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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARK STEVEN BEZZEK, PLAINTIFF
v.
SHERRY LEE BEZZEK, DEFENDANT

No. COA18-761

Filed 19 February 2019

Appeal and Error—interlocutory appeal—validity of separation agreement

An appeal was dismissed as interlocutory where the only substantive issue was the validity of a separation agreement, the order on appeal did not fall within those set forth in N.C.G.S. § 50-19.1 for which an interlocutory appeal may be taken, the trial court did not certify the claim for immediate appeal, and the wife made no claim of a substantial right that would be lost without immediate appeal. The Court of Appeals chose not to issue a writ of certiorari on its own motion.

Appeal by defendant from order entered 27 February 2018 by Judge Joseph M. Buckner in District Court, Orange County. Heard in the Court of Appeals 30 January 2019.

No brief filed for plaintiff-appellee.

M. Noah Oswald, for defendant-appellant.

STROUD, Judge.

In April of 2016, plaintiff filed a complaint for absolute divorce and equitable distribution. On 31 May 2016, defendant filed an answer to the

complaint which admitted the allegations relevant to absolute divorce but also included a motion to dismiss the claim for equitable distribution, alleging the parties had entered into a "Separation Agreement" ("Agreement") which "addressed the matters of equitable distribution" and thus "waived their right to equitable distribution by the express terms thereof." On 28 June 2016, the trial court entered an order of absolute divorce acknowledging the Agreement but ultimately reserving the issue of equitable distribution for further proceedings.

On 2 December 2016, plaintiff filed a motion to rescind or set aside Agreement based upon fraud, duress, undue influence, Wife's failure to disclose assets, unconscionability, and in the alternative, impossibility of performance. Husband also filed a motion for establishment of child support, alleging that he was unable to pay the child support established by the Agreement and requesting the trial court to set child support according to the North Carolina Child Support Guidelines. The trial court held a hearing on Husband's motion to set aside the Agreement on 23 August, 5 September, and 28 September 2017, and on 27 February of 2018, the trial court entered an order with extensive findings of fact regarding Wife's fraud; failure to disclose many assets to Husband, in breach of paragraph 14 of the Agreement; duress; undue influence; unconscionability; and impossibility. The trial court concluded that Husband was entitled to relief and that the Agreement was void. The trial court decreed that:

> 1. The June 25, 2015 Contract of Separation and Martial Settlement Agreement is rescinded, set aside, and void and of no legal effect;
>
> 2. Plaintiff may proceed on his claim of Equitable Distribution.

Defendant filed a notice of appeal from the 27 February 2018 order. In the "STATEMENT OF GROUNDS FOR APPELLATE REVIEW" in her brief, Wife claims simply that "Judge Buckner's February 27, 2018 Order is a final judgment from a district court in a civil action, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)." But the order is not a final order, since the equitable distribution claim is still pending before the trial court.[1]

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be determined between

1. The motion for establishment of child support was also still pending according to our record.

> them in the trial court. An interlocutory order, on the other hand, 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.

Cagle v. Teachy, 111 N.C. App. 244, 246–47, 431 S.E.2d 801, 803 (1993) (citation omitted).

> When an appeal is interlocutory and not certified for appellate review pursuant to Rule 54(b), the appellant must include in the statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. Otherwise, the appeal is subject to dismissal.

Peters v. Peters, 232 N.C. App. 444, 447, 754 S.E.2d 437, 440 (2014) (citation, quotation marks, and brackets omitted).

Wife has the burden of establishing a right to appeal this interlocutory order:

> Rule 28(b) of the North Carolina Rules of Appellate Procedure provides, in relevant part:
>
> > An appellant's brief shall contain a statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.
>
> While our Supreme Court has held that noncompliance with nonjurisdictional rules such as Rule 28(b) normally should not lead to dismissal of the appeal, when an appeal is interlocutory, Rule 28(b)(4) is not a nonjurisdictional rule. Rather, the only way an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right.

Edwards v. Foley, ___ N.C. App. ___, ___, 800 S.E.2d 755, 756 (citations, quotation marks, ellipses, and brackets omitted), *writ of supersedeas and petition for disc. review denied*, 370 N.C. 377, 807 S.E.2d 571 (2017).

The trial court did not certify the order for review under Rule 54(b), so Wife must show that she has

> been deprived of a substantial right pursuant to N.C. Gen. Stat. §§ 1–277 and 7A–27(d)(1). This Court has stated that to be immediately appealable on the foregoing basis, a party has the burden of showing that: (1) the judgment affects a right that is substantial; and (2) the deprivation of that substantial right will potentially work injury to him if not corrected before appeal from final judgment. Whether a substantial right will be prejudiced by delaying appeal must be determined on a case by case basis.

Collins v. Talley, 135 N.C. App. 758, 760, 522 S.E.2d 794, 796 (1999) (citation omitted). Wife has made no argument of any deprivation of a substantial right that would be lost without immediate appeal, so she has not carried her burden under Rule 28. *See Edwards*, ___ N.C. App. at ___, 800 S.E.2d at 756.

In the absence of showing deprivation of a substantial right, although not mentioned by defendant, this Court has jurisdiction to review some interlocutory family law orders under North Carolina General Statute § 50-19.1, but an order ruling upon the validity of a separation agreement is not specifically enumerated as one such order:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

N.C. Gen. Stat. Ann. § 50-19.1 (2018).[2] The order on appeal does not fall within the types of orders set forth in N.C. Gen. Stat. S 50-19.1, and

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2. North Carolina General Statute § 50-19.1 was first adopted in 2013, and it originally did not include "the validity of a premarital agreement as defined by G.S. 52B-2(1)" in the list of orders for which an interlocutory appeal could be taken; this language was added by an amendment in 2018. *See* N.C. Gen. Stat. § 50-19.1 Editor's Note. North Carolina General Statute § 52B-2(1) defines a "Premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." N.C. Gen. Stat. § 52B-2(1) (2017).

we cannot simply add the validity of a separation and property settlement agreement to this list.

We have also considered whether we should suspend the requirements of the Rules of Appellate Procedure to grant review by certiorari under Rule 2.

> Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to suspend or vary the requirements of the Rules to prevent manifest injustice to a party, or to expedite decision in the public interest. We exercise our authority under Rule 2 to consider the parties' appeals as petitions for certiorari, and we grant certiorari to review the trial court's interlocutory order.

Brown v. City of Winston-Salem, 171 N.C. App. 266, 269–70, 614 S.E.2d 599, 601–02 (2005) (quotation marks and brackets omitted). We have also considered treating Wife's brief as a petition for certiorari and allowing review under Rule 2, but in our discretion, we decline to do so. *See State v. Campbell*, ___ N.C. App. ___, ___, 810 S.E.2d 803, 814 ("The decision to allow review under Rule 2 is discretionary[.]"), *writ of supersedeas and disc. review allowe*d, ___ N.C. ___, 813 S.E.2d 849 (2018). First, Wife did not request a suspension of the Rules under Rule 2. Also, Husband did not file a brief in this appeal, and he may have decided not to file a brief in reliance upon Wife's failure to establish this court's jurisdiction to consider her appeal.

"It is the court's duty to dismiss an appeal *sua sponte* when no right of appeal exists." *Collins*, 135 N.C. App. at 762, 522 S.E.2d at 798. Since the validity of the Agreement is the only substantive issue addressed in the order appealed, and Wife has not made any argument regarding deprivation of a substantial right, we must dismiss this appeal as interlocutory. *See Peters*, 232 N.C. App. at 447, 754 S.E.2d at 440.

DISMISSED.

Judges DIETZ and BERGER concur.

