound discretion of the trial judge. *See id.*; *see also* N.C. Gen. Stat. § 15A-1226(b) (2017). Thus, a trial court's decision whether to reopen a case when a defendant reconsiders his decision not to testify will be upheld "unless it is shown to be manifestly unsupported by reason." *State v. Phillips*, 171 N.C. App. 622, 630, 615 S.E.2d 382, 387 (quotation marks omitted), *appeal dismissed and disc. review denied*, 360 N.C. 74, 622 S.E.2d 628 (2005).

In the instant case, toward the end of the State's evidence, the trial court suggested to Defendant that he begin thinking about whether he wanted to testify. At the end of the next day, Defendant informed the trial court that he would "decide tonight." Finally, after the close of the State's evidence on the next day, the trial court addressed Defendant regarding his decision whether or not to testify:

> Sir, you have the right to remain silent, any statement you make may be used against you. You don't have to say anything to me at all, you're represented by a lawyer, but I'd like to have this discussion with you to make sure you understand your rights concerning whether or not you wish to testify. You have the right to testify or not to testify. The decision about whether or not to testify should not be made by your lawyer, the district attorney, me, your family

> members or anyone else. That decision is yours and yours alone. If you choose not to testify, I will give an instruction to the jury saying they are not to hold that against you. If you don't mind discussing this with me, I want to ask you do you have any questions about your right to testify or not to testify or anything related to that right?

Defendant told the trial court that he did not have any questions on the matter, but said that he wanted to speak with his attorney one last time before he made his decision. After speaking privately with his attorney for fifteen minutes, Defendant informed the trial court that he was not going to testify. Defendant thereafter did not present any evidence, the defense rested, and the jury was excused.

However, after the charge conference, Defendant's attorney informed the trial court that Defendant had reconsidered his decision and now wished to testify. The trial court declined to reopen the case and bring the jury back in order to allow Defendant to testify, reasoning:

> I don't know how I could have been more careful than to go through with him throughout the week and talk to him about his right to testify or not to testify. I did it at the very beginning, I don't know that I did it every day but I believe I did it multiple days. I gave him—talked to him last night about it, explained it to him again last night, he said he wanted to have an opportunity to think about it, I said fair enough, gave him the opportunity to do that. Asked him this morning, again he delayed. Then he wanted an opportunity to consult with his attorney when the—I sent the jury out. I asked—after a while I asked the bailiff to go and ask that you all come back in so I can discuss it. I was informed that he needed additional time, I gave him additional time to do that. And he came back in I went through it in detail with him, he indicated he did not want to testify. Then the matter was—the case was rested in front of the jury, I then heard motions. . . . And to the extent I have discretion, I'm going to deny his request at this stage.

The trial court thoroughly explained its reasoning, and we see nothing in its justification to be manifestly unsupported by reason. Accordingly, the trial court did not abuse its discretion when it declined to reopen the case after Defendant reconsidered his decision not to testify.

Conclusion

For the reasoning contained herein, we conclude that (1) the trial court properly denied Defendant's motion to dismiss the charge of disseminating obscenity to a minor; (2) the trial court's instructions did not deprive Defendant of his right to unanimous jury verdicts; and (3) the trial court did not abuse its discretion when it declined to reopen the case after Defendant reconsidered his decision not to testify.

NO ERROR.

Judges BRYANT and DILLON concur.

KRISTI LYNNE DEAN WALSH, Plaintiff
v.
KENNETH RAY JONES, II, Defendant

No. COA18-496

Filed 15 January 2019

Child Custody and Support—custody modification—substantial change in circumstances—resumption of visitation with father

In an action to modify a custody order that had terminated all visitation with the father seven years prior, the trial court did not abuse its discretion by modifying custody to allow a gradual resumption of visitation with the father after making numerous unchallenged findings of fact detailing the positive changes in the father's life which the court determined would be of benefit to the child, and that it was in the child's best interests to resume visitation with her father.

Appeal by plaintiff from order entered 3 August 2017 by Judge Carol A. Jones in District Court, Duplin County. Heard in the Court of Appeals 28 November 2018.

Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by William C. Coley, III, for plaintiff-appellant.

White & Allen, P.A., by David Jarvis Fillippeli, Jr. and Ashley Fillippeli Stucker, for defendant-appellee.

STROUD, Judge.

Plaintiff-mother appeals an order modifying custody of the parties' daughter by allowing defendant-father to resume visitation with the child several years after a custody order which "immediately and permanently suspended and terminated" all visitation and contact of any sort with defendant-father. Where the trial court made extensive unchallenged findings of fact of the positive changes in Father's life since the prior order and determined these changes justify a modification of custody, the trial court did not abuse its discretion in modifying the custody order to allow a gradual resumption of visitation with Father.

I. Background

Plaintiff-mother and defendant-father are the parents of Tammy, born in 2004.[1] Mother and Father were living together when Tammy was born but stopped living together on 24 September 2005 due to Father's domestic violence. An order was entered in the domestic violence case which granted primary custody of Tammy to Mother and gave Father specific visitation. On 7 December 2005, Mother filed a complaint for custody and child support in this case, alleging Father had committed domestic violence against her, was abusing illegal drugs, and could not control his anger. On 30 January 2006, an order was entered suspending Father's visitation because he had tested positive for use of methamphetamine and marijuana and a referral was made to the Department of Social Services ("DSS").

On or about 27 March 2006, the trial court entered a consent order in the custody case allowing Father to resume visitation. This order noted that Father had repeatedly passed his drug tests but required him to continue drug testing in the discretion of DSS, to meet with DSS personnel by June 2006 to review the case, and urged Father to participate in an anger management course. In April and May, 2007, Father filed motions for modification of visitation alleging that in late March 2007, DSS prevented Father from having any contact with Tammy based upon Mother's report of inappropriate touching of Tammy by Father. Father further alleged DSS had completed its investigation of Mother's report as of 26 April 2007 and he had one visit with Tammy, supervised by his parents, but another report of inappropriate touching was made to DSS on 3 May 2007, ceasing his visitation again.

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1. A pseudonym is used to protect the identity of the minor involved.

On 23 August 2007, the trial court entered an order including detailed findings regarding Father's drug abuse and anger issues. In the August 2007 order, the trial court found it had "grave concerns about the Defendant's usage of controlled substances, his anger related issues, and his judgment/decision making process" and ordered that he have no contact with Tammy until he complied with the order's provisions. Father was required to submit to drug testing and could not resume visitation unless he was clean for three consecutive weeks; this order set a review hearing for September 2007. The trial court held a review hearing in September 2007 and entered an order again requiring drug testing and allowing conditional supervised visitation if he was in compliance. Another review order was entered in May 2008 which again required drug testing and further noted that Father could file for a modification after three consecutive weeks of clean drug tests.

In March 2010, Mother filed a motion for modification of custody and emergency relief asking to terminate Father's visitation because he had been charged with felony possession of methamphetamine and other drug-related crimes. Mother alleged Father was not living with his parents, who had supervised his visitation, and was not getting drug tests as ordered. The trial court entered an emergency order suspending Father's visitation. After several continuances, the trial court heard Mother's motion and entered an order in October 2010. The 2010 custody order included detailed findings regarding Father's drug abuse and his guilty plea to some of the criminal charges. The trial court found Father was not a fit and proper person to have visitation or contact of any kind with Tammy. The order granted sole legal and physical custody to Mother and provided

> that all visitation(s), association(s), and/or contact(s), including without limitation opportunities for same, of any kind and description, by and between the Defendant and the minor child, [Tammy], shall be and same is/are immediately and permanently suspended and terminated. That, further, neither Defendant nor any person/agent acting on his behalf shall visit, associate with and/or contact, or attempt to visit, associate with and/or contact, in any manner, fashion or way, the minor child or anyone having legal and authorized possession of said child. That any rights, legal or otherwise, of any kind or description that Defendant heretofore had relative to visiting or having contact, of any kind or description, with the parties' minor child, [Tammy], are hereby and shall be immediately

> terminated and ended; and, Defendant shall have no further contact of any kind or description with the said child.

In August 2016, Father filed a motion in the cause to modify custody alleging a substantial change in circumstances. Father alleged he had been released from prison in December 2015. While in prison, he had participated in DART, NA, and AA and continued to pay child support. On post-release supervision, all of his drug tests were negative; he was residing with his mother and intended to continue doing so; and he felt remorse for his past decisions. Father asked to resume visitation with Tammy.

Mother filed a response to Father's motion, asking that his motion be "denied" and "dismissed[;]" her response did not cite any specific rule supporting dismissal. In January 2017, the trial court began the hearing on Father's motion for modification but after hearing part of the evidence suspended the hearing and entered an order requiring the parties to participate in a "Best Interest Evaluation" regarding custody and visitation, to be performed by Dr. Jerry Sloan. The custody hearing later resumed and was completed in June 2017.

On 3 August 2017, the trial court entered an order modifying custody. The order includes detailed findings of fact regarding the prior orders and history. Findings 11 through 29 address the substantial changes in circumstances regarding Father's cessation of drug abuse and improvements in problem areas noted in the prior orders. Other findings noted that Mother opposed resumption of visitation and that Mother claimed Tammy did not want to visit with Father and was upset by the prospect of visitation.[2] The order allowed Father to resume visitation on a schedule of gradually increasing visitation, starting with supervised visits. The order also required Father to participate in individual, group, and family therapy to address his reintegration into Tammy's life. Mother appeals from the August 2017 order.

II. Denial of Motion to Dismiss

Mother contends that "the trial court erred by not granting plaintiff's Rule 41(b) motion for involuntary dismissal at the close of the defendant's evidence and also at the close of all of the evidence." (Original in first letter caps.) Mother argues that Father's evidence showed no change of circumstances which affects the interests of the minor child because he cannot prove there is any potential benefit to Tammy from a resumption of a relationship with Father.

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2. Tammy testified in chambers, and there is no record of her testimony.

We first note that because the trial court is the trier of fact in a custody trial, and the trial court is vested with broad discretion in this type of case, our appellate courts generally disfavor dismissal of a custody action under Rule 41(b):

> Dismissal under Rule 41(b) is left to the sound discretion of the trial court. In a Rule 41(b) context, the trial judge may decline to render any judgment until the close of all the evidence, and except in the clearest cases, he should defer judgment until the close of all the evidence.

Beck v. Beck, 175 N.C. App. 519, 523, 624 S.E.2d 411, 414 (2006) (citations, quotation marks, and brackets omitted). Since the trial court must make findings of fact to support an order under Rule 41(b), there is little practical or legal difference between an order *dismissing* a motion to modify custody under Rule 41(b) and an order *denying* a party's claim for modification of custody. *See Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973) ("There is little point in such a motion at the close of all the evidence, since at that stage the judge will determine the facts in any event." (citation quotation marks, and ellipses omitted)); *see also Hill v. Lassiter*, 135 N.C. App. 515, 517-18, 520 S.E.2d 797, 800 (1999) ("If the trial court grants a defendant's motion for involuntary dismissal, he must make findings of fact and failure to do so constitutes reversible error. Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purposes of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts." (citations omitted)). Whether the trial court is ruling on a motion to dismiss under Rule 41(b) or ruling on the substantive claim for modification of custody, the trial court is doing essentially the same thing; in both instances, the trial court must evaluate the evidence to determine whether the motion to modify custody has merit and must make findings of fact.

> On a motion to dismiss pursuant to Rule 41(b), the trial court is not to take the evidence in the light most favorable to plaintiff. Instead, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them.

> A dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits.

Id. at 517, 520 S.E.2d at 800 (citations and quotation marks omitted).

We review the trial court's denial of Mother's motion to dismiss for abuse of discretion, *see Beck*, 175 N.C. App. at 523, 624 S.E.2d at 414, and we also review the trial court's determination of the motion to modify custody for abuse of discretion. *See generally Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) ("Our trial courts are vested with broad discretion in child custody matters."). Since we must consider the trial court's findings of fact and conclusions of law to review both issues, we will proceed to address the substantive issue of modification of custody.

III. Modification of Custody

Mother contends the trial court erred in determining there was a substantial change of circumstances to justify the modification of custody. In *Shipman*, our Supreme Court stated that "[i]t is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Id.* at 473, 586 S.E.2d at 253 (citations and quotation marks omitted). The change in circumstances may have either an adverse or beneficial effect on the child. *See id.* at 473-74, 586 S.E.2d at 253 ("The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." (citations, quotation marks, and brackets omitted)). The trial court must first determine if there has been a substantial change in circumstances and if so, the trial court must consider the effect on the child and if a modification is in the child's best interests:

> As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare

> of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Id. at 474, 586 S.E.2d 250, 253 (citations omitted).

We review an order for modification of custody to determine if the findings of fact are supported by substantial evidence and if the conclusions of law are supported by the findings; the trial court determines the credibility and weight of the evidence. *See id.* at 474-75, 586 S.E.2d at 253-54 ("When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." (citations and quotation marks)). If the findings of fact and conclusions of law are supported, then we review the trial court's decision regarding custody for abuse of discretion. *See generally id.* at 474, 586 S.E.2d at 253.

A. Findings of Fact and Conclusions of Law

Mother challenges only two of the trial court's findings of fact as unsupported by the evidence, numbers 58 and 60:

> 58. That there has been a substantial and material change in circumstances warranting the court in modifying the previous order of this court.
>
> . . . .
>
> 60. That the Defendant is a fit and proper person to have visitation with the minor child and it is in the best interests of and will best promote the general health, education and welfare of the minor child that she have visits with the Defendant.

All of the other findings of fact are binding upon this Court. *See In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) ("[T]he trial court's findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court."). Mother also challenges two of the trial court's conclusions of law:

> 2. There has been clear and convincing evidence of a substantial and material change in circumstances warranting the court in modifying the previous order of this court as outlined hereinbelow.
>
> . . . .
>
> 4. That the Defendant is a fit and proper person to have the visitation with the minor child and it is in the best interests of and will best promote the general health, education and welfare of the minor child that she have visits with the Defendant.

In reality, these "findings of fact" and "conclusions of law" say the same thing and are best characterized as conclusions of law. *See In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) ("[A]ny determination requiring the exercise of judgement, or the application of legal principles is more properly classified as a conclusion of law.") Further,

> [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. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that "finding" *de novo*.

Westmoreland v. High Point Healthcare, Inc., 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citations omitted).

Although Mother did not challenge the trial court's findings of fact regarding the positive changes in Father and his life, her argument asks this court to reweigh the evidence, but we do not have this authority.[3] For example, Mother argues that Father's "evidence in this case does not eliminate anger issues from his lifestyle and does not equate to a substantial change in circumstance" and that Father may have been lying about his abstinence from drugs and alcohol. But the trial court found that Father completed the DART program; took various educational classes; consistently passed drug tests; stopped consuming drugs and alcohol; regularly attended church and participated in community service projects; became a member of a volunteer fire department; paid child support from his disability payment; did not have "any dealings with any of his pre-incarceration associates[;]" and lives with his mother who is a registered nurse. The trial court also made findings regarding defendant's love for his child and desire to be involved in her life in a positive manner. None of these findings of fact were challenged as unsupported by the evidence. The trial court assessed the credibility of Father's evidence regarding his cessation of drug abuse and changes to the problems in his life which led to his loss of visitation originally and determined that his evidence was convincing.

B. Effect on the Child's Welfare

Mother argues that "even if there was a change in circumstances [Husband] has failed to show that it has affected [Tammy's] welfare." (Original in first letter caps.) Mother contends that even if Father has reformed, Father cannot show that his sobriety and stability will have a beneficial effect on Tammy. We addressed a similar argument in *Shell v. Shell*, where the mother lost custody of the children because of her substance abuse, unstable housing, and failure to provide a safe home for the children. *See Shell v. Shell*, ___ N.C. App. ___, ___, 819 S.E.2d 566, 569 (2018). Four years later, the trial court determined that the positive changes in her life were substantial changes in circumstances affecting the welfare of the children and modified the custody order. *See id.* at

3. The trial court here even concluded there was "clear and convincing evidence" of the substantial change in circumstances, although only a preponderance of the evidence is required. *See Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001) ("[T]he applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence."). Although the higher standard of proof was not required, *see generally id.*, the trial court did not err by noting its analysis of the weight of the evidence.

___, 819 S.E.2d at 569-70. On appeal, the father argued that the mother's positive changes did not affect the welfare of the children:

> Father also contends that even if Mother's sobriety is a change of circumstances, it has no effect on the children. This argument is difficult to understand, since Father contended—quite correctly—in 2012 that Mother's substance abuse was still having detrimental effects on the children, even after she had been sober for a few months. Her life was still unstable, even if she was not actively using drugs or alcohol. Considering the other findings in the order regarding the positive changes in Mother's life which have accompanied her sobriety, this argument is entirely without merit. The trial court's order includes many findings detailing these effects—Mother's involvement with the children, her ability to provide a home and support them, and her becoming a caring parent instead of a selfish and unreliable one.

Id. at ___, 819 S.E.2d at 571-72 (citation omitted).

Here too, the trial court made findings regarding many positive changes in Father's life and determined that Tammy would benefit from resumption of her relationship with him. In any order changing a custodial schedule, to some extent the trial court must predict the effect the change will have on the child, especially when a parent has had no contact with the child for an extended period of time. Before Tammy resumes a relationship with Father, no one can know exactly how it will affect her, but based upon the trial court's findings of fact, the trial court did not abuse its discretion by concluding that Father's positive changes are beneficial for Tammy.

C. Best Interests

Mother also contends that "even if there was a change in circumstances which affected the welfare of [Tammy], there is insufficient evidence to support a finding that modifying the custody order by granting [Father] visitation with [Tammy] is in the child's best interest." (Original in first letter caps.) This argument is similar to the last but is based primarily upon Mother's evidence of Tammy's negative emotions and behaviors since finding out Father may be returning to her life. The trial court did not overlook these concerns but made findings of fact about them and addressed them by ordering a gradual resumption of visitation and requiring Father to participate in individual and joint therapy to assist in this transition. A child's potential difficulty in resuming a

relationship with a parent who has been absent from her life does not mean that the trial court cannot order a resumption of visitation. Even if Tammy stated a desire not to resume a relationship with Father, the trial court does not have to accede to her wishes. *See Mintz v. Mintz*, 64 N.C. App. 338, 340-41, 307 S.E.2d 391, 393 (1983) ("If the child is of the age of discretion, the child's preference on visitation may be considered, but his choice is not absolute or controlling."). The trial court did not abuse its discretion in concluding it is in Tammy's best interests to resume visitation with Father.

IV. Conclusion

We affirm.

AFFIRMED.

Judges DIETZ and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JANUARY 2019)

D.A.N. JOINT VENTURE PROPS. OF N.C., LLC v. N.C. GRANGE MUT. INS. CO. No. 18-265	Greene (15CVS197)	Appeal Dismissed
DINGEMAN v. MISSION HEALTH SYS., INC. No. 18-634	N.C. Industrial Commission (15-036998) (15-055793)	Affirmed
GRAY v. N.C. DEP'T OF PUB. SAFETY No. 18-446	Office of Admin. Hearings (17OSP04389)	Remanded in part, affirmed in part
HUGHES v. DROHAN No. 18-399	Forsyth (14CVD6521)	Affirmed in Part, Reversed in Part and Remanded
IN RE A.H. No. 18-624	Orange (16JT49)	Affirmed
IN RE C.L.R. No. 18-314	Wilkes (14JT31-32)	Affirmed
IN RE N.J.M.G. No. 18-715	New Hanover (16JT316)	Affirmed
IN RE S.M.M. No. 18-561	Cabarrus (15JT132)	Dismissed in part; affirmed in part, and remanded in part.
IN RE T.O. No. 18-596	Mecklenburg (08J215-216) (16J243)	Affirmed
ROLLS v. JUST STUMPS, INC. No. 17-1322	N.C. Industrial Commission (Y27414)	Affirmed
STATE v. AGUILH No. 18-310	Gaston (15CRS63902)	No Error
STATE v. BAKER No. 17-1354	Union (16CRS54621)	No Error

STATE v. BLUE No. 18-677	Davidson (15CRS52791-93)	No Error
STATE v. BOVA No. 18-413	Iredell (14CRS685)	Affirmed
STATE v. BURNEY No. 18-455	Cumberland (15CRS64194)	No Error
STATE v. DINKINS No. 18-138	Buncombe (15CRS91878)	Dismissed
STATE v. DISORDA No. 18-620	Lincoln (16CRS53959)	No Error
STATE v. FORD No. 18-535	Durham (16CRS60372)	Dismissed
STATE v. GIBSON No. 18-454	Catawba (16CRS4854)	Dismissed in Part, Vacated in Part and Remanded.
STATE v. GOMEZ No. 18-144	Haywood (16CRS480) (16CRS482) (16CRS51082)	No Error
STATE v. HOPPER No. 18-558	Cabarrus (14CRS51843) (17CRS473)	No Error
STATE v. HUGHES No. 18-631	Randolph (16CRS52805)	No Plain Error.
STATE v. HUGO No. 18-342	Onslow (16CRS51621-23)	No error in part; Dismissed in part
STATE v. KAWELO No. 18-316	Randolph (12CRS52202) (13CRS53866) (14CRS51583)	Vacated and Remanded
STATE v. MILLS No. 18-315	Rowan (15CRS2590) (15CRS51562) (15CRS51564)	No Error
STATE v. MITCHELL No. 18-333	Bladen (15CRS51969) (16CRS33-35)	No plain error in part; dismissed in part; vacated and remanded in part

STATE v. MOONEY No. 18-368	Transylvania (16CRS50708-10) (16CRS50715)	No Error
STATE v. MORALES No. 18-539	Wake (15CRS210198)	No Error
STATE v. REYNOLDS No. 18-445	Surry (15CRS692) (15CRS694)	No Error
STATE v. RICHARDSON No. 17-1313	Transylvania (16CRS51714)	No Error
STATE v. RYCKELEY No. 18-139	Catawba (16CRS1224) (16CRS1464) (16CRS1869)	No Error
STATE v. SINCLAIR No. 18-293	Mecklenburg (16CRS236559) (16CRS236562)	No Plain Error in Part; Dismissed in Part.
STATE v. SMITH No. 18-421	Henderson (16CRS000555)	No Error
STATE v. TERRELL No. 18-237	Mecklenburg (15CRS236592)	REVERSED AND VACATED.
STATE v. WADDELL No. 18-219	New Hanover (16CRS57327)	Affirm
STATE v. WEAVER No. 18-740	Burke (16CRS50291) (17CRS1114)	No error in part; reversed in part and remanded; new sentencing hearing.
STATE v. WEST No. 18-242	Cumberland (13CRS62985) (13CRS63009) (13CRS63523) (13CRS63525) (13CRS63526) (13CRS64535)	Affirmed
SWANSON v. ENLOE No. 18-617	Caldwell (16CVS768)	Dismissed

VEER RIGHT MGMT. GRP., INC. v. CZARNOWSKI DISPLAY SERV., INC. No. 18-420	Wilson (14CVS1038)	AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.
WELCH v. R&M CHARLOTTE LLC No. 17-649	Mecklenburg (16CVD17036)	Affirmed in part; reversed and remanded in part.

THE ESTATE OF WILLIAM BELK, BY AND THROUGH
TAQUITTA BELK, ADMINISTRATRIX, PLAINTIFF
v.
BOISE CASCADE WOOD PRODUCTS, L.L.C., A MEMBER OF
BOISE CASCADE COMPANY, JOHN DOE 1 AND JOHN DOE 2, DEFENDANTS

No. COA18-542

Filed 5 February 2019

Workers' Compensation—lent employees—right to control day-to-day work—exclusivity of Industrial Commission's jurisdiction

A mechanic who was lent to a plywood manufacturing company by a staffing company was a special employee of the plywood company for purposes of workers' compensation law. Pursuant to the contract between the two companies, the plywood company had the right to control the mechanic's day-to-day work, establishing the mechanic's status as its special employee. The Industrial Commission had exclusive jurisdiction over claims arising from the mechanic's death in a workplace accident at the plywood plant.

Judge BRYANT concurring in result only.

Appeal by Defendant Boise Cascade Company from order entered 11 December 2017 by Judge David Thomas Lambeth, Jr., in Lee County Superior Court. Heard in the Court of Appeals 13 November 2018.

Muller Law Firm, PLLC, by Tara Davidson Muller, and The Hunt Law Firm, by Anita B. Hunt and Ralph A. Hunt, Jr., for Plaintiff-Appellee.

Husch Blackwell, LLP, by William E. Corum, and Teague, Campbell, Dennis & Gorham, LLP, by Jennifer B. Milak, for Defendant-Appellant Boise Cascade Wood Products, L.L.C.

DILLON, Judge.

Defendant Boise Cascade Company ("Boise Cascade")[1] appeals from the trial court's order denying its motion for summary judgment.

1. Pursuant to motion allowed 6 August 2018, Boise Cascade Company has been substituted for Boise Cascade Wood Products, L.L.C., as the defendant in this case. We conform the caption in this opinion to the previous documents in this line.

Boise Cascade contends that exclusive jurisdiction over this case belongs to the Industrial Commission, because Boise Cascade was a "special employer" of the deceased. After careful review, we reverse.

I. Background

Boise Cascade is a limited liability company which owns and operates a plywood manufacturing plant in Moncure. Boise Cascade entered into an Agreement for Temporary Services with a staffing company, Aerotek, Inc. ("Aerotek"), to provide temporary personnel for the plant. Pursuant to their Agreement for Temporary Services, Aerotek recruited William Belk as a candidate for a mechanic position in Boise Cascade's maintenance department.

In August 2014, Mr. Belk began working at the Boise Cascade plant. On 26 September 2015, after working at the Boise Cascade plant for more than a year, Mr. Belk was killed in a workplace accident when a machine he was repairing collapsed.

Mr. Belk's estate ("Plaintiff") brought a workers' compensation claim against Aerotek before the Industrial Commission and received an award of death benefits.

In April 2016, Plaintiff instituted this civil action against Boise Cascade seeking damages for Mr. Belk's death. Boise Cascade then filed to dismiss, which was denied. Boise Cascade subsequently moved for summary judgment, which, after a hearing on the matter, was also denied.

Boise Cascade appeals.

II. Appellate Jurisdiction

This appeal is interlocutory. Typically, "[t]he denial of a motion for summary judgment is an interlocutory order and is not appealable." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Nonetheless, "the denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable." *Fagundes v. Ammons Dev. Grp., Inc.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 532 (2017). Therefore, we conclude that the appeal is timely.

Plaintiff, though, argues that Boise Cascade has not properly appealed from the correct judgment. N.C. R. App. P. 3(d) ("The notice of appeal required to be filed . . . shall designate the judgment or order from which appeal is taken[.]"). Boise Cascade's notice of appeal cites to the order denying summary judgment as the order being appealed. Plaintiff, though, argues that this order was void. Specifically, Plaintiff

contends that the trial court's denial of Boise Cascade's prior motion to dismiss was, essentially, an order denying summary judgment because the trial court considered matters outside the complaint. Therefore, Plaintiff contends, the subsequent order denying summary judgment was void and any appeal should have been taken from the first order. We disagree with Plaintiff.

The record shows that Boise Cascade did initially file a Rule 12(b)(6) motion to dismiss and that the trial court entered an order denying that motion. Plaintiff notes that in defense to the Rule 12(b)(6) motion it submitted approximately twenty-seven (27) pages of documents to the trial court, thus transforming the Rule 12(b)(6) motion into a motion for summary judgment.

It is true that "[a] Rule 12(b)(6) motion to dismiss for failure to state a claim is . . . converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). However, "the trial court [is] not required to convert a motion to dismiss into one for summary judgment simply because additional documents [are] submitted." *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 252, 552 S.E.2d 186, 189 (2001). Where it is clear from the record, namely from the order itself, that the additional materials were not considered by the trial court, the 12(b)(6) motion is not converted into a Rule 56 motion. *Id.*

Here, the order denying Boise Cascade's Rule 12(b)(6) motion does not mention that the trial court considered anything beyond the pleadings. The order merely states that the court's decision was made after "having reviewed the pleadings and having heard and considered the arguments of Counsel[.]" At best, the trial court's language converted the Rule 12(b)(6) motion, which properly focuses only on the complaint, into a Rule 12(c) motion, which focuses on all of the pleadings. We, therefore, deny Plaintiff's motion to dismiss Boise Cascade's appeal.

III. Analysis

This appeal is from the denial of Boise Cascade's motion for summary judgment. We review an appeal from summary judgment *de novo*, to determine whether, in the light most favorable to the nonmoving party, there is any genuine issue of material fact and whether any party is entitled to judgment as a matter of law. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "If there is any question as to the weight of evidence, summary judgment should be denied." *Marcus Bros.*

Textiles, Inc., v. Price Waterhouse, LLP, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999).

On appeal, Boise Cascade argues that the evidence showed, as a matter of law, that Boise Cascade was a "special employer" of Mr. Belk, and that, therefore, jurisdiction over Plaintiff's action belongs exclusively to the Industrial Commission. We agree.

The Workers' Compensation Act creates an exclusive remedy for employees injured in work-related incidents. N.C. Gen. Stat. Ann. § 97-10.1 (2013) ("[T]he rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death."). Where the Workers' Compensation Act applies, the employee is barred from pursuing a common law negligence action against his employer(s), *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985), and the trial courts are divested of jurisdiction. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 579, 350 S.E.2d 83, 85 (1986).

Our Supreme Court has recognized that an employee may be in both the employment of his primary, general employer, and also be "lent" as a special, temporary employee to a secondary, special employer. *Leggette v. J. D. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965); *Leonard v. Tatum & Dalton Transfer Co.*, 218 N.C. 667, 671, 12 S.E.2d 729, 731 (1940); *Baker v. State*, 200 N.C. 232, 235, 156 S.E. 917, 918 (1931). But the lent employee is not automatically an employee of both the general and the special employer for the purpose of workers' compensation. *Id.*

Our Supreme Court has held that "[t]he crucial test in determining whether a servant furnished by one person to another becomes the employe [sic] of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it* [] irrespective of whether [the latter] actually *exercises* that control or not." *Weaver v. Bennett*, 259 N.C. 16, 28, 129 S.E.2d 610, 618 (1963). Our Supreme Court has applied this test to determine whether a plaintiff-worker was a special employee of a defendant-company, and therefore subject to the jurisdiction of the Industrial Commission in seeking compensation/damages when he was injured on the job. *Moody v. Kersey*, 270 N.C. 614, 621, 155 S.E.2d 215, 220-21 (1967); *see also Rouse v. Pitt County Memorial Hosp.*, 343 N.C. 186, 197-98, 470 S.E.2d 44, 51 (1996) (applying the

Weaver "right to control" test to determine whether a borrowed worker was a special employer).

Whether a lent worker became a special employee of the entity to whom he was lent is a question of fact. And, in a civil action, where the evidence is sufficient to create a genuine issue of fact on this issue, our Supreme Court has instructed that the determination is to be decided by the jury. *See Weaver*, 259 N.C. at 30, 129 S.E. 2d at 620 (reversing dismissal where evidence in the light most favorable to the plaintiff created a genuine issue of fact regarding whether there was an employment relationship between the lent worker and the special employer).[2]

Therefore, the question before us is whether there was a genuine issue of material fact before the trial court regarding whether Mr. Belk was a special, lent employee of Boise Cascade. For the reasons stated below, we conclude that the evidence established, as a matter of law, that Mr. Belk was, indeed, a special employee of Boise Cascade: The evidence conclusively establishes that control over the manner in which Mr. Belk performed his job passed to Boise Cascade. Accordingly, Boise Cascade was entitled to summary judgment.

In reaching our conclusion, we note the following uncontested facts:

The Agreement for Temporary Services between Aerotek (Mr. Belk's general employer) and Boise Cascade attributes the right to control Mr. Belk to Boise Cascade. Specifically, in that Agreement, Boise Cascade clearly undertook the right to control the day-to-day work activities of Mr. Belk, leaving administrative/clerical functions (payroll, etc.) to Aerotek, providing as follows:

> 1. . . . *[Aerotek] will be the general employer*, responsible for all administrative responsibilities and legal compliance, except as otherwise provided in this Agreement. *Boise Cascade will be the special employer, responsible for day-to-day supervision and control* of [Aerotek's] Employees who are assigned by [Aerotek] to render services to Boise Cascade, pursuant to this

2. We do not disturb a jury's determination in a civil trial regarding the nature of the relationship between a lent worker and the company for whom he is working, where the determination is supported by evidence. However, in the context of a worker's compensation claim brought before the Industrial Commission, the reviewing court gives no deference to the Commission's findings on this jurisdictional issue, but reviews them *de novo*. *See*, *e.g.*, *Whicker v. Compass Group USA, Inc.*, 246 N.C. App. 791, 795-96, 784 S.E.2d 564, 568 (2016) (reviewing "jurisdictional facts" *de novo*).

> Agreement . . . . *Boise Cascade will also be considered an employer for purposes of state workers' compensation law*, although [Aerotek] will retain liability for workers' compensation benefits.
>
> . . .
>
> 4. . . . .[Aerotek] shall have the right and responsibility to . . . [comply with] state and local taxes and charges incident to the provision of and payment of compensation for Temporary Services . . . .
>
> 5. Boise Cascade will be responsible for that portion of the day-to-day supervision and control of Employees as necessary to conduct Boise Cascade's business and shall determine the general procedures to be followed by the Employees regarding the performance of their duties.
>
> 6. . . . *[Aerotek] shall inform the Employees that both [Aerotek] and Boise Cascade are considered their employer for workers' compensation benefits.*

(Emphasis added).

Our Supreme Court has stated that "most persuasive" to the determination of special employment is whether the contract between the employers gives the right to control the work of the employee to the special employer. *Harris v. Miller*, 335 N.C. 379, 395, 438 S.E.2d 731, 740 (1994) ("When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the [lent employee] question is relatively simple[.]" (citation omitted)). In its 1996 *Rouse* opinion, our Supreme Court repeated a statement it made in its 1994 *Harris* opinion, that "[w]here the [employers] have made an explicit agreement regarding the right of control, this agreement will be dispositive." *Rouse*, 343 N.C. at 200, 470 S.E.2d at 52. But we do not take this statement to mean that a statement contained in the contract between the employers is *conclusive* on the issue of whether the lent worker is an employee of the special employer, notwithstanding the use of the word "dispositive." Rather, such an agreement is merely strong evidence of the nature of the relationship between the lent worker and the special employer. Indeed, in *Rouse*, our Supreme Court recognized that the contract between the employers gave the right to control the lent workers to the special employer, but that this and other evidence was sufficient only to raise a genuine issue of material

fact as to whether there was indeed a right to control sufficient to create a special employment relationship. *Id.* at 201-02, 470 S.E.2d at 53.

In addition to the contract between Aerotek and Boise Cascade, there is other uncontradicted evidence demonstrating that Mr. Belk was a special employee of Boise Cascade. For instance, Mr. Belk was hired by Boise Cascade to serve as a mechanic in its maintenance department. Mr. Belk was fatally injured while repairing a hydraulic valve on one *of Boise Cascade's machines*[3] when part of the machine collapsed. It is uncontested, and therefore there is no genuine issue of fact, that Mr. Belk was performing the work of Boise Cascade, the special employer, when the incident occurred.

The evidence is uncontradicted that Boise Cascade had the right to control Mr. Belk with respect to the work he performed as a maintenance mechanic. Boise Cascade paid Mr. Belk an hourly wage. And Mr. Belk worked at Boise Cascade's plant for over a year before he was injured.

Plaintiff relies on various points in depositions that were before the trial court that suggest Boise Cascade did not provide training, direction, or supervision over Mr. Belk regarding his job duties. Regardless, Boise Cascade had the right and ability to control Mr. Belk's work pursuant to contract.

Plaintiff claims that its proceedings in the Industrial Commission against Aerotek alone preclude the possibility that Boise Cascade controlled Mr. Belk because the resulting Opinion and Award stated that "there [was] no question as to . . . nonjoinder of parties." However, the Industrial Commission made no rulings in its Opinion and Award as to whether Aerotek controlled Mr. Belk. Rather, the parties in that proceeding mutually stipulated both that there was no issue of nonjoinder and that Mr. Belk was an employee of Aerotek. In any event, this stipulation is not binding on Boise Cascade, who was not a party to that proceeding.

IV. Conclusion

We conclude that there were no genuine questions of fact with respect to whether Mr. Belk was a special, lent employee of Boise

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3. Our Supreme Court has held that a presumption exists that a lent worker remains the sole employee of the general employer when the worker works with expensive equipment owned by the general employer. *Weaver*, 259 N.C. at 28-29, 129 S.E.2d at 619. But, here, there is no indication that Aerotek owned any equipment which was used by Mr. Belk. Rather, Mr. Belk was working with equipment owned by Boise Cascade.

Cascade. Even considering the evidence in the light most favorable to Plaintiff, we hold that the evidence conclusively showed that Mr. Belk was a special employee of Boise Cascade. Necessarily, exclusive jurisdiction over Plaintiff's claims rests in the Industrial Commission, not the trial court below. Therefore, we reverse the trial court's order denying Boise Cascade's motion for summary judgment.

REVERSED.

Judge ZACHARY concurs.

Judge BRYANT concurs in result only.

IN THE MATTER OF B.B.

No. COA18-428

Filed 5 February 2019

Juveniles—appeal of commitment—mootness—juvenile turning 18 years old during appeal

The Court of Appeals dismissed as moot an appeal of a juvenile commitment order where the juvenile reached the age of 18 years during the pendency of the appeal.

Appeal by Juvenile from Amended Disposition and Commitment Order entered 14 December 2017 by Judge Robert A. Mullinax, Jr. in Caldwell County District Court. Heard in the Court of Appeals 16 January 2019.

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

Morgan & Carter, PLLC, by Michelle F. Lynch, for juvenile-appellant.

MURPHY, Judge.

B.B. appeals a *Disposition and Commitment Order* of the Caldwell County District Court. Where a juvenile has already been discharged from the custody of a Youth Development Center by reason of his or her age, "the subject matter . . . has ceased to exist and the issue is moot."

In re Swindell, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990). We dismiss B.B.'s appeal as moot.

Our decision does not necessitate an extensive description of the background and procedural history of this matter. B.B. was adjudicated delinquent and received a Level 2 disposition of probation after admitting to assault inflicting serious injury by strangulation. Over a year later, the State filed a *Motion for Review* based on its allegation that B.B. had violated probation terms by engaging in a physical interaction. At the hearing before the District Court, B.B.'s attorney moved for a continuance because he had only met B.B. that afternoon and a potential witness—one of B.B.'s relatives—was unavailable to testify on that date. The trial court denied the motion for continuance and sentenced B.B. to a Level 3 disposition. B.B. was committed to a Youth Development Center for a minimum period of six months and an indefinite period not to exceed "the juvenile's eighteenth birthday" thereafter. On appeal, B.B. alleges the trial court "abused its discretion in denying Juvenile's first motion for a continuance in [the] probation revocation hearing . . . ."

"[A]s a general rule [our appellate courts] will not hear an appeal when the subject matter of the litigation has . . . ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968) (citations omitted). Our appellate courts apply the mootness doctrine in juvenile justice cases where the juvenile has reached the age of 18 during the pendency of their appeal. *In re Swindell*, 326 N.C. at 474, 390 S.E.2d at 135 (dismissing as moot juvenile's appeal of trial court's order committing him to training school where the juvenile was released during the pendency of his appeal); *In re W.H.*, 166 N.C. App. 643, 648, 603 S.E.2d 356, 360 (2004) (dismissing as moot juvenile's appeal of trial court's order regarding custody pending appeal where the juvenile had already served his disposition and been discharged); *In re Cowles*, 108 N.C. App. 74, 78, 422 S.E.2d 443, 445 (1992) (declining to reach arguments on appeal because juvenile had reached the age of 18 during pendency of appeal). Here, B.B. reached the age of 18 during the pendency of this appeal. While the briefing period closed prior to B.B.'s 18th birthday, the Juvenile did not file a supplemental brief addressing mootness or present us with any collateral consequences that may stem from the disposition order in question. *State v. Stover*, 200 N.C. App. 506, 509-10, 685 S.E.2d 127, 130-31 (2009). We need not reach the merits of this appeal and dismiss it as moot.

DISMISSED.

Judges DILLON and ARROWOOD concur.

JONES v. JONES

[263 N.C. App. 606 (2019)]

JOY MANN JONES, PLAINTIFF-APPELLEE
v.
BRUCE RAY JONES, DEFENDANT-APPELLANT

No. COA18-478

Filed 5 February 2019

1. Civil Procedure—entry of default—motion to set aside—good cause—diligence in pursuit of matter

In a breach of contract action, the trial court did not abuse its discretion by denying defendant's motion to set aside entry of default where defendant did not show good cause pursuant to Civil Procedure Rule 55(d). Defendant took no action during the two months following a Court of Appeals decision in the matter (regarding the denial of defendant's motion to dismiss for lack of subject matter jurisdiction), and he admitted that he did not fully comply with the terms of the separation agreement and the property settlement.

2. Specific Performance—breach of contract—separation agreement—refinance of debt—parties' intent

In a breach of contract action, the trial court did not abuse its discretion by ordering specific performance to achieve the original intent of the parties' separation agreement and property settlement (the Agreement). Since plaintiff-ex-wife satisfied the mortgage on the former marital residence and the outstanding balance on an equity line of credit through a refinance in order to lower her monthly payments, and since both of those debts were defendant-ex-husband's responsibility under the Agreement, the trial court achieved the parties' original intent by ordering defendant to pay plaintiff a monthly sum until the date the mortgage had originally been scheduled to be paid off and to pay a lump sum for the equity line balance (representing the payoff amount as of the date of separation).

3. Specific Performance—sufficiency of evidence—alimony—income, savings, and expenses

There was sufficient evidence to support the trial court's finding and conclusion that defendant had the ability to comply with an order for specific performance of a separation agreement and property settlement, where there were numerous findings regarding defendant's income, savings, and monthly expenses.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from entry of default entered 2 June 2015 by the Lee County Clerk of Court and orders entered 10 August 2016 and 12 October 2017 by Judge Mary H. Wells in Lee County District Court. Heard in the Court of Appeals 29 November 2018.

Elizabeth Myrick Boone for plaintiff-appellee.

Wilson, Reives and Silverman, PLLC, by Jonathan Silverman, for defendant-appellant.

ARROWOOD, Judge.

Bruce Ray Jones ("defendant") appeals from entry of default and orders denying his motion to set aside entry of default, denying his Rule 59 motion, and ordering specific performance. For the following reasons, we affirm.

I. Background

Plaintiff initiated this breach of contract action for damages and specific performance by filing a verified complaint on 5 September 2013 alleging defendant failed to comply with a separation agreement and property settlement entered into by the parties on 19 October 2011 as part of their separation and divorce. Defendant filed a motion for extension of time to file responsive pleadings on 13 September 2013 which was granted the same day by order of the clerk. The order allowed responsive pleadings through 8 November 2013. On 7 November 2013, defendant filed a motion to dismiss for lack of subject matter jurisdiction. In the motion, defendant asserted that he had previously filed an action against plaintiff in Lee County with case number 12 CVD 442 to rescind or vacate the 19 October 2011 separation agreement and property settlement at issue and that plaintiff's claims in the present action were compulsory counterclaims in his prior action. Plaintiff filed a response on 13 January 2014.

Defendant's motion to dismiss came on for hearing in Lee County District Court on 12 February 2014. The trial court denied the motion by order filed 18 March 2014. Defendant filed notice of appeal to this Court from the 18 March 2014 order denying his motion to dismiss on 27 March 2014 alleging the trial court's decision affected a substantial right. The appeal was heard before this Court on 25 September 2014. This Court

agreed the matter affected a substantial right and reviewed the appeal, ultimately affirming the trial court's denial of defendant's motion to dismiss in an unpublished opinion filed 17 March 2015. *See Jones v. Jones*, 240 N.C. App. 88, 772 S.E.2d 13 (2015) (unpub.) COA14-507 (available at 2015 WL 1201332).[1] This Court's opinion was certified to the district court on 6 April 2015 and filed in Lee County on 8 April 2015.

Almost two months later, on 2 June 2015, plaintiff filed a motion for entry of default together with an attached affidavit of plaintiff's counsel. Plaintiff asserted entry of default was proper because defendant failed to file an answer or other pleading before the time for doing so expired. The Lee County Clerk of Court entered default against defendant on the same day plaintiff filed the motion, 2 June 2015. Plaintiff then filed an affidavit and a motion for summary judgment on 15 June 2015.

Almost a month after entry of default, defendant filed a verified motion to dismiss and answer on 30 June 2015. Over a month after entry of default, defendant filed a motion to set aside entry of default on 9 July 2015. Defendant asserted that entry of default should be set aside because "[it] was obtained without notice to [him] and as required by Rule 5" and because "[he] has now filed an answer in this action and has meritorious defenses." Thus, defendant contended "[g]ood cause has been shown to set aside entry of default and it should be set aside pursuant to Rule 55(d) . . . ."

The matter came on for a motions hearing on 6 April 2016. Defendant was represented by new counsel at the hearing because his original counsel was suspended from the practice of law around 5 February 2016. At the hearing, the court first considered defendant's motion to set aside entry of default. Defendant argued the entry of default was not proper because he did not have notice or receive service. Defendant further argued that even if entry of default was proper without notice or service, the court could set aside entry of default using its equitable powers. In opposition, plaintiff argued the entry of default was simply a ministerial task by the clerk when there is no responsive pleading. Plaintiff additionally argued that notice and service were not necessary for entry of default and, therefore, defendant has not established grounds for setting aside entry of default.

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1. Defendant also filed notice of appeal from the trial court's entry of summary judgment in favor of plaintiff in the separate action he previously filed to rescind or vacate the 19 October 2011 separation agreement and property settlement. That appeal was heard at the same time as defendant's appeal in the present action. This Court filed a separate opinion in that appeal. *See Jones v. Jones*, 240 N.C. App. 88, 772 S.E.2d 13 (2015) (unpub.) COA14-236 (available at 2015 WL 1201320).

After considering the arguments, the trial court indicated it was inclined to deny defendant's motion to set aside entry of default. At that point, defendant's counsel sought to postpone a decision until they could get an affidavit from defendant's original counsel. Defendant's counsel asserted that the affidavit would show whether or not good cause existed. The trial court agreed to allow defendant to file an affidavit of defendant's original counsel. The next day, 7 April 2016, defendant filed an amended motion to set aside entry of default, which sought to incorporate an affidavit of his original counsel with the original motion to set aside entry of default. The affidavit of defendant's original counsel asserted the following grounds to support his assertion that good cause does exist to set aside the entry of default: the passage of time between filing the motion to dismiss and this Court's decision in defendant's appeal; a State Bar grievance which defendant's original counsel was dealing with; other murder cases defendant's original counsel was involved with; defendant's defense through the litigation; alleged meritorious defenses; the failure of plaintiff's counsel to provide notice of the motion for entry of default; and the violation of local customs when plaintiff's counsel moved for entry of default without discussing the matter with defendant's counsel in advance.

Plaintiff's counsel responded by filing an affidavit on 8 April 2016. Plaintiff's counsel averred that she spoke with defendant's original counsel after this Court's decision and "asked him if [defendant] was now going to pay [plaintiff]. His response to me was 'that it was the case with no options.' " Plaintiff's counsel further averred that they felt filing the motion for entry of default was the best option after defendant's original counsel's "comment . . . about this being 'the case with no options' along with his failure to file an answer or to respond with any information regarding [defendant's] willingness or unwillingness to comply with the [a]greement[.]"

After plaintiff submitted a proposed order and defendant filed a request for additional findings of fact, the trial court filed an order denying defendant's motion to set aside entry of default on 10 August 2016. On the same day defendant filed a motion for a new hearing pursuant to Rule 59(a)(8) claiming the trial court erred by imputing his original counsel's neglect to him.

The matter came back on for a hearing on 14 September 2016. At that time, the court considered and denied defendant's Rule 59 motion. The court then proceeded to consider plaintiff's motion for summary judgment and denied the motion. The matter was then scheduled for an evidentiary hearing, which took place on 29 September 2016 and

19 October 2016. After plaintiff submitted a proposed order, defendant filed a request for findings of fact on 9 August 2017.

On 12 October 2017, the trial court filed orders denying defendant's Rule 59 motion, denying plaintiff's summary judgment motion, and ordering specific performance of the separation agreement and property settlement. On 9 November 2017, defendant filed notice of appeal from the trial court's entry of default on 2 June 2015, order denying his motion to set aside entry of default filed on 10 August 2016, and orders filed on 12 October 2017 denying his Rule 59 motion and ordering specific performance.

II. Discussion

On appeal, defendant challenges the trial court's denial of his motion to set aside entry of default and the trial court's order for specific performance.

1. Entry of Default

[1] Defendant first argues the trial court erred in denying his motion to set aside entry of default. "A trial court's decision of whether to set aside an entry of default, will not be disturbed absent an abuse of discretion. A judge is subject to a reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Luke v. Omega Consulting Grp., LLC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009) (citation and quotation marks omitted). Upon review, we find no abuse of discretion and affirm the trial court.

Rule 55(d) governs setting aside entry of default and provides that the trial court may set aside an entry of default "[f]or good cause shown[.]" N.C. Gen. Stat. § 1A-1, Rule 55(d) (2017). "What constitutes good cause depends on the circumstances in a particular case" and "defendant carries the burden of showing good cause to set aside entry of default." *Luke*, 194 N.C. App. at 748, 670 S.E.2d at 607 (quotation marks omitted). When determining if defendant has shown good cause to set aside entry of default, both the trial court and this Court consider the following factors: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Id.*

> [I]t is entirely proper for the court to give consideration to the fact that default judgments are not favored in the law. At the same time, however, it is also true that rules which require responsive pleadings within a limited time serve

> important social goals, and a party should not be permitted to flout them with impunity.

Howell v. Haliburton, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974).

In this case, defendant emphasizes that the standard for setting aside entry of default is lower than that for setting aside a default judgment, *see Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, 255 N.C. App. 837, 842, 805 S.E.2d 743, 747 (2017) (" 'This [good cause] standard is less stringent than the showing of 'mistake, inadvertence, or excusable neglect' necessary to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b).' ") (quoting *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000)), and *Coastal Federal Credit Union v. Falls*, 217 N.C. App. 100, 108, 718 S.E.2d 192, 197 (2011) (comparing the standard for setting aside entry of default with the more stringent standard for setting aside a default judgment), and contends that he met the threshold of showing good cause to set aside entry of default in this case. Defendant compares his case to *Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, 255 N.C. App. 837, 805 S.E.2d 743 (2017), and *Beard v. Pembaur*, 68 N.C. App. 52, 313 S.E.2d 853, *disc. review denied*, 311 N.C. 750, 321 S.E.2d 126 (1984).

In *Swan Beach*, this Court explained that "[a] trial court abuses its discretion when the party appealing the denial of its motion to set aside the entry of default demonstrates that the trial court did not apply the proper 'good cause' standard in its determination." 255 N.C. App. at 842, 805 S.E.2d at 747. This Court further explained that a trial court may also abuse its discretion in finding that a defendant had not established good cause to set aside entry of default. *Id.* at 842, 805 S.E.2d at 747 (citing *Peebles v. Moore*, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980), *modified and aff'd by* 302 N.C. 351, 275 S.E.2d 833 (1981)).

In *Swan Beach*, this Court held "the trial court abused its discretion by failing to apply the good cause standard when it denied [the d]efendant's motion to set aside the entry of default." *Id.* at 845, 805 S.E.2d at 749. This Court explained that its review of the record revealed "that the trial court identified no reason for its denial of [the d]efendants' motion other than uncertainty as to whether the time for which [the d]efendants had to file an answer had run." *Id.* at 843, 805 S.E.2d at 748. This Court then went a step further in its analysis and held "that even if the trial court had applied the proper standard it would have abused its discretion in denying [the d]efendant's motion[.]" *Id.* at 845-46, 805 S.E.2d at 749. In reaching its alternative holding, this Court analyzed the three factors set forth above and agreed with the defendants that they had been

vigorously pursuing the litigation and that they would suffer a grave injustice given the size of the judgment and the nature of the claims. *Id.* at 844-45, 805 S.E.2d at 748-49. In concluding the defendants were vigorously pursuing the litigation, this Court explained that within a week of this Court's decision overturning the trial court's grant of the defendant's prior motion to dismiss, "counsel for [the d]efendants promptly resumed discussions with [the p]laintiffs' counsel regarding discovery scheduling and other tasks related to continuing the litigation" and "[t]wo days before [the p]laintiffs' counsel sought entry of default, counsel had scheduled a meeting to discuss settlement." *Id.* at 845, 805 S.E.2d at 749. This Court further noted that the entry of default was a surprise to the defendants, who submitted a proposed answer and filed a motion to set aside entry of default six days after entry of default. *Id.* at 845, 805 S.E.2d at 749.

In *Beard*, to which this Court referred in *Swan Beach*, *see* 255 N.C. App. at 843-44, 805 S.E.2d at 748, this Court reviewed the trial court's denial of the plaintiff's motion to set aside entry of default on the defendant's counterclaim and held the trial court abused its discretion. *Beard*, 68 N.C. App. at 55-56, 313 S.E.2d at 855-56. This Court explained in *Beard* that the plaintiff cited both Rule 55 and Rule 60 and specifically referred to "excusable neglect" and "meritorious defense" in the motion to set aside the entry of default and it was unclear from the trial court's order whether the trial court applied the proper "good cause" standard. *Id.* at 56, 313 S.E.2d at 855. This Court, however, held that "[e]ven if the trial court used as its standard, 'good cause,' as set forth in Rule 55(d), the trial court abused its discretion" because the record indicated that "discovery was being pursued vigorously by the parties; that [the] plaintiff's counsel thought, albeit erroneously, that service was not perfected on [the] defendant until . . . four days before the entry of default; and that all matters in [the] defendant's [c]ounterclaim related to the . . . subject of all material allegations in the plaintiff's [c]omplaint." *Id.* at 56, 313 S.E.2d at 855-56.

First and foremost, unlike in *Swan Beach* and *Beard*, it is clear the trial court applied the "good cause" standard in this case. The trial court made a finding and issued a conclusion directly stating that "[d]efendant has failed to show good cause for his failure to file a responsive pleading in this matter."

Furthermore, the trial court did not abuse its discretion in its good cause analysis. As this Court noted in both *Swan Beach* and *Beard*, the unique facts in each case must be considered. While we may have arrived at a result different from that of the trial court if we were to review the

matter *de novo*, we simply cannot say that the trial court abused its discretion in this instance.

This Court's analysis in both *Swan Beach* and *Beard* emphasized that the defaulting party was vigorously pursuing the litigation at the time of the entry of default. That does not appear to be the case following the appeal to this Court in the present action. Defendant attempts to broaden the scope of this Court's review on appeal by asserting that "[i]t cannot be said that [he] was anything other than diligent in pursuing issues relating to the subject agreement . . . ." In doing so, defendant conflates this action with the action he previously filed to rescind and vacate the separation agreement and property settlement and contends he vigorously litigated both actions all the way to this Court. Defendant contends his participation in the two actions has included taking part in depositions and court hearings, submitting affidavits, and conducting other discovery. Furthermore, despite defendant's acknowledgment that his answer was untimely by weeks, defendant emphasizes that he has submitted an answer raising defenses along with another motion to dismiss.

Indeed, in the order denying defendant's motion to set aside entry of default, the trial court found that defendant had vigorously litigated this action and asserted meritorious defenses. Yet, contrary to defendant's assertion that he was actively pursuing his case through the time of the entry of default and unlike in *Swan Beach*, in which the parties immediately resumed discussions regarding discovery and litigation following this Court's decision on appeal, nothing in the record in this case indicates defendant took any action related to this particular case following the filing of this Court's decision on 17 March 2015 and the certification of that opinion to the district court on 6 April 2015. Based on the record in this case, the trial court found counsel for the parties continued to communicate between the time this Court's decision was filed on 17 March 2015 and entry of default on 2 June 2015. Those communications, however, were directed toward discovery, trial preparation, and continuances in a separate action by plaintiff against defendant's current wife for alienation of affection; they have nothing to do with the present case. The only evidence of communications between counsel concerning this particular case was the affidavit of plaintiff's counsel, in which counsel explains she communicated with defendant's counsel, who indicated there were no options after this Court's decision on appeal.

Additionally, we note that after this Court upheld the validity of the separation agreement and property settlement in defendant's appeal in his separate action to rescind and vacate the agreement, *see Jones*

v. Jones, 240 N.C. App. 88, 772 S.E.2d 13 (2015) (unpub.) COA14-236 (available at 2015 WL 1201320), the only issues for determination in this action were whether defendant breached the agreement and what plaintiff was entitled to recover as a result of any breach. Defendant has admitted to his unilateral reduction in payments toward obligations under the separation agreement and property settlement. Furthermore, the trial court denied plaintiff's motion for summary judgment and ultimately considered evidence related to the affirmative defenses asserted in the untimely answer submitted by defendant. Defendant had the opportunity at trial to contest plaintiff's evidence of his ability to comply and the amount of damages. Thus, it does not appear that defendant has suffered a grave injustice as a result of the entry of default.

Given that defendant took no action regarding this case between the filing of this Court's decision on his appeal and the entry of default, and because defendant admits to not fully complying with the terms of the separation agreement and property settlement when coupled with the fact that defendant was able to contest plaintiff's evidence at trial, this case is distinguishable from *Swan Beach* and *Beard*. The trial court did not abuse its discretion in this case.

Moreover, the trial court found that "[d]efendant failed to state a reason in his [m]otion for his inattention to the process." Defendant argues this finding is not supported by the evidence. However, the record shows that the only grounds asserted in the motion to set aside filed on 9 July 2015 were that defendant previously appeared in the action, the motion for entry of default and the entry of default do not bear a certificate of service, entry of default was obtained without notice, and defendant had filed an answer after entry of default. The motion did not explain why defendant did not timely answer the complaint.

It was not until defendant's motion came on for hearing and the trial court indicated the motion would be denied that defendant requested, and the trial court allowed defendant's replacement counsel to file an affidavit of defendant's original counsel. The trial court, however, did not allow defendant to file an amended motion to change the basis asserted in the original motion. While the affidavit submitted shows that defendant's original counsel was dealing with several unrelated matters during the relevant time, the affidavit continues to maintain that it was defendant's original counsel's opinion that plaintiff's counsel should have provided notice of their motion for entry of default. Defendant's original counsel also candidly admits in the affidavit that it "slipped [his] mind that [he] needed to file additional responsive pleadings after th[is Court] entered its decision."

Considering both the motion to set aside entry of default filed on 9 July 2015 and the affidavit, we hold the trial court's finding is supported by the record. The trial court did not abuse its discretion in denying defendant's motion to set aside entry of default in this case.

2. Specific Performance

[2] Defendant also argues the trial court erred in various ways in its order for specific performance. We are not convinced.

This Court has explained that, "the equitable remedy of specific performance may be ordered only if no adequate remedy exists at law, and the party who is ordered to specifically perform is capable of doing so." *Lasecki v. Lasecki*, 257 N.C. App. 24, 29, 809 S.E.2d 296, 302 (2017) (citations omitted).

> The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court, and is conclusive on appeal absent a showing of a palpable abuse of discretion.

Munchak Corp. v. Caldwell, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981).

Defendant first takes issue with the portion of the trial court's order for specific performance requiring him to continue paying plaintiff the sum of $3,750.00 per month in alimony until the time that the mortgage on the former marital residence was scheduled to be paid in full. Defendant contends this portion of the order was in error because plaintiff voluntarily satisfied the mortgage on the former marital residence on 27 November 2012, which defendant contends triggered a reduction in his alimony payments. Defendant also takes issue with that portion of the trial court's order for specific performance ordering him to pay $16,080.66 to plaintiff after plaintiff satisfied an outstanding balance on an equity line of credit with BB&T that was defendant's responsibility under the separation agreement and property settlement. Defendant argues these alleged errors were the result of the trial court adopting plaintiff's position that there was a subsequent oral agreement between the parties concerning the refinance of the mortgage on the former marital residence.

We address these issues together and, upon review, hold the trial court did not abuse its discretion in fashioning an equitable remedy in

this instance to achieve the original intent of the parties and ordering specific performance.

In regards to the responsibilities of the parties for the mortgage and the equity line of credit, the separation agreement entered into by the parties includes the following relevant provisions:

> 6. . . . [Defendant] shall assume sole liability for the outstanding second mortgage to BB&T, pay in full within 48 months from the date of this agreement, and hold [plaintiff] harmless therefrom.
>
> 13. . . . The [c]amper currently owned by the parties is hereby transferred, set over, and assigned to [defendant] as his sole and separate property. The [c]amper was purchased through the BB&T Home Equity Line of Credit for which [defendant] assumes sole liability. [Defendant] shall make regular payments on this [l]ine of [c]redit and make no further withdrawals. He shall pay this [l]ine of [c]redit in full within 48 months of this agreement.
>
> 18. . . . [Defendant] agrees to pay to [plaintiff] as [a]limony the sum of $3,750.00 per month on the first day of each month beginning [1 November 2011] and on the first day of each month thereafter . . . . At such time as the former marital residence mortgage is paid in full, [defendant's] alimony obligation shall be reduced by $1,444.00, the amount of the mortgage payment. The payments for alimony to [plaintiff], as provided herein, are fixed payments, and shall not be modified or changed, except by further written agreement of the parties.

In plaintiff's 5 September 2013 complaint, plaintiff asserted the following allegations that defendant breached his obligations under the separation agreement and property settlement:

> 7. That [d]efendant has breached the parties' agreement in that he has failed to pay the monthly alimony of $3,750.00 in full since [7 December 2012].
>
> 8. Despite [p]laintiff's demands, the [d]efendant has continued to unilaterally reduce his alimony payments since [7 December 2012.] Defendant owes [p]laintiff

alimony in the amount of $6,678.13 as arrearages as of [16 August 2013].

9. That there was an outstanding balance of $26,020.97 on the [e]quity [l]ine of [c]redit with BB&T on [the] date of separation. Defendant had purchased a camper for his use on [9 September 2011] with an initial cost of $16,020.97. Defendant made minimal monthly payments on the [e]quity [l]ine of [c]redit until [27 November 2012]. On [25 September 2012], [d]efendant represented to [p]laintiff that he would pay off the portion of the outstanding second mortgage to BB&T which consisted of the funds used to purchase his [c]amper with the initial cost of $16,020.97 on [9 September 2011]. Plaintiff relied to her detriment on [d]efendant's representation and obtained financing to combine the first and second mortgages to decrease the monthly payment on or about [27 November 2012]; however, [d]efendant then refused to pay to [p]laintiff the outstanding balance for the [c]amper unless she agreed to his demand to renegotiate the alimony provisions of the subject [s]eparation [a]greement and [p]roperty [s]ettlement. Defendant was distributed the camper in the parties [s]eparation [a]greement and [p]roperty [s]ettlement; however, [p]laintiff now is solely obligated to BB&T for the total previous equity line balance. Plaintiff has made 9 payments since the refinance of the two mortgages. It is equitable that [d]efendant should reimburse [p]laintiff for the entire $26,020.97 date of separation equity line balance.

Both parties acknowledge that the evidence showed that plaintiff satisfied the mortgage on the former marital residence on 27 November 2012 when she refinanced the mortgage in order to reduce the monthly payment. In connection with the refinance, plaintiff paid the outstanding balance on the equity line of credit with BB&T and refinanced it together with the mortgage on the former marital residence. Up to that point, defendant had made minimum payments on the equity line of credit to keep from defaulting. Defendant, however, argues that no competent evidence was presented regarding conversations between him and plaintiff about the refinance of the debt. Defendant objected when plaintiff testified defendant had requested the refinance and plaintiff admitted that

she did not directly communicate with defendant. At that time, plaintiff indicated the conversation was through counsel.