RICHARD ALAN BRODKIN, PLAINTIFF
v.
NOVANT HEALTH, INC., FORSYTH MEMORIAL HOSPITAL, INC., VOLKER STIEBER, STEPHEN J. MOTEW, TIMOTHY S. COLLINS, AND THOMAS H. GROTE, DEFENDANTS

No. COA18-805

Filed 19 February 2019

1. Contracts—employment—terminable without cause—change of terms—doctor's treatment practices

Defendant-hospital was entitled to summary judgment on plaintiff-oncologist's breach of contract claim where the hospital demanded that the oncologist agree to limit some of his cancer treatment practices or else be fired. Even though the oncologist's employment contract gave him "exclusive control over decisions requiring professional medical judgment," the contract was terminable without cause, and the hospital merely indicated that it would terminate the contract unless the oncologist agreed to change the terms.

2. Employer and Employee—contract terminable without cause—wrongful discharge—public policy—doctor's decisions harmful to patients

Defendant-hospital was entitled to summary judgment on plaintiff-oncologist's claim for wrongful discharge where the employment contract was terminable without cause. Even assuming public policy protected doctors' independent judgment, such a policy would not prohibit a hospital from firing a doctor whose medical decisions, in the hospital's view, were harmful to patients.

3. Fraud—employment contract—exercise of professional medical judgment—termination for refusal to limit treatment practices

Defendant-hospital was entitled to summary judgment on plaintiff-oncologist's fraud claim where the hospital terminated the oncologist's employment for his refusal to agree to limit some of his treatment practices. The oncologist's employment was terminated many years after the parties entered the employment contract (which provided that the oncologist would "have exclusive control over decisions requiring professional medical judgment"), and there was no indication that the hospital intended to prevent the oncologist from exercising his independent medical judgment at the time the parties entered the contract.

4. Contracts—tortious interference with contract—employment contract—professional judgment clause—investigation for legitimate reasons

Defendant-doctor was entitled to summary judgment on plaintiff-oncologist's tortious interference with contract claim where plaintiff-oncologist argued that defendant-doctor induced defendant-hospital not to afford him his right to exercise his own professional medical judgment, which breached the professional judgment clause in his employment contract. The hospital's administrators had asked defendant-doctor to investigate concerns about plaintiff-oncologist's treatment of patients, and there was no evidence that defendant-doctor pursued the investigation for any reason other than his legitimate interest in carrying out his own role at the hospital.

5. Libel and Slander—defamation—doctor's treatment of patients—qualified privilege

Defendant-doctor was entitled to summary judgment on plaintiff-oncologist's claim for defamation where defendant-doctor emailed a hospital administrator to express concerns about plaintiff-oncologist's treatment of patients. Even assuming the email was defamatory, it was protected by qualified privilege—it addressed a legitimate concern, nothing indicated that it was sent with malice or bad faith, it was limited in scope, and it was directed to the proper party.

Appeal by plaintiff from orders entered 30 June 2017 by Judge John O. Craig and 1 February 2018 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 14 November 2018.

David B. Hough, P.A., by David B. Hough, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by G. Gray Wilson and Linda L. Helms, for defendant-appellee Volker Stieber.

Constangy, Brooks, Smith & Prophete, LLP, by Kristine M. Sims and William J. McMahon, IV, for defendants-appellees.

DIETZ, Judge.

Dr. Richard Alan Brodkin was an oncologist treating cancer patients at Forsyth Memorial Hospital[1] in Winston-Salem. In 2014, other

1. Forsyth Memorial Hospital is the legal name of the hospital, which the record indicates presently does business under the name Novant Health Forsyth Medical Center.

oncologists at the hospital became concerned about Dr. Brodkin's use of a treatment known as "induction chemotherapy." Ultimately, following disagreements in a collaborative meeting intended to ensure best practices, one of the other oncologists took his concerns to the head of the department. This resulted in a series of discussions, investigations, and reports that led the hospital to present Dr. Brodkin with an ultimatum: sign a letter agreeing to limit some treatment practices, or be fired.

When Dr. Brodkin refused to sign the letter, the hospital terminated his employment. Dr. Brodkin then filed this lawsuit, which included claims for breach of contract, wrongful discharge, tortious interference, fraud, and defamation. The trial court granted summary judgment in favor of the Defendants on all claims, and this appeal followed.

As explained below, the bulk of Dr. Brodkin's claims fail because his employment contract was terminable without cause and the hospital's decision to terminate the contract was neither a breach of contract nor a violation of our State's public policy. The fraud claim fails because there is no evidence of fraud in this record. The defamation claim fails because the challenged statements are protected by qualified privilege. Thus, because the trial court properly concluded that the defendants were entitled to judgment as a matter of law on all claims, we affirm the court's order.

Facts and Procedural History

In 2010, Forsyth Memorial Hospital purchased Dr. Richard Alan Brodkin's oncology practice. As part of the purchase, Dr. Brodkin became an employee of the hospital. When he began employment, he signed a contract entitled "Physician Employment Agreement." The contract contained various terms of the parties' employment relationship. The contract was terminable without cause by either party and had no definite term.

As part of his employment duties as an oncologist, Dr. Brodkin attended collaborative meetings with other hospital physicians who treat cancer patients. Together, these physicians would review patients' case files to ensure that the hospital's patients were receiving the best treatment possible. The meetings were referred to as "Tumor Board" meetings.

This case arose out of a disagreement among physicians attending these Tumor Board meetings. Some of Dr. Brodkin's fellow oncologists, including Dr. Volker Stieber, were concerned that Dr. Brodkin's use of a treatment known as "induction chemotherapy" was inconsistent with

National Comprehensive Cancer Network guidelines—a set of guidelines that reflected recommended treatment approaches from experts around the country—and that these induction chemotherapy treatments were not the appropriate course of treatment for Dr. Brodkin's patients.

Ultimately, Dr. Stieber complained to Dr. Susan Hines, the head of medical oncologists at the hospital. Dr. Hines asked Dr. Stieber to provide a list of patients who were impacted, and a description of Dr. Stieber's concerns with those patients' treatment. In response, Dr. Stieber prepared an email that summarized Dr. Brodkin's care of ten patients and explained why Dr. Stieber and some of his colleagues disagreed with those treatment decisions. Dr. Stieber's email did not reference Dr. Brodkin by name but it described the induction chemotherapy treatments provided to ten of Dr. Brodkin's patients and explained that Dr. Stieber and his "group" of physicians had concerns about whether this was the appropriate course of treatment. Dr. Stieber sent the email directly to Dr. Hines, copying Dr. Dawn Moose, but the record indicates that the email eventually circulated to other employees of the hospital.

In November 2014, Dr. Timothy Collins, the hospital's oncology service line lead, and Dr. Thomas Grote, the hospital's oncology practice lead, met with Dr. Brodkin to discuss Dr. Stieber's email. According to Dr. Brodkin, he was unaware of Dr. Stieber's email until this November meeting. Dr. Collins gave Dr. Brodkin one week to respond to the issues identified in Dr. Stieber's email and told him that Dr. Grote would later evaluate the situation and make a recommendation. Dr. Brodkin spent days reviewing his patients' records and preparing a response, which he then submitted to Dr. Grote.

Later, at the request of Dr. Collins and other supervisory staff at the hospital, Dr. Grote began a further review of Dr. Brodkin's patient care by forming a committee that consisted of oncologists from various specializations. The committee prepared a report with a series of forward-looking recommendations for Dr. Brodkin's treatment of patients.

On 4 February 2015, Dr. Stephen J. Motew, a hospital administrator, met with Dr. Brodkin and gave him a letter outlining the hospital's expectations moving forward. The expectations letter stated that Dr. Brodkin must follow the National Comprehensive Cancer Network guidelines "in virtually every case" and that if he departed from those guidelines in treating a patient he must first take the issue to the "tumor board for multidisciplinary discussion and approval." The letter stated that "[b]eginning immediately, you will follow the expectations outlined above providing patient care pursuant to the guidelines."