In any event, without making findings about any subsequent conversation or oral agreement between the parties, the trial court found as follows:

> 12. That the [d]efendant began to unilaterally reduce his alimony payments on [7 December 2012] and has continued to do so. Defendant owed [p]laintiff alimony in the amount of $6,678.13 as arrearages as of [16 August 2013] and $81,678.13 as of October 2016. . . .
>
> 13. That [d]efendant has breached the parties' agreement in that he has failed to pay the monthly alimony of $3,750.00 in full since [7 December 2012].
>
> . . . .
>
> 17. That there was an outstanding balance of $26,020.97 on the [e]quity [l]ine of [c]redit with BB&T on [the] date of separation. Defendant had purchased a camper for his use on [9 September 2011] with an initial cost of $16,020.97 which was paid out of funds from the BB&T [h]ome [e]quity [l]ine of [c]redit. Defendant received the [c]amper pursuant to the [a]greement, and was to make regular payments on this [l]ine of [c]redit, make no further withdrawals, and pay the [l]ine of [c]redit in full within 48 months of the [a]greement. Defendant made minimal monthly payments on the [e]quity [l]ine of [c]redit until [27 November 2012]. Plaintiff refinanced the [m]ortgage and [e]quity [l]ine of [c]redit in order to reduce her monthly payment. Although said refinance extinguished the outstanding equity line, [d]efendant has not paid the balance of [e]quity [l]ine of [c]redit that he promised to pay under the [a]greement.
>
> . . . .
>
> 41. That the [p]laintiff is entitled to judgment against the [d]efendant in the amount of $6,678.13 for past due and unpaid alimony.
>
> 42. That it is equitable for the [p]laintiff to receive a judgment requiring the [d]efendant to pay to [p]laintiff

the amount of $16,080.66 representing the date of separation payoff amount of the [e]quity [l]ine of [c]redit with BB&T within 12 months of the date of this [o]rder.

43. In addition to the specific performance provision of the parties' [s]eparation [a]greement and [p]roperty [s]ettlement, the [p]laintiff's remedies at law are inadequate to enforce the agreement in that performance of the agreement involves future payments and activities which cannot adequately be addressed by way of judgment against the [d]efendant. Defendant should be required to specifically perform his obligation to pay alimony pursuant to this agreement, . . . as well as his payments for the BB&T second mortgage on the former marital residence.

Based on these findings, the trial court concluded that "[p]laintiff is entitled to an order of specific performance of [d]efendant's support obligation as provided in the parties' [a]greement" and ordered, in pertinent part, as follows:

1. That [p]laintiff is granted specific performance of the [d]efendant's obligations as provided in the parties' [s]eparation [a]greement and [p]roperty [s]ettlement dated [19 October 2011].

2. That [d]efendant shall pay to [p]laintiff alimony that was due in the amount of $6,678.13 as arrearage as of [16 August 2013] plus monies for failure to perform since [16 August 2013].

3. That [d]efendant shall pay [p]laintiff the sum of $3,750.00 per month as alimony on the first day of each month and shall continue to pay [p]laintiff alimony as provided in the [s]eparation [a]greement and [p]roperty [s]ettlement paragraph 18. At such time that the date that the former marital residence mortgage was scheduled to be paid in full, prior to [p]laintiff refinancing, [d]efendant's alimony obligation shall be reduced by $1,444.00 per month.

4. That [d]efendant is ordered and required to pay to [plaintiff] the [e]quity [l]ine balance in the amount of $16,080.66 within twelve (12) months from the entry of this [o]rder.

Defendant's argument on appeal is that the trial court improperly reformed the separation agreement and property settlement so that he is required to pay what was contemplated at the time the separation agreement and property settlement was executed, even after plaintiff satisfied the mortgage and equity line of credit that he was obligated to pay. Defendant contends the trial court erred because it must uphold the plain language of the original agreement. We do not agree the trial court erred.

Our Supreme Court has long recognized that "[t]he heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atlantic Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). That is no different when the contract is a separation agreement.

> "Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution."

Gilmore v. Garner, 157 N.C. App. 664, 666, 580 S.E.2d 15, 17-18 (2003) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)).

As stated above, the terms of the separation agreement and property settlement concerning the mortgage and equity line of credit are as follows:

> 6. . . . [Defendant] shall assume sole liability for the outstanding second mortgage to BB&T, pay in full within 48 months from the date of this agreement, and hold [plaintiff] harmless therefrom.
>
> 13. . . . The [c]amper currently owned by the parties is hereby transferred, set over, and assigned to [defendant] as his sole and separate property. The [c]amper was purchased through the BB&T Home Equity Line of Credit for which [defendant] assumes sole liability. [Defendant] shall make regular payments on this [l]ine of [c]redit and make no further withdrawals. He shall pay this [l]ine of [c]redit in full within 48 months of this agreement.

> 18. . . . [Defendant] agrees to pay to [plaintiff] as [a]limony the sum of $3,750.00 per month on the first day of each month beginning [1 November 2011] and on the first day of each month thereafter . . . . At such time as the former marital residence mortgage is paid in full, [defendant's] alimony obligation shall be reduced by $1,444.00, the amount of the mortgage payment. The payments for alimony to [plaintiff], as provided herein, are fixed payments, and shall not be modified or changed, except by further written agreement of the parties.

There is nothing in the record to suggest that the parties contemplated a refinance of the mortgage and equity line of credit would terminate defendant's obligations to pay the debts. It appears that the intent of the parties was that defendant would pay $3,750.00 in alimony per month until the mortgage on the marital property at the time of the separation agreement and property settlement was executed was "paid in full," not merely satisfied in a refinance with the debt rolling over into a new mortgage. To hold otherwise would shift from defendant to plaintiff the original mortgage obligation. In the same way, it appears that the intent of the parties was that defendant would pay the entirety of the outstanding balance on the equity line of credit. Defendant testified that at the time of the agreement, it was his intention to pay $3,750.00 in alimony per month and to pay off the equity line of credit. The subsequent refinance of the mortgage and equity line of credit could not have changed the intention of the parties at the time they entered into the separation agreement and property settlement. The separation agreement and property settlement does not specifically address the situation presented here. However, it is clear from the plain language of the agreement and defendant's own testimony that it was the intent of the parties that defendant was to be responsible for paying the balance of both the equity line directly and the mortgage via paying an additional $1,444.00 per month in alimony until the mortgage was paid in full.

In the order for specific performance, the trial court requires defendant to pay no more and no less towards the mortgage on the former marital residence than the parties intended when they entered into the separation agreement and property settlement. Specifically, defendant is obligated to pay "$3,750.00 per month as alimony" in accordance with the separation agreement and property settlement until "*the date that the former marital residence mortgage was scheduled to be paid in full, prior to [p]laintiff refinancing[; then d]efendant's alimony obligation*

shall be reduced by $1,444.00 per month." (Emphasis added). With the reduced, but extended mortgage payments on the former marital residence following the refinance, plaintiff may receive more in alimony in the short term than is necessary to make the mortgage payments on the former marital residence. However, that is by no means a financial benefit to plaintiff who will be making mortgage payments long after defendant's alimony payments have been reduced by $1,444.00 to exclude any contribution to the mortgage. As indicated above, because the order for specific performance requires defendant to pay $3,750.00 in alimony until the time the former marital residence mortgage was scheduled to be paid in full, defendant's obligation is limited to what was contemplated at the time the separation agreement and property settlement was entered into by the parties. Likewise, the order for specific performance does not require defendant to pay any more towards the equity line of credit than he was obligated to pay under the separation agreement and property settlement. Specifically, the trial court ordered defendant to "pay to [plaintiff] the [e]quity [l]ine balance in the amount of $16,080.66 within twelve (12) months from the entry of [the o]rder]."

Upon review of the record in his case, we hold the trial court did not abuse its discretion in ordering specific performance to achieve the intent of the parties. The order for specific performance is equitable as it achieves the parties' intent, as shown by a full reading of the separation agreement and property settlement and by defendant's own testimony. To hold otherwise would provide a windfall to defendant who would escape his obligation to satisfy the former marital residence mortgage in the form of alimony until the former marital residence mortgage is paid in full.

[3] Lastly, defendant contends the trial court erred in ordering specific performance because he lacked the means and ability to comply with the agreement.

Plaintiff bears the burden of showing the defendant has the ability to comply with an order for specific performance. *See Reeder v. Carter*, 226 N.C. App. 270, 276, 740 S.E.2d 913, 918 (2013). Moreover, the trial court must issue findings concerning the defendant's ability to pay before it orders specific performance. *Edwards v. Edwards*, 102 N.C. App. 706, 709, 403 S.E.2d 530, 531 (1991) (citing *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 23 (1986)). Yet,

> [i]n finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's present ability to

> comply as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possess[es] some amount of cash, or asset readily converted to cash prior to ordering specific performance.

Condellone v. Condellone, 129 N.C. App. 675, 683, 501 S.E.2d 690, 696 (1998) (quotation marks and citations omitted).

In addition to the payments discussed above for alimony in arrears, alimony yet to be paid, and for compensation for the repayment of the equity line of credit, the trial court ordered defendant to "immediately designate [p]laintiff as beneficiary of [a] life insurance policy on his life with a face value of at least $300,000.00" and to "maintain the 12.743 acres [that comprises the former marital residence]." The trial court specifically found in finding of fact number 37 and concluded in conclusion of law number 3 that "[d]efendant has had and continues to have the means and ability to comply with the terms of the [separation agreement and property settlement]."

Defendant now contends there is insufficient evidence in the record to support the trial court's finding and conclusion that he has the ability to comply. Defendant also takes issue with the trial court allowing plaintiff to testify concerning her cost of living and financial future. Defendant contends plaintiff's testimony was irrelevant, speculative, and merely plaintiff's opinion.

Upon review, we hold there was sufficient evidence to support the trial court's many unchallenged findings regarding defendant's financial situation and ability to comply. Specifically, the trial court made findings that defendant lives with his current wife on three acres of land in a mobile home; his current wife has stopped working at the age of 54; defendant and his current wife have made improvements to the mobile home so that her mother is able to live with them instead of in a nursing home; defendant has voluntarily assumed the support for two additional people since executing the separation agreement and property settlement; defendant's current wife receives a distribution of $1,500.00 per month from her 401-k plan; defendant has monthly expenses totaling $3,000.00 for three people without including alimony; defendant has incurred $15,000.00 in legal fees in actions against plaintiff; beginning in June 2013, defendant increased his vehicle payment from $350.00 per month to $500 per month for four months and then increased his vehicle payment again to $1,000.00 per month for six months until he paid $2,078.15 to pay the loan off in April 2014; defendant's current wife

obtained a new vehicle with a $646.54 per month payment; defendant and his current wife purchased six spaces in trailer park that they rent for $350.00 per month, totaling $2,100.00 per month in income; defendant has continued to contribute to his retirement at Duke Energy in 2016 making contributions of $10,556.18 and receiving employer contributions of $4,524.06; defendant maintains a life insurance policy with his current wife named as the beneficiary; as of 11 September 2016, defendant's gross earnings for the year from Duke Energy were $75,401.32; defendant received federal and state income tax returns for 2012 totaling $13,668.00; defendant and his current wife have received federal and state income tax returns for their joint filings for 2013 through 2015 totaling $46,233.00; defendant has a balance of $163,969.00 in one retirement account, $179,013.00 in another individual retirement account, and $257,656.00 in a 401-k plan; defendant has not withdrawn any money from his retirement accounts or 401-k plan; defendant's BB&T joint savings account contained over $100,000.00 from December 2013 until August 2015 when his new wife withdrew $80,000.00 by online transfer.

We hold these numerous findings support the trial court's ultimate finding and conclusion that "[d]efendant has had and continues to have the means and ability to comply with the terms of the [separation agreement and property settlement]." The record in this case established a valid agreement, a breach of that agreement, and defendant's ability to comply with the order for specific performance. Consequently, any error in allowing plaintiff's testimony regarding her own finances into evidence was harmless. The trial court did not abuse its discretion in ordering specific performance in this case.

III. Conclusion

For the reasons discussed, we affirm both the trial court's denial of defendant's motion to set aside entry of default and the trial court's order for specific performance.

AFFIRMED.

Judge INMAN concurs.

Judge TYSON concurs in part, concurs in result in part, and dissents per separate opinion.

TYSON, Judge, concurring in part, concurring in the result in part, dissenting in part.

I concur with that portion of the majority's opinion which affirms under an abuse of discretion standard of review the trial court's denial of defendant-husband's motion to set aside entry of default pursuant to North Carolina Rule of Civil Procedure 55(d). I also concur in result only to affirm that portion of the trial court's order requiring defendant to specifically pay the balance of the equity line of credit. Defendant agreed to assume that liability under the parties' separation agreement and he received the camper the equity line of credit was used to purchase. The trial court's order for defendant to compensate plaintiff for the equity line puts him in no different a position than he otherwise would have been, and is in accordance with what the parties' agreed to under the plain terms of the separation agreement.

I respectfully dissent from that portion of the majority's opinion which affirms the trial court's order of specific performance requiring defendant to pay arrearages on and prospective alimony in the amount of $3,750.00 per month. This order is based upon the trial court's re-writing the parties' express agreement and erroneous conclusion that the parties intended defendant's alimony obligation would be reduced by $1,444.00 per month "[a]t such time as the date that the former marital residence mortgage *was scheduled to be paid in full*, prior to plaintiff refinancing[.]" (Emphasis supplied).

The trial court's conclusion and the majority opinion's holding are contrary to the express and plain language agreed to by the parties in the separation agreement. This agreement provides a condition precedent for defendant's alimony obligation to be reduced by $1,440.00 per month "[a]t such time as the former marital residence mortgage *is paid in full*[.]" (Emphasis supplied). *See*, *e.g.*, *In re Foreclosure of Goforth Properties*, *Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) ("A condition precedent is an event which must occur before a contractual right arises[.]" (citation omitted)). The trial court misconstrued the mortgage pay-off condition precedent to reduce defendant's monthly alimony, ventured outside the four corners of the agreement, and failed to make any findings of fact of whether the mortgage on the former marital residence was "paid in full" upon the refinance.

I. Standard of Review

The Supreme Court of North Carolina has held that separation agreements are privately agreed-upon contracts and are to be interpreted according to principles of contract law. *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). "The proper interpretation of a contractual provision presents a question of law, which is reviewed *de*

novo by this Court." *Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (citation omitted).

Our Supreme Court has also held: "When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law." *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985) (citations omitted). "[W]here the terms of a separation agreement are plain and explicit, the court will determine the legal effect and *enforce it as written by the parties*." *Tyndall-Taylor v. Tyndall*, 157 N.C. App. 689, 692, 580 S.E.2d 58, 61 (2003) (emphasis supplied) (citation and internal quotation marks omitted). "[C]ourts follow the general rule that the parties are free to contract according to their own judgment and the reasonableness of their engagements will not be entered into." *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 183, 221 S.E.2d 499, 505 (1976), *overruled in part on other grounds by State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. 541, 299 S.E.2d 763 (1983).

When applying the terms and conditions of a contract, our Supreme Court has held: "It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract *must be construed to mean what on its face it purports to mean*." *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (emphasis supplied and citation omitted). The intent of the parties is determined by reviewing the plain written language of the contract. *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999).

"Whether or not the language of a contract is ambiguous or unambiguous is a question for the court to determine." *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (1986).

"Where the parties have put their agreement in writing, it is presumed that the writing embodies their entire agreement." *Dellinger v. Lamb*, 79 N.C. App. 404, 408, 339 S.E.2d 480, 482 (1986). The parol evidence rule provides "that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new or different contract from the one evidenced by the writing, is incompetent." *Phelps v. Spivey*, 126 N.C. App. 693, 697, 486 S.E.2d 226, 229 (1997) (emphasis and citation omitted).

"[A] contract is to be interpreted as written, as if there is no dispute with respect to the terms of the contract and they are plain and

unambiguous, *there is no room for construction*." *Lowe's v. Hunt*, 30 N.C. App. 84, 86, 226 S.E.2d 232, 234 (1976) (emphasis supplied) (quotation marks and citation omitted). "It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument." *Light Co. v. Bowman*, 229 N.C. 682, 693-94, 51 S.E.2d 191, 199 (1949) (citations omitted).

In *Neal v. Marrone*, our Supreme Court stated:

> [W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged into the written agreement.

239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953). Another court applying these well-settled principles of contract law stated: "Absent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, *no matter how unwise it may appear to a third party*." *Rowe v. Great Atlantic & Pac. Tea Co.*, 385 N.E.2d 566, 569 (1978) (emphasis supplied).

"When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court . . . and *the court cannot look beyond the terms of the contract to determine the intentions of the parties*." *Piedmont Bank*, 79 N.C. App. at 240, 339 S.E.2d at 52 (emphasis supplied).

II. Plain Language of Separation Agreement

The relevant provisions of the parties' separation agreement state:

> 18. Alimony and Post-Separation Support. Husband agrees to pay to Wife as Alimony the sum of $3,750.00 per month on the first day of each month beginning November 1, 2011 and on the first day of each month thereafter . . . . *At such time as the former marital residence mortgage is paid in full, Husband's alimony obligation shall be reduced by $1,440.00, the amount of the mortgage payment.* The payments for alimony to Wife, as provided herein, are fixed payments, and shall not be modified or changed, except by further written agreement of the parties. (Emphasis supplied)

> . . .
>
> 26. Entire Agreement. Each party acknowledges that the agreement contains *the entire understanding and that there are no representations, warranties, covenants, nor undertakings other than those expressly set forth in the agreement.* (Emphasis supplied)
>
> . . . .
>
> 32. Whole Contract; Modification or Waiver. This agreement constitutes the whole contract between the parties hereto. A modification or waiver of any provision of this agreement shall be effective only if made in writing and executed upon the same formality as the original agreement. . . .

The emphasized portion of provision 18 ("the mortgage condition") is plain, explicit, and unambiguous. *See Tyndall-Taylor*, 157 N.C. App. at 692, 580 S.E.2d at 61; *Piedmont Bank*, 79 N.C. App. at 240, 339 S.E.2d at 52. On its face, the mortgage condition plainly states the parties' intent and agreement that when the mortgage on the former marital residence is "paid in full," defendant's alimony obligation to plaintiff would be reduced by $1,440.00 per month. The mortgage condition does not indicate the parties contemplated a particular date or time upon which the mortgage was scheduled to be "paid in full." Defendant's alimony would be reduced only "*[a]t such time* as the former marital residence mortgage is paid in full." (Emphasis supplied).

Provisions 26 and 32 indicate the separation agreement constitutes the whole contract and the complete agreement between the parties. "There are situations in which the writing, on its face, will clearly indicate that it reflects a complete contract which . . . may not be contradicted or varied." John N. Hutson, Jr & Scott A. Miskimon, *North Carolina Contract Law*, § 5-2, 423 Lexis Publishing, (1st Ed. 2001).

The mortgage condition is a condition precedent to the reduction of defendant's alimony obligation. *See Goforth*, 334 N.C. at 375, 432 S.E.2d at 859 (" 'Almost any event may be made a condition.' The event may be largely within the control of the obligor or the oblige." (quoting II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.2 (1990)). "Where parties enter a contract containing a condition precedent, they are bound when the condition is satisfied." *Powell v. City of Newton*, 364 N.C. 562, 566, 703 S.E.2d 723, 727 (2010).

The trial court, and the majority's opinion, erroneously ignored the plain language of this condition precedent and interpreted "[a]t such time" as being "the date that the former marital residence mortgage *was scheduled to be paid in full*," a new substituted provision for the parties' express language. (Emphasis supplied).

The majority's opinion states: "It appears that the intent of the parties was that defendant would pay $3,750.00 in alimony per month until the mortgage on the marital property at the time of the separation agreement and property settlement was executed was 'paid in full,' not merely satisfied in a refinance with the debt rolling over into a new mortgage." The majority's opinion does not hold the mortgage condition was ambiguous, but effectively concludes it was proper for the trial court to venture outside the four corners of the separation agreement to consider defendant's testimony and construe the intent of the parties beyond the plain language stated in the mortgage condition. *See Lowe's*, 30 N.C. App. at 86, 226 S.E.2d at 234 ("if there is no dispute with respect to the terms of the contract and they are plain and unambiguous there is no room for construction").

The majority's opinion erroneously: (1) ignores the plain, unambiguous language of the mortgage condition in the separation agreement; (2) infers and injects its notion of the parties' intent; (3) adds a time period and condition that does not exist; (4) wholly ignores provisions 26 and 32 of the agreement; and, (5) reads into the condition a distinction between "paid in full" and "satisfaction" that is unsupported by any authority. The trial court's order makes no findings on what constitutes "paid in full," and the majority's analysis effectively rewrites the parties' agreement to create a whole new contractual provision.

Presuming the mortgage condition is ambiguous, it is undisputed plaintiff's attorney drafted the separation agreement. As such, the ambiguous agreement would be construed against her as the drafting party. *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000) ("[W]hen an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language." (citation omitted)).

The parties entered into the separation agreement on 19 October 2011. Plaintiff subsequently refinanced the mortgage on the former marital residence on her own initiative with BB&T on 21 November 2012 without defendant's prior knowledge or consent. Generally, "[w]hen you refinance, you pay off your existing mortgage and create a new one."

A Consumer's Guide to Mortgage Refinancings (2008), https://www.federalreserve.gov/pubs/refinancings/ (last visited Jan. 22, 2019). Even though the term of plaintiff's new mortgage has a term seven years longer than the original mortgage, plaintiff received a direct and substantial financial benefit for doing so in the form of lower payments. Taking into account the time value of money, the $340.00 difference between the $1,4440.00 plaintiff will be receiving and the reduced amount plaintiff will be paying on the new mortgage, plaintiff is receiving a substantial benefit the parties did not bargain for.

Included as a documentary exhibit to the record on appeal is a satisfaction of security instrument on the marital residence recorded with the Chatham County Registry at Book 1661, Page 937 on 9 January 2013. The satisfaction references a deed of trust for the parties' former marital residence recorded on 2 November 2010 in the Chatham County Registry at Book 1537, Page 826. The satisfaction states, in relevant part: "This Satisfaction terminates the effectiveness of the security instrument."

No promissory note evidencing the debt and corresponding to the collateral secured by the 2010 deed of trust is included in the record on appeal. Based upon the trial court's erroneous interpretation of the mortgage condition in the separation agreement, it appears the trial court failed to make any findings of fact concerning whether the promissory note evidencing the 2010 mortgage debt on the former marital residence was "paid in full" when plaintiff refinanced the mortgage on 21 November 2012.

Plaintiff testified her new mortgage payment is now $1,100.00 per month compared to $1,440.00 per month for the former mortgage. According to the deeds of trust included as documentary exhibits in the record on appeal, the original mortgage on the former marital residence was scheduled to be paid in full by 1 December 2020. After plaintiff refinanced, the new mortgage is scheduled to be paid in full 1 December 2027.

The trial court's order and the majority's affirmation confers a financial benefit on plaintiff of $340.00 per month by allowing her to receive the conditional $1,440.00 per month former payment, even though she now has a lower monthly mortgage payment. The trial court's specific performance order does not acknowledge the $340.00 per month benefit plaintiff obtained from refinancing unilaterally and without defendant's knowledge or consent. Plaintiff's conduct raises conflicts and her hands are not clean to be awarded the equitable relief of specific performance. *See Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985) ("The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands.").

Whether the original mortgage on the former marital home was "paid in full" when plaintiff refinanced in November 2012 is an issue of fact, which must be resolved to determine whether the mortgage condition of the separation agreement to reduce defendant's alimony obligation was satisfied. The trial court's conclusion and decree ordering defendant to pay arrearages including the additional $1,440.00 per month since the date of plaintiff's refinance and until the date the original mortgage "was scheduled to be paid in full" is error and properly reversed. This matter should be remanded to the trial court for further fact finding of whether plaintiff "paid in full" the note for the original 2010 mortgage when she unilaterally refinanced in November 2012. Plaintiff is not entitled to equitable relief on this issue.

The plain and unambiguous language of the mortgage condition must be applied. *See Tyndall-Taylor*, 157 N.C. App. at 692, 580 S.E.2d at 61. If the trial court finds the note evidencing the mortgage on the former marital residence was "paid in full" when plaintiff unilaterally refinanced, such as by the lender loaning her the money to pay off the original mortgage debt and issuing and recording a new mortgage, then the plain language of the mortgage condition in the separation agreement would apply and be satisfied. Defendant would not be legally obligated to pay the additional $1,440.00 per month in alimony as of 21 November 2012, the date plaintiff accomplished her refinancing.

Only if the trial court finds and concludes the note evidencing the 2010 mortgage on the former marital residence was not "paid in full" upon the refinance would defendant be obligated to pay $3,750.00. Defendant's payment would include the $1,440.00 per month former mortgage payment until such time as the 2010 original note and mortgage is "paid in full." The plain language of the separation agreement compels defendant's alimony obligation be reduced by $1,440.00 per month when the original debt is "paid in full."

III. Conclusion

I concur with the portions of the majority's opinion which affirm the trial court's denial of defendant's motion to set aside default, and I concur with the result to require defendant to re-pay the equity line of credit in exchange for the distribution and receipt of the asset purchased therewith.

I respectfully dissent from that portion of the majority's opinion which affirms the trial court's interpretation that the unambiguous 2010 mortgage condition in the separation agreement means "[a]t such time that the date that the former marital residence was scheduled to be paid

in full, prior to plaintiff refinancing" and specifically ordering arrearages and future payments in accordance therewith. The plain, unambiguous language of the mortgage condition indicates the parties' intent that defendant's alimony obligation would be reduced "at such time" as the 2010 original mortgage is "paid in full," and not at the time the mortgage was originally scheduled to be paid off. It is undisputed plaintiff received a substantial financial benefit from her unilateral refinancing to bar any equitable relief.

Courts "must presume[] the parties intended what the language used clearly expresses, and the contract *must be construed to mean what on its face it purports to mean*." *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234 (emphasis supplied). Neither the trial court, nor the majority of a panel of this Court, is free to substitute new or different provisions for what the parties themselves unambiguously agreed to be bound. The trial court and the majority opinion's holding effectively binds defendant to a new contract.

Plaintiff receives a financial benefit in the form of substantially lower payments from her unilateral refinance of the mortgage on the former marital home. The consequence of her action was to trigger the agreed-upon condition precedent to reduce defendant's alimony by the amount of the former payment when the 2010 note and deed of trust evidencing the collateral and mortgage on the former marital residence was "paid in full."

Were we to agree that the mortgage condition is ambiguous to allow parol or extrinsic evidence of the parties' intent, it is undisputed that plaintiff's attorney drafted the separation agreement. As such, any ambiguity in the agreement's provision must be construed against her as the drafting party. *Novacare*, 137 N.C. App. at 476, 528 S.E.2d at 921 ("[T]he court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language."). Plaintiff is not entitled to equitable relief for consequences she brought about through her own unilateral actions.

The trial court's order and the majority's affirmation is erroneous on this issue. I respectfully dissent.

LAMB v. STYLES

[263 N.C. App. 633 (2019)]

JOHN HENRY LAMB, JR., ALMA LAMB ROBERTS, AND KAY LAMB LUNSFORD, PLAINTIFFS
v.
ALAN B. STYLES AND ALAN B. STYLES LAND SURVEYING, PLLC, DEFENDANTS

No. COA18-350

Filed 5 February 2019

1. Engineers and Surveyors—negligence—liability to adjoining landowner—sufficiency of allegations

Plaintiffs' allegations of a breach of a duty to exercise ordinary care were not sufficient to survive a motion to dismiss in a negligence action against a surveyor by an adjoining landowner. The liability of a surveyor to an adjoining landowner had not then been addressed by the Court of Appeals, but plaintiff argued several reasons for the Court of Appeals to adopt a rule holding surveyors accountable for such damages. Plaintiffs also alleged a breach of the common law duty to exercise ordinary care.

2. Engineers and Surveyors—surveyors—statute of limitations—ten years—no expansion of duty of care

The fact that the statute of limitations for surveyors is ten years rather than the three years of other professional negligence claims does not create or expand surveyors' duty of care. Statutes of limitations are purely procedural bars to bringing claims and affect only the remedy and not the right to recover.

3. Engineers and Surveyors—surveyors—standard of care—no statutory standard

The legislature intended its rules on surveying to protect property interests in North Carolina. Neither N.C.G.S. § 89C-2, stating that surveying is subject to regulation, nor provisions in the administrative code regulating the profession created a specific standard of care for surveyors.

4. Engineers and Surveyors—surveyors—liability—general negligence principles

Plaintiffs, adjoining landowners, did not identify a duty of care owed by an allegedly negligent surveyor to a non-reliant third party. Cases involving whether a professional owes a third party a duty of care are often analyzed based on negligent misrepresentation. Applying that standard, plaintiffs did not sufficiently allege that they

were within the class of people intended to rely on the survey or to whom the survey would be supplied. Even though plaintiffs argued that negligent misrepresentation did not apply, plaintiffs still needed to show that defendants' conduct induced them to act in reliance.

5. Damages and Remedies—surveyor's negligence—costs of prior litigation—no statutory authorization

Plaintiffs did not sufficiently allege damages against a surveyor where their alleged damages consisted of costs associated with prior litigation to quiet title against the landowner who hired the surveyor, an action in which the surveyor was not a party. Costs are entirely creatures of legislation; plaintiffs did not cite any statute authorizing them to recover court costs and attorney fees in this action.

6. Engineers and Surveyors—surveyors—negligence—causation

Plaintiffs, adjoining landowners who brought a negligence action against a surveyor, did not sufficiently allege that defendants' survey was the proximate cause of their damages where plaintiffs alleged that defendant wrongfully created a cloud on the title of plaintiffs' property. There were doubts about whether the plat was apparently valid; if any party relied on defendants' plats, then the liability would be with the encroaching party rather than with defendants.

Appeal by Plaintiffs from order entered 13 November 2017 by Judge R. Gregory Horne in Superior Court, Madison County. Heard in the Court of Appeals 14 November 2018.

Sharpe & Bowman, PLLC, by Brian W. Sharpe, for Plaintiffs-Appellants.

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Robert B. Long, Jr. and Ronald K. Payne, for Defendants-Appellees.

McGEE, Chief Judge.

John Henry Lamb, Jr., Alma Lamb Roberts, and Kay Lamb Lunsford ("Plaintiffs" or "the Lambs") filed a negligence action against Alan B. Styles Land Surveying, PLLC and its owner Alan B. Styles (together, "Defendants") on 12 June 2017. Defendants performed a survey of a tract of real property adjoining Plaintiffs' real property in 2007 that incorrectly identified the boundary line between the properties. As a result,

Plaintiffs filed suit against their neighbors with claims for quiet title, declaratory judgment, and trespass. The trial court in that case entered an order declaring that the area of real property in dispute was owned by Plaintiffs. Plaintiffs now seek to recover the cost of the prior litigation from Defendants, claiming that Defendants' negligent performance of the survey necessitated the litigation. The trial court entered an order on 13 November 2017 dismissing Plaintiffs' action for failure to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

I. Factual and Procedural History

Plaintiffs were joint owners as tenants in common of 36.32 acres of real property located in Madison County ("Lamb property"). John Henry Lamb, Jr. received his interest in the Lamb property in 2011 from his mother, Kay Lamb Lunsford, who is the sister of Alma Lamb Roberts (collectively, "the Lamb sisters"). The Lamb sisters had received the Lamb property from their parents in a deed dated 9 May 1996 and recorded in Deed Book 228, Page 37 in the Madison County Registry.

The Lamb sisters contracted with Dry Ridge Land Surveying ("Dry Ridge") in 2008 to survey and draft a plat of the Lamb property. During the course of the preparation of the plat, Dry Ridge discovered several other plats associated with adjoining property owners. Those plats were prepared by Defendants in 2007, at the request of William Holt and Harold Holt ("the Holts"). The plats Defendants had prepared for the Holts incorrectly depicted 17.632 acres of the Lamb property as being part of the Holts' property. The erroneous plats made by Defendants for the Holts were prepared based on statements made by the Holts to Defendants. Those plats noted that the line separating Plaintiffs' property from the Holts' property was drawn "per parol evidence from William and Harold Holt."

The Lamb sisters filed an action on or around 28 October 2009 against the Holts for quiet title, declaratory judgment, and trespass. John Henry Lamb, Jr. was later added as a party to the action. During the course of that litigation, the trial court ordered a neutral surveyor to map the true boundary line between the properties. The neutral surveyor filed his survey with the trial court on 30 July 2013, matching the description set forth in Deed Book 228, Page 37, which was the deed that conveyed the property to the Lamb sisters by their parents. The trial court ordered the neutral surveyor to amend the filed survey. The amended map also showed that 17.15 acres of the disputed area was owned by the Lambs. The trial court entered an order granting partial summary judgment in favor of the Lambs, dismissing the Holts'

claims to the disputed 17.15 acres, and declaring the 17.15 acres of property was owned by the Lambs.

The Lambs faced financial difficulties as a result of the cost of litigation and filed a voluntary dismissal without prejudice of the remaining claims against the Holts in December 2013. The Holts voluntarily dismissed their counterclaims that had been asserted against the Lambs on 6 December 2013. The North Carolina Board of Examiners for Engineers and Surveyors ("the Board") issued a Notice of Contemplated Board Action on 13 August 2014 charging Defendant Alan B. Styles with "gross negligence, incompetence, and/or misconduct." The Board received no response from Defendant Alan B. Styles and entered a final decision and order on 16 September 2014, requiring Defendant Alan B. Styles to pay a penalty of $2,000.00 and to earn a passing grade in a professional ethics course within three months. The Board based its action on evidence showing Defendant Alan B. Styles "performed inaccurate or substandard surveys . . . failed to make adequate investigation . . . failed to report results of surveys in a clear and factual manner . . . and failed to identify all reference sources."

John Henry Lamb, Jr. also filed a new complaint against the Holts on 30 November 2015 asserting claims for quiet title and declaratory judgment. The trial court entered a memorandum of judgment and order on 27 June 2016 divesting the Holts of any right, title or ownership of the disputed property. The trial court further ordered that any purported interest arising from the disputed property be vested in fee simple in John Henry Lamb, Jr. and Alma Lamb Roberts, as tenants in common.

Plaintiffs filed a complaint on 12 June 2017 asserting a claim of "Professional Negligence" against Defendants. Defendants filed a motion to dismiss on 16 August 2016 pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. Defendants argued that a surveyor did not owe any duty of care to adjoining property owners who had not contracted with the surveyor or who did not rely on the survey in any way. The trial court heard Defendants' motion to dismiss on 9 October 2017 and entered an order on 13 November 2017 granting Defendants' motion to dismiss. Plaintiffs appeal.

II. Analysis

[1] Plaintiffs argue that the trial court erred in granting Defendants' motion to dismiss for failure to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We disagree.

> The motion to dismiss under [Rule] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Kohn v. Firsthealth Moore Reg'l Hosp., 229 N.C. App. 19, 21, 747 S.E2d 395, 397 (2013) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)).

> It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

Grich v. Mantelco, LLC, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). This Court reviews a trial court's ruling on a motion for Rule 12(b)(6) *de novo*. *Id.*

"While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). While Plaintiffs' complaint alleged a claim for "Professional Negligence," this Court must determine whether the complaint states the substantive elements of "some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citing *Stanback*, 297 N.C. 181, 254 S.E.2d 611). A claim of professional negligence requires plaintiff establish: "(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs." *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004).

A. *Duty of Care*

"It is fundamental that actionable negligence is predicated on the existence of a legal duty owed by the defendant to the plaintiff." *Derwort v. Polk Cty.*, 129 N.C. App. 789, 791, 501 S.E.2d 379, 381 (1998). This Court has not yet addressed whether a surveyor owes a duty of care to adjoining landowners when performing a survey and recording

plats. Plaintiffs argue several reasons why this Court should establish a rule that "holds licensed surveyors accountable for damages that foreseeably result from" their conduct: (1) N.C. Gen. Stat. § 1-47(6) (2017) demonstrated that the General Assembly has sought to subject land surveyors to expanded civil liability, (2) N.C. Gen. Stat. § 89C-2 and 21 N.C.A.C. 56.0701 create specific standards of care by which a land surveyor's actions may be judged, and (3) general negligence principles. Plaintiffs argue further that, even if this Court fails to recognize that surveyors owe a duty of care to adjoining landowners, Plaintiffs sufficiently alleged a breach of the common law duty to exercise ordinary care.

1. N.C. Gen. Stat. § 1-47(6)

[2] "Generally, a surveyor or civil engineer is required to exercise 'that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury.' " *Fleming*, 162 N.C. App. at 410, 590 S.E.2d at 870 (quoting *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 668, 255 S.E.2d 580, 585, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979)). Plaintiffs argue that N.C.G.S. § 1-47(6) subjects land surveyors to a heightened standard of care in that N.C.G.S. § 1-47(6) creates a ten-year statute of limitations for actions "[a]gainst any registered land surveyor as defined in [N.C.]G.S. 89C-3(9) or any person acting under his supervision and control . . . for economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting[.]" *See Duke Energy Carolinas, LLC v. Bruton Cable Serv., Inc.*, 233 N.C. App. 468, 474-75, 756 S.E.2d 863, 867-68 (2014). Other professional negligence claims are subject to only a three-year statute of limitations pursuant to N.C. Gen. Stat. § 1-52 (2017).

Plaintiffs contend that the General Assembly's decision to impose a longer statute of limitation on claims against surveyors "demonstrates North Carolina's willingness to subject the profession of land surveying to robust regulation and expanded civil liability in the interest of safeguarding property rights and public welfare." We disagree. "A statute of limitations functions to limit the amount of time that a claimant has to file an action." *KB Aircraft Acquisition, LLC v. Barry*, ___ N.C. App. ___, ___, 790 S.E.2d 559, 566 (2016). "Statutes of limitation are purely procedural bars to the bringing of claims; they 'affect only the remedy and not the right to recover.' " *Id.* (quoting *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 604 (1994)). Therefore, the imposition of a longer statute of limitations for

negligence claims against surveyors does not create or expand their duty of care.

2. Statutory Standard of Care

[3] Plaintiffs next argue that there are both statutory and regulatory standards of care imposed upon surveyors for the protection of those who may be damaged by the surveyor's negligence under N.C. Gen. Stat. § 89C-2 and 21 N.C. Admin. Code 56.1601. Courts "may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation[.]" *Hall v. Toreros, II, Inc.*, 176 N.C. App. 309, 317, 626 S.E.2d 861, 867 (2006) (citing *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983)).

N.C.G.S. § 89-C provides "[i]n order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest." Plaintiffs argue that "the legislature intended its rules on the practice of surveying to protect property interests in North Carolina." In *In re Suttles Surveying, P.A.*, 227 N.C. App. 70, 76, 742 S.E.2d 574, 578-79 (2013), this Court acknowledged "as N.C. Gen. Stat. § 89C–2 makes clear, the Legislature intended its rules on the practice of surveying to protect property interests in North Carolina."

In *Fleming*, the defendant surveying company, challenged the trial court's finding that the defendant "failed to meet its legal duty and failed to meet the standard of care created by N.C.G.S. § 89C–2 and N.C.G.S. § 89C–3." *Fleming*, 162 N.C. App. at 413, 590 S.E.2d at 872. This Court held that "[t]o the extent that [the trial court] suggests that N.C. Gen. Stat. §§ 89C–2, –3 (2003) create a specific standard of care, . . . the trial court erred in relying on those statutes." *Fleming*, 162 N.C. App. at 413, 590 S.E.2d at 872. Therefore, to the extent Plaintiffs argue that N.C.G.S. § 89-C creates a standard of care, their argument is without merit.

The regulatory provisions governing the conduct of surveyors similarly do not create a standard of care. "[A] safety regulation having the force and effect of a statute creates a specific duty for the protection of others. A member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator." *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994) (internal citations omitted). However " 'not every statute [or regulation] purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation.' " *Toreros*, 176 N.C. App. at 318, 626 S.E.2d at 867

(quoting *Williams v. City of Durham*, 123 N.C. App. 595, 598, 473 S.E.2d 665, 667 (1996)). In order for the regulation to be adopted as a standard of care, the purpose of the regulation must be exclusively or in part:

> (a) to protect a class of persons which includes the one whose interest in invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Hutchens, 63 N.C. App. at 14, 303 S.E.2d at 592.

21 N.C.A.C. 56.0701 specifies the Rules of Professional Conduct for engineers and land surveyors and states:

> (b) A licensee shall conduct the practice in order to protect the public health, safety and welfare. The licensee shall at all times recognize the primary obligation to protect the public in the performance of the professional duties. If the licensee's engineering or land surveying judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, the licensee shall inform the employer, the client, the contractor, other affected parties and any appropriate regulatory agency of the possible consequences of the situation.

In *Suttles Surveying*, this Court noted "[t]he Legislature has expressly endowed the *Board* with the authority to promulgate Rules of Professional Conduct and to discipline licensees that violate those rules." 227 N.C. App. at 77, 742 S.E.2d at 579. The Board has therefore established standards of practice for land surveyors in order to better regulate the practice of land surveying. 21 N.C.A.C. 56.1601. Therefore, the intent of 21 N.C.A.C. 56.0701(b) is not to create a private right of action or standard of care for surveyors, but rather to express the public policy considerations the Board will consider in promulgating and enforcing its rules.

3. Negligence Principles

[4] Plaintiffs' final and primary argument is that general negligence principles necessitate that this Court establish a rule that holds licensed surveyors accountable for damages that foreseeably result to adjoining landowners from their negligent performance. We disagree.

Cases involving whether a professional owes a duty of care to a third party are often analyzed based on negligent misrepresentation. Negligent misrepresentation occurs when a party justifiably relies to the party's detriment on information prepared without reasonable care by one who owed the relying party a duty of care. *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). In *Raritan*, 322 N.C. 200, 367 S.E.2d 609, our Supreme Court adopted the approach of the Restatement (Second) of Torts § 552 (1977) to determine an accountant's liability for negligent misrepresentation ("Restatement approach"). The Restatement approach holds:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Our Supreme Court in *Raritan* praised the Restatement approach because it

> recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom

> he knows his client intends will so rely. On the other hand . . . it prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated."

Id. at 214-15, 367 S.E.2d at 617. Therefore, "[i]f he knows at the time he prepares his report that specific persons, or a limited group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them." *Id.* at 215, 367 S.E.2d at 618.

We find *Raritan*'s approach beneficial in assessing whether a land surveyor can be held liable for negligent misrepresentation by an adjacent landowner. Similar to an accountant, surveyors have little control over the distribution of their surveys once provided to their client. Surveyors also specifically contract with individual clients to perform their surveys. Therefore, applying the Restatement approach appropriately limits the scope of potential liability for surveyors. *See Ballance v. Rinehart*, 105 N.C. App. 203, 207-08, 412 S.E.2d 106, 109 (1992) (extending *Raritan*'s rationale to real estate appraisers).

Applying this standard to the present case, Plaintiffs have failed to sufficiently allege that they are within either category of persons that the Restatement approach identifies: (1) the class of persons whose benefit and guidance Defendants intended to supply the survey, or that Defendants knew that the Holts intended to supply it to Plaintiff, or (2) Defendants or the Holts intended Plaintiffs to rely on the survey in a transaction. Therefore, Plaintiffs failed to allege a valid claim for negligent misrepresentation.

Plaintiffs argue that the cause of action of negligent misrepresentation "has no application under the facts of the instant case," because "[t]here is no allegation that . . . [P]laintiffs relied on [D]efendants' survey work to their detriment." Instead, Plaintiffs argue "[a] third party who might be affected by negligence of a surveyor can still bring a suit against the surveyor for pecuniary harm." In support, Plaintiffs cite *Davidson*, 41 N.C. App. at 666, 255 S.E.2d at 584, which held "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence."

In *Davidson* this Court examined whether two defendants – an architect and an engineering firm – were liable for damages sustained by

the plaintiff. In the portion quoted by Plaintiffs in the case before us, this Court was addressing the architect's liability and stated:

> An architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects. *Where breach of such contract* results in foreseeable injury, economic or otherwise, *to persons so situated by their economic relations, and community of interests as to impose a duty of due care*, we know of no reason why an architect cannot be held liable for such injury. Liability arises from the negligent breach of a common law duty of care *flowing from the parties' working relationship.* Accordingly, we hold that an architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner.

Id. at 667, 255 S.E.2d at 584 (emphasis added). This Court has subsequently interpreted *Davidson* to require some "working relationship" or "community of interests" between a plaintiff and defendant. *See Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 409, 598 S.E.2d 608, 613 (2004). Critically, in addressing the engineering firm with whom the plaintiff had no contractual relationship in *Davidson*, this Court applied the Restatement approach discussed above requiring reliance. 41 N.C. App. at 668-69, 255 S.E.2d at 585.

Plaintiffs argue that this Court should apply a six-factor balancing test outlined in *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 406-407, 263 S.E.2d 313, 318 (1980) in this case. This Court has previously acknowledged that:

> [U]nder certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking.

Condominium Assoc. v. Scholz Co., 47 N.C. App. 518, 522, 268 S.E.2d 12, 15 (1980). However, the extent of such a duty is limited. *United Leasing* enumerated six factors to determine "[w]hether or not a party has placed himself in such a relation with another so that the law will

impose upon him an obligation . . . to act in such a way that the other will not be injured[,]" including:

> (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

United Leasing, 45 N.C. App. at 406-7, 263 S.E.2d at 318 (citing *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979), *disc. rev. denied*, 299 N.C. 332, 265 S.E.2d 397 (1980)).

In addressing the first factor, "our courts have generally focused on whether the attorney's (or other professional's) conduct, based on a contractual agreement with the attorney's client, was intended or likely to cause a third party to act in reliance on the deficient service performed by the attorney for his client." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 405, 580 S.E.2d 1, 7 (2003). Without an allegation in the complaint that a defendant's action "induced any action on the part of the plaintiff *in reliance* on the [defendant's] conduct[,]" "plaintiff has failed to state a claim upon which relief can be granted[.]" *Id.* (emphasis added). Therefore, Plaintiffs' argument that their "theory of liability does not require reliance" is incorrect. Plaintiffs have failed to identify a duty of care that a surveyor owes to a non-reliant third party.

B. *Damages*

[5] Even assuming *arguendo* Plaintiffs had sufficiently alleged that Defendants owed a duty of care, Plaintiffs failed to sufficiently allege damages attributable to Defendants' actions. Plaintiffs' complaint alleged Defendants' negligent acts caused

> Plaintiffs to suffer and incur the following injuries and damages:
>
> a. Reasonable attorneys' fees for resolving the cloud on Plaintiffs' title, contesting the adverse claims of ownership asserted by the Holts, and correcting the misrepresentation appearing of record in the public land registry;
>
> b. Court costs and other expenses, including, but not limited to, expert witness fees and recording fees,

arising from the First Litigation and the Second Litigation; and

c. Costs for producing corrective surveys and plats of the Plaintiffs' real property.

Plaintiffs' alleged damages were all costs expended in connection with their prior litigation against the Holts for quiet title, declaratory judgment, and trespass.

> At common law neither party recovered costs in a civil action and each party paid his own witnesses. Today in this State, all costs are given in a court of law by virtue of some statute. The simple but definitive statement of the rule is: Costs, in this state, are entirely creatures of legislation, and without this they do not exist.

City of Charlotte v. McNeely, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (citations and quotations omitted). Plaintiffs fail to cite any statute authorizing them to recover their court costs and attorney's fees in the present case.

C. *Causation*

[6] Dismissal of Plaintiffs' claims was also proper because Plaintiffs failed to sufficiently allege that Defendants' survey was the proximate cause of their damages. In *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 781 S.E.2d 1 (2015), our Supreme Court addressed whether real estate appraisers who conducted appraisals on behalf of a bank could be held liable to future purchasers if the appraisals were incorrect. The Court held that the plaintiffs had failed to established that the appraisers owed them a duty of care. *Id.* at 454, 781 S.E.2d at 11. However, the Court further held that, even if the appraisers owed a duty of care to potential purchasers, the plaintiffs had failed to establish that the faulty appraisals were the proximate cause of their damages because the plaintiffs failed to allege that they had relied on the appraisals in deciding to purchase or finance their purchases of the real estate. *Id.* at 455, 781 S.E.2d at 11.

In the case before us, Plaintiffs do not allege that they relied on the erroneous surveys. Plaintiffs also do not allege that the Holts or anyone else acted in reliance on the erroneous surveys in a manner that caused damages. Instead, Plaintiffs claim that Defendants' actions were the proximate cause of their damages because Defendants "wrongfully created a cloud on the title to Plaintiffs' real property," which "necessitated" their litigation expenses. "A cloud upon title is, in itself, a title, or

encumbrance, apparently valid, but in fact invalid. . . . A cloud [on title] may be created by anything that may be a muniment of title or constitute an encumbrance." *York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968).

In the case before us, there are doubts about whether the recorded plat was "apparently valid" as Defendants failed to conduct a complete survey and noted the deficiency of their work directly on the plat with the annotation "per parol evidence from William and Harold Holt." Nevertheless, a muniment of title is "[d]ocumentary evidence of title, such as a deed or a judgment regarding the ownership of property." Black's Law Dictionary 1043 (8th ed. 2004). The deficient nature of Defendants' survey would make the recorded plats insufficient evidence of title and would not create a cloud on title. *See Parrish v. Haywood*, 138 N.C. App. 637, 640-41, 532 S.E.2d 202, 205 (2000) (noting that where a plat does not sufficiently describe an encumbrance it is void). Therefore, Plaintiffs failed to allege how Defendants' conduct was the proximate cause of Plaintiffs' damages. If a party were to rely on Defendants' plats to encroach on Plaintiffs' property rights, then liability would be with the encroaching party rather than Defendants.

III. Conclusion

A surveyor does not owe a duty of care to landowners that are not in privity with the surveyor and who do not rely on the survey. Additionally, Plaintiffs failed to sufficiently allege that they were damaged by Defendants' conduct. The only damages alleged were litigation costs of an action in which Defendants were not a party. Plaintiffs failed to cite any statute that would entitle them to recover their litigation costs from Defendants. Finally, where Defendants relied on their client's statements in ascertaining the boundary line between the properties and conspicuously noted such on the plat, Defendants were not the proximate cause of Plaintiffs' alleged damages. Therefore, Plaintiffs failed to sufficiently allege a claim for negligence against Defendants. For these reasons, the trial court did not err in granting Defendants' motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

McLAUGHLIN v. BAILEY

[263 N.C. App. 647 (2019)]

IVAN McLAUGHLIN AND TIMOTHY STANLEY, Plaintiffs
v.
DANIEL BAILEY, in his Official Capacity as Sheriff of Mecklenburg County, and OHIO CASUALTY INSURANCE COMPANY, Defendant

No. COA18-665

Filed 5 February 2019

Courts—law of the case—decision of Supreme Court—motion for relief from judgment—consideration by trial court

The trial court erred by considering the substance of plaintiff's Rule 60(b)(6) motion for relief from judgment, which argued that he was entitled to relief because a U.S. Supreme Court opinion, decided after the N.C. Supreme Court's opinion in his case, was "now controlling." The trial court lacked discretion to consider the substance of the motion because the N.C. Supreme Court's decision was the law of the case. But the trial court's denial of plaintiff's motion was affirmed since it was the correct result—even if correct for the wrong reason.

Appeal by plaintiff Timothy Stanley from order entered 16 February 2018 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 16 January 2019.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Womble Bond Dickinson (US) LLP, by Sean F. Perrin, for defendants-appellees.

STROUD, Judge.

The background of this case can be found in this Court's prior opinion of *McLaughlin v. Bailey*, 240 N.C. App. 159, 771 S.E.2d 570 (2015), *aff'd*, 368 N.C. 618, 781 S.E.2d 23 (2016). The prior appeal was filed in this same case and addressed the same claims and issues. *See id.* In 2008, plaintiff was a deputy sheriff working in the Mecklenburg County Sheriff's Department. *Id.* at 160, 771 S.E.2d at 573. Defendant Daniel Bailey was elected as sheriff, and defendant then terminated plaintiff's employment. *See id.* at 160-61, 771 S.E.2d at 573. Plaintiff Timothy Stanley filed this lawsuit alleging he had been terminated for unlawful reasons. *See id.* at 161, 771 S.E.2d at 573. Defendant filed a motion for

summary judgment, and the trial court granted summary judgment for defendants, dismissing plaintiff Stanley's claims. *Id.* at 161-62, 771 S.E.2d 573. Plaintiff Stanley appealed, and this Court affirmed the trial court's judgment. *See id.*, 240 N.C. App. 159, 771 S.E.2d 570. Plaintiffs then petitioned the North Carolina Supreme Court for discretionary review, and the Supreme Court affirmed this Court's opinion in January of 2016. *See McLaughlin v. Bailey*, 368 N.C. 618, 781 S.E.2d 23.

In November of 2017, plaintiff Stanley filed a motion with the trial court under Rule 60(b)(6) for relief from judgment, arguing he was entitled to resurrect his claim based upon the United State Supreme Court's opinion in *Heffernan v. City of Patterson, N.J.*, 136 S. Ct. 1412, 194 L. Ed 2d 508 (2016), which was decided after the North Carolina Supreme Court had affirmed the dismissal of his claim. Plaintiff alleged the *Heffernan* case "is now controlling." On 16 February 2018, the trial court entered an order denying plaintiff's motion. Plaintiff appeals.

Plaintiff Stanley contends that the summary judgment for defendants dismissing his claim should be overturned based on *Heffernan*. Defendants contend *Heffernan* is not applicable to plaintiff Stanley's claims and his motion was untimely filed. But we need not address the trial court's substantive rationale for denial of the Rule 60(b)(6) motion or the timing of the motion because the trial court did not have the discretion to allow the Rule 60(b)(6) motion. *See generally D & W, Inc. v. Charlotte*, 268 N.C. 720, 722-23, 152 S.E.2d 199, 202 (1966) ("In our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered.").

This Court normally reviews a trial court's order denying a motion under Rule 60(b)(6) for abuse of discretion:

> General Statute 1A-1, Rule 60(b)(6) is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. Our Supreme Court has indicated that this Court cannot substitute what it considers to be its own better judgment for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it probably amounted to a substantial miscarriage of justice. Further, 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.

Huggins v. Hallmark Enterprises, Inc., 84 N.C. App. 15, 25, 351 S.E.2d 779, 785 (1987) (citations, quotation marks, and brackets omitted).

But in this instance, the trial court had no discretion to allow plaintiff's motion, *see generally D & W, Inc.*, 268 N.C. at 722-23, 152 S.E.2d at 202, even if it had determined plaintiff's argument that *Heffernan* somehow changed the law in a way which would affect plaintiff's claim, though ultimately that is not what the trial court determined. The exact same legal issue, with no factual distinctions, argued by plaintiff in the Rule 60(b)(6) motion was argued in the first appeal and the North Carolina Supreme Court ruled on it; that ruling is the law of the case:

> The questions raised in the present appeal must be viewed in the light of the rule that a decision of this Court on former appeal constitutes the law of the case in respect to questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal when the same matters are involved.

Collins v. Simms, 257 N.C. 1, 3, 125 S.E.2d 298, 300 (1962). While plaintiff Stanley claims that the United States Supreme Court ruling in *Heffernan* changed the law applicable to his claim, that contention is misplaced because his claim was already over.[1] Again,

> [i]n our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals.

D & W, Inc., 268 N.C. at 722-23, 152 S.E.2d at 202.

Since the trial court had no authority to rule upon plaintiff Stanley's Rule 60 motion, we must determine whether the trial court's order is simply erroneous, void, or irregular:

> The contention has some procedural significance, and leads to the inquiry as to whether the judgment is erroneous,

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1. Plaintiff has not presented any argument as to whether *Heffernan* would have retroactive effect upon his case, and we have not considered this issue. The trial court's order appears to assume that *Heffernan* could have retroactive effect but determined that *Heffernan* did not change the law applicable to plaintiff's claim.

> irregular or void. The question is not without difficulty. The decisions in this and other jurisdictions establish no strict lines of demarcation, in this category of judgments, for determining whether particular judgments are erroneous, irregular or void. We have held judgments of Superior court which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court in the respective causes, especially where they amounted to insubordination, to be unauthorized and void. But we have held judgments, which indicated the judge misunderstood and misinterpreted the opinion of this Court on former appeal and gave it broader significance or narrower scope than we intended, to be erroneous. Judgments of the lower court have been held to be erroneous in a number of cases where its rulings were inconsistent with prior appellate decisions. The Supreme Court has, in at least two cases, held judgments by the lower court to be irregular where they undertook to modify prior opinions of Supreme Court.
>
> Upon the plainest principle, the courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise the courts of error would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself. But there is no rule of thumb for classifying non-conforming judgments as to whether they are erroneous, irregular or void. Of course general principles apply. But decisions have undoubtedly taken into consideration the circumstances of the particular case, and the necessity for doing justice.

Collins, 257 N.C. at 7–8, 125 S.E.2d at 303–04 (citations and quotation marks omitted).

Here, the trial court's order conformed to the Supreme Court's prior holding, since the motion was denied, albeit for the wrong reason. But the trial court had no authority to do otherwise and should have simply denied plaintiff's motion based on the law of the case since the issue raised by the Rule 60(b) motion was specifically addressed previously and affirmed by the Supreme Court. *See McLaughlin*, 368 N.C. 618, 781 S.E.2d 23. However, the trial court had jurisdiction to hear plaintiff's Rule 60(b) motion so the order is not void. *See generally Collins*, 257

N.C. at 7–8, 125 S.E.2d at 303–04. In theory a proper Rule 60 motion could raise some issue not addressed by the prior appeal and the trial court might have the discretion to grant the motion, although that did not happen here. Furthermore, both in the trial court and on appeal, defendants responded to the substance of plaintiff Stanley's motion without arguing it was barred by the law of the case from the prior appeal, so "[t]he trial court was doubtless misled in the matter by the way in which it was presented." *Cannon v. Cannon*, 226 N.C. 634, 637, 39 S.E.2d 821, 823 (1946). Thus, taking "into consideration the circumstances of the particular case, and the necessity for doing justice[,]" we will characterize the trial court's order analysis simply as erroneous since the trial court "misunderstood and misinterpreted the opinion[s] of [this Court and the Supreme Court] on former appeal and gave [them] … narrower scope than we intended[.]" *Collins*, 257 N.C. at 8, 125 S.E.2d at 303–04. The trial court's rationale was in error only because it had no authority to consider the issue presented — nor does this Court, so we will not address the substance of the motion. *See generally D & W, Inc.*, 268 N.C. at 722-23, 152 S.E.2d at 202.

We conclude the order is erroneous to the extent that it addresses the substance of plaintiff's motion. *See generally Lea Co. v. N.C. Board of Transportation*, 323 N.C. 697, 374 S.E.2d 866 (1989) (affirming the trial court's denial of a Rule 60(b) motion "to reopen a prior judgment for the purpose of making additional findings and conclusions as to whether plaintiff should be awarded compound interest as an element of just compensation for defendant's taking of an interest in plaintiff's property by inverse condemnation" because "[t]he mandate of this Court in the second appeal of this case affirmed a judgment of the trial court granting plaintiff simple interest on its award at the rate of 11% per annum for the time between defendant's taking of plaintiff's property and entry of the judgment awarding compensation. As the trial court noted, our mandate did not include a remand for consideration of an award of compound interest; rather, it affirmed a judgment awarding simple interest, which was all the plaintiff had sought." The trial court "had no authority to modify or change in any material respect the decree affirmed." (citations and quotation marks omitted)).[2] But because the

2. This case can be contrasted with *McNeil v. Hicks*, where the defendant Allstate Insurance Company "moved for relief from the order of partial summary judgment pursuant to N.C. Gen. Stat. § 1A-1 Rule 60(b)(6) (1990), and for an order dismissing all claims against Allstate without prejudice. . . . in light of the North Carolina Supreme Court's recent holding in *Andersen v. Baccus*" because in that case the motion was filed while the action was still pending before the Courts. *See McNeil v. Hicks*, 119 N.C. App. 579, 459 S.E.2d 47 (1995).

trial court denied plaintiff's motion, which is the correct result, we affirm the order. *See generally Hughey v. Cloninger*, 297 N.C. 86, 95-96, 253 S.E.2d 898, 903-04 (1979) (affirming where a lower court, this Court, "reached the right result but for the wrong reason").

AFFIRMED.

Judges DIETZ and BERGER concur.

JOSE E. RIVERA, PLAINTIFF
v.
RICKY L. MATTHEWS AND WIFE JO MATTHEWS, AND LEE COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

No. COA18-359

Filed 5 February 2019

1. Child Custody and Support—grandparents—deceased parents—abatement of action

A child custody claim by a grandparent did not abate where the father was found dead in the family home, in which illegal drugs and paraphernalia were discovered; the mother was arrested and the child stayed with the paternal grandparents; the paternal grandparents filed a complaint for child custody against the mother and were awarded temporary custody; the mother died; and plaintiff, the maternal grandfather, filed this action for custody. Although plaintiff argued that the custody action abated upon the mother's death, the single sentence on which plaintiff relied, in *McIntyre v. McIntyre*, 341 N.C. 629 (1995), constituted dicta and did not resolve the legal issue raised by the particular facts of the case. Considering constitutional and statutory law, the *McIntyre* rule did not apply because it was not a dispute for the care, custody, and control of the child between two parents and there was no surviving parent vested with constitutional rights.

2. Child Custody and Support—pending claim—new complaint—no subject matter jurisdiction

The trial court did not have subject matter jurisdiction to consider the maternal grandfather's independent complaint for child custody against the paternal grandparents where both parents were deceased, the paternal grandparents had been awarded temporary

custody, and that action had not abated. The proper procedure for plaintiff was to file a motion to intervene and a motion for custody in the pending custody action.

Appeal by Plaintiff from an order entered 7 June 2017 by Judge Mary H. Wells in Lee County District Court. Heard in the Court of Appeals 17 October 2018.

THE LAW OFFICE OF ERIKA R. BALES, PLLC, by Erika R. Bales, for Plaintiff-Appellant.

POST, FOUSHEE & PATTON, P.A., by Kristy Gaines Patton, for Defendants-Appellees Ricky L. and Jo Matthews.

Elizabeth Myrick Boone for Defendant-Appellee Lee County Department of Social Services.

INMAN, Judge.

Plaintiff-Appellant Jose E. Rivera ("Plaintiff") appeals from an order dismissing his complaint for custody of his maternal grandchild under Sections 50-13.1 and 50A-101 of the North Carolina General Statutes. In dismissing the complaint, the trial court held that, due to an unabated pre-existing child custody action between the child's paternal grandparents, Defendants-Appellees Ricky L. and Jo Matthews (the "Matthews"), and Plaintiff's now-deceased daughter ("Mother"), it lacked subject matter jurisdiction to proceed. After careful review, we affirm the order of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

N. M. ("Nancy")[1] was born out of wedlock to Mother and R. M. ("Father") in 2007. On 5 June 2015, Mother found Father dead in the family home. Seven-year-old Nancy was at the home at the time the body was discovered. Law enforcement searched the home and discovered copious amounts and varieties of illegal drugs and associated paraphernalia. Mother was then arrested on one drug-related misdemeanor and four drug-related felony charges. The Matthews arrived at the home that same day, and Mother implored them to take care of Nancy. Nancy has stayed in the Matthews' care ever since.

1. We refer to the minor and her parents by pseudonym.

In investigating Father's death, law enforcement and the Lee County Department of Social Services ("DSS," together with the Matthews as "Defendants") interviewed Nancy. She told them that Mother injected and snorted drugs in her presence, she had seen used needles and blood in her bathroom, she frequently had to fix her own meals due to Mother's incapacitation from drug usage, and she often missed school. On at least one occasion, Nancy recounted, she had stepped on a used needle littering the floor of the home.

Following their son's death and Nancy's disclosure, the Matthews filed a complaint and motion for domestic violence protective order against Mother under Section 50B-1 of our General Statutes on 9 June 2015. The trial court awarded temporary custody of Nancy to the Matthews by *ex parte* order later that morning.