Dr. Motew told Dr. Brodkin that, if he did not sign this expectations letter, the hospital would terminate Dr. Brodkin's employment. Dr. Brodkin refused to sign the letter because he believed that "he was being punished, because other people's interpretation of the [NCCN] guidelines was not correct" and "the expectations were ridiculous, because [he] followed the guidelines in every case." Two days later, Dr. Brodkin circulated a lengthy email to his fellow medical oncologists at the hospital in which he explained why he believed his induction chemotherapy treatments were appropriate.

On 26 February 2015, Dr. Grote and Dr. Collins sent a letter to Dr. Motew discussing Dr. Brodkin's refusal to sign the expectations letter and stating that "[s]ince [Dr. Brodkin] is unwilling to sign this letter and commit to the group's consensus of our Standard of Care, we support his termination of employment at this time." On 27 February 2015, Dr. Motew again met with Dr. Brodkin and asked that he sign the letter. Dr. Brodkin refused. Dr. Motew then offered Dr. Brodkin the opportunity to resign, which Dr. Brodkin declined. The hospital then terminated Dr. Brodkin's employment.

Dr. Brodkin later sued the Defendants, asserting claims including breach of contract, wrongful discharge, fraud, tortious interference with contract, and defamation. After an opportunity for full discovery, the trial court granted summary judgment in favor of the Defendants on all claims in orders entered 30 June 2017 and 1 February 2018. Dr. Brodkin timely appealed.

Analysis

Dr. Brodkin argues that the trial court erred by granting summary judgment in favor the Defendants on each of the claims he asserted in this action. This Court reviews an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). When considering a summary judgment motion, we view the evidence in the light most favorable to the non-movant. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

I. Breach of Contract Claim

[1] We begin with Dr. Brodkin's breach of contract claim. To establish a breach of contract claim, there must be: (1) the existence of a valid

contract and (2) a breach of a contractual term. *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 333, 713 S.E.2d 495, 500 (2011).

Our analysis of this claim involves two separate clauses in the employment contract, and we quote the relevant contract language here for ease of understanding. First, the contract provides that Dr. Brodkin "will have exclusive control over decisions requiring professional medical judgment":

> 3. DUTIES AND EXTENT OF SERVICES
>
> a. Practice of Medicine. . . . Physician shall exercise independent professional judgment in the treatment and care of patients and, in this regard, will have exclusive control over decisions requiring professional medical judgment.

Second, the contract provides that either party may terminate it without cause by providing 90 days' notice:

> 14. TERMINATION OF EMPLOYMENT
>
> . . .
>
> b. Termination Without Cause. Either party may terminate Physician's employment without cause by providing the other party at least ninety (90) days' written notice of its intention to terminate, such termination to be effective as of the date specified in the notice, but not prior to the expiration of the ninety (90) day notice period.

Dr. Brodkin's argument is straightforward. He contends that, when the hospital presented him with the expectations letter and demanded that he sign it or be fired, the hospital breached the contract. He argues that the expectations letter would have required him to pursue courses of treatment with which he disagreed, thus eliminating his exclusive control over decisions involving his professional medical judgment. Because the contract guaranteed that he would retain exclusive control of his medical judgment, Dr. Brodkin contends that the hospital's demand to sign the expectations letter breached the contract.

The flaw in this argument is that, even assuming Dr. Brodkin's interpretation of the professional judgment clause is correct (the hospital disagrees with that interpretation), there is no evidence that the hospital ever prevented Dr. Brodkin from exercising his professional judgment, or that it took any disciplinary action against him for exercising that independent judgment. The hospital only sought to monitor (and

potentially restrict) Dr. Brodkin's *future* treatment decisions. It did so by requesting that Dr. Brodkin agree to either amend the contract or waive the professional judgment clause as a condition of continuing the parties' contractual relationship (which the hospital could terminate at any time).

Put another way, what happened here is what happens in countless contract relationships that are terminable without cause at any time: one party indicated that it would need to terminate the contract unless the parties agreed to change the terms. So long as the party requesting the change has not yet materially breached the contract (as is the case here), requesting an amendment or waiver of an otherwise binding contract term is not a breach. *See*, *e.g.*, *Varnell v. Henry M. Milgrom*, *Inc.*, 78 N.C. App. 451, 454, 337 S.E.2d 616, 618 (1985). Thus, because the hospital had not breached the contract at the time it terminated without cause, the trial court properly determined that the hospital was entitled to judgment as a matter of law on Dr. Brodkin's breach of contract claim.

II. Wrongful Discharge Claim

[2] We next address Dr. Brodkin's claim that his termination for refusing to sign the expectations letter violated North Carolina public policy and thus amounted to wrongful discharge. Ordinarily, an employee whose contract is terminable without cause "has no claim for relief for wrongful discharge." *Privette v. Univ. of North Carolina at Chapel Hill*, 96 N.C. App. 124, 133, 385 S.E.2d 185, 190 (1989). But there is a limited exception to this rule where the termination runs contrary to our State's public policy. *Considine v. Compass Grp. USA*, *Inc.*, 145 N.C. App. 314, 317, 551 S.E.2d 179, 181 (2001). To prevail, "the employee has the burden of pleading and proving that the employee's dismissal occurred for a reason that violates public policy." *Id.*

Dr. Brodkin has not met that burden here. He contends that N.C. Gen. Stat. § 90-14(a)(6), a statute that protects physicians from certain regulatory discipline for pursuing experimental treatments, demonstrates a North Carolina public policy in favor of safeguarding physician independence. But even assuming this is true—an issue we need not address today—that would not prevent a hospital from discharging an employee whose medical decisions, in the hospital's view, are harmful to its patients.

As the Oregon Court of Appeals has observed, "although [a doctor] may have had a duty to exercise his professional judgment, other doctors had no duty to agree with him, nor did [a hospital] have an obligation to accept [the doctor's] judgment over the judgment of its other

doctors." *Eusterman v. Northwest Permanente, P.C.*, 129 P.3d 213, 220 (Or. App. 2006). Put another way, even assuming there is a public policy protecting physicians' independent judgment, that policy would not force an employer (whether a hospital or other physicians in a shared practice) to continue employing or partnering with a physician whose professional judgment they believe is wrong. Accordingly, we reject Dr. Brodkin's public policy argument and hold that the trial court did not err in granting summary judgment on the wrongful discharge claim.

III. Fraud Claim

[3] We next address Dr. Brodkin's fraud claim. Dr. Brodkin argues that the hospital committed fraud when the parties initially entered into an employment contract nearly a decade ago. He asserts that the hospital never had any intention of affording Dr. Brodkin independent medical judgment, despite the professional judgment language in the contract, and mispresented that fact to Dr. Brodkin during contract negotiations.

To establish a claim of fraudulent misrepresentation, the plaintiff must show: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party. *Taylor v. Gore*, 161 N.C. App. 300, 303, 588 S.E.2d 51, 54 (2003).

Here, there is no evidence in the record that the hospital either falsely represented any material fact concerning the employment contract or intended to deceive Dr. Brodkin about any material fact in the contract. As explained above, at best, the record indicates that the hospital sought to limit some of Dr. Brodkin's treatment methods after other oncologists expressed concerns. This occurred many years after the parties entered into the employment contract. There is nothing in the record from which a reasonable jury could infer that the hospital made any misrepresentations, or intended to deceive Dr. Brodkin, at the time the parties entered into the contract. Accordingly, the trial court properly granted summary judgment on this claim.