On 25 June 2015, Mother was charged with first-degree murder in the death of Father and misdemeanor child abuse of Nancy. The Matthews filed a complaint for child custody against Mother the following day (the "Custody Action"), and the trial court immediately entered an *ex parte* temporary custody order. Mother and the Matthews appeared for a hearing to review the *ex parte* temporary custody order the following week and, on 12 August 2015, the trial court entered a temporary custody order continuing Nancy's placement with the Matthews. In that order, the trial court concluded from the evidence and factual findings that Mother "is not a fit and proper person to exercise the care, custody and control of the minor child and has taken such actions that are inconsistent with her constitutionally protected rights as the minor child's natural parent." It also concluded that the Matthews were fit to care for Nancy and that it would be in her best interest to be placed in their sole and exclusive legal custody. The trial court dissolved the *ex parte* order, decreed that the Matthews have "temporary sole and exclusive legal and physical care, custody and control" over Nancy, and ordered that Mother have no contact with Nancy until further order of the court.

On 28 September 2015, Plaintiff filed a complaint and motion in the Custody Action seeking visitation; that claim was subsequently denied and dismissed by the trial court, and Plaintiff did not appeal that decision. The record on appeal reveals no further action in the Custody Action following the dismissal of Plaintiff's complaint and motion.

Mother died on 3 June 2016. On 16 June 2016, Plaintiff, Nancy's maternal grandfather, filed a complaint against the Matthews in a new, separate action seeking full custody of Nancy pursuant to Sections 50-13.1 and 50A-101 of our General Statutes. Although Plaintiff acknowledged

the existence of the Custody Action, he alleged that it terminated upon Mother's death. The complaint also named DSS as a defendant, asserting that "[s]ince both biological and legal parents of the minor are deceased, [DSS] is a necessary party to this action."

The Matthews filed a motion to dismiss pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure on 19 August 2016 on the grounds that the earlier Custody Action was still pending and the temporary child custody order "has not been set aside and continues to remain in full force and effect." After a hearing on 28 September 2016, the trial court granted the motion to dismiss for lack of subject matter jurisdiction. In its written order filed 7 June 2017, the trial court held that the Custody Action had not abated upon Mother's death, concluding that holding otherwise would be contrary to "reason, statutory meaning and legislative intent[,]" insofar as it would render Nancy a ward of the state despite her current placement with "fit and proper legal custodians."

Plaintiff filed a belated notice of appeal from the order on 10 August 2017 and a petition for writ of certiorari on 28 December 2017. We allowed Plaintiff's petition to review the trial court's order on 10 January 2018.

II. ANALYSIS

A. Standard of Review

This Court reviews questions of subject matter jurisdiction *de novo*, *McKoy v. McKo*y, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010), meaning we consider the issue anew without any consideration of or reliance upon the lower court's determination, *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007). This same standard applies to questions of statutory interpretation. *Swauger v. University of North Carolina At Charlotte*, ___ N.C. App. ___, ___, 817 S.E.2d 434, 435 (2018).

B. Death and Abatement In Custody Actions

[1] Plaintiff argues on appeal, as he did below, that Mother's death resulted in an abatement of the Custody Action. That argument is largely premised on a single sentence found within our Supreme Court's opinion in *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995): "After an initial custody determination, the trial court retains jurisdiction on the issue of custody until the death of one of the parties or the emancipation of the youngest child." 341 N.C. at 633, 461 S.E.2d at 745 (citing *Shoaf v. Shoaf*, 282 N.C. 287, 290, 192 S.E.2d 299, 302 (1972)). While this sentence, standing in isolation and devoid of context, may appear to

resolve the question presented by this appeal, an opinion rendered upon that language alone would do a disservice to the law[2] and, as explained *infra*, untether *McIntyre* and other related cases from their constitutional moorings. Indeed, when those decisions are considered fully and alongside our statutes concerning the survival of actions and the custody and visitation rights of grandparents, Plaintiff's appeal grows ever the more vexatious and the simple answer he proposes increasingly less viable. Resolution of this appeal, therefore, requires a thorough dredging of these subjects, and we begin that analysis with *McIntyre*.

In *McIntyre*, paternal grandparents filed a complaint under Section 50-13.1(a) against their son and his wife for visitation with their minor granddaughters, who lived with their parents in an intact family and were not involved in any ongoing custody action. 341 N.C. at 629, 461 S.E.2d at 746-47. To determine whether such a right of action existed under those circumstances, our Supreme Court conducted a review of the statutes under which grandparents may bring a suit for custody or visitation. *Id.* at 633, 461 S.E.2d at 748-49. The Court noted that Section 50-13.5 provides grandparents with the option of filing a motion for visitation in an ongoing custody action following an initial custody determination. *Id.* at 633, 461 S.E.2d at 748-49. The Court cited its earlier decision in *Shoaf* for the proposition that grandparents' rights to file for visitation persist until emancipation of the child or the death of a party to the custody action. *Id.* at 633, 461 S.E.2d at 748. The decision in *McIntyre*, however, was not itself concerned with the abatement of custody actions, and its general review of statutes concerning the rights of grandparents to seek custody against the constitutional rights of parents was only conducted to determine how they "control[led the Supreme Court's] interpretation of [N.C. Gen. Stat.] § 50-13.1(a)." *Id.* at 634, 461 S.E.2d at 749. *Cf. Sharp v. Sharp*, 124 N.C. App. 357, 360, 477 S.E.2d 258, 260 (1996) (recounting the issue in *McIntyre* and concluding that its "holding was narrowly limited to suits initiated by grandparents for *visitation* and does not apply to suits for *custody*" (emphasis in original)). The sentence in *McIntyre* that Plaintiff relies on constitutes *dicta* that, while helpful as a general statement of the law applicable to grandparents' interventions into custody disputes between parents, does not resolve the legal issue raised by the particular facts of this case.

Delving into *Shoaf* and earlier decisions also sheds light on the mismatch between *McIntyre* and this case. *Shoaf* involved a "single question of law[,]" namely, whether a consent judgment in a custody and

2. As well as to the parties and Nancy.

divorce action required a father to pay child support until age 21 when a subsequent change in the law reduced the age of majority to 18. 282 N.C. at 289, 192 S.E.2d at 302. In holding that the father's obligation ceased at age 18, the Supreme Court observed the following:

> When *parents* of minor children invoke the jurisdiction of the court on matters involving separation, support, custody, etc., the children become wards of the court. The court, thereafter has authority to force the parent to discharge the legal obligation to support a minor child until he reaches legal age. *After separation, followed by action for divorce in which a complaint has been filed or a writ of habeas corpus has issued*, authority to provide for the custody of children vests in the court in which *the divorce proceeding* is pending. " 'Jurisdiction rests in this (trial) court so long as the action is pending and it is pending for this purpose until the death of one of the parties,' or the youngest child born of the marriage *reaches the age of maturity*, (emphasis added) whichever event shall first occur. (Citing many cases)." *Weddington v. Weddington*, 243 N.C. 702, 92 S.E.2d 71.

Shoaf, 282 N.C. at 289-90, 192 S.E.2d at 302 (first and second emphasis added).

Weddington and other cases therein all discuss a trial court's jurisdiction over a child's custody in the context of *a divorce action between the child's parents*. *Weddington*, 243 N.C. at 704, 92 S.E.2d at 73 (" 'So soon as the "state of separation" between husband and wife resolves itself into . . . an action for divorce . . . , the jurisdiction . . . and authority to provide for the custody of the children of the marriage vests in the court in which the divorce proceeding is pending. Jurisdiction rests in this court . . . until the death of one of the parties[.]' " (quoting *Phipps v. Vannoy*, 229 N.C. 629, 632, 50 S.E.2d 906, 907-08 (1948) (additional citations omitted)); *Phipps*, 229 N.C. at 632, 50 S.E.2d at 907-08 (noting the trial court has jurisdiction over the divorce proceeding and subordinate child custody issue until the death of one of the parties). This rule has been applied in that context alone. *See, e.g.*, *Elmore v. Elmore*, 67 N.C. App. 661, 313 S.E.2d 904 (1984) (holding an action for divorce and child custody abated upon the death of the husband under the common law and N.C. Gen. Stat. § 28A-18-1(b)(3)); *see also Latham v. Latham*, 74 N.C. App. 722, 723, 329 S.E.2d 721, 722 (1985) ("[W]e rely upon the long-settled rule that a *divorce action* is pending for purposes of determining custody and support until the death of one of the parties or until the

youngest child born of the marriage reaches maturity, whichever event occurs first." (citing *Weddington*, 243 N.C. at 704, 92 S.E.2d at 73) (additional citations omitted) (emphasis added)).[3]

Constitutional law also cautions against the outcome advocated by Plaintiff. As recognized in *McIntyre*, "the common law rule is that parents have a paramount right . . . to custody, care and nurture of their children, . . . and that that right includes the right to determine with whom their children shall associate." 341 N.C. at 631, 461 S.E.2d at 748 (citations and internal quotation marks omitted). This right generally prevails against any desire by grandparents to engage with their grandchild. *See Eakett v. Eakett*, 157 N.C. App. 550, 553, 579 S.E.2d 486, 489 (2003) (holding grandparents are entitled to custody in an action against a parent only when there is a showing of parental unfitness, as "[t]he requirement to show unfitness if a grandparent initiates a custody dispute is consistent with a parent's constitutionally protected right to the care, custody and control of the child" (citation omitted)); *see also Wellons v. White*, 229 N.C. App. 164, 175, 748 S.E.2d 709, 718 (2013) ("To receive custody under N.C. Gen. Stat. § 50-13.1(a), grandparents must prove parental unfitness." (citing *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489)). Thus, a custody dispute between grandparents and a parent involves a conflict between unequal interests, *Eakett* at 554, 579 S.E.2d at 489, while a custody battle between two parents involves a conflict of equal rights, *see, e.g.*, *Rosero v. Blake*, 357 N.C. 193, 208, 581 S.E.2d 41, 50 (2003) ("[T]he father's right to custody of his illegitimate child is legally equal to that of the child's mother"). It follows, then, that disputes between parents are subject to different procedural standards and safeguards than those applicable to actions between parents and non-parents:

> [U]nless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution. Furthermore, the protected right *is irrelevant in a custody proceeding between two natural parents*, whether biological or adoptive, *or between two parties who are not natural parents*. In such instances, the trial court must determine custody using the "best interest of the child" test.

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3. There is "sound reason and logic" behind the notion that all causes of action "incidental to the marital status" abate upon the death of a party, *Elmore*, 67 N.C. App. at 667, 313 S.E.2d at 908, as "no power can dissolve a marriage which has already been dissolved by act of God." *Bell v. Bell*, 181 U.S. 175, 178, 45 L. Ed. 804, 807 (1901).

Owenby v. Young, 357 N.C. 142, 145, 579 S.E.2d 264, 266-67 (2003) (citations omitted) (emphasis added).

The constitutional right vested in parents—and not grandparents—also comes into play when one parents dies. In *McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002), the minors' parents divorced, with the mother receiving custody and the father visitation. 155 N.C. App. at 588, 573 S.E.2d at 607. The mother died and the children began living with their maternal grandmother. *Id.* The grandmother subsequently filed a custody suit against the father. *Id.* The trial court dismissed the grandmother's complaint and we affirmed, "not[ing] that where one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children." *Id.* at 589, 573 S.E.2d at 607-08 (citations omitted). That maxim was no less true when the sole surviving parent was the non-custodial parent of the children, *id.* at 589-90, 573 S.E.2d at 608, and, because the complaint failed to allege actions inconsistent with the father's constitutional rights as a parent, we held that the maternal grandmother had failed to state a claim for custody, *id.* at 591, 578 S.E.2d at 609.[4] Thus, as illustrated by *McDuffie*, even a non-custodial parent ordinarily enjoys a constitutional right to the care, custody, and control of his child that springs upon the death of the custodial parent to the exclusion of and superior to any interest held by a grandparent.

Because a non-custodial parent has the benefit of this constitutional right upon the death of the custodial parent while a grandparent does not, it stands to reason that the death of a party in a divorce and custody suit would result in the action's abatement while the death of the last surviving non-custodial parent would not abate a custody action between that parent and the custodial grandparents. Stated differently, when the death of one party in a custody action does not result in an automatic vestiture of custody in another by operation of a constitutional right, the rationale for abatement as set forth in *McIntyre* and other decisions falters.

Finally, statutory law presents a final hurdle to Plaintiff's desired outcome. Section 28A-18-1 of our general statutes provides that "[u]pon the death of any person, *all demands whatsoever*, and rights to prosecute or defend *any action or special proceeding*, existing in favor of or

4. We note that, just as death results in the extinguishing of a parent's constitutional right to the care, custody, and control of her child, this Court has previously equated an order terminating parental rights to "a civil death penalty." *Stann v. Levine*, 180 N.C. App. 1, 11 n.9, 636 S.E.2d 214, 220 n.9 (2006) (citation and internal quotation marks omitted).

against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person's estate." N.C. Gen. Stat. § 28A-18-1(a) (2017) (emphasis added). The exceptions listed in subsection (b) are limited to "rights of action *in favor of* a decedent." N.C. Gen. Stat. § 28A-18-1(b) (2017) (emphasis added). Our Supreme Court has held that, in drafting this statute, "[t]he legislature employ[ed] language of broad signification to describe the causes of action which survive." *McIntyre v. Josey*, 239 N.C. 109, 111, 79 S.E.2d 202, 203 (1953) (construing virtually identical language found in N.C. Gen. Stat. § 28A-18-1(a)'s predecessor statute). The Custody Action at issue here was not a cause of action in favor of Mother but a complaint for custody in favor of the Matthews and, therefore, survived Mother's death under the plain language of the statute.

Having reviewed the above constitutional and statutory law, we hold that the rule espoused in *McIntyre* and related cases does not apply to the Custody Action, as it was not a dispute for the care, custody, and control of Nancy between two parents, and there is no surviving parent vested with constitutional rights. Instead, the Custody Action was brought by the Matthews against Mother and, following Mother's death, did not abate for reasons of constitutional law previously articulated by our appellate courts and did not abate pursuant to the plain language of Section 28A 18 1. Plaintiff offers no other grounds for abatement and, with none appearing following our analysis, we hold the trial court properly concluded that the Custody Action was still pending following Mother's death.

C. Subject Matter Jurisdiction

[2] Having determined the trial court properly concluded the Custody Action did not abate, we now turn to Plaintiff's argument that he could invoke the trial court's jurisdiction to pursue custody of his granddaughter pursuant to Section 50-13.1. While that statute does provide that "[a]ny . . . relative . . . may institute an action or proceeding for the custody of [a] child," N.C. Gen. Stat. § 50-13.1(a), we hold that this broad language, when construed *in pari materia* with more specific provisions concerning grandparent rights to visitation and custody and considered in the context of existing case law, does not support Plaintiff's position.

We acknowledge that "N.C. Gen. Stat. § 50-13.1(a) grants grandparents standing to seek custody at any time." *Wellons*, 229 N.C. App. at 174, 748 S.E.2d at 717. Our case law, however, has generally understood this broad grant to provide grandparents with standing to bring an *initial* custody claim against *parents*, not a new suit against

non-parents who have already obtained custody by order in a prior, ongoing action. *See Sharp*, 124 N.C. App. at 363, 477 S.E.2d at 262 ("[Section] 50-13.1(a) grants grandparents the right to bring an *initial suit* for custody *where there are allegations that the child's parents are unfit*." (emphasis added)), *Wellons*, 229 N.C. App. at 174, 748 S.E.2d at 717 ("To receive custody under N.C. Gen. Stat. § 50-13.1(a), grandparents must show parental unfitness."), *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489 ("The requirement to show unfitness if a grandparent initiates a custody dispute is consistent with a parent's constitutionally protected right"), *and Perdue v. Fuqua*, 195 N.C. App. 583, 586, 673 S.E.2d 145, 148 (2009) ("[A] grandparent initiating a proceeding for custody [under Section 50-13.1(a)] must allege unfitness of a parent due to neglect or abandonment."). Furthermore, we have held that "[N.C. Gen. Stat.] § 50-13.1(a) grants grandparents the broad privilege to institute an action for custody or visitation, *as allowed in* [N.C. Gen. Stat.] §§ 50-13.2(b1), 50-13.2A, and 50-13.5(j)." *Eakett*, 157 N.C. App. at 552, 579 S.E.2d at 488 (emphasis added). One of those statutes, Section 50-13.5(j), "permits a grandparent to petition for custody or visitation due to changed circumstances in those actions where custody has previously been determined." *Perdue*, 195 N.C. App. at 585, 673 S.E.2d at 147. Our Supreme Court has held that Section 50-13.5(j) is a "special provision [that] control[s the] interpretation of [Section] 50-13.1(a)," and "[w]e therefore must read [it] . . . in conjunction with [Section] 50-13.1(a) so as to harmonize them and give effect to consistent legislative policy." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749.

In the instant case, Plaintiff initiated his custody claim naming the Matthews and DSS as defendants while the Matthews' Custody Action was, as established *supra* Part II.B., still pending. Plaintiff did not file suit against an allegedly unfit parent, but against non-parents who were previously awarded custody in the Custody Action. And, given our holding that the Custody Action has not abated, Plaintiff's complaint against the Matthews is more akin to a request to modify the custody order entered in the Custody Action under Section 50-13.5(j) than it is an initial claim for custody under Section 50-13.1(a).[5] Construing Plaintiff's complaint in the context of the relevant statutory provisions and the existence of a custody order in the Custody Action, we hold that "under [Section] 50-13.5(j), the proper procedure for [Plaintiff] was to file . . . a

5. Indeed, Plaintiff conceded at oral argument that: (1) if the Custody Action has not abated, then his action can only proceed as a motion in that cause; and (2) the custody order entered in the Custody Action was valid and would survive even if the Custody Action were held to have abated.

Motion to Intervene and a Motion for Custody [in the Custody Action]." *Perdue*, 195 N.C. App. at 585-86, 673 S.E.2d at 147-48. Plaintiff's standing is therefore limited to filing such a motion in the Custody Action, and we hold the trial court properly concluded it lacked subject matter jurisdiction to hear Plaintiff's independent complaint for custody against the Matthews and DSS.

III. CONCLUSION

For the foregoing reasons, we hold the trial court properly concluded the Custody Action had not abated and affirm its dismissal of Plaintiff's complaint for lack of subject matter jurisdiction.

AFFIRMED.

Chief Judge McGEE and Judge DILLON concur.

MARY WOLF SMITH, PLAINTIFF
v.
RICHARD T. RODGERS, JR., PERSONAL REPRESENTATIVE OF THE ESTATE OF GERALD WOLF, JR. AND SHERMAN AND RODGERS, PLLC, DEFENDANTS

No. COA18-261

Filed 5 February 2019

1. Divorce—equitable distribution—distributive award—death of spouse—not claim against estate

In an action to enforce an equitable distribution order granting a distributive award to plaintiff, plaintiff's declaratory judgment claim was not time-barred by the provisions of Chapter 28A, since the distributive award was not part of the decedent's estate (of plaintiff's former spouse), and plaintiff was therefore not required to adhere to Chapter 28A's filing and notice requirements. The equitable distribution order vested in plaintiff a property right and did not constitute a claim against decedent's estate.

2. Jurisdiction—equitable distribution—claim for unpaid distributive award—deceased spouse—correct court

In an action to enforce an equitable distribution (ED) order granting a distributive award to plaintiff, plaintiff's declaratory judgment claim filed as part of decedent's estate matter should have

been dismissed by the superior court. The distributive award to plaintiff did not belong to decedent (her former spouse) and did not become part of his estate when he died. Exclusive jurisdiction over ED belonged to the district court, which is where plaintiff must enforce her claim.

3. Appeal and Error—abandonment of issues—equitable distribution—unpaid distributive award—tort claims

On appeal from an action to enforce an equitable distribution order granting a distributive award to plaintiff, the superior court had jurisdiction to dismiss plaintiff's claims for breach of fiduciary duty and conversion for failure to state a claim upon which relief can be granted. Plaintiff failed to advance any argument about the elements of those torts, thereby abandoning any issue on the merits.

Appeal by Plaintiff from order entered 21 September 2017 by Judge Ebern T. Watson, III, in New Hanover County Superior Court. Heard in the Court of Appeals 20 September 2018.

Law Office of Susan M. Keelin, PLLC, by Susan M. Keelin for Plaintiff Appellant.

Cranfill Sumner & Hartzog LLP, by Melody Jewell Jolly for Defendant Appellees.

INMAN, Judge.

Enforcement of an equitable distribution award remains within the exclusive jurisdiction of the district court, even after one party subject to the order dies.

Plaintiff Mary Wolf Smith ("Ms. Smith") appeals the superior court's dismissal of her complaint arising from an equitable distribution award ordered ("ED Order") by the district court against her ex-husband, Gerald Wolf, Jr. ("Mr. Wolf"), prior to his death. Ms. Smith sued Richard T. Rodgers, Jr., Esq. ("Rodgers") and Sherman and Rodgers, PLLC, administrators of Mr. Wolf's estate (collectively "Defendants") for declaratory relief, breach of fiduciary duty, and conversion. The superior court agreed with Defendants that Ms. Smith's complaint was time-barred by a statute governing claims against estates.

Ms. Smith argues that her complaint does not assert claims against an estate and is therefore not subject to the statutory time limitation for

bringing such claims.[1] We agree that Ms. Smith's claim for declaratory judgment is directly related to enforcement of the ED Order and is not a claim against the estate and therefore not time barred. But we hold that the superior court lacked jurisdiction to hear it. We are not persuaded that Ms. Smith's tort claims are likewise directly related to the ED Order, so we affirm the trial court with respect to those claims.

I. Factual and Procedural Background

The record,[2] including Ms. Smith's complaint, reflects the following:

A. Facts and Litigation Preceding this Action

Ms. Smith and Mr. Wolf married in 1994 and divorced in 2013. During the marriage, Mr. Wolf was a member in Savings Home, LLC ("Savings Home"), which owned parcels of real estate for sale or rental.[3] In December 2012, in an equitable distribution proceeding in the New Hanover County District Court, the court entered an ED Order providing for Ms. Smith to receive fifty percent of the marital estate. The ED Order identified, valued, and distributed specific marital property and debt according to a detailed schedule, including a line item referred to as Savings Home, which allocated half the value of Mr. Wolf's ownership interest in Savings Home ("LLC interest") to Ms. Smith and the other half of the value to Mr. Wolf. The district court found that the LLC interest had a fair market value of $419,283, and allocated a value of $209,642 to Ms. Smith and a value of $209,641 to Mr. Wolf.

Because it was not possible to divide the value of specific assets equally between the parties, the trial court also included a distributive award requiring Mr. Wolf to pay Ms. Smith $30,620 over a period of 36

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1. Ms. Smith also argues that Defendants are estopped from arguing that her claims are time-barred and that the trial court erred in considering materials outside the pleadings when ruling on a motion to dismiss pursuant to N.C. Rule of Civil Procedure 12(b)(6). Because we hold that Ms. Smith's claim for declaratory judgment should have been dismissed for lack of subject matter jurisdiction, and because she has asserted no argument to differentiate her other claims, we conclude these issues are not dispositive and we do not address them.

2. The only facts not alleged in Ms. Smith's complaint relate to Mr. Wolf's estate proceeding and are reflected by documentary exhibits submitted to the trial court by Defendants. While those facts provide context for the procedural background of this appeal, they are immaterial to our decision.

3. Though the record and the parties refer to Mr. Wolf as a partner, because Savings Home is a limited liability company, we refer to Mr. Wolf as a member and his interest as an ownership interest or LLC interest.

months to make the total distribution to her equal to half of the value it found in the entire marital estate.

The ED Order required that "each party shall immediately execute any and all documents and make all transfers of property necessary to effectuate the terms and conditions of this Order."

Mr. Wolf died suddenly on 7 March 2013, three months after the ED Order but before he had liquidated his LLC interest in Savings Home or paid to Ms. Smith half the value of the LLC interest, as required by the ED Order. At the time of Mr. Wolf's death, Savings Home owned eight parcels of real estate, all of which were controlled by and in the possession of the surviving member in Savings Home, David Goldrup ("Goldrup").

Rodgers qualified as the personal representative of Mr. Wolf's estate through letters of administration filed in the Clerk of New Hanover County Superior Court's estate division on 4 January 2013 (the "Estate Matter"). Mr. Wolf's only heirs at law are his two daughters.[4]

On 7 August 2013, Ms. Smith, through her then-counsel, filed a notice of claim in the Estate Matter for $30,620, the distributive award provided for in the ED Order.[5] In July 2016, Defendants, on behalf of Mr. Wolf's estate, paid Ms. Smith's claim.

Ms. Smith did not file a notice of claim for any other aspect of the equitable distribution award, including the distribution to her of half the value of Mr. Wolf's LLC interest in Savings Home.

After Rodgers became the personal representative of Mr. Wolf's estate, he and Ms. Smith agreed to coordinate efforts to recover the value of the LLC interest in Savings Home for the benefit of Mr. Wolf's estate and Ms. Smith. In August 2014, Rodgers and Ms. Smith filed suit against Savings Home and Goldrup, the sole surviving member, seeking an accounting of the limited liability company's affairs and imposition of a constructive trust on all of its assets ("the Savings Home Action").

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4. One is Ms. Smith's daughter as well; the other is Ms. Smith's stepdaughter.

5. Defendants assert in their appellate brief that Ms. Smith filed her notice of claim in response to a notice to creditors that Sherman and Rodgers, PLLC sent on 9 August 2013. There is no evidence in the record of a notice to creditors. In any event, the record shows that Ms. Wolf filed her notice of claim two days before the alleged date of the notice to creditors. Because we hold that the superior court had no jurisdiction to hear Ms. Smith's claim to recover any portion of her award provided in the ED Order, the discrepancy is immaterial to our decision.

In June 2016, the parties in the Savings Home Action agreed to a consent order ("the 2016 consent order") for all real property owned by Savings Home to be sold, and for all sales proceeds to be placed in a trust controlled by Sherman and Rodgers, PLLC, the law firm in which Rodgers is a member. The 2016 consent order also provided for Sherman and Rodgers, PLLC to be responsible for managing all of the real property, to provide an accounting for all revenues and expenses for the real property, and to list each parcel of property for sale after obtaining the written approval of all parties to the Savings Home Action to the list price, commission rate, and sale price for each parcel. The 2016 consent order also provided that the net proceeds of the sale of each parcel would be divided by agreement of the parties to the Savings Home Action "or in accordance with any orders of this Court." Consistent with the 2016 consent order, Goldrup then transferred to Sherman and Rodgers, PLLC management and control of all of the real estate owned by Savings Home.[6]

In December 2016, Ms. Smith, through new counsel, Susan Keelin, sent a letter by e-mail to Mr. Rodgers demanding "excise of her property from [Mr. Wolf's estate] as set forth in the [ED Order]." The letter asserted that Ms. Smith's "right to an equitable distribution of property from the marital estate vested when she and [Mr. Wolf] separated" and that it was not, and never had been, part of Mr. Wolf's estate.[7] That same day, Rodgers, on behalf of Sherman and Rodgers, PLLC, sent an e-mail response to the demand letter, telling Keelin that she "[has] no case" and that she should "[c]ontact [her] malpractice insurer carrier and have them call [him]."

On 14 March 2017, Rodgers filed in the Estate Matter a denial of Ms. Smith's demand for half the value of Mr. Wolf's LLC interest in Savings Home, which Rodgers characterized as a "claim" against Mr. Wolf's estate, for failure to properly present a claim pursuant to N.C. Gen. Stat. § 28A-19-1, a statute governing claims against an estate.

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6. In November 2016, the defendants in the Savings Home Action filed a motion to dismiss Ms. Smith's claim—later refiled as a summary judgment motion—asserting that Ms. Smith was a mere unpaid judgment creditor of Mr. Wolf's estate with no standing to sue Savings Home or its members. As a judgment creditor, they argued, Ms. Smith should have filed a notice of claim against the estate, but the statute of limitations for doing so had expired. Rodgers—Ms. Smith's co-plaintiff—also joined in the motion, asserting that Ms. Smith "was difficult to work with" and was "obstructing the process," exposing him to potential liability. The motion was later withdrawn.

7. On the date of the letter, the balance of funds in the law firm's trust account derived from Savings Home was $193,009.96.

B. This Action and Related Proceedings

On 22 March 2017, Ms. Smith filed suit in New Hanover County Superior Court, alleging claims against Defendants for breach of fiduciary duty, conversion, and for a declaratory judgment that she is entitled to her half of the distributive value of the LLC interest in Savings Home without having to file a claim against Mr. Wolf's estate. Defendants filed a motion to dismiss the action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that Ms. Smith's claims were time-barred by statutes governing claims against a decedent's estate.

On 31 August 2017, the remaining parties in the Savings Home Action agreed to a second consent order ("the 2017 consent order") which required Sherman and Rodgers, PLLC to pay to the New Hanover County Clerk of the Superior Court, among other things, the funds in the law firm's trust account derived from Savings Home, and provided for the trial court to appoint a commissioner to manage and sell the remaining assets of Savings Home. The 2017 consent order also relieved Sherman and Rodgers, PLLC from "any further duties under the 2016 consent order."

One month later, after a hearing in this action, the trial court granted Defendants' motion to dismiss Ms. Smith's complaint, holding that she had failed to state a claim for which relief could be granted. Ms. Smith appeals.

II. Analysis

A. Declaratory Judgment Claim

[1] The trial court concluded that Ms. Smith's claims are subject to Section 28A-19-1 of our General Statutes and are time-barred by that statute because she did not file her claim within 90 days of the estate administrator's notice to creditors that Mr. Wolf had died and his debts were to be handled by his estate. Ms. Smith argues this ruling is error. For reasons explained below, we agree that Ms. Smith's claim to enforce the ED Order through a declaratory judgment falls outside the scope of Chapter 28A and within the scope of Section 50 of our General Statutes, which governs equitable distribution proceedings. But our holding that this claim is an equitable distribution matter is also fatal to subject matter jurisdiction in the superior court. Accordingly, we vacate the trial court's order of dismissal on the merits of Ms. Smith's declaratory judgment claim and dismiss that claim for lack of subject matter jurisdiction.

1. Equitable Distribution Versus Estate Administration

Equitable distribution is the process by which a court divides property belonging to a married couple based upon a variety of statutory factors. N.C. Gen. Stat. § 50-20(c) (2017). It is presumed that an in-kind distribution of marital property is equitable; however, if the presumption is rebutted by the greater weight of the evidence, or "by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind," the court shall provide for a distributive award to be paid by either party, incrementally or in a lump sum, to achieve equity between the parties. *Id.* §§ 50-20(b)(3), (e). "The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation." *Id.* § 50-20(k).

Chapter 28A establishes the procedure for the administration of a decedent's estate. The personal representative appointed to oversee the decedent's estate is obligated to, among other things, accumulate the assets of the estate, notify potential claimants, and pay valid claims against the estate. Different categories of claims are paid according to a statutory hierarchy, which includes the following:

> (a) After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:
>
> . . . .
>
> Sixth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at the decedent's death. . . .
>
> Eighth class. A claim for equitable distribution.
>
> Ninth class. All other claims.

N.C. Gen. Stat. § 28A-19-6(a) (2017). The eighth class of claims was added to the statute in 2005, after Section 50-20(l) had been amended to provide that equitable distribution claims whether pending or not yet filed at the time of a spouse's death, could be pursued against the decedent's estate. Act of July 12, 2005, ch. 180, sec. 1, 2005 N.C. Sess. Laws 307.

This Court held in *Painter Jamieson v. Painter*, 163 N.C. App. 527, 594 S.E.2d 217 (2004), that an award in an equitable distribution proceeding pending prior to the death of one spouse is not a "claim" with

respect to Chapter 28A-19-6(a), but "represents [the surviving spouse's] portion of the marital property." *Id.* at 529, 594 S.E.2d at 218.

In *Painter*, during the pendency of an equitable distribution action with his former spouse, Dr. Painter died. *Id.* at 528, 594 S.E.2d at 218. The personal representative of Dr. Painter's estate was substituted for Dr. Painter in the equitable distribution proceeding, and the parties eventually agreed to a consent order by the district court awarding Deborah Woodward Painter a distributive payment of $167,413.48. *Id.* at 528, 594 S.E.2d at 218. By May 2002, however, the estate had not paid the award. *Id.* at 528, 594 S.E.2d at 218. Deborah filed a motion for contempt against the personal representative seeking immediate payment of the award. Deborah argued—and the district court agreed—that the award was not governed under North Carolina estate law, but "[was] her own money . . . and [did] not [] belong to the estate." *Id.* at 529, 594 S.E.2d at 219. The district court ordered the personal representative to pay the award within thirty days. *Id.* at 529, 594 S.E.2d at 219.

Reviewing the personal representative's appeal, this Court acknowledged "the obvious conflict between the policy of equitable distribution and the application of Chapter 28A to unpaid distributive awards ordered pursuant to an Equitable Distribution Order," *id.* at 531, 594 S.E.2d at 220, but expressly rejected the argument that, "where one party dies before he pays the distributive award[,] Chapter 28A must be utilized to administer the estate and the distribution award becomes a claim against [the] decedent's estate." *Id.* at 531, 594 S.E.2d at 220. We explained that "the distributive award should not be treated as a claim under Chapter 28A" because that statute "provides that [a] decedent's estate is comprised of [a] decedent's assets, including all [of a] decedent's real and personal property." *Id.* at 531, 594 S.E.2d at 220 (citing N.C. Gen. Stat. § 28A-15-1(a) (2004)) (emphasis omitted). Instead, we held: "Although [a] decedent's assets include those he acquired from the equitable distribution order, *his assets do not include those marital assets awarded to his former spouse.*" *Id.* at 531, 594 S.E.2d at 220 (emphasis added).

Our decision in *Painter* also addressed how its holding affected the administration of a deceased ex-spouse's estate:

> Where payment is due from a decedent to a former spouse to account for the former spouse's portion of the marital estate, that payment must be made first. Only after the marital estate is separated from decedent's estate can

> the administrator determine decedent's assets and proceed to pay the creditors and distribute the assets of the estate pursuant to Chapter 28A.

Id. at 532-33, 594 S.E.2d at 221.

This Court recently followed *Painter* in *Watson v. Joyner-Watson*, which, like this case, arose from a superior court proceeding and held that an equitable distribution award owed to a surviving spouse "is neither part of the deceased spouse's estate nor subject to the traditional procedures governing claims against the estate." __ N.C. App. __, __, __ S.E.2d __, __ (Dec. 18, 2018) (COA18-524).

Considering section 50-20(k)'s provision that equitable distribution rights vest on the date of a couple's separation, as well as the express holdings in *Painter* and *Watson* that marital assets distributed to a surviving spouse are not part of a deceased spouse's estate, we conclude that as a result of the ED Order, half of Mr. Wolf's LLC interest in Savings Home belonged to Ms. Smith at the time of his death, and that asset did not become part of Mr. Wolf's estate.

Defendants argue that statutory amendments applicable to equitable distribution claims against decedents' estates require a different analysis. We disagree.

In 2003, the General Assembly amended Section 50-20 to add the following pertinent language:

> (l)(1) A claim for equitable distribution, whether an action is filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death.
>
> > (2) The provisions of Article 19 of Chapter 28A of the General Statutes shall be applicable to a claim for equitable distribution against the estate of the deceased spouse.

N.C. Gen. Stat. § 50-20(l) (2017). Unlike *Painter* and *Watson*, the ED Order in this case post-dates the amendment. So we must consider how Section 50-20(l) affects enforcement of an equitable distribution award entered prior to the death of a party, and specifically whether the distribution award becomes a "claim" against the decedent's estate and thus governed by Chapter 28A.

If a statute's language is clear and unambiguous, no further analysis is necessary "and the courts must give it its plain and definite meaning."

Quality Built Homes Inc. v. Town of Carthage, 369 N.C. 15, 19, 789 S.E.2d 454, 457 (2016).

It is reasonable to construe the plain language of "a claim for equitable distribution against the estate of a deceased spouse" to include a yet-to-be-asserted claim for equitable distribution from marital property held by a spouse at the time of his death, as well as a claim previously filed and pending at the time of death. This language plainly does not include an equitable distribution award already ordered, but not yet satisfied, *before* the decedent's death and necessarily *before* the existence of the estate.

Section 50-20(l), created by the General Assembly in 2001, initially provided: "A *pending action* for equitable distribution shall not abate upon the death of a party." Act of Aug. 10, 2001, ch. 364, sec. 2, 2001 N.C. Sess. Laws 1167 (emphasis added). The statute did not mention Chapter 28A, which governs decedents' estates, and this Court held that it "abrogated the Supreme Court's decision in *Brown v. Brown*, which held an *equitable distribution claim* abated upon the death of a party." *Estate of Nelson ex rel. Brewer v. Nelson*, 179 N.C. App. 166, 170-71, 633 S.E.2d 124, 128 (2006) (emphasis added); *see also Stann v. Levine*, 180 N.C. App. 1, 12, 636 S.E.2d 214, 221 (2006) (agreeing with *Nelson*). In *Brown v. Brown*, the parties were separated and were in pending divorce and equitable distribution proceedings; however, before the trial court entered a final divorce decree and a final equitable distribution judgment, the wife died. 353 N.C. 220, 222, 539 S.E.2d 621, 622 (2000). The Supreme Court in *Brown* held that, because an "equitable distribution . . . is inextricably linked with divorce proceedings," the wife's death prior to a final divorce decree abated her claim for equitable distribution. *Id.* at 227, 539 S.E.2d at 625. *Brown* also explained that its "reasoning [did] not contradict *Tucker v. Miller*, 113 N.C. App. 785, 788, 440 S.E.2d 315, 317 (1994)," which "held that an equitable distribution action survived a party's death" occurring after a final divorce decree but before final resolution of the equitable distribution proceeding. *Id.* at 225 n.1, 539 S.E.2d at 624 n.1.

The 2003 amendment to Section 50-20(l) replaced the reference to "a pending action for equitable distribution" with "a claim for equitable distribution, whether an action is filed or not." Act of June 12, 2003, ch. 168, sec. 1, 2003 N.C. Sess. Laws 230 31. The General Assembly noted that the amendment was intended to "allow a claim for equitable distribution to not only survive the death of one of the spouses but also *to be filed* after" a spouse's death if the spouses were separated at the time of death. North Carolina Bill Summary, 2003 Reg. Sess. S.B. 394

(June 12, 2003) (emphasis added). The General Assembly also noted its intent that all "claim[s] against the estate [are] subject to the same filing and notice requirements" like all other creditors "under Article 19 of Chapter 28A." *Id.*

Based on the plain language of the statute, and consistent with related statutes and our precedents, we hold that absent the death of a spouse *prior to* adjudication of an equitable distribution proceeding, Section 50-20(l)(2) does not require the surviving spouse to comply with Section 28A-19-3's filing and notice requirements to enforce an equitable distribution order. Section 50-20(l) does not affect Ms. Smith's right to collect her distributional share of Mr. Wolf's LLC interest in Savings Home. Because the ED Order severed the marital property into separate and distinct assets with respect to each party, Ms. Smith's demand to excise her distributional property from Mr. Wolf's estate is not a "claim" for the purposes of Section 28A-19-6.

Defendants argue in the alternative that, if we do not conclude Ms. Smith has asserted an equitable distribution claim against Mr. Wolf's estate, she was still obligated to comply with Chapter 28A because the ED Order is a judgment, docketed and a lien on the property of Mr. Wolf at the time of his death, falling under the sixth class in the hierarchy of claims against an estate. N.C. Gen. Stat. § 28A-19-6(a). This argument is precluded by this Court's holdings in *Painter* and *Watson*, which explain that an equitable distribution order vests in the surviving spouse a property right that is not subject to Section 28A-19-6(a). Unlike equitable distribution claims, which were added to the hierarchy of claims against a decedent's estate in 2005, docketed judgments have been listed in the hierarchy of claims for more than a century. Defendants have cited no appellate decisions, and we have found none, characterizing an equitable distribution order as a judgment within the scope of Section 28A-19-6(a).

2. Subject Matter Jurisdiction

[2] Because Ms. Smith's claim of ownership in half of Mr. Wolf's LLC interest is not a "claim" falling within Chapter 28A, but a separate asset outside of Mr. Wolf's estate and within the scope of the ED Order, the superior court should have dismissed Ms. Smith's declaratory judgment claim pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The district court's ED Order established exclusive original jurisdiction over the parties' equitable distribution process.

This Court's recent decision in *Watson*, which followed *Painter*, explained its consequence for subject matter jurisdiction, holding that "the entire equitable distribution process—including the enforcement

of an unpaid distributive award—is governed by N.C. Gen. Stat. § 50 *et seq*. and is under the authority of the district court pursuant to N.C. Gen. Stat. § 7A-244." __ N.C. App. at __, __ S.E.2d at __.

In *Watson*, the district court entered an equitable distribution order in 1999, which named the wife as sole beneficiary of the husband's survivor benefit plan and provided that, if the husband did not make the wife sole beneficiary before his death, an amount equal to the plan's present value would become an obligation of the husband's estate. *Id*. at __, __ S.E.2d at __. The husband died before naming the wife as beneficiary, and the wife filed a claim against his estate in superior court. The trial court dismissed the wife's claim pursuant to Rule 12(b)(1) because she "failed to file her claims with the appropriate division of the general court of justice." *Id*. at __, __ S.E.2d at __.

Watson followed the holding in *Painter* that property rights arising from an equitable distribution order vest at the time of separation and are not subject to statutes governing estate administration. But because *Watson*, unlike *Painter*, arose from an action in superior court, this Court had to address the delineation between the jurisdiction and powers of the trial court division, governed by Chapter 7A of our General Statutes. *Id*. at __, __ S.E.2d at __ (citing N.C. Gen. Stat. § 7A-240 *et seq*. (2017)). We explained:

> [T]he superior court maintains "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates[.]" N.C. Gen. Stat. § 7A-241 (2017). Under the auspice of the superior court, the personal representative of a decedent's estate "must follow the requirements of Chapter 28A, which include . . . paying claims against the estate," among other responsibilities. *Painter-Jamieson v. Painter*, 163 N.C. App. 527, 530, 594 S.E.2d 217, 219 (2004); *see generally* N.C. Gen. Stat. § 28A (2017).
>
> In contrast, the district court exercises subject matter jurisdiction over "civil actions and proceedings for . . . equitable distribution of property . . . and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof." N.C. Gen. Stat. § 7A-244 (2017). Equitable distribution is a process that occurs upon the dissolution of a marriage whereby the district court divides "property acquired during the marriage" among former spouses "in recognition that marital property and divisible property are species of

> common ownership." *Painter-Jamieson*, 163 N.C. App. at 532, 594 S.E.2d at 220 (quoting N.C. Gen. Stat. § 50-20(k)) . . . . *Thus, the entire equitable distribution process—including the enforcement of an unpaid distributive award—is governed by N.C. Gen. Stat. § 50 et seq. and is under the authority of the district court pursuant to N.C. Gen. Stat. § 7A-244.*

Id. at __, __ S.E.2d at __ (emphasis added). We concluded that, because the "plaintiff's portion of the [marital estate] is excluded from the decedent's estate, the superior court properly dismissed [her] claims for lack of subject matter jurisdiction." *Id.* at __, __ S.E.2d at __. The plaintiff's distributive award was "neither part of the [decedent's] estate *nor subject to the traditional procedures governing claims against the estate*." *Id.* at __, __ S.E.2d at __ (citing *Painter*, 163 N.C. App. at 532-33, 594 S.E.2d at 221) (emphasis added).

Here, instead of filing her action in the district court, where the ED Order originated, Ms. Smith brought an action in New Hanover County Superior Court in an attempt to enforce her right to a distributive share in Mr. Wolf's LLC interest. It follows from Ms. Smith's argument that her distributive share is not within her former husband's estate under Chapter 28A and is separate from Mr. Wolf's estate that she "must attempt to enforce her rights through the underlying equitable distribution action." *Id.* at __, __ S.E.2d at __. As established in *Painter*, and as reiterated in *Watson*, Chapter 28A is not the "mechanism for enforcement," as "the district court maintains authority over the enforcement of" the ED Order. *Id.* at __, __ S.E.2d at __.

B. Breach of Fiduciary Duties and Conversion

[3] Ms. Smith also appeals the trial court's dismissal of her claims for breach of fiduciary duty and conversion. Her complaint alleges that (1) Rodgers breached his fiduciary duty to her by not complying with the ED Order and by improperly exercising his power as representative of Mr. Wolf's estate; (2) Sherman and Rodgers, PLLC breached its fiduciary duty to her by mishandling assets it held in trust for her benefit as a result of the 2016 consent order; and (3) Defendants are liable to her for conversion because they continued to exercise dominion and control over her distributive share in the LLC interest after she demanded they relinquish it to her. The trial court dismissed those claims, along with Ms. Smith's declaratory judgment claim, pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim for which relief can be granted.

The tort claims, unlike the declaratory judgment claim, are not clearly within the holdings of *Painter* and *Watson*. Neither of those cases involved tort claims, and unlike a claim to enforce an equitable distribution award, tort claims do not fall within the exclusive jurisdiction of the district court. *Compare* N.C. Gen. Stat. § 7A-244 (2012) (district court is proper division for all equitable distribution matters), *with* N.C. Gen. Stat. § 7A-243 (2012) (civil claims seeking damages in excess of $10,000 are properly filed in the superior court).[8] Ms. Smith's complaint seeks, in addition to $209,642 related to the ED Order, double damages, punitive damages, and attorneys' fees. Accordingly, based upon a review of the complaint on its face, we hold that the superior court had subject matter jurisdiction to hear those claims and we therefore review *de novo* the trial court's dismissal of those claims on their merits.

But Ms. Smith limits her appeal from the trial court's dismissal of her tort claims to the same argument she asserts regarding her declaratory judgment claim—that these claims are not time-barred by Chapter 28A's limitations on claims against a decedents' estates. She argues that all three claims "rise and fall" on this single legal issue. Ms. Smith offers no argument distinguishing the factual allegations or legal theories supporting her tort claims from those supporting her declaratory judgment claim. She offers no argument regarding the elements of these tort claims.

Ms. Smith has offered no argument in this regard on appeal and abandoned any appeal from the dismissal of these claims on their merits. We affirm the trial court's dismissal of these claims pursuant to Rule 12(b)(6).

III. Conclusion

While Ms. Smith's declaratory judgment claim to enforce her equitable distribution rights is not time-barred by Section 28A-19-3, she must

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8. We note that N.C. Gen. Stat. §§ 7A-240 and 7A-242, respectively titled "Original civil jurisdiction generally" and "Concurrently held original jurisdiction allocated between trial divisions," provide that, with the exception of proceedings in probate and estate matters, the district court and superior court have concurrent jurisdiction in civil matters. Section 7A-242 explains that "[f]or the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions in accordance with allocations in this Article." Section 7A-244, which this Court in *Watson* held gives exclusive jurisdiction in all equitable distribution proceedings to the district court, provides that the district court "is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for . . . equitable distribution of property." We follow *Watson*'s interpretation of Section 7A-244. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

enforce those rights in the district court, which has exclusive jurisdiction over the enforcement of its equitable distribution order. Accordingly, we vacate the trial court's order dismissing the declaratory judgment claim on its merits and remand to the trial court to dismiss that claim pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Absent any argument on appeal regarding the merits of the claims for breach of fiduciary duty and conversion independent of her equitable distribution rights, we affirm the trial court's dismissal of those claims pursuant to Rule 12(b)(6).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and BERGER concur.

STATE OF NORTH CAROLINA
v.
CORNELIUS EDWARD NIXON, III

No. COA18-787

Filed 5 February 2019

Indictment and Information—information—express waiver of indictment—guilty plea—motion for appropriate relief

Defendant was entitled to relief from two criminal convictions where he was charged by a bill of information that did not include or attach an express waiver of indictment pursuant to N.C.G.S. § 15A-642(c). The lack of a formal waiver deprived the trial court of jurisdiction to accept defendant's guilty plea and enter judgment on the convictions.

Appeal by Defendant from an Order entered 4 December 2017 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 14 January 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

HAMPSON, Judge.

I. Factual and Procedural Background

On 7 November 2017, Cornelius Nixon (Defendant) filed a Motion for Appropriate Relief (MAR), seeking relief from criminal convictions. The Record based upon the proceedings on the MAR below tends to show the following relevant facts:

On 26 July 2004, a New Hanover County grand jury indicted Defendant for committing a Crime Against Nature. Subsequently, and at some point on or before 2 March 2006, a Bill of Information issued which charged Defendant with the offenses of Crime Against Nature, Indecent Liberties with a Child, and Contributing to the Delinquency of a Juvenile.[1] The Bill of Information included in the Record before us, although signed by Defendant and his trial counsel, contains no express language waiving indictment and no waiver of indictment is attached to the Bill of Information.

On 2 March 2006, in accordance with a plea arrangement, Defendant pleaded guilty to the charges of Indecent Liberties with a Child and Contributing to the Delinquency of a Minor, and the State agreed to dismiss the charge of Crime Against Nature. The presiding Superior Court Judge entered a consolidated Judgment on two charges, sentencing Defendant to a minimum of 19 months and a maximum of 23 months in the custody of the North Carolina Department of Adult Correction. The Judgment, however, erroneously included the charge of Crime Against Nature rather than the charge of Contributing to the Delinquency of a Minor.

On 7 November 2017, Defendant filed his MAR seeking to have the Judgment against him arrested or vacated and alleging two claims for relief: (1) the trial court lacked subject matter jurisdiction over all the charges because no waiver of indictment was attached to or executed upon the Bill of Information such that Defendant had not validly waived indictment; and (2) the Judgment erroneously included the charge of Crime Against Nature, and should be corrected.

On 4 December 2017, the trial court entered its Order on Defendant's MAR granting Defendant relief in part. The trial court vacated the erroneous Crime Against Nature conviction, but denied Defendant relief on his jurisdictional claim. Specifically, the trial court found Defendant had signed the Bill of Information, although the trial court recognized the document lacked specific language reciting Defendant's waiver of an indictment. The trial court concluded that, "[b]y signing the bill

1. The Bill of Information before us in the Record contains no date.

of information, Defendant accepted it in lieu of an indictment and acknowledged that he had received notice of the charges against him[,]" which "operate[d] as a waiver of Defendant's right to an indictment[.]"

On 27 April 2018, this Court granted Defendant's Petition for Writ of Certiorari for the purpose of reviewing the 4 December 2017 Order. *See* N.C. Gen. Stat. § 15A-1422(c)(3) (2017).

II. Issue

The sole issue is whether the trial court erred in denying Defendant's MAR alleging the trial court lacked subject matter jurisdiction to enter the original Judgment where Defendant was charged by way of a Bill of Information which did not include or attach an express waiver of indictment for the crimes of Indecent Liberties with a Minor and Contributing to the Delinquency of a Minor.

III. Analysis

A. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief." N.C. Gen. Stat. § 15A-1420(c)(6) (2017). "If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5). As a result, a defendant seeking an MAR bears the burden of proof before the trial court. *State v. Hyman*, ___ N.C. ___, ___, 817 S.E.2d 157, 172 (2018).

B. Denial of Defendant's MAR

A trial court "acquires jurisdiction of the offense by valid information, warrant, or indictment." *State v. Willis*, 285 N.C. 195, 201, 204 S.E.2d 33, 37 (1974). "There 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." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (citation and quotation marks omitted). "[A] court has no authority to accept a plea to a charge until it has properly acquired jurisdiction." *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798, 798 (1974). "[A] plea of guilty standing alone does not waive a jurisdictional defect." *State v. Stokes*, 274 N.C. 409, 412, 163 S.E.2d 770, 772 (1968).

Under the North Carolina Constitution:

> Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

N.C. Const. Art. I, Sec. 22. In felony cases initiated in Superior Court, the General Assembly has prescribed the pleading must be a bill of indictment, "unless there is a waiver of the bill of indictment as provided in G.S. 15A-642." N.C. Gen. Stat. § 15A-923(a), (c) (2017). N.C. Gen. Stat. § 15A-642 allows for the waiver of an indictment in non-capital cases in Superior Court where a defendant is represented by counsel. N.C. Gen. Stat. § 15A-642(b) (2017). The statute further requires: "Waiver of Indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information." N.C. Gen. Stat. § 15A-642(c).

In this case, it is undisputed Defendant, along with his trial counsel, signed a Bill of Information informing him of the charges against him and the relevant factual details thereof. The form used for the Bill of Information itself contains absolutely no language waiving indictment and no waiver appears to be attached or included in the Record before us. This Court has previously held "the absence of a sufficient accusation or a formal waiver of indictment deprived the trial court of jurisdiction to accept defendant's plea and to enter judgment." *State v. Neville*, 108 N.C. App. 330, 333, 423 S.E.2d 496, 497 (1992).

The State contends we should not deem the specific statutory requirements of section 15A-642 to be jurisdictional. The State further contends Defendant has offered no evidence Defendant did not, in fact, waive indictment even if it is not evidenced in writing and, thus, cannot meet his burden to show grounds for relief on his MAR.[2] However,

2. The State offered no evidence of a waiver in fact to rebut Defendant's claims.

in light of *Neville*, these statutory requirements intended to carry out the constitutional mandate of Article I, Section 22 are jurisdictional and mandatory. *See, e.g.*, *State v. Wolfe*, 158 N.C. App. 539, 540-41, 581 S.E.2d 117, 118 (2003) ("Both our State Constitution and Criminal Procedure Act require indictment or waiver thereof in order for a superior court to have jurisdiction in a criminal case"); *State v. Daniel*, 19 N.C. App. 313, 314, 198 S.E.2d 464, 464 (1973) (under a predecessor statute: "In non-capital felony cases a defendant may waive a bill of indictment only *when represented by counsel* and when both defendant *and his counsel* sign a written waiver of indictment" (emphasis in original)).

The absence, in this case, of a formal waiver signed by both Defendant and his counsel on or attached to the Bill of Information meeting the statutory requirements of N.C. Gen. Stat. § 15A-642(c) deprived the trial court of jurisdiction to accept Defendant's guilty plea and enter the original Judgment.

Moreover, the initial indictment for the charge of Crime Against Nature – a charge which was ultimately dismissed pursuant to the plea arrangement – does not vest the trial court with jurisdiction over the subsequent charges of Indecent Liberties and Contributing to the Delinquency of a Minor. While it is true an indictment for one offense may permit a defendant to be lawfully convicted of lesser included offenses, neither Indecent Liberties nor Contributing to the Delinquency of a Minor is a lesser included offense of Crime Against Nature. *See State v. Copeland*, 11 N.C. App. 516, 520, 181 S.E.2d 722, 724 (1971) (Indecent Liberties is not a lesser included offense of Crime Against Nature); *State v. Cronan*, 100 N.C. App. 641, 646, 397 S.E.2d 762, 765 (1990) ("the act of sexual intercourse is not inherent to the crime of contributing to the delinquency of a minor"). We hold Defendant has met his burden to show the existence of the asserted grounds for relief in his MAR. *See Hyman*, ___ N.C. at ___, 817 S.E.2d at 172.

IV. Conclusion

Accordingly, we reverse the portion of the trial court's 4 December 2017 Order denying Defendant's MAR. We remand this matter to the trial court, with instructions to grant the MAR, and to vacate the 2 March 2006 Judgment against Defendant.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge HUNTER concur.

STATE v. SHELTON

[263 N.C. App. 681 (2019)]

STATE OF NORTH CAROLINA
v.
JOSEPH BRIAN SHELTON

No. COA17-1426

Filed 5 February 2019

1. Motor Vehicles—felony death by vehicle—impairment—sufficiency of evidence

In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, the State presented sufficient evidence from which the jury could reasonably infer that (1) defendant was appreciably impaired due to ingesting two controlled substances that were present in a blood sample taken after the incident and (2) that the impairment was a proximate cause of the victim's death. Both controlled substances have as possible side effects drowsiness or dizziness; defendant failed to see the victim standing at the side of the road; he admitted he did not know he had struck a human being in the collision; and despite his brakes malfunctioning, he continued to drive all the way to his home.

2. Evidence—felony death by vehicle—officer testimony—prejudice analysis

In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, defendant failed to show that he was prejudiced by the exclusion of testimony of an investigating officer that he did not charge defendant with driving while impaired immediately after the collision. Even if the trial court erred by sustaining the State's objection, it was apparent that defendant was not charged separately with that offense, a fact acknowledged by the prosecutor during closing argument.

3. Criminal Law—felony death by vehicle—prosecutor's closing argument—propriety

In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, the trial court was not required to intervene in the prosecutor's closing argument, where the entirety of the closing argument correctly stated the law regarding impairment and the trial court's instruction on impairment was not challenged by defendant. Moreover, the State's appeal to the jury to be the voice and conscience of the community when considering the verdict was not so grossly improper that intervention was required.

Appeal by defendant from judgment entered 9 May 2017 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 16 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

DAVIS, Judge.

In this case, we address the quantum of evidence the State must present in order to survive a defendant's motion to dismiss a charge of felony death by vehicle arising out of the presence of narcotics in an unknown quantity in the defendant's blood. Because we are satisfied that the State's evidence was sufficient to raise a jury issue as to whether the defendant was, in fact, appreciably impaired, we conclude that the trial court correctly denied his motion to dismiss.

Factual and Procedural Background

The State's evidence at trial tended to show the following: On 22 July 2015, Joseph Brian Shelton ("Defendant") woke up at 6:30 a.m. and ingested Oxycodone, a drug that had been prescribed by his doctor for pain stemming from injuries he had received in a car accident in 2009. The pharmacist's label on the pill bottle warned that the drug could cause drowsiness or dizziness and thus to "use caution when operating a vehicle, vessel or machine." Despite the fact that his driver's license had been revoked for over a year, Defendant got into his green Dodge pickup truck and drove from his home in Sneads Ferry to his place of employment in Surf City. At 11:00 a.m., Defendant ingested another drug, Tramadol, for which he also possessed a prescription. The Tramadol bottle likewise contained warnings about the drug's potential to cause drowsiness and dizziness.

Defendant left work to drive home at 5:00 p.m. that day. At approximately 5:10, Defendant was driving eastbound on Old Folkstone Road, a two-lane road in Onslow County, behind a silver Ford Range Rover being operated by Robin Jones. At the same time, Rebecca Lovely was driving her vehicle behind Defendant's truck. As these three vehicles traveled along Old Folkstone Road at approximately 45-50 miles per hour, both Jones and Lovely saw 53-year-old Rhonda Anderson standing to the right in a grassy area near a group of "two or three" mailboxes

located about three feet away from the side of the road. Approximately 150 yards away, Lee Hill, who was sitting in a pick-up truck facing Old Folkstone Road, also saw Anderson standing by the mailboxes. Although the road was straight, weather conditions were clear, and it was fully light outside, Defendant did not notice Anderson.

As Jones approached the intersection of Old Folkstone Road and Winery Road, he slowed down to turn left on Winery Road. Defendant attempted to slow down as well, but his brakes failed and "went straight to the floor." Although there was no oncoming traffic in the westbound lane to Defendant's immediate left, he swerved to the right through the grassy area and into a ditch. As he did so, Defendant's truck struck Anderson, causing her body to fly 59 feet through the air before hitting the ground. Defendant's truck also hit the rear of Jones' vehicle, causing the truck's driver's side mirror to become detached. Unaware that his truck had collided with Anderson and despite the failure of his brakes moments earlier, Defendant chose to accelerate out of the ditch and drive to his home where he was forced to use his emergency brakes to bring his truck to a stop in his driveway.

At the scene of the collision, Lovely called 911 and went over to the area where Anderson's body had landed. She observed that Anderson was "laying on her back, with both of her legs up on [the] other side of her body . . . [Anderson's] head was bleeding through her hair . . . . She wasn't breathing . . . . and there were no signs of life." Paramedics arrived and declared Anderson dead on the scene.

Dr. William Kelly, a forensic pathologist who examined Anderson's body, found that the cause of death was "multiple blunt trauma." He testified that Anderson's skull was fractured and that she also had a large open fracture of her right hip. In addition, Anderson's left femur was broken, and she had a five-inch-long bruise along the lower part of her left leg.

The collision was investigated by the North Carolina State Highway Patrol. After a call went out that the hit-and-run driver was operating a green Dodge pickup truck missing its driver's side mirror, Trooper James Kirk responded to the call and patrolled the area surrounding the scene of the accident in an attempt to find a vehicle matching that description. At 6:45 p.m., Trooper Kirk observed Defendant's green Dodge pickup truck parked in his driveway. Trooper Kirk pulled into the driveway, exited his vehicle to look at the truck, and saw that the driver's side mirror was missing. As Trooper Kirk was inspecting the truck, Defendant came outside and stated that he knew that Trooper Kirk was there about "the wreck [Defendant] was in on Old Folkstone Road."

Trooper Kirk took Defendant to his patrol car and advised him of his *Miranda* rights, which Defendant waived. In addition to answering Trooper Kirk's questions, Defendant also wrote out a statement, explaining that "when [the] vehicle in front of me had slammed on [his] brakes very unexpected, I tried to stop but my brake pedal failed and went straight to the floor." Defendant also told Trooper Kirk that he "swerved to the right so [he] wouldn't hit another car head-on, but [he] just did clip the truck." Defendant explained that because he knew his license had been revoked, he "panicked" and fled the scene.

Trooper Kirk was aware that a pedestrian had been involved in the collision but did not yet know the extent of her injuries. For this reason, he did not question Defendant about his truck striking Anderson. Nor did Defendant mention having hit anyone with his truck. Defendant told Trooper Kirk he had not consumed any alcohol that day. At 7:05 p.m., Trooper Kirk gave Defendant a portable breathalyzer test, which confirmed the absence of alcohol in Defendant's body. Trooper Kirk did not ask Defendant if he had ingested any other controlled substances, and Defendant did not volunteer the information that he had taken either Oxycodone or Tramadol.

Troopers Johnathan Acuna and Matt Bryan responded to the scene of the collision at approximately 6:00 p.m. Trooper Acuna was the lead investigator, and Trooper Bryan collected evidence. Trooper Acuna learned from paramedics that Anderson had died on the scene. He interviewed Lovely, Jones, and other witnesses and took their statements. After the scene was cleared, Troopers Acuna and Bryan went to Defendant's home.

At Defendant's residence, Trooper Acuna interviewed Defendant in his patrol car. Defendant did not volunteer much information but was polite and cooperative and answered all of Trooper Acuna's questions. Once again, Defendant was not asked whether he had consumed any controlled substances and did not affirmatively disclose to the officers the fact that he had taken either Oxycodone or Tramadol earlier that day.

During the interview, Trooper Acuna told Defendant that his vehicle had struck Anderson and that she had been killed. Defendant "didn't believe it" and "seemed pretty upset." Trooper Bryan obtained a search warrant for Defendant's truck and arranged to have it towed from his home. While backing Defendant's truck out of the driveway for the tow truck, Trooper Bryan attempted to apply the brakes, but the pedal went all the way to the floor. Trooper Acuna subsequently conducted an inspection of Defendant's truck on 27 July 2015 during which he noted a mechanical brake failure and concluded that the "vehicle has no brakes."

In accordance with the protocol followed by the Highway Patrol in connection with fatal motor vehicle accidents, Trooper Bryan obtained a search warrant to collect a sample of Defendant's blood on the night of the accident. The blood sample was submitted to the crime laboratory of the North Carolina State Bureau of Investigation ("SBI") where chemical analyst Natasha Testa ultimately determined that both Oxycodone and Tramadol were present in Defendant's blood.

On the night of the collision, Trooper Acuna charged Defendant with a number of offenses, including misdemeanor death by vehicle, failure to reduce speed to avoid a collision, failure to report an accident resulting in property damage in excess of $1,000, operating a motor vehicle with improper brakes, and driving with license revoked. Defendant was not charged by Trooper Acuna with driving while impaired.

On 13 October 2015 — which was after the results of Defendant's blood test revealed the presence of Oxycodone and Tramadol in his blood — Defendant was indicted by an Onslow County grand jury on charges of second-degree murder, felony death by vehicle, driving with no liability insurance, felony hit and run by failing to immediately stop at the scene of an accident, felony hit and run by failing to remain at the scene of an accident, misdemeanor death by vehicle, failure to reduce speed to avoid a collision, failure to report an accident resulting in property damage in excess of $1,000, operating a motor vehicle with improper brakes, and driving with license revoked. Prior to Defendant's trial, the charges of failure to report an accident, failure to reduce speed to avoid a collision, driving with no liability insurance, and felonious hit and run by failing to remain at the scene of an accident were dismissed.