IV. Tortious Interference With Contract Claim

[4] We next address Dr. Brodkin's claim that Dr. Grote tortiously interfered with the employment contract. To establish a claim for tortious interference with contract, there must be "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5)

resulting in actual damage to plaintiff." *United Labs, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

Dr. Brodkin claims that Dr. Grote induced the hospital not to afford Dr. Brodkin his right to his own professional medical judgment, which in turn breached the professional judgment clause in the contract. This claim fails because, as explained above, the hospital did not breach the contract. Moreover, when the person who allegedly interferes with the contract is an employee of the defendant, the plaintiff must show that the alleged interference was unrelated to a "legitimate business interest" of the employee. *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 308, 382 S.E.2d 836, 841 (1989). Here, the record indicates that hospital administrators tasked Dr. Grote with investigating and addressing concerns about Dr. Brodkin's treatment of patients. There is no evidence in the record that Dr. Grote pursued that investigation for reasons other than his legitimate interest in carrying out his own role within the hospital hierarchy. Accordingly, the trial court properly entered summary judgment on this tortious interference claim.

V. Defamation Claim

[5] Finally, we address Dr. Brodkin's defamation claim against Dr. Stieber. Dr. Brodkin argues that Dr. Stieber defamed him by emailing a hospital administrator expressing concerns about Dr. Brodkin's treatment of patients. Because the communications are protected by the affirmative defense of qualified privilege, we disagree.

"To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed." *Daniels v. Metro Magazine Holding Co, L.L.C.*, 179 N.C. App. 533, 538–39, 634 S.E.2d 586, 590 (2006). But even if a statement satisfies these criteria for defamation—an issue we need not reach in this case—the defendant can assert the affirmative defense of qualified privilege. *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 283, 182 S.E.2d 410, 414 (1971). Qualified privilege is established if the communication is made in good faith, there is an interest to be upheld, the statement is limited in scope to its purpose, the publication is directed to proper parties, and the statement was not made with malice or through excessive publication. *Harris v. The Proctor & Gamble Mfg. Co.*, 102 N.C. App. 329, 331, 401 S.E.2d 849, 850–51 (1991).

Evening assuming Dr. Stieber's email otherwise would be defamatory (and we are not persuaded that it would be), the email is protected by qualified privilege. The email addressed legitimate concerns Dr. Stieber had with the course of treatment for many of Dr. Brodkin's

patients. Ensuring that cancer patients receive the appropriate medical treatment is unquestionably an important interest for all parties in this lawsuit, including Dr. Stieber. Moreover, there is nothing in the record from which a reasonable jury could infer that Dr. Stieber acted with any malice or bad faith; to the contrary, the record indicates that Dr. Stieber had a good faith disagreement with a fellow cancer doctor about the appropriate course of treatment during a meeting designed to encourage honest debate. Dr. Stieber discussed those concerns with the hospital's head of oncology, who requested that Dr. Stieber compile the concerns in an email. That is precisely what Dr. Stieber did in this case. Accordingly, the trial court properly granted summary judgment on the defamation claim because it is barred by the affirmative defense of qualified privilege.

Conclusion

For the reasons stated above, we affirm the trial court's orders.

AFFIRMED.

Chief Judge McGEE and Judge ARROWOOD concur.

ERIC DENNEY, AND WIFE CHRISTINE DENNEY, PLAINTIFFS
v.
WARDSON CONSTRUCTION, INC., AND HEALTHY HOME INSULATION, LLC, DEFENDANTS

No. COA18-667

Filed 19 February 2019

Appeal and Error—interlocutory appeal—res judicata defense—substantial right—required factual showing

An appeal from a partial summary judgment order rejecting some of defendant construction company's res judicata defenses was dismissed as interlocutory where defendant did not include in the statement of grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of the case. Although defendant contended that a ruling by the trial court on a res judicata defense affects a substantial right as a matter of law, the cases cited by defendant did not examine and reject the notion that the appellants must show that the appeal is permissible

based on the particular facts of the case. The Court of Appeals found controlling a separate line of cases requiring an individualized factual showing.

Appeal by defendant from order entered 14 February 2018 by Judge Vince Rozier in Wake County Superior Court. Heard in the Court of Appeals 16 January 2019.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr., and L. Lamar Armstrong, III, for plaintiffs-appellees.

George B. Currin, and Lewis & Roberts, PLLC, by Matthew D. Quinn, for defendant-appellant.

DIETZ, Judge.

Defendant Wardson Construction, Inc. appeals a partial summary judgment order rejecting some of Wardson's res judicata defenses. Wardson concedes that this appeal is interlocutory and, notably, does not assert on appeal that the trial court's partial rejection of its res judicata defense creates any actual risk of inconsistent verdicts—meaning a risk that separate fact-finders reach conflicting results on the same factual issues.

Instead, relying on a handful of decade-old cases, Wardson contends that the denial of a res judicata defense is immediately appealable in every case as a matter of law. As explained below, this argument has been considered and rejected by this Court many times. As we recently reaffirmed, "invocation of res judicata does not automatically entitle a party to an interlocutory appeal of an order rejecting that defense." *Smith v. Polsky*, __ N.C. App. __, __, 796 S.E.2d 354, 359 (2017). For clarity, we once again hold that appellants in interlocutory appeals involving the defense of res judicata must show that the challenged order creates a risk of inconsistent verdicts or otherwise affects a substantial right based on the particular facts of the case. Because Wardson did not do so here, we dismiss this appeal for lack of appellate jurisdiction.

Facts and Procedural History

This dispute began after Eric Denney claimed that Wardson Construction and its subcontractor failed to properly install spray foam insulation during construction of Denney's home. In 2015, Denney sued Wardson and the subcontractor, asserting claims for breach of contract, fraudulent or negligent misrepresentation, and negligence. Defendants

later moved for summary judgment on all claims. In 2016, the trial court granted partial summary judgment for Defendants, dismissing the fraud and negligence claims but permitting the breach of contract claim to proceed. Denney then voluntarily dismissed the suit.

In 2017, Denney and his wife filed a new lawsuit, asserting claims for breach of express warranty, breach of implied warranty, breach of contract, unfair and deceptive trade practices, fraud, conversion, and unjust enrichment. Wardson moved for summary judgment, arguing that all claims in the new lawsuit, except the breach of contract claim, were barred by res judicata.

The trial court again granted partial summary judgment, ruling that the fraud, conversion, and unjust enrichment claims were barred by res judicata, but permitting the remaining claims to proceed. Wardson timely appealed.

Analysis

"Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court." *Crite v. Bussey*, 239 N.C. App. 19, 20, 767 S.E.2d 434, 435 (2015). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015).

There is a statutory exception to this general rule when the challenged order affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a). To confer appellate jurisdiction in this circumstance, the appellant must include in its opening brief, in the statement of the grounds for appellate review, "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Larsen*, 241 N.C. App. at 77, 772 S.E.2d at 95.

Importantly, this Court will not "construct arguments for or find support for appellant's right to appeal from an interlocutory order" on our own initiative. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). That burden falls solely on the appellant. *Id.* As a result, if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction. *Larsen*, 241 N.C. App. at 79, 772 S.E.2d at 96.

Although this rule seems straightforward in the abstract, it is complicated by different rules concerning *how* a litigant must show that

a substantial right is affected. Some rulings by the trial court affect a substantial right essentially as a matter of law. Sovereign immunity is an example. A litigant appealing the denial of a sovereign immunity defense need only show that they raised the issue below and the trial court rejected it—there is no need to explain why, on the facts of that particular case, the ruling affects a substantial right. *See*, *e.g.*, *Ballard v. Shelley*, __ N.C. App. __, __, 811 S.E.2d 603, 605 (2018).

By contrast, most interlocutory issues require more than a categorical assertion that the issue is immediately appealable. In these (more common) situations, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right.

Wardson acknowledges that this appeal is interlocutory but contends that rejection of a res judicata defense is like rejection of a sovereign immunity defense—meaning there is no need to explain why the facts of this particular case warrant immediate appeal. The company points to a series of decisions from this Court that, in its view, "expressly adopted a bright-line rule" that any order rejecting a res judicata defense is immediately appealable. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005); *Wilson v. Watson*, 136 N.C. App. 500, 501, 524 S.E.2d 812, 813 (2000); *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999).

We are not persuaded that these decisions mean what Wardson claims. To be sure, these cases all permitted an immediate appeal of a res judicata issue. But none of these cases examined and rejected the notion that the appellants must show the appeal is permissible based on the particular facts of their case. Instead, the Court in these cases simply held that the appeal was permissible, without a detailed analysis of the distinction between the types of issues that categorically affect a substantial right and those that must be considered on a case-by-case basis. *Moody*, 169 N.C. App. at 84–87, 609 S.E.2d at 261–63; *Wilson*, 136 N.C. App. at 501–02, 524 S.E.2d at 813; *Little*, 134 N.C. App. at 487–89, 517 S.E.2d at 902–03.

More importantly, there is a separate, more specific line of cases holding that an individualized factual showing is required in res judicata cases. As this Court recently reaffirmed, "when a trial court enters an order rejecting the affirmative defense of res judicata, the order *can* affect a substantial right and *may* be immediately appealed." *Smith v. Polsky*, __ N.C. App. __, __, 796 S.E.2d 354, 359 (2017). "Even so, it is clear that invocation of res judicata does not automatically entitle a

party to an interlocutory appeal of an order rejecting that defense." *Id.* Instead, the challenged order affects a substantial right only if there is a risk of "inconsistent verdicts," meaning a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time. *Id.*

This line of cases, which includes nearly a dozen decisions over the past two decades, originated with a Supreme Court decision in the early 1990s. *See Bockweg v. Anderson*, 333 N.C. 486, 490–91, 428 S.E.2d 157, 160–61 (1993). In *Bockweg*, after acknowledging that "the right to avoid the possibility of two trials on the same issues" can permit an immediate appeal, the Supreme Court held that rejection of a res judicata defense "may affect a substantial right, making the order immediately appealable." *Id.*

The *Smith v. Polsky* line of cases applied this reasoning and held that rejections of a res judicata defense, while not categorically appealable in every case, *may* be immediately appealable if it creates a risk of inconsistent verdicts. Thus, even assuming there is a conflict between the *Smith v. Polsky* line of cases and the cases cited by Wardson (and, as explained above, we are not persuaded that there is one), we must follow *Smith v. Polsky* because that line of precedent both came first and, over time, expressly addressed and distinguished the reasoning of the cases cited by Wardson. *See State v. Gonzalez*, No. COA18-228, __ N.C. App. __, __, __ S.E.2d __, __, 2019 WL 189853, at *3 (Jan. 15, 2019).

Applying this controlling line of precedent, we again reaffirm that an appellant seeking to appeal an interlocutory order involving res judicata must include in the statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right based on the particular facts of that case. *Smith*, __ N.C. App. at __, 796 S.E.2d at 359–60. Wardson did not do so here. The company's arguments are, in effect, simply an assertion that they should not be forced to endure the burden of a trial when they have asserted a defense on which they believe they will prevail on appeal. It is well-settled that "avoiding the time and expense of trial is not a substantial right justifying immediate appeal." *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001). Accordingly, mindful of our duty to avoid "fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts," we dismiss this interlocutory appeal for lack of appellate jurisdiction. *Larsen*, 241 N.C. App. at 76, 772 S.E.2d at 95.

Conclusion

We allow Plaintiffs' motion to dismiss this appeal.

DISMISSED.

Judges BERGER and MURPHY concur.

IN THE MATTER OF THE APPEAL OF AARON'S, INC., APPELLANT. FROM THE DECISION OF THE SAMPSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN PERSONAL PROPERTY FOR TAX YEAR 2016 [SIC] [TAX YEARS 2010 THROUGH 2015].

No. COA18-607

Filed 19 February 2019

Taxation—leased property—option to purchase—not "inventories" subject to exemption

A taxpayer's property possessed by a lessee pursuant to a lease purchase agreement was not exempt from taxation because it did not constitute "inventories" held for sale by a merchant pursuant to N.C.G.S. § 105-275(34). The fact that the lease purchase agreement contained an option for lessees to purchase the property did not transform the agreement into a sales contract, since lessees were not obligated to make a purchase. Further, the total cost to purchase the property was significantly higher under the rent-to-own scheme than if it were purchased in a direct sale, demonstrating that the transactions were leases and not sales.

Appeal by Taxpayer from Final Decision entered 1 March 2018 by Chairman Robert C. Hunter in the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 17 January 2019.

Nexsen Pruet, PLLC, by Alexander P. Sands III and George T. Smith III, for Taxpayer-Appellant.

W. Joel Starling, Jr. for Sampson County-Appellee.

ZACHARY, Judge.

Aaron's, Inc. ("Taxpayer") appeals from the Final Decision of the North Carolina Property Tax Commission determining that property in the physical possession of Taxpayer's customers pursuant to "Lease Purchase Agreements" is subject to *ad valorem* taxation. Taxpayer argues that such property constitutes "inventories owned by retail and wholesale merchants," and is thus exempt from taxation pursuant to N.C. Gen. Stat. § 105-275(34). We disagree, and affirm the Final Decision of the Commission.

Background

Taxpayer is a multi-state business with a location in Sampson County at which it offers for sale or lease "property such as furniture, appliances, personal computers and other household electronics." However, Taxpayer derives the vast majority of its revenue from a "rent-to-own" business model rather than from pure "retail sales"; Taxpayer's "Lease Revenues and Fees" ranged between $1.68 billion and $2.68 billion for the years 2012 through 2015, whereas its "Retail Sales" during the same period ranged between only $32.87 million and $40.88 million.

The rent-to-own transactions are effectuated through the execution of Taxpayer's "Lease Purchase Agreement," which provides for monthly or semi-monthly renewal terms, and designates the subject property and the customer as the "leased property" and the "lessee," respectively. Pursuant to the terms of the Lease Purchase Agreement, Taxpayer retains title to, and the lessee obtains possession of, the subject property. While the lessee has a "Purchase Option," the lessee may also "terminate th[e] Agreement without penalty at any time by surrendering or returning the Leased Property in good repair and paying all Renewal Payments and Other Charges through the date of surrender or return."

After conducting an audit, on 6 November 2015, the Sampson County Office of Tax Assessor sent Taxpayer a notice and appraisal assessing a tax deficiency of $2,636,576.00 for the tax years 2010 through 2015. This deficiency was largely the result of Taxpayer's failure to list property that was in the possession of its lessees pursuant to its Lease Purchase Agreements. Taxpayer filed written exception to the deficiency, arguing that the property subject to its Lease Purchase Agreements, as property that was "in the process of being sold," qualified as "inventories" and was therefore exempt from taxation. The Tax Administrator declined to amend the assessment as requested by Taxpayer, and rendered a final decision providing, in pertinent part, that:

> I have reviewed your letter and your opinion that inventory held by [Taxpayer] is excluded from taxation. General

> Statutes 105-273(8a) defines inventories as goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants and construction contractors. The nature of your business tends to be in rental and leasing rather than sales. It is important to note that inventories cannot be held for sale and rent/lease simultaneously. In the audit, there was an adjustment of 10% on inventories allowed for the relatively small portion that was actually sold.
>
> It is my opinion that the inventories for [Taxpayer] are not exempt under the provisions of the Machinery Act of North Carolina and the discovery of the inventories not reported during the listing period will remain in effect.

Taxpayer appealed the Tax Administrator's decision to the Sampson County Board of Equalization and Review, which affirmed the Tax Administrator's decision. Taxpayer thereafter appealed the County Board's decision to the North Carolina Property Tax Commission.