A jury trial was held beginning on 1 May 2017 in Onslow County Superior Court before the Honorable Charles H. Henry. The State called fourteen witnesses, including Lovely, Jones, and Hill; the responding troopers; the medical personnel who examined Anderson; and several expert witnesses, including Testa. Testa testified to the following: (1) she had tested the sample of Defendant's blood for the presence of impairing substances; (2) her tests showed that Oxycodone and Tramadol were present in his blood; (3) the tests revealed the presence of these drugs in amounts equal to or greater than 25 nanograms per milliliter — the "detection limits" used by the SBI for the test; (4) the half-lives of Oxycodone and Tramadol are approximately three to six hours and four to seven hours, respectively; (5) she was unable to determine the precise quantities of the drugs present in Defendant's blood; and (6) she was not able to accurately determine from the test results whether Defendant would have been impaired at the time of the 22 July 2015 accident.

Defendant testified on his own behalf and elicited testimony from four additional witnesses, including three character witnesses and an expert in the field of pharmacology, Professor Brian McMillen. Professor McMillen offered his opinions that (1) he would "not expect to see impairment" in a person who had 25 nanograms per milliliter of both substances in his bloodstream; and (2) people who frequently take Oxycodone and Tramadol develop "a great deal of tolerance" to the drugs.

Defendant moved to dismiss all charges at the close of the State's evidence and again at the close of all the evidence. Both of these motions were denied. On 8 May 2017, the jury found Defendant not guilty of second-degree murder but guilty of the lesser-included offense of involuntary manslaughter as well as of the offenses of felony death by motor vehicle, driving with improper brakes, driving with license revoked, misdemeanor death by motor vehicle, and felonious hit and run resulting in serious injury or death.[1]

On 10 May 2017, Defendant was sentenced to a term of 73 to 100 months imprisonment for the charge of felony death by motor vehicle. All of the remaining convictions were consolidated with the felony hit and run resulting in serious injury or death conviction for which Defendant was sentenced to a consecutive term of 17 to 30 months imprisonment. Defendant gave timely notice of appeal to this Court.

Analysis

On appeal, Defendant contends that the trial court erred by: (1) denying his motion to dismiss the charge of felony death by vehicle; (2) refusing to allow testimony from Trooper Acuna that Defendant was never charged with driving while impaired; and (3) failing to intervene *ex mero motu* during the State's closing argument. We address each argument in turn.

I. Motion to Dismiss

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, 247 N.C. App. 391, 394, 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).

1. Following the jury's verdict, the trial court arrested judgment on Defendant's convictions for involuntary manslaughter and misdemeanor death by vehicle.

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 may be substantial whether it is "direct, circumstantial, or both[.]" *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009).

When reviewing a motion to dismiss, courts are concerned solely "with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Smith*, 40 N.C. App. 72, 80, 252 S.E.2d 535, 541 (1978) (citation omitted). The evidence must be viewed 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) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). Any discrepancies in the evidence "are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citations and quotation marks omitted).

Our General Assembly has defined the crime of felony death by vehicle, in pertinent part, as follows:

> (a1) Felony Death by Vehicle. — A person commits the offense of felony death by vehicle if:
>
> (1) The person unintentionally causes the death of another person,
>
> (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 . . . , and
>
> (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of death.

N.C. Gen. Stat. § 20-141.4 (2017).

The offense of driving while impaired is, in turn, defined in N.C. Gen. Stat. § 20-138.1.

> (a) Offense. — A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or

> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; 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, Defendant was convicted of felony death by vehicle based on the theory of impairment set out in N.C. Gen. Stat. § 20-138.1(a)(1). This Court has held that "[t]o support a charge of driving while impaired, the State must prove that the defendant has . . . taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental facilities, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." *State v. Norton*, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (internal citation and quotation marks omitted). The fact that a motorist has consumed impairing substances "when considered in connection with faulty driving or other conduct indicating an impairment of physical and mental faculties, is sufficient *prima facie* to show a violation of N.C. Gen. Stat. § 20-138.1." *Id.* at 79, 712 S.E.2d at 390 (internal quotation marks, brackets, and citation omitted).

[1] Defendant argues that the trial court erred by denying his motion to dismiss because there was a lack of substantial evidence that he was actually impaired at the time he struck Anderson as a result of his prior ingestion of Tramadol or Oxycodone.[2] He contends that the State's evidence merely showed negligence regarding his operation of his truck at the time of the collision as opposed to giving rise to a reasonable inference that he was impaired. We disagree.

It is undisputed that Defendant ingested both drugs on the day of the accident and that they were still present in his blood after the crash. Taking these facts together with the evidence at trial regarding Defendant's lack of awareness of the circumstances around him and his

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2. We note that unlike N.C. Gen. Stat. § 20-138.1(a)(3), which provides that operating a vehicle with *any* amount of a Schedule I drug present in one's blood or urine constitutes driving while impaired, § 20-138.1(a)(1) requires a finding that the defendant was actually driving "*under the influence* of an impairing substance" in order for criminal liability to attach. N.C. Gen. Stat. §§ 20-138.1(a)(1), (3) (emphasis added).

conduct before and after the collision, reasonable jurors could — and did — find that Defendant was appreciably impaired.

First, evidence was presented that the labels on the bottles of Tramadol and Oxycodone warned that they may cause drowsiness or dizziness and that care should be taken when operating a vehicle after their ingestion. Under North Carolina law, Oxycodone and Tramadol are classified as Schedule II and Schedule IV controlled substances, respectively. *See* N.C. Gen. Stat. §§ 90-90(1)(a)(14), 90-92(a)(5) (2017).

Second, Defendant testified that he failed to see Anderson standing on the side of the road before the accident despite the fact that it was daytime, visibility was clear, and the road was straight. Moreover, all three of the eyewitnesses who testified at trial — one of whom was at least 150 yards away — were able to see Anderson before Defendant struck her with his truck.

Third, Defendant admitted that following the accident he was unaware that his vehicle had even collided with a human being despite the fact that the impact of the collision was sufficiently strong to cause Anderson's body to fly 59 feet through the air down the side of Old Folkstone Road. Fourth, although Defendant testified that his brakes had completely stopped functioning when he attempted to slow down immediately prior to the accident, he decided not to remain at the scene and instead elected to drive his truck out of the ditch back onto Old Folkstone Road and all the way to his home despite the fact that the vehicle lacked operable brakes.

None of this evidence conclusively established that Defendant was legally impaired. But that is not the question before us. Rather, the sole issue is whether sufficient evidence was presented that *could* have led a rational jury to conclude that Defendant was, in fact, impaired. We are unable to agree with Defendant that this standard was not met. The evidence discussed above lends itself to a reasonable inference that Defendant's senses were appreciably impaired at the time of the collision.

Moreover, we reject Defendant's attempt to separate the concepts of negligence and impairment in this context as mutually exclusive. While the evidence certainly shows, at a bare minimum, negligent driving by Defendant, it also supports the conclusion that such negligence was caused by Defendant's impairment due to his ingestion of Tramadol and Oxycodone earlier that day.

Although Defendant also argues that the failure of his brakes was a cause of the accident, the fact that his brakes were in poor condition is

not incompatible with the proposition that he was driving while impaired and that his impairment constituted a proximate cause of the death of Anderson. Based on the evidence presented at trial, the jury could reasonably have concluded that a non-impaired driver — upon realizing his brakes were inoperable — would not have chosen to swerve in the direction of a person standing on the side of the road whose presence should have been clearly visible to him.[3]

Defendant further points to the evidence that the troopers who met with him following the accident did not charge him with driving while impaired. However, although this fact could support an inference of a lack of impairment, when reviewing the trial court's denial of a defendant's motion to dismiss we are required to draw every reasonable inference and resolve every conflict in the *State's* favor — not the defendant's.[4] *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223. The other evidence discussed above — taken in the light most favorable to the State — was sufficient to support a finding that Defendant was, in fact, impaired.

In reaching this result, we are guided by our Supreme Court's decision in *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970). In *Atkins*, the plaintiff was driving on a highway at night in the rain and fog when he collided with the defendant's truck — which was stopped in the plaintiff's lane of travel — that the plaintiff failed to see in time to prevent the accident. *Id.* at 180-81, 176 S.E.2d at 790-91. The plaintiff did not "break his speed" before he hit the defendant's truck with his vehicle. *Id.* at 185, 176 S.E.2d at 793. After the accident, the defendant detected an odor of alcohol on the plaintiff's breath. *Id.* The investigating officer smelled alcohol in the plaintiff's vehicle and observed that there was a pint bottle containing a small amount of whiskey on the floorboard under the front seat of the plaintiff's car. *Id.*

The plaintiff brought a civil action in which he alleged negligence on the part of the defendant. *Id.* at 181, 176 S.E.2d at 791. The defendant asserted the defense of contributory negligence, arguing that the plaintiff had caused the accident by operating his vehicle while under the

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3. Indeed, Jones testified that there was no oncoming traffic in the westbound lane at the time of the accident, meaning that Defendant could have safely swerved to the left in order to avoid striking both Jones' vehicle and Anderson.

4. It is undisputed that Defendant did not inform the law enforcement officers about his ingestion of Oxycodone or Tramadol. We observe that signs of drowsiness — a side effect of both Oxycodone and Tramadol — would have been less readily apparent during an interview under these circumstances than, for example, the odor of alcohol or bloodshot and glassy eyes typically exhibited by one who has recently consumed alcohol.

influence of alcohol. *Id.* At trial, the jury determined that the plaintiff had, in fact, been contributorily negligent due to his impairment resulting from his prior consumption of alcohol. *Id.* at 183, 176 S.E.2d at 792.

Our Supreme Court held that the evidence presented was sufficient to support the jury's verdict, noting that the plaintiff was traveling 30 miles per hour upon a straight road and failed to see the tractor trailer until he was ten feet away despite the presence of blinking lights and reflectors. *Id.* at 185, 176 S.E.2d at 793. In its opinion, the Court further explained its ruling as follows:

> An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. However, an odor, *standing alone*, is no evidence that he is under the influence of an intoxicant, and the *mere* fact that one has had a drink will not support such a finding. Notwithstanding, the fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show [impairment].
>
> We hold that the evidence of the "broken pint" and the odor of alcohol on plaintiff's breath and in his automobile, when taken in conjunction with his failure to take any action to avoid a collision with the truck, was sufficient to support a finding that plaintiff's faculties had been appreciably impaired by the consumption of an alcoholic beverage. It is quite true . . . that the only testimony of any odor of alcohol on plaintiff's breath came from defendant . . . . We also note that plaintiff testified he had consumed no alcoholic beverages all day and that he failed to see the truck because the lights of an approaching car, reflected on the wet, blacktop pavement, blinded him. The credibility of the witnesses and conflicts in the evidence, however, are for the jury, not the court.

Id. at 185-86, 176 S.E.2d at 793-94 (internal citations, quotation marks, brackets, and ellipses omitted).

Thus, *Atkins* stands for the proposition that impairment can be shown by a combination of evidence that a defendant has both (1) ingested an impairing substance; and (2) operated his vehicle in a manner showing he was so oblivious to a visible risk of harm as to raise an inference that his senses were appreciably impaired.

While Defendant argues that the upholding of his conviction for felony death by vehicle will have the effect of creating a strict liability standard for persons who lawfully take prescription drugs and then are parties to a motor vehicle collision caused by their negligent driving, this contention is misplaced for several reasons. First, the circumstances of every case are different, and not every accident involving a driver who has ingested prescription drugs will raise an inference that the driver was appreciably impaired. Second, even in cases where a defendant is charged with an offense based on impaired driving under such circumstances, it is ultimately the role of the jury to determine whether the defendant was actually impaired and whether the impairment was a proximate cause of the accident.

Finally, we wish to emphasize that our holding today does not break new legal ground as we are simply applying in the context of prescription drugs the same rules that apply to driving after consuming alcohol.[5] It is not *per se* illegal to operate a motor vehicle after consuming alcohol just as it is not — without more — illegal to do so after ingesting prescription drugs. But both are potentially impairing substances, and criminal liability attaches when a driver operates a vehicle despite being appreciably impaired. As *Atkins* demonstrates, this is not a novel proposition.

Were we to accept Defendant's argument, it is unclear how a jury would ever have the opportunity to determine whether a driver with an indeterminate amount of drugs in his bloodstream was impaired in the absence of opinion testimony from an officer — regardless of the strength of the evidence showing that he was oblivious to an obvious risk of harm to others. Neither law nor logic supports such a result.

It was the role of the jury to determine based on the evidence presented at trial whether (1) Defendant was appreciably impaired due to his ingestion of one or both of the controlled substances he had taken earlier that day; and (2) whether his impairment was a proximate cause of Anderson's death. We therefore conclude that the trial court properly denied Defendant's motion to dismiss.

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5. While the State did not dispute the fact that Defendant possessed prescriptions for Oxycodone and Tramadol, the potentially impairing effects of these substances are the same whether they are taken with or without a prescription. Although Defendant presented testimony suggesting that frequent users of these drugs often develop a tolerance for these side effects, it was up to the jury to decide the appropriate weight to give that evidence.

II. Exclusion of Trooper Acuna's Testimony

[2] Defendant also contends that the trial court committed reversible error in excluding Trooper Acuna's testimony as to the fact that he did not charge Defendant with the offense of driving while impaired. On cross-examination, the following exchange occurred.

> [DEFENDANT'S COUNSEL]: What did you tell [Defendant] he was under arrest for?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [TROOPER ACUNA]: I believe –
>
> [DEFENDANT'S COUNSEL]: Wait a minute.
>
> [PROSECUTOR]: Don't answer that.
>
> THE COURT: I sustained the objection.
>
> [DEFENDANT'S COUNSEL]: What charges did you charge him with?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENDANT'S COUNSEL]: Did you charge him with driving while impaired?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

"A trial court's evidentiary rulings are subject to appellate review for an abuse of discretion, and will be reversed only upon a finding that the ruling was so arbitrary that it could not be the result of a reasoned decision." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 644-45, 643 S.E.2d 28, 33-34 (citation omitted), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007). It is well established that "[e]ven if the complaining party can show that the trial court erred in its ruling, ordinarily relief will not be granted absent a showing of prejudice." *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988).

Even assuming — without deciding — that the trial court erred in sustaining the State's objections to questioning by Defendant's counsel regarding whether Defendant had been charged with driving while impaired, Defendant has failed to show that he was prejudiced by any

such error. Despite the trial court's exclusion of this testimony, it would have been apparent to the jury that Defendant was never charged with that offense. Troopers Acuna and Kirk both testified that they did not form an opinion that Defendant was impaired based on their interactions with him on the day of the accident. Moreover, in his closing argument the prosecutor expressly acknowledged that the Defendant was not separately charged with driving while impaired.

Therefore, Defendant cannot establish prejudice from the trial court's exclusion of this testimony. *See State v. Boone*, 302 N.C. 561, 565, 276 S.E.2d 354, 357 (1981) (holding that trial court's exclusion of testimony, while erroneous, was not prejudicial).

III. Closing Argument

[3] Finally, Defendant argues that the trial court reversibly erred in failing to intervene *ex mero motu* during the State's closing argument. Specifically, he contends that the prosecutor's argument was grossly improper in that it (1) incorrectly stated the legal standard for impairment; and (2) improperly appealed to the passion and prejudice of the jury.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). Our Supreme Court has held that "[i]n determining whether the [State's] argument was grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609 (citation omitted), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997).

Defendant initially challenges the following portion of the State's closing argument:

> So, the controlled substances that were present in Joseph Shelton's blood at the time of this collision, Oxycodone and Tramadol, and those are impairing substances, the presence of these drugs in his blood hours after the collision.
>
> And the laws of the State of North Carolina allow for you to find persons guilty of impaired driving if they have in their blood controlled substances.

> And the State submits to you that these controlled substances were in his blood and he was impaired by those controlled substances and you must follow the law in this case.

Defendant contends that these statements were legally incorrect because in order to convict Defendant of felony death by vehicle the jury had to find beyond a reasonable doubt not merely that impairing substances were present in Defendant's bloodstream but also that he was appreciably impaired at the time of the accident. However, in his brief, Defendant selectively quotes from this portion of the State's argument and omits other statements in which the prosecutor made clear that Defendant could only be convicted if he was, in fact, legally impaired. The relevant portion of the State's argument — in its entirety — stated as follows:

> The State alleges and has proven to you that the defendant was impaired by a controlled substance at the time of this collision.
>
> *And you will find that the defendant is impaired if you find that he was under the influence of an impairing substance, which is what the Court will tell you the law is.*
>
> So, the controlled substances that were present in Joseph Shelton's blood at the time of this collision, Oxycodone and Tramadol, and those are impairing substances, the presence of these drugs in his blood hours after the collision.
>
> And the laws of the State of North Carolina allow for you to find persons guilty of impaired driving if they have in their blood controlled substances.
>
> And the State submits to you that these controlled substances were in his blood and *he was impaired by those controlled substances and you must follow the law in this case.*

(Emphasis added.)

Therefore, when considered contextually the statements cited by Defendant from the State's closing argument did not require intervention *ex mero motu* by the trial court. Furthermore, following closing arguments, the trial court instructed the jury on the issue of impairment, and Defendant has not challenged this instruction.

In addition, Defendant contends that the State improperly appealed to the jury's passion and prejudice in the following portion of its closing argument.

> The people of the State of North Carolina are entitled to guilty verdicts for what he did to her. Her family is entitled to justice for how he left her.
>
> And you can send a message with your verdicts that this will not be tolerated. Let Joseph Shelton know that this will not be tolerated. That he'll be held accountable. Let Rhonda Anderson's family right there know that justice will be served and let the community, the community, right, let them know that people who drive while impaired will be severely punished.
>
> You must not let Joseph Shelton who drove under the influence with his history on a revoked license that ran over that woman and left her there for dead walk out of this courtroom with nothing more than a misdemeanor.
>
> You are the moral voice and conscience of this community, the community you live in, and you can be the somebody that ought to do something. If you don't act, no one can. If you don't decide, no one can.
>
> And the moment of decision is here. It's here. You go back in that jury room, search your heart, search your mind, decide what you think is right. It's not going to be easy, but you've got to decide.

Our Supreme Court has held that it is permissible for a prosecutor to argue "that for purposes of defendant's trial, they are the voice and conscience of the community." *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). It is also not improper for prosecutors to "tell the jury that its verdict will send a message to the community[.]" *State v. Golphin*, 352 N.C. 364, 471, 533 S.E.2d 168, 237 (2000) (quotation marks and citation omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Based on our careful review of the transcript, we are once again unable to agree with Defendant that the State's argument was so grossly improper that intervention *ex mero motu* was required. Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTHONY SHERIDAN

No. COA18-312

Filed 5 February 2019

1. Sexual Offenses—sexual offense in parental role—sufficiency of evidence—parent-child relationship

There was sufficient evidence of a parent-child relationship in a prosecution for sexual offense in a parental role where defendant paid for a fourteen-year-old's care and support at a time when she was legally unable to work and maintain herself, made numerous representations to others of his parental and supervisory role over the child, indicated to police that he was her godfather, represented to a friend that he was trying to help her and get her enrolled in school, and told his other girlfriends that the victim was his daughter. There was no indication that he was a friend of the family, and he initiated a relationship of trust by approaching the victim with reference to his daughter, who was the same age, and he was always present when the two girls were hanging out at his house.

2. Constitutional Law—speedy trial—pro se motion—representation by counsel

Defendant's pro se motion for a speedy trial, made while defendant was represented by counsel, was properly before the Court of Appeals where the trial court ruled on the motion.

3. Constitutional Law—speedy trial—length of delay—Barker factors

The trial court's ruling on a motion for speedy trial was remanded where the twenty-eight month delay between arrest and

trial was enough to trigger further analysis. The appeal was insufficiently developed for analysis and determination where the trial court did not consider all of the factors under *Barker v. Wingo*, 407 U.S. 514 (1972).

4. Sexual Offenses—sexual offense in parental role—mistrial denied—statement of expert

The trial court did not abuse its discretion in a prosecution for sexual offense in a parental role by denying a mistrial where an expert witness stated that the child was neglected because her mother allowed her to stay with defendant, who had a criminal history. The trial court immediately sustained defendant's objection and instructed the jury not to consider the remark. Furthermore, the disclosure of defendant's history of criminality was vague and did not suggest that defendant had been convicted of anything.

5. Satellite-Based Monitoring—lifetime monitoring—order—no evidence

An order that defendant would be subject to satellite-based monitoring for the remainder of his life was remanded for proper analysis and determination under N.C.G.S. § 14-208.40A where no evidence was presented in support of the order.

Appeal by defendant from judgments entered 24 March 2017 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

TYSON, Judge.

Michael Anthony Sheridan ("Defendant") appeals from judgments entered upon a jury's verdicts and convictions of four counts of first-degree sexual exploitation of a minor, two counts of statutory rape, and one count of sexual offense in a parental role. We find no error in part and remand for appropriate findings on Defendant's *pro se* speedy trial motion and the trial court's satellite-based monitoring ("SBM") determination.

I. Background

T.S. ("Tonya") met Defendant in March 2013, in the Raleigh neighborhood where they both lived. Tonya was fourteen years old and Defendant was forty-four. Defendant told Tonya about and introduced her to his daughter, who was around the same age. Tonya began "hanging out" with Defendant's daughter, and Defendant was "always" around.

On 14 March 2013, Defendant asked Tonya if she wanted to "hang out" at his house the next day, while she waited for his daughter to get home. The next day, Defendant told Tonya his daughter was home, and she should come over.

Once she entered his house, Defendant told Tonya they were alone. Defendant took Tonya into his bedroom, began kissing her, removed their clothes, and engaged in her first vaginal intercourse. Defendant and Tonya engaged in vaginal intercourse and fellatio "every day" thereafter, and within a week or two Tonya came to believe she was "in love" with Defendant.

Tonya moved with her family to Hertford County in November 2013. Defendant continued engaging in sexual relations with Tonya after the move, when she returned to Raleigh with her mother to visit in the area. In June 2014, Tonya moved back to Raleigh and lived with Defendant. Defendant had told Tonya she could choose where she wanted to live after she turned sixteen years old. Tonya told her mother Defendant had offered her a job in Raleigh, and she was going to live with and work for him.

Defendant and Tonya shared a bed when she moved in with him and immediately resumed their sexual relationship. Their near daily sexual activity occurred before and after Tonya's sixteenth birthday. Between 2013 and 2014, Tonya used Defendant's phone at his request to take four or five nude photographs of herself. Defendant purchased food and clothing for Tonya and gave her a bank card to use for expenses.

On 27 October 2014, Defendant and Tonya argued. At Tonya's request, her grandmother dropped her off at her mother's boyfriend's house in Harnett County. Tonya's mother's boyfriend refused to allow Tonya to stay, and she returned to Defendant's house in a taxicab late that night.

When she arrived, Tonya found Defendant naked in bed with another woman. Tonya requested Defendant to pay for her cab fare, but he refused. An argument ensued and the police were called. The cab

driver retained all of Tonya's luggage and belongings for the unpaid fare. Tonya was arrested and taken to jail for failing to pay the cab fare.

Tonya was released from jail at approximately 3:00 a.m. on 28 October 2014 and walked back to Defendant's home from the jail. The other woman was still at the house. Defendant and Tonya argued, and the other woman was driven home by Defendant's housemate. Tonya and Defendant slept in the same bedroom, but upon waking continued to argue, mainly about access to a phone. Defendant had provided Tonya with a phone when she had moved in, but he had taken it away from her.

Tonya attempted to retrieve the phone while Defendant was in the shower, but Defendant allegedly began to physically assault her. Tonya grabbed a beer bottle and struck him on the head. Defendant escalated the assault, and when Tonya fell to the floor, she saw a knife and grabbed it. Defendant and Tonya grappled with the knife, but she regained control of it and stabbed Defendant. The assaults continued, and Defendant's mother called 911.

Officers arrived and Tonya was transported to the hospital and underwent a sexual assault examination. Tonya told police officers that Defendant had raped her that day and had been sexually active with her prior to that occurrence. Tonya was placed into foster care. Soon after, Tonya learned she was pregnant again and gave birth to a son. She had previously aborted an earlier pregnancy. Subsequent DNA testing confirmed to a confidence interval of 99% that Defendant was the father of the child.

Defendant was indicted for four counts of first-degree sexual exploitation of a minor, two counts of statutory rape, one count of sexual offense in a parental role, one count of indecent liberties with a minor, and of attaining habitual felon status. Defendant had retained counsel, but filed a *pro se* motion for a speedy trial on 14 April 2015, while being incarcerated in the Wake County Jail for approximately six months. Even though Defendant was represented by counsel, the trial court heard and denied the *pro se* motion.

Defendant's case was called for trial on 20 March 2017. The jury's verdict found Defendant guilty of the four counts of sexual exploitation, two counts of statutory rape, and one count of sexual offense in a parental role. The State dismissed the charges of indecent liberties and Defendant having attained habitual felon status. Defendant was sentenced to two consecutive sentences of 317-441 months, one consecutive sentence of 33-100 months, and four consecutive sentences of

96-176 months. He was also ordered to register as a sex offender and enroll in SBM for the remainder of his natural life.

Defendant gave oral notice of appeal in open court, but did not enter written notice of appeal of the civil SBM order. Defendant has subsequently filed a petition for writ of certiorari to seek review of the civil SBM.

II. Jurisdiction

An appeal of right of Defendant's criminal convictions lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the trial court erred by (1) denying his motion to dismiss the charge of sexual offense in a parental role; (2) denying his motion for speedy trial; and, (3) denying his motion for mistrial. Defendant also asserts his counsel failed to provide effective assistance.

IV. Motion to Dismiss

[1] Defendant asserts the trial court erred in denying his motion to dismiss the charge of sexual offense in a parental role. He argues the State presented insufficient evidence a parent-child relationship existed between Defendant and Tonya. We disagree.

A. Standard of Review

"Upon a defendant's motion to dismiss for insufficient evidence, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Sweat*, 366 N.C. 79, 84, 727 S.E.2d 691, 695 (2012) (alteration original) (citation and internal quotation marks omitted). The evidence is to be considered and reviewed in the light most favorable to the State, including all reasonable inferences therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

"The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). A motion to dismiss should only be granted when the evidence presented raises no more than a "suspicion of guilt." *Id.*

Whether the State presented sufficient evidence is a question of law, which this Court reviews *de novo*. *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013) (citation omitted).

B. Analysis

Defendant was charged with violating N.C. Gen. Stat. § 14-27.7(a), which prohibits a person "who has assumed the position of a parent in the home of a minor victim [from] engag[ing] in vaginal intercourse or a sexual act with a victim who is a minor residing in the home." N.C. Gen. Stat. § 14-27.7(a) (2015). This statute was recodified as § 14-27.31, but the relevant language is virtually identical. 2015 N.C. Sess. Laws 181, § 13(a).

To survive a motion to dismiss, the State must have presented evidence that Defendant "had (1) assumed the position of a parent in the home, (2) of a minor victim, and (3) engaged in a sexual act with the victim residing in the home." *State v. Oakley*, 167 N.C. App. 318, 322, 605 S.E.2d 215, 218 (2004) (citation omitted). Defendant asserts the factor at issue in this case is whether or not Defendant assumed a "parental role" in his relationship with Tonya.

This Court has identified a "parental role" to include evidence of "emotional trust, disciplinary authority, and supervisory responsibility." *State v. Bailey*, 163 N.C. App. 84, 93, 592 S.E.2d 738, 744 (2004). The most significant of these factors is whether the defendant and the minor "had a relationship based on trust that was analogous to that of a parent and child." *Id.* at 94, 592 S.E.2d at 745. It is not necessary for the defendant to have maintained a romantic relationship with the child's parent or to exercise any legal rights over the child in order to be prosecuted under the statute. *Id.*

Defendant argues Tonya was over sixteen years old and she engaged in a "consensual" relationship with him. However, the statute clearly indicates consent is not a defense. N.C. Gen. Stat. § 14-27.31(c) (2017). Further, this Court has found a parental role existed between a sixteen-year-old victim and a twenty-three-year-old defendant. *Oakley*, 167 N.C. App. at 319, 605 S.E.2d at 216. The sexual relationship began when the victim was sixteen, and he began residing with the defendant when he was seventeen. *Id.* at 319, 605 S.E.2d at 216-17.

Both prior to and during the time the victim was living with him, the defendant had "paid for all of [the victim's] support . . . including food, shelter, gifts and spending money." *Id.* at 323, 605 S.E.2d at 219. The defendant, Oakley, held himself out to be the victim's temporary

custodian to the victim's parole officer. *Id.* Evidence at trial indicated the defendant was a friend of the family. *Id.* at 323, 605 S.E.2d at 218.

Similar to the defendant in *Oakley*, Defendant paid for Tonya's care and support at a time she was legally unable to work and maintain herself. He also made numerous representations to others of his parental and supervisory role over Tonya: he indicated to police he was her "godfather," represented to a friend he was trying to help Tonya out and get her enrolled in school, and told his other girlfriends Tonya was his "daughter." While there was no indication Defendant was a friend of Tonya's family, there is evidence he initiated a relationship of trust by approaching Tonya with references to his daughter, who was the same age, and being "always" present when the two girls were "hanging out" at his house.

Viewed in the light most favorable to the State, sufficient evidence of Defendant's exercise of a parental role over Tonya was presented to survive Defendant's motion to dismiss. *See Powell*, 299 N.C. at 99, 261 S.E.2d at 117. We find no error in the trial court's denial of Defendant's motion to dismiss this charge.

V. Motion for Speedy Trial

Defendant argues the trial court erred in denying his motion for speedy trial without addressing any of the *Barker v. Wingo* factors. We remand for appropriate findings.

A. Standard of Review

The appeal of a denial of a speedy trial motion raises a question of constitutional law, which is subject to *de novo* review. *State v. Johnson*, __ N.C. App. __, __, 795 S.E.2d 126, 131 (2016) (citation omitted).

B. Analysis

[2] The State argues this issue is not properly before this Court. Defendant filed his *pro se* motion for a speedy trial on 14 April 2015. At that time, Defendant was represented by retained counsel. It is well established that a defendant cannot file motions on his own behalf and also be represented by counsel. *State v. Williams*, 363 N.C. 689, 700, 686 S.E.2d 493, 501 (2009). Nothing in the record indicates Defendant's appointed trial counsel adopted his *pro se* motion:

> my client I believe wishes to address the Court prior to going further. He's indicated to me, as I heard, his own motions that he is wanting to make.

The defendant in *Williams* argued the trial court erred by declining to rule on his *pro se* motions, including his *pro se* motion for speedy trial. *Id.* The Supreme Court found this refusal to rule on the defendant's *pro se* motion was not error. *Id.* Unlike in *Williams*, the trial court in the present case ruled on Defendant's *pro se* motion for speedy trial, stating, "the defendant's motion for a speedy trial is hereby denied."

Where a trial court has specifically considered and denied a defendant's constitutional argument, this Court has granted review. *E.g.*, *In re Hall*, 238 N.C. App. 322, 329, 768 S.E.2d 39, 44 (2014) (concerning *ex post facto* violation); *State v. Kirkwood*, 229 N.C. App. 656, 665-66, 747 S.E.2d 730, 736-37 (2013) (trial court's *sua sponte* ruling on double jeopardy issue gave this Court jurisdiction over the issue on appeal). Defendant's argument is properly before this Court. Because this is a question of law, subject to *de novo* review, we consider the matter anew. *Johnson*, __ N.C. App. at __, 795 S.E.2d at 131.

[3] A defendant is guaranteed the right to a speedy trial under the Constitution of the United States and the North Carolina Constitution. U.S. Const. amend. VI; N.C. Const. art. I, § 18. The Supreme Court of the United States set out a four-factor balancing test to determine whether a defendant's right to a speedy trial under the Constitution of the United States was violated. *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972).

Reviewing courts are to consider the "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* North Carolina adopted this four-factor balancing test to analyze purported speedy trial violations under our state's constitution. *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000).