Before the Commission, Taxpayer reiterated its assertion that the property subject to its Lease Purchase Agreements constituted "Inventories owned by retail and wholesale merchants," and was therefore exempt from taxation pursuant to N.C. Gen. Stat. § 105-275(34). By Final Decision entered 1 March 2018, the Commission affirmed the County Board's decision and concluded that "Taxpayer, by renting the equipment to third parties, is not entitled to the inventory tax exclusion for the rented equipment[,] . . . but that said property tax exclusion does apply as to such personal property that is in the actual possession of the [Taxpayer] and available for sale." Taxpayer timely filed written notice of appeal to this Court from the Final Decision of the Commission.

On appeal, Taxpayer argues that the Commission erred in concluding that it is required to list and pay *ad valorem* taxes on the property subject to its Lease Purchase Agreements.

Scope of Appellate Review

The scope of this Court's appellate review of final decisions of the Property Tax Commission is defined by N.C. Gen. Stat. § 105-345.2, which provides, in pertinent part:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of

> any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2017).

Discussion

All real and personal property located in North Carolina is subject to taxation unless otherwise excluded or exempted by statute. *Id.* § 105-274(a)(1). The burden is on the taxpayer to establish that the property in question falls within one of the numerated tax exemptions. *In re Southeastern Baptist Theol. Seminary, Inc.*, 135 N.C. App. 247, 249, 520 S.E.2d 302, 304 (1999). "This burden is substantial and often difficult to meet . . . ." *Id.*

The General Assembly has enacted legislation exempting some categories of property from taxation. One such statute provides for the exemption from taxation of "[i]nventories owned by retail and wholesale merchants." N.C. Gen. Stat. § 105-275(34). "Inventories" are defined, in pertinent part, as "[g]oods held for sale in the regular course of business by . . . retail and wholesale merchants[.]" *Id.* § 105-273(8a)(a). Whether particular property constitutes exempt "inventories" will ultimately depend upon the wording of Section 105-273(8a) and "the use to which the property is dedicated[.]" *In re R.W. Moore Equip. Co.*, 115 N.C. App. 129, 132, 443 S.E.2d 734, 736, *disc. review denied*, 337 N.C. 693, 448 S.E.2d 533 (1994).

In the instant case, Taxpayer maintains that the transfer of its property to the possession of a lessee pursuant to a Lease Purchase

Agreement effects a form of "sale," such as a conditional sale, and that such property thus constitutes exempt inventory under N.C. Gen. Stat. § 105-275(34). We agree with the Commission, however, that the transfer of possession of property following the execution of Taxpayer's Lease Purchase Agreement is not properly categorized as a "sale," and therefore the property held thereunder does not fall within the class of exempt "inventories" described in N.C. Gen. Stat. § 105-275(34).

We reach this conclusion primarily due to the fact that Taxpayer's lessees are, in fact, under no obligation to either purchase the subject property or to pay the "Total Cost to Own" the property pursuant to the terms of Taxpayer's Lease Purchase Agreements. *See Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 461-62, 206 S.E.2d 242, 249 (1974). As our Supreme Court explained in *Szabo*, "[o]ne of the principle tests for determining whether a contract is one of conditional sale or lease is whether the party is obligated at all events to pay the total purchase price of the property . . . ," it being clear that "[i]f the return of the property is either required or permitted, the instrument will be held to be a lease; if the so-called lessee is obligated to pay the purchase price, even though it be denominated rental, the contract will be held to be one of sale." *Id.*

The Lease Purchase Agreements in the instant case provide for a month-to-month "Initial Lease Term," and either monthly or semi-monthly "Renewal Terms." The agreements merely grant to the lessee a "Purchase Option," and the lessee is permitted to "return or surrender the Leased Property" to Taxpayer at any time, without penalty. The fact that the Lease Purchase Agreements contain an *option* to purchase does not render those agreements sales contracts. *Cf. id.* at 462, 206 S.E.2d at 249 ("[I]n order to make a conditional sale, . . . the buyer should be *bound* to take title to the goods, or at least to pay the price for them. Therefore, a lease which provides for a certain rent in installments is not a conditional sale if the lessee can terminate the transaction at any time by returning the property, even though the lease also provides that if rent is paid for a certain period, the lessee shall thereupon become the owner of the property." (emphasis added)). Because Taxpayer's self-denominated "lessees" are not required to ultimately purchase the property under the terms of the Lease Purchase Agreements, we necessarily conclude that such property is not held for the purpose of "sale" within the meaning of N.C. Gen. Stat. § 105-273(8a). *See id.* at 461-62, 206 S.E.2d at 249.

Another indication that the "rent-to-own" transactions do not constitute contracts of sale is the discrepancy between the ultimate "Total

Cost to Own" the property pursuant thereto and the price at which the same merchandise could be purchased via a direct sale. The Supreme Court has held:

> A lease of personal property is substantially equivalent to a conditional sale when the buyer is bound to pay rent substantially equal to the value of the property . . . . [T]hough the rent is to be applied at the buyer's option toward the payment of the price, the transaction is not a conditional sale if the price largely exceeds the rent that the lessee is bound to pay.

Id. at 462, 206 S.E.2d at 249. Here, the record reveals that an item that would ordinarily cost one of Taxpayer's customers $1,639.12 if purchased through a direct sale would cost a lessee $2,917.63—or an additional $1,278.51—if the customer were to purchase that same item by exercising the purchase option under a Lease Purchase Agreement. This substantial increase in cost is consistent with the denomination of Taxpayer's "rent-to-own" transactions as a lease rather than a sale of the property.

In addition, we note that N.C. Gen. Stat. § 105-273(8a) defines "inventories" as "[g]oods *held* for sale in the regular course of business *by* . . . retail and wholesale merchants." N.C. Gen. Stat. § 105-273(8a)(a) (emphases added). As this Court concluded in *R.W. Moore Equipment*, property cannot be found to be " 'held' by [a] [t]axpayer" for sale for purposes of Section 273 when that property is "in the lessee's possession." *R.W. Moore Equip. Co.*, 115 N.C. App. at 132, 443 S.E.2d at 736. In this respect, the property which was subject to Taxpayer's Lease Purchase Agreements could not be said to be tax-exempt inventory, in that it was "held" in the possession of the lessee, rather than Taxpayer, at all pertinent points.

Accordingly, we conclude that once Taxpayer's property was in the possession of a lessee pursuant to the terms of a Lease Purchase Agreement, that property no longer constituted tax-exempt "inventories" pursuant to N.C. Gen. Stat. § 105-275(34). We affirm the Commission's Final Decision in that respect.

Taxpayer lodges additional arguments under N.C. Gen. Stat. § 105-306(c)(2) and N.C. Const. art. V, § 2 (1) and (2). However, those arguments are each dependent upon the classification of the execution of its Lease Purchase Agreements as a form of "sale." Because we conclude that Taxpayer's Lease Purchase Agreements are rental agreements

rather than sales, Taxpayer's arguments under N.C. Gen. Stat. § 105-306(c)(2) and N.C. Const. art. V, § 2 are inapposite.

Lastly, we observe that the Commission's Final Decision appears to contain clerical errors. The Final Decision recites that this matter was heard upon appeal "[f]rom the decision of the Sampson County Board of Equalization and Review concerning the valuation of certain personal property for tax year 2016." However, as Taxpayer notes in its Notice of Appeal to this Court, and as both parties note in their briefs, the record reveals that the instant case "concerns the exemption of business and personal property for the tax years 2010 through 2015." Accordingly, we remand with instructions to correct each of the captions in this matter so that the records appropriately reflect the dates and property involved herein.

Conclusion

We affirm the Final Decision of the Property Tax Commission, but remand for correction of the clerical errors discussed herein.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges TYSON and COLLINS concur.

IN THE MATTER OF THE ESTATE OF CLARENCE MAYNARD JOHNSON

No. COA18-778

Filed 19 February 2019

1. Estates—order denying petition to revoke letters testamentary—appeal to superior court—standard of review

In an appeal from a clerk of court's denial of a petition for revocation of letters testamentary in an estate matter, the superior court erred by failing to conduct a de novo hearing as required by sections 28A-9-4, 28A-2-9(b), and 1-301.2.

2. Estates—order finding deficiency in year's allowance—appeal to superior court—standard of review

In an appeal from a clerk of court's order directing an executor to pay a deficiency in the year's allowance awarded to decedent's spouse, the superior court erred by disregarding the clerk's findings and conducting a de novo review, instead of applying the deferential standard of review required by N.C.G.S. § 1-301.3(d).

Appeal by petitioner from orders entered 9 March 2018 by Judge James M. Webb in Anson County Superior Court. Heard in the Court of Appeals 31 January 2019.

The McCraw Law Firm, PLLC, by Jeffrey M. McCraw, for petitioner-appellant.

Harrington Law Firm, by Larry E. Harrington, for respondent-appellee.

TYSON, Judge.

Stacia Ward Johnson ("Petitioner") appeals two orders of the superior court issued upon review of orders from the clerk of superior court. We vacate both of the superior court's orders and remand.

I. Background

Clarence Maynard Johnson ("Decedent") and Petitioner were married on 14 August 1999. Decedent died testate on 28 September 2014. Decedent's last will and testament dated 5 April 2013 was submitted for probate on 18 November 2014. Decedent's will named one of Decedent's two sons from a prior marriage, Edward Michael Johnson

("Respondent"), as his executor. In his will, Decedent left a residence at 512 North Pine Lane in Wadesboro and one-half of all of his other real property and personal property to Petitioner. The remaining one-half undivided interest was devised to Respondent and Mark Johnson, Decedent's other son by a prior marriage.

Petitioner submitted an AOC-E-100 form for a year's allowance of $30,000.00 as a surviving spouse pursuant to N.C. Gen. Stat. § 30-15 on 14 January 2016. After applying N.C. Gen. Stat. § 30-31, the Anson County Clerk of Superior Court entered an order on 20 January 2016 ("the January 2016 Order") finding Petitioner was "entitled to a year's allowance in the amount of $13,349.50 . . . to be credited against her distributive share." The January 2016 Order also specified that two motor vehicles totaling $3,050.00 in value and an insurance check for damage to another motor vehicle in the amount of $4,097.06 be assigned to Petitioner in partial payment of the year's allowance. After assigning the vehicles and the check, the January 2016 Order specified that a $6,202.44 balance on the $13,349.50 assignment was to be paid from the estate's assets.

Also on 20 January 2016, the Assistant Anson County Clerk of Superior Court signed the section entitled "ASSIGNMENT OF YEAR'S ALLOWANCE" on the AOC-E-100 form submitted by Petitioner. The "ASSIGNMENT OF YEAR'S ALLOWANCE" section of the form contains pre-printed language, which states:

> I have examined the above application and have determined the money and other personal property of the decedent. I find that the allegations in the application are true and that each person(s) named in the application is entitled to the allowance requested.
>
> I ASSIGN to the applicant the funds or other items of the personal property of the decedent listed below, which I have valued as indicated. This property is assigned free and clear of any lien by judgment or execution against the decedent and is to be paid by the applicant to the person(s) entitled. I assess as a DEFICIENCY the amount, if any, shown below, which is to be paid or delivered to the proper person when any additional personal assets of the decedent are discovered.

The form listed the $13,349.50 worth of Decedent's personal property assigned to Petitioner to pay her year's allowance, and noted a deficiency of $16,650.50, the difference between the $30,000.00 year's allowance

provided under N.C. Gen. Stat. § 30-15 (2014) and the $13,349.50 worth of personal property assigned to Petitioner.

On 11 September 2017, Petitioner filed a petition for revocation of letters testamentary issued to Respondent. Petitioner alleged:

> a. [Respondent] has failed to properly handle, manage, and account for estate assets in accordance with the North Carolina General Statutes;
>
> b. [Respondent] has failed to file timely and accurate periodic accountings with the Clerk;
>
> c. The estate has been open for three (3) years and accurate and complete final distributions and a final accounting have yet to be proffered; and
>
> d. These and potentially other failures and circumstances appear to rise to a violation of the fiduciary duty of the [Respondent's] office under NCGS 28A-9-1(3).

A hearing was held on Petitioner's petition on 8 November 2017 before the clerk of superior court. Petitioner asserted Respondent had committed multiple breaches of his fiduciary duties as the estate executor, including failing to satisfy the deficiency on Petitioner's year's allowance before paying lower priority claims on Decedent's estate.

Petitioner also asserted, in part, that: (1) Respondent had failed to include several assets in the estate's inventory, including the contents of two safes owned by Decedent that contained firearms, U.S. currency, and a coin collection; (2) Respondent had improperly included nonprobate real estate transactions within his estate accounting, including the sale of timber from Decedent's real property, real estate rents, and real estate expenses; (3) Respondent had calculated his commissions as executor based upon inflated receipts and disbursements; and (4) Respondent had failed to provide vouchers to support disbursements made from the estate.

At the conclusion of the hearing, the clerk of superior court orally ruled that there was a deficiency of $16,650.50 in Petitioner's year's allowance, and ordered Respondent to issue Petitioner a check for the deficiency. The clerk also ordered an appraisal of Decedent's coin collection and calendared a hearing for 29 November 2017 on the results of the appraisal. The clerk deferred ruling on the removal of Respondent as the executor. Respondent gave oral notice of appeal of the clerk's order on the deficiency payment.

After the hearing, Petitioner filed a new petition for the revocation of Respondent's letters testamentary on 17 November 2017. In the new petition, Petitioner reasserted the arguments she had made for removal of Respondent as the estate executor at the 8 November hearing and in her previous petition.

On 20 November 2017, the clerk of court issued a written order ("the Deficiency Order") which contained findings of fact and conclusions of law. The Deficiency Order required that Petitioner be paid the $16,650.50 deficiency for the year's allowance. The order contained the following relevant findings of fact:

> 6. That on January 20th, 2016 the Anson County Clerk of Superior Court issued an order Assigning Spouse Year's Allowance of $13,349.50 . . . .
>
> 7. That the aforementioned remittance in paragraph #6 of $13,349.50, toward an Assignment of Year's Allowance, did and does cause a remaining deficiency of $16,650.50 to the Spouse's Year's Allowance, per N.C.G.S. 30-15.

Based upon these findings, the clerk of court concluded, in relevant part:

> 8. That on January 20th, 2016 the court approved and ordered a Year's Allowance to be assigned to [Petitioner] in the amount of $13,349.50, leaving a deficiency of $16,650.50, per N.C.G.S. 30-15.

On 19 December 2017, the clerk of court issued an order ("the Revocation Order") denying Petitioner's petition for revocation of letters testamentary granted to Respondent. The Revocation Order contained the following relevant findings of fact:

> 8. The Court has examined the filed reports of the Executor. While sometimes tardy, the Court can find no breach of fiduciary duty, no evidence of bad faith and no misconduct that would justify removal or revocation of letters testamentary.
>
> 9. The Court finds no evidence that [Respondent] has acted in bad faith in carrying out his fiduciary duties as Executor.
>
> 10. The Court finds no evidence that [Respondent] is guilty of misconduct in the execution of his office.

> 11. The Court finds no evidence that [Respondent] has a private interest that might hinder or be adverse to a proper administration of the estate.

The Revocation Order concluded, in part:

> 2. [Respondent] has violated no fiduciary duty through default or misconduct in the execution of his office.
>
> 3. [Respondent] has no private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration of the estate.

Petitioner filed written notice of appeal of the Revocation Order to the superior court, "pursuant to N.C.G.S. §§ 28A-9-4 and 28A-2-9(b) and 1-301.2 or alternatively 1-301.3 . . . ."