The "length of the delay is not *per se* determinative" of whether a defendant's right to a speedy trial has been violated. *Id.* The Supreme Court of the United States has noted a delay becomes "presumptively prejudicial" as it approaches one year, which is enough to warrant further analysis. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992).

Here, the twenty-eight months' delay between Defendant's arrest and trial is enough to trigger further analysis. While the trial court was not obligated to consider Defendant's *pro se* motion for speedy trial while he was represented by counsel, because it did so, it erred by not considering all the *Barker* factors and making appropriate findings. The record on appeal is insufficiently developed for this analysis and determination to be made by this Court.

"A full evidentiary hearing is required in order for the superior court to hear and make an appropriate assessment of Defendant's arguments. If the superior court ultimately concludes Defendant's right to a speedy trial was violated, the only remedy is dismissing the indictment and vacating those convictions." *State v. Wilkerson*, __ N.C. App. __, __, 810 S.E.2d 389, 396 (2018). We remand to the trial court for a proper *Barker v. Wingo* analysis and appropriate findings.

VI. Motion for Mistrial

[4] Defendant argues the trial court erred by denying his motion for mistrial when an expert witness opined that Tonya was neglected because her mother allowed her to stay with Defendant, "a person who had a history of criminality." We disagree.

A. Standard of Review

A trial court is required to call a mistrial "if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2017). Whether or not there has been "substantial and irreparable prejudice" is a matter that rests within the discretion of the trial court. *State v. Mills*, 39 N.C. App. 47, 50, 249 S.E.2d 446, 448 (1978), *cert. denied*, 296 N.C. 588, 254 S.E.2d 33 (1979). "[A]bsent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal." *Id.*

B. Analysis

Dr. Elizabeth Witman, the director of SAFEchild Advocacy Center, testified about Tonya's medical evaluation and diagnostic interview. When asked whether she had any concerns about Tonya's biological family, Dr. Witman replied:

> I did. We always try to look very carefully at those issues and it was my opinion sometimes I'm not describing all these motivation to why a child's been mission [sic] treated or neglected. It could be to a number of factors. It doesn't necessarily always mean ill intention, but I think because of her mother's homelessness and probably financial struggles and some other issues it was my opinion that she was neglected by being allowed to live with a person who had a history of criminality.

Defense counsel immediately moved to strike, and the trial court sustained the objection and instructed the jury:

> Ladies and gentlemen, with regard to the last remark by this witness you are to disregard that remark and not consider it as part of your consideration towards a deliberation to a verdict in this case.

The trial court denied defense counsel's motion for mistrial.

"When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). Defendant argues some evidence "is so inherently prejudicial that its influence on the jury cannot be cured with an instruction to disregard it" and cites to *State v. Hunt*, 287 N.C. 360, 215 S.E.2d 40 (1975), and *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), for support.

In *Hunt*, evidence of the defendant's "police record," and that he was on probation "for possession of marijuana and assault" was improperly introduced during cross-examination of a defense witness. 287 N.C. at 372-73, 215 S.E.2d at 48. Shortly thereafter, court adjourned for the day. *Id.* at 373, 215 S.E.2d at 48. Defense counsel moved for a mistrial at the beginning of court the next day. *Id.* The trial court denied that motion, but instructed the jury to disregard the testimony. *Id.*

The Supreme Court found "the instructions then given were not specific as to the content of the challenged questions, and by this time the evidence must have found secure lodgment in the minds of the jurors." *Id.* at 376, 215 S.E.2d at 50. The Court also limited its holding to the specific "circumstances of [that] capital case." *Id.* at 376, 215 S.E.2d at 51.

In *Aycoth*, during cross-examination, a State's witness revealed the defendant had been previously arrested on another charge and had been indicted for murder. 270 N.C. at 272, 154 S.E.2d at 60. Defense counsel immediately objected and moved to strike, and the trial court allowed the motion and instructed the jury to not "consider" the previous statements. *Id.* Defense counsel moved for a mistrial after the State rested, which was denied. *Id.* The Supreme Court found "the incompetent evidence to the effect [the defendant] had been or was under indictment for murder was of such serious nature that its prejudicial effect was not erased by the court's quoted instruction." *Id.* at 273, 154 S.E.2d at 61.

Unlike in *Hunt*, the trial court immediately sustained the objection and instructed the jury "to disregard that remark and not consider it." Further, and unlike in *Aycoth*, the disclosure of Defendant's history of criminality was vague and did not suggest Defendant had previously been convicted of anything. Defendant has failed to show the trial

court abused its discretion in denying Defendant's motion for mistrial. Defendant's arguments are overruled.

VII. Ineffective Assistance of Counsel

[5] Defendant argues he was denied effective assistance of counsel when his attorney stated it would be "pointless" to proceed with a SBM hearing. This statement came after the prosecutor acknowledged the cumulative length of Defendant's sentences might make a SBM determination "a moot point," but was prepared to present evidence nonetheless. Because the trial court failed to comply with statutory mandates, we need not reach the merits of Defendant's argument.

We initially address whether this issue is properly before this Court. Defendant did not file written notice of appeal for the SBM determination, as required by N.C. R. App. P. 3. Defendant filed a petition for writ of certiorari, requesting this Court to consider his arguments on the merits. This Court has previously granted petitions for certiorari when a defendant has given oral notice of appeal, but failed to comply with Rule 3 for an appeal of the SBM determination. *State v. Dye*, __ N.C. App. __, __, 802 S.E.2d 737, 741 (2017); *State v. Green*, 229 N.C. App. 121. 128, 746 S.E.2d 457, 464 (2013).

A writ of certiorari "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Defendant argues issuing a writ of certiorari is appropriate because the trial court erroneously concluded Defendant's convictions were "aggravated offenses" under N.C. Gen. Stat. § 14-208.6(1a) (2017). Aggravated offenses include those where a defendant (1) engaged in a penetrative sexual act with a victim of any age "through the use of force or the threat of serious violence" or (2) engaged in a penetrative sexual act with a child under twelve. *Id.* We agree, grant Defendant's petition, and issue the writ.

When a defendant is convicted of a reportable offense under the sex offender registration scheme, the district attorney is required to present evidence at the sentencing phase of whether: (1) the defendant has been classified as a sexually violent predator; (2) the defendant is a recidivist; (3) the conviction is an aggravated offense; (4) the sexual act or rape was of a victim under thirteen and the defendant was an adult; or, (5) the offense involved physical, mental, or sexual abuse of a minor. N.C. Gen. Stat. § 14-208.40A(a) (2017).

In this case, no evidence was presented prior to or to support the trial court's determination that Defendant would be subject to SBM for the remainder of his life. We vacate the order requiring Defendant to enroll in SBM for the remainder of his life, and remand for proper analysis and determination under N.C. Gen. Stat. § 14-208.40A. *See State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009).

VIII. Conclusion

The State presented sufficient evidence of Defendant's parental role. The trial court did not err by denying Defendant's motion to dismiss the charge of sexual offense by substitute parent. The trial court did not abuse its discretion in denying Defendant's motion for mistrial.

The trial court erred in failing to conduct a proper analysis of the *Barker v. Wingo* factors prior to denying Defendant's *pro se* motion for speedy trial. We remand this issue to the trial court for an appropriate analysis and findings.

We vacate Defendant's SBM determination and remand for the trial court to conduct a proper determination in accordance with N.C. Gen. Stat. § 14-208.40A. *It is so ordered.*

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges ZACHARY and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 FEBRUARY 2019)

BANYAN GW, LLC v. WAYNE PREPARATORY ACAD. CHARTER SCH., INC. No. 18-378	Wake (16CVS66)	AFFIRMED IN PART; DISMISSED IN PART.
BRUNSON v. N.C. DEP'T OF JUSTICE No. 18-837	N.C. Industrial Commission (TA-25964)	Affirmed
BRUNSON v. N.C. DEP'T OF JUSTICE No. 18-656	N.C. Industrial Commission (TA-25758)	Affirmed
FOSTER v. WELLS FARGO BANK, N.A. No. 18-643	Durham (17CVS3799)	Dismissed in Part; Affirmed in Part
HUNT v. COLLINSWORTH No. 18-301	Iredell (10SP976)	Affirmed
IN RE C.S. No. 18-439	Mecklenburg (14JB661)	Dismissed
IN RE G.G.K. No. 18-640	Wake (16JT116-117)	Affirmed
IN RE I.C. No. 18-869	Henderson (13JA116)	Dismissed
IN RE J.P.N. No. 18-622	Iredell (17JA102)	Affirmed
IN RE N.A.C. No. 18-721	Forsyth (17JT16)	Affirmed
IN RE N.L.C. No. 18-669	Caldwell (15JT117)	Affirmed
IN RE S.M. No. 18-759	Iredell (16JA157)	Affirmed
INT'L PROP. DEVS., LLC v. K CONSTR. & ROOFING, LLC No. 17-509-2	Cabarrus (15CVS500)	Dismissed in part; Affirmed in part.

LLOYD v. BAILEY No. 18-666	Mecklenburg (13CVS14121)	Affirmed
MORGAN v. DEFEO No. 18-322	Iredell (17CVD1652)	Reversed
SANGHRAJKA v. FAMILY FARE, LLC No. 18-164	Durham (17CVS3173)	Affirmed
STATE v. BROTHERS No. 18-177	Pitt (16CRS53109)	No Error; Remanded for Correction of Clerical Error
STATE v. BROWN No. 18-279	Buncombe (14CRS89800)	No Error
STATE v. CLARK No. 18-291	Buncombe (16CRS82164-66)	Vacated
STATE v. CLAWSON No. 18-57	Guilford (14CRS68714) (16CRS24493) (16CRS24497)	Dismissed.
STATE v. DAVIS No. 18-471	Johnston (16CRS53489)	No Error
STATE v. DOTSON No. 18-443	Haywood (16CRS538)	Affirmed
STATE v. FORTE No. 17-669-2	Wilson (15CRS1614-15) (15CRS50196) (15CRS50200) (15CRS50247) (15CRS50473)	No Error in Part, Vacate in Part, and Remand.
STATE v. FOWLER No. 16-947-2	Wake (14CRS214112)	No Reversible Error.
STATE v. JOHNSON No. 18-556	Rowan (16CRS55016-19) (17CRS308)	Vacated and Remanded
STATE v. KINGSBERRY No. 18-226	Vance (14CRS50543)	No Error
STATE v. LAMBERTH No. 18-370	Person (16CRS50368)	No Error

STATE v. LATHAM No. 17-1075	Union (14CRS54529)	No Prejudicial Error.
STATE v. LLOYD No. 18-53	Durham (13CRS4534) (13CRS56221) (13CRS56657) (13CRS56716)	Vacated in part; Remanded for resentencing.
STATE v. McKOY No. 18-564	Harnett (16CRS1041-42) (16CRS1143) (16CRS1149)	Affirmed
STATE v. MORGAN No. 18-575	Pitt (15CRS52140-43) (16CRS1242-43)	No Error
STATE v. NARRON No. 18-193	Johnston (14CRS52516-17)	No Error
STATE v. OTTO No. 18-574	Forsyth (15CRS54382) (15CRS54383)	Dismissed
STATE v. SANDERS No. 18-476	Macon (15CRS50788)	No Error
STATE v. SPENCER No. 18-304	Randolph (15CRS50435)	No Prejudicial Error
STATE v. SWAFFORD No. 18-324	Cleveland (15CRS54626)	Dismissed
STATE v. THOMPSON No. 18-423	Lincoln (15CRS53483)	No error in part; Dismissed in part.
STATE v. TYSON No. 18-459	Pitt (16CRS57893)	Vacated and Remanded in Part; Affirmed in Part
STATE v. WHITE No. 18-401	Duplin (16CRS50741)	Dismissed
SUMMIT DE CORP. v. KWEIDER BROS. INC. No. 18-353	Mecklenburg (16CVS19740)	Dismissed

TEAGUE & GLOVER, P.A. v. KANE & SILVERMAN, P.C. No. 17-727	Pasquotank (15CVS454)	Affirm in part; reverse and remand in part.
TURNMIRE v. ELDRETH No. 17-960	Ashe (16CVD59)	Affirm in part; Remand in part
WALZ v. WALZ No. 18-240	Carteret (16CVD361)	Vacated and Dismissed
YOUNG v. BAILEY No. 18-664	Mecklenburg (13CVS9560)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Abandonment of issues—equitable distribution—unpaid distributive award —tort claims—On appeal from an action to enforce an equitable distribution order granting a distributive award to plaintiff, the superior court had jurisdiction to dismiss plaintiff's claims for breach of fiduciary duty and conversion for failure to state a claim upon which relief can be granted. Plaintiff failed to advance any argument about the elements of those torts, thereby abandoning any issue on the merits. **Smith v. Rodgers, 662.**

Abandonment of issues—lack of argument on appeal—prior bad acts—On appeal from a conviction for first-degree sex offense with a child, defendant abandoned his argument that the trial court should have excluded evidence that he previously observed the victim through a hole in the wall taking showers. Although defendant challenged the basis for the trial court's ruling, he offered no specific argument as to why that prior act was inadmissible under Evidence Rule 404(b) or should have been excluded under Rule 403. **State v. Godfrey, 264**.

Access to sealed court file—standard of review—de novo—In an action by a newspaper seeking public access to a sealed court file pursuant to N.C.G.S. § 1-72.1 and in which the newspaper asserted multiple constitutional claims, the Court of Appeals determined that the correct standard of review on appeal was de novo. **Doe v. Doe, 68.**

Appealability—interlocutory order—arbitration—An appeal from an order compelling arbitration was dismissed as interlocutory where plaintiff did not demonstrate that a substantial right would be lost if her appeal was not heard. Although plaintiff attempted to distinguish controlling precedent on the basis of a difference between North Carolina's Revised Uniform Arbitration Act (NC-RUAA) and the Federal Arbitration Act (FAA), there was no reason that the substantial right analysis would be any different under the FAA versus the NC-RUAA. **Spencer v. Portfolio Recovery Assocs., LLC, 219.**

Interlocutory orders—substantial right—right to a jury trial—ultimate factual issue—An interlocutory order in a boundary dispute affected a substantial right and was immediately appealable where plaintiffs had demanded a jury trial and the trial court's order effectively mooted all of plaintiffs' claims by ruling on the ultimate factual issue of the location of the boundary line, without a jury trial. **Ayscue v. Griffin, 1.**

Mootness—temporary order—expiration—The question of whether the trial court lacked jurisdiction to grant temporary child custody in a Domestic Violence Prevention Order was moot. The order expired more than one month before the matter was heard by the Court of Appeals. **Martin v. Martin, 173.**

Preservation of issues—denial of motion for DNA testing—Defendant preserved for appellate review the denial of his motion for post-conviction DNA testing. N.C.G.S. § 15A-270.1 explicitly states that the defendant may appeal an order denying the defendant's motion for DNA testing, including by an interlocutory appeal. **State v. Byers, 231.**

Preservation of issues—effective assistance of trial counsel—failure to raise claim on appeal—In a prosecution for multiple sexual offenses against a minor, where a determination could be made from the cold record that defendant's trial counsel provided ineffective assistance—by failing to move to strike inadmissible testimony by the State's expert witness who opined that the victim had been

APPEAL AND ERROR—Continued

CHILD CUSTODY AND SUPPORT—Continued

Modification—substantial change in circumstances—new information—In an action to modify custody, the trial court did not err by finding a substantial change in circumstances existed to justify modifying custody based on previously undisclosed or unknown information that the minor child suffered from food allergies, confirmed by a court-appointed medical expert, and that the non-movant parent was in denial of those allergies and refused to alter the child's diet. **Peeler v. Joseph, 198.**

Pending claim—new complaint—no subject matter jurisdiction—The trial court did not have subject matter jurisdiction to consider the maternal grandfather's independent complaint for child custody against the paternal grandparents where both parents were deceased, the paternal grandparents had been awarded temporary custody, and that action had not abated. The proper procedure for plaintiff was to file a motion to intervene and a motion for custody in the pending custody action. **Rivera v. Matthews, 652.**

Support—Rule 60 motion—jurisdiction—The trial court did not err by denying plaintiff's Rule 60(b)(4) motion in an action involving a Swiss support judgment where the trial court possessed jurisdiction by statute. Although the issue was not raised below, questions concerning subject matter jurisdiction may be raised for the first time on appeal. **Gyger v. Clement, 118.**

CIVIL PROCEDURE

Entry of default—motion to set aside—good cause—diligence in pursuit of matter—In a breach of contract action, the trial court did not abuse its discretion by denying defendant's motion to set aside entry of default where defendant did not show good cause pursuant to Civil Procedure Rule 55(d). Defendant took no action during the two months following a Court of Appeals decision in the matter (regarding the denial of defendant's motion to dismiss for lack of subject matter jurisdiction), and he admitted that he did not fully comply with the terms of the separation agreement and the property settlement. **Jones v. Jones, 606.**

Motion for reconsideration—Rule 60(b)—surprise—conversion of motion in limine into bench trial—The trial court abused its discretion by denying plaintiffs' motion for reconsideration in a boundary dispute where it had improperly converted plaintiffs' motion in limine into a bench trial and decided the ultimate factual issue of the location of the boundary line. Because there was no notice or basis to know that the trial court would decide the location of the boundary line in the hearing calendared for the motion in limine (to consider plaintiffs' request that the court order the surveyor to disregard a certain map), the ruling constituted a surprise which ordinary prudence could not have guarded against under Civil Procedure Rule 60(b). **Ayscue v. Griffin, 1.**

Summary judgment—burden of responding—Defendant failed to meet his burden of production in responding to plaintiff's summary judgment motion in an action on a credit card account where he relied on the allegations and denials in his unverified answer. The record does not indicate that defendant filed any affidavits, verified pleadings, or verified answers to interrogatories opposing plaintiff's motion. **Bank of Am., N.A. v. McFarland, 15.**

Summary judgment—no genuine issue of fact—initial burden—Plaintiff met its initial burden for obtaining summary judgment in an action to recover debt on a credit card account by showing that plaintiff had a valid contract and that defendant was in

CONSTITUTIONAL LAW—Continued

COURTS—Continued

lacked discretion to consider the substance of the motion because the N.C. Supreme Court's decision was the law of the case. But the trial court's denial of plaintiff's motion was affirmed since it was the correct result—even if correct for the wrong reason. **McLaughlin v. Bailey, 647.**

CRIMINAL LAW

Defense of habitation—jury instruction—In a prosecution for assault with a deadly weapon inflicting serious injury, defendant should have been afforded a jury instruction on the defense of habitation where he intended to and did shoot at the victim while under attack inside his home. **State v. Coley, 249.**

Felony death by vehicle—prosecutor's closing argument—propriety—In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, the trial court was not required to intervene in the prosecutor's closing argument, where the entirety of the closing argument correctly stated the law regarding impairment and the trial court's instruction on impairment was not challenged by defendant. Moreover, the State's appeal to the jury to be the voice and conscience of the community when considering the verdict was not so grossly improper that intervention was required. **State v. Shelton, 681.**

Jury instructions—instructions requested by defendant—sufficiency of charge—jailhouse informant—In a first-degree murder prosecution in which a jailhouse informant testified against defendant in the hope of a charge reduction, the trial court did not err in providing the pattern jury instructions regarding interested witnesses, informants, and the jury's ability to consider a witness's interest, bias, prejudice, and partiality—while omitting defendant's requested instructions. The trial court's charge was sufficient to address the concerns about the informant's credibility that motivated defendant's request for a special instruction. **State v. Smith, 550.**

Post-conviction DNA testing—inventory—The statutory procedure for an inventory of evidence for post-conviction DNA testing is set out in N.C.G.S. § 15A-268(a7) and N.C.G.S. § 15A-269(f). In this case, there was no evidence in the record that defendant made a request to a custodial agency and was not entitled to an inventory of the evidence under section 15A-268(a7). **State v. Byers, 231.**

Post-conviction DNA testing—inventory—timing—The trial court did not err by denying defendant's motion for post-conviction DNA testing prior to obtaining and reviewing the inventory. N.C.G.S. § 15A-269(b) clearly lays out the conditions that must exist prior to granting a motion for post-conviction DNA testing; obtaining and reviewing the results of an inventory prepared by a custodial agency is not one of the conditions. Whether the requested evidence is still in the possession of the custodial agency is immaterial to the trial court's determination. **State v. Byers, 231.**

Self-defense—failure to instruct—The trial court erred by failing to instruct the jury on self-defense in a prosecution for assault with a deadly weapon inflicting serious injury where competent evidence was presented showing that defendant had an objectively reasonable belief that he needed to use deadly force to repel another assault by the victim. Although the prosecutor introduced the idea of a warning shot, which would not entitle defendant to a self-defense instruction, defendant's testimony taken as a whole supported his argument that he shot the victim and intended to do so, in order to protect himself. Intent to kill is not necessary for self-defense and sufficient evidence was presented to provide an instruction on self-defense to the jury. **State v. Coley, 249.**

DIVORCE

Alimony—earning capacity—imputed income—In an action for alimony, the trial court did not err by imputing income to a husband from a side business repairing motorcycles where the trial court's determination that the husband deliberately suppressed his income in bad faith was supported by competent evidence. **Walton v. Walton, 380.**

Alimony—imputed income—bad faith required—In an action for alimony, the trial court did not err by declining to impute income to a wife for her earning capacity from an abandoned business to make and sell chocolate, since the trial court made no finding that she had acted in bad faith, and the husband did not argue on appeal that the trial court should have made such a finding. **Walton v. Walton, 380.**

Alimony—monthly expenses—determination of third-party contribution—sufficiency of findings—In an action for alimony, the trial court erred by imputing to a husband the contribution to his monthly living expenses that the trial court reasoned his live-in girlfriend should be making, without first finding the husband acted in bad faith to inflate his expenses or reduce his income by failing to seek contribution from his girlfriend, or making any findings regarding her income or ability to pay. The trial court also erred by reducing several of the husband's monthly expenses by half without explanatory findings of fact why one-half of the husband's claimed expenses were unreasonable. **Walton v. Walton, 380.**

Alimony—pleadings—lack of provocation—The trial court did not err in an alimony action by finding that defendant husband committed marital fault even though the wife did not allege a lack of provocation. Defendant's argument was treated on appeal as a Rule 12(b)(6) motion to dismiss for failure to state a claim, and denial of such a motion is not properly presented in an appeal from a judgment on the merits. **Gilmartin v. Gilmartin, 104.**

Alimony—sexual activity—condonation—The trial court did not err in an alimony action by not finding that the wife condoned the husband's illicit sexual behavior. Although the wife was aware of two affairs in 2008 and the parties remained together, almost all of the findings regarding fault addressed sexual indignities (an addiction to pornography and online communications with women), not illicit sexual behavior. The evidence and findings showed that the husband was deceiving his wife regarding these activities. **Gilmartin v. Gilmartin, 104.**

Equitable distribution—distributive award—death of spouse—not claim against estate—In an action to enforce an equitable distribution order granting a distributive award to plaintiff, plaintiff's declaratory judgment claim was not time-barred by the provisions of Chapter 28A, since the distributive award was not part of the decedent's estate (of plaintiff's former spouse), and plaintiff was therefore not required to adhere to Chapter 28A's filing and notice requirements. The equitable distribution order vested in plaintiff a property right and did not constitute a claim against decedent's estate. **Smith v. Rodgers, 662.**

Equitable distribution—military retirement—federal preemption—The trial court erred by ordering an executrix to make defendant (a former spouse) the sole beneficiary of plaintiff's military survivor benefit plan (SBP) pursuant to an equitable distribution order where the equitable distribution order was not submitted to the Defense Finance and Accounting Services within the year it was entered, as required by the U.S. Code. Federal law preempts state law as to a former spouse's right to claim entitlement to an SBP annuity. **Watson v. Watson, 404.**

ENGINEERS AND SURVEYORS—Continued

Surveyors—standard of care—no statutory standard—The legislature intended its rules on surveying to protect property interests in North Carolina. Neither N.C.G.S. § 89C-2, stating that surveying is subject to regulation, nor provisions in the administrative code regulating the profession created a specific standard of care for surveyors. **Lamb v. Styles, 633.**

Surveyors—statute of limitations—ten years—no expansion of duty of care—The fact that the statute of limitations for surveyors is ten years rather than the three years of other professional negligence claims does not create or expand surveyors' duty of care. Statutes of limitations are purely procedural bars to bringing claims and affect only the remedy and not the right to recover. **Lamb v. Styles, 633.**

ESTATES

Life tenancy—timber harvesting—waste—no claim by remaindermen—Grandchildren-remaindermen had no claim for waste of their inheritance where rights to large trees (defined as 12 inches or more in diameter) had been expressly granted to the life tenant, even if some of those trees were cut without the life tenant's authorization, because any damages would have accrued to the life tenant. **Jackson v. Don Johnson Forestry, Inc., 487.**

Life tenancy—timber rights—This action involved the alleged unauthorized cutting of timber from land subject to a life estate where the fee simple owner bequeathed to the life tenant more timber rights than are normally held by a life tenant. Under the terms of the life estate, the deceased holder of the life estate had the unfettered right during her life tenancy to profit from any large tree (defined as 12 inches or more in diameter). Her right to the smaller trees during the life tenancy was limited to that of a life tenant. **Jackson v. Don Johnson Forestry, Inc., 487.**

Life tenancy—timber rights—remaindermen—In a case involving a life tenant, remaindermen, and timber rights, the grandchildren-remaindermen were entitled to any damage from the cutting of trees less than 12 inches in diameter (small trees) where the fee simple holder (the grandfather) had expressly conveyed rights in large trees (more than 12 inches in diameter) to the life tenant. The life tenant's interest in the small trees was only that of a life tenant, as the fee simple holder had not granted her any additional rights to those trees in the will. There was no evidence that small trees were cut for any reason other than for profit, which is not permissible for a life tenant to enjoy. **Jackson v. Don Johnson Forestry, Inc., 487.**

Life tenancy—timber rights—unauthorized cutting—A timber broker was not liable to grandchildren-remaindermen as a matter of law where the timber broker relied on a power of attorney when contracting to harvest timber from land subject to a life estate while the life tenant was alive. There was no evidence of actionable negligence or bad faith by the broker, who acted reasonably and in good faith. **Jackson v. Don Johnson Forestry, Inc., 487.**

Life tenancy—timber rights—unauthorized cutting—remaindermen—standing—In a case involving a deceased life tenant, remaindermen, and timber rights, the grandchildren-remaindermen had standing to seek relief for damage caused by any unauthorized timber cutting on the property which occurred during the life tenancy. It is irrelevant whether the grandchildren-remaindermen's interest in the property was vested or contingent under the will. They did not bring suit until after the life tenant's death; contingent remaindermen may bring suit for damages after their interest vests, even for acts committed during the life tenancy. **Jackson v. Don Johnson Forestry, Inc., 487.**

EVIDENCE—Continued

given for a victim who was found dead in a bathtub with a hair dryer, the trial court did not err by admitting expert testimony and evidence regarding an electrical experiment to determine the amount of current leakage from a hair dryer when submerged in water. Defendant's arguments challenging the qualifications of the experts, reliability of their methods, and form of the experiment were rejected. **State v. Holmes, 289.**

Felony death by vehicle—officer testimony—prejudice analysis—In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, defendant failed to show that he was prejudiced by the exclusion of testimony of an investigating officer that he did not charge defendant with driving while impaired immediately after the collision. Even if the trial court erred by sustaining the State's objection, it was apparent that defendant was not charged separately with that offense, a fact acknowledged by the prosecutor during closing argument. **State v. Shelton, 681.**

Indecent liberties—cross-examination—alleged prior assault of minor daughter—impeachment purposes—In a prosecution for taking indecent liberties with a child and solicitation of a child by computer, the trial court did not err by allowing the State to cross-examine defendant for impeachment purposes about an alleged prior sexual assault of defendant's then-minor daughter, despite the State initially stating it would not present the evidence for Rule 404(b) purposes because the daughter declined to testify. No prejudicial error occurred because the State's questions did not themselves constitute evidence, and defendant's conclusive denials rendered the questioning harmless. **State v. Heelan, 275.**

Prior bad acts—dissimilar to criminal conduct—lack of prejudice—In a prosecution for first-degree sex offense with a child, defendant failed to demonstrate he was prejudiced by the trial court's admission of evidence that defendant and the victim watched pornography together, given the overwhelming evidence establishing defendant's guilt, including testimony from the victim and defendant's recorded admissions. **State v. Godfrey, 264.**

Prior bad acts—recorded statement—temporal proximity to charged offense—In a prosecution for first-degree sex offense with a child, the trial court did not err by admitting a recorded statement defendant made to the victim that he remembered the first incident of the specific sexual act he perpetrated against her even though the date of that incident was not given. Since the referenced act was similar to the one giving rise to the criminal charge and was evidence of a common scheme or plan, any remoteness in time went to the weight of the evidence, not its admissibility. **State v. Godfrey, 264.**

Prior bad acts—same victim—same acts—common plan or scheme—In a prosecution for first-degree sex offense with a child, the trial court did not err or abuse its discretion by admitting testimony from the victim regarding two prior incidents involving the same type of sexual act perpetrated against her by the defendant, because the incidents were not too remote in time, indicated a common plan or scheme, and were not so highly prejudicial as to require exclusion. Further, the trial court gave limiting instructions to the jury to consider the testimony only for the purpose for which it was admitted. **State v. Godfrey, 264.**

Relevance—jailhouse attack—defendant's guilt and informant's credibility—In a first-degree murder prosecution, the trial court did not err by admitting a jailhouse informant's testimony that he was threatened by defendant and then attacked by another inmate for "telling on" defendant when he returned to jail after testifying for the State in a pretrial hearing. The challenged testimony was relevant

SPECIFIC PERFORMANCE—Continued

defendant had the ability to comply with an order for specific performance of a separation agreement and property settlement, where there were numerous findings regarding defendant's income, savings, and monthly expenses. **Jones v. Jones, 606.**

TERMINATION OF PARENTAL RIGHTS

Abandonment—consent order—void as against public policy—The trial court erred in a termination of parental rights proceeding by concluding that respondent-father willfully abandoned his children through a consent order that was void as against public policy. There is a two-step judicial process that must be followed in proceedings for the termination of parental rights. **In re C.K.C., 158.**

Abandonment—willfulness—findings not sufficient—The trial court erred in a termination of parental rights proceeding based on abandonment where the trial court did not address willfulness. The child was three years old and any communication with her, gifts to her, or requests to visit would have been directed to the mother, but there was a domestic violence prevention order (DVPO) that specifically prohibited the father from harassing the mother and required him to stay away from her. The DVPO effectively kept the father from visiting or trying to visit the child. **In re I.R.L., 481.**

Failure to pay child support—findings—The trial court erred in a termination of parental rights proceeding by concluding that the father was subject to termination based on willful failure to pay child support. The termination order did not have findings indicating that a child support order existed or that the father failed to pay support as required by the child support order. **In re I.R.L., 481.**

Grounds—notice—The trial court could not terminate a father's parental rights based on failure to pay support where the mother did not allege a "willful" failure to pay as required by a support or custody agreement. The mother's bare allegation that the father failed to provide substantial financial care or consistent care was insufficient to put the father on notice of the specific statutory ground for termination. **In re I.R.L., 481.**

Neglect—by abandonment—consent order—void as against public policy—To the extent that the trial relied on a consent order that was void as against public policy, it erred by concluding that grounds existed to terminate a father's parental rights for neglect based on abandonment. **In re C.K.C., 158.**

Willful abandonment—motion requesting custody—The trial erred by finding that respondent-father willfully abandoned his children and terminating his parental rights where, during the six months immediately preceding the petition, respondent-father filed a motion in the cause seeking to modify a prior consent order and requesting that he be granted custody. His motion thoroughly averted the trial court's determination that he willfully abandoned the children. **In re C.K.C., 158.**

TRIALS

Right to jury trial—on factual issues—waivers strictly construed—The trial court erred by determining the location of a boundary line without a jury trial where plaintiffs and defendants had both demanded a jury trial. The location of the boundary line was the ultimate factual issue in the action, and waivers of the right to a jury trial are strictly construed and not lightly inferred. **Ayscue v. Griffin, 1.**