The superior court conducted a hearing on Petitioner and Respondent's appeals on 12 February 2018. The superior court issued two orders on 6 March 2018. One order denied Petitioner's petition for revocation of letters testamentary granted to Respondent. The other order allowed Respondent's appeal of the Deficiency Order and declared the Deficiency Order null and void. The superior court ruled that the clerk of court's 20 January 2016 order, which did not specify a deficiency owed to Petitioner, controlled over the Deficiency Order.

Petitioner filed timely notice of appeal of the superior court's two orders.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Petitioner argues the superior court applied the incorrect standards of review to the Revocation Order and the Deficiency Order, which warrants reversal and remand of both orders to the superior court. In the alternative, Petitioner argues the superior court erred in denying her petition for revocation of letters testamentary and in ruling the clerk of court's deficiency order was null and void.

IV. Standard of Review

"On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court." *In re Estate of Pate*, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3 (1995) (quotations

and citations omitted). "The standard of review in this Court is the same as in the Superior Court." *Id.* at 403, 459 S.E.2d at 3. "Errors of law are reviewed *de novo*." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002) (citation omitted).

We address Petitioner's arguments that the superior court applied the wrong standards of review to each of the clerk of court's orders.

V. Analysis

A. *The Revocation Order*

[1] Petitioner argues the superior court failed to apply *de novo* review to the clerk of court's Revocation Order, which denied Petitioner's petition to revoke letters testamentary granted to Respondent as executor of Decedent's estate.

In her notice of appeal to the superior court, Petitioner appealed "pursuant to N.C.G.S. §§ 28A-9-4 and 28A-2-9(b) and 1-301.2 or alternatively 1-301.3 . . . ."

N.C. Gen. Stat. § 28A-9-4 (2017) provides an "interested person" a right to appeal a clerk of court's order granting or denying revocation of letters testamentary to the superior court. The statute states:

> Any interested person may appeal from the order of the clerk of superior court granting or denying revocation *as a special proceeding pursuant to G.S. 28A-2-9(b)*. The clerk of superior court may issue a stay of an order revoking the letters upon the appellant posting an appropriate bond set by the clerk until the cause is heard and determined upon appeal.

N.C. Gen. Stat. § 28A-9-4 (emphasis supplied). N.C. Gen. Stat. § 28A-2-9(b) (2017) specifically provides: "Appeals in special proceedings shall be as provided in *G.S. 1-301.2*." (emphasis supplied).

N.C. Gen. Stat. § 1-301.2(e) (2017) in turn states, in relevant part:

> (e) Appeal of Clerk's Decisions.-- . . . [A] party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, *appeal to the appropriate court for a hearing de novo*. . . . (Emphasis supplied).

Although Petitioner appealed, in the alternative, under N.C. Gen. Stat. § 1-301.3, nothing indicates that section provides an alternative method to appeal decisions or orders of a clerk of court granting or

denying letters testamentary. N.C. Gen. Stat. § 1-301.3 generally governs appeals of trust and estate matters decided by a clerk of court; however, this statute expressly states:

> (a) Applicability. -- This section applies to matters arising in the administration of trusts and of estates of decedents, incompetents, and minors. *G.S. 1-301.2 applies in the conduct of a special proceeding when a special proceeding is required in a matter relating to the administration of an estate.*

N.C. Gen. Stat. § 1-301.3(a) (2017) (emphasis supplied). Under N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b) and 1-301.2, an appeal from an order of the clerk of superior court granting or denying a petition to revoke letters testamentary mandates a *de novo* hearing. N.C. Gen. Stat. § 1-301.2(e) provides the appropriate scope of review for Petitioner's appeal of the Revocation Order to the superior court, and not N.C. Gen. Stat. § 1-301.3. *See id.*

Respondent cites this Court's opinion in *In re Estate of Longest*, 74 N.C. App. 386, 328 S.E.2d 804 (1985), to contend the superior court was not required to conduct a *de novo* hearing and that the court applied the correct standard of review. *Longest* involved an appeal of a superior court order affirming a clerk of court's order to revoke letters testamentary. *Longest*, 74 N.C. App. at 388-89, 328 S.E.2d at 806.

This Court stated, in relevant part: "Civil actions and special proceedings, . . . which originate before the Clerk of Court are heard *de novo* when appealed to the Superior Court. However, a proceeding to remove an executor is not a civil action or a special proceeding." *Id.* at 389, 328 S.E.2d at 807 (citation omitted). The Court also stated: "[I]n an appeal from an order of the Clerk in a probate matter, the Superior Court is not required to conduct a *de novo* hearing." *Id.* at 390, 328 S.E.2d at 807.

Longest was decided prior to the General Assembly's amendment of N.C. Gen. Stat. § 28A-9-4 in 2011 to provide for "a hearing *de novo*" in the nature of a special proceeding. The General Assembly enacted N.C. Gen. Stat. § 28A-2-9(b) to make N.C. Gen. Stat. § 1-301.2, which provides for a *de novo* hearing, applicable to appeals of orders granting or denying letters testamentary. Session Laws 2011-344, § 4, eff. Jan. 1, 2012. This Court's opinion in *Longest* no longer controls the standard or scope of review applied to appeals to the superior court of a clerk of court's order granting or denying letters testamentary. *See id.* Respondent's position is contradicted by the plain language and legislative history of the statutes.

The superior court was not required to review the Revocation Order *de novo*, but to conduct "a hearing *de novo*" pursuant to N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b), and 1-301.2.

The superior court's order denying Petitioner's petition to revoke Respondent's letters testamentary, states, in relevant part:

> [A]fter review of the court file, evidence presented, petitioner's post hearing brief, applicable law, and arguments of counsel, the Court finds as follows:
>
> 1. That the findings of fact are supported by the evidence;
>
> 2. That the conclusions of law are supported by the findings of facts; and
>
> 3. That the order is consistent with the conclusions of law.

The language of the superior court's order does not indicate it conducted "a hearing *de novo*" as is required by N.C. Gen. Stat. § 1-301.2. Instead, the language of the trial court's order tracks the language of N.C. Gen. Stat. § 1-301.*3(d)*, which states:

> (d) Duty of Judge on Appeal. -- Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> *(1) Whether the findings of fact are supported by the evidence.*
>
> *(2) Whether the conclusions of law are supported by the findings of facts.*
>
> *(3) Whether the order or judgment is consistent with the conclusions of law and applicable law.* (Emphasis supplied).

The Supreme Court of North Carolina has recognized that "When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings." *Concerned Citizens v. Holden Enterprises*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) (1991) (citation omitted); *see Thompson v. Town of White Lake*, __ N.C. App. __, __, 797 S.E.2d 346, 353 (2017) ("Ordinarily when a superior court applies the wrong standard of review . . . this Court vacates the superior court judgment and remands for proper application of the correct standard.").

Based upon the superior court's apparent misapprehension of the scope of its review, the appeal of the clerk of court's Revocation Order must be remanded to the superior court for "a hearing *de novo*" in accordance with N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b), and 1-301.2.

"The word '*de novo*' means fresh or anew; for a second time; and a *de novo* trial in appellate court is a trial had as if no action whatever had been instituted in the court below." *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964) (citation and quotation marks omitted). "A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." *Caswell Cty. v. Hanks*, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995) (citations and internal quotation marks omitted).

In *Hanks*, this Court analyzed the provision of N.C. Gen. Stat. § 67-4.1(c) providing for an appeal to superior court of a county's animal control appellate board's determination that a dog is a "potentially dangerous dog." *Id.* at 490, 462 S.E.2d at 842. N.C. Gen. Stat. § 67-4.1(c) states, in relevant part: "The appeal *shall be heard de novo* before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located."

In analyzing N.C. Gen. Stat. § 67-4.1(c), this Court stated: "The language of the statute in this case is mandatory, providing that the appeal to superior court 'shall be heard *de novo*[.]' " *Hanks*, 120 N.C. App. at 491, 462 S.E.2d at 843 (citing N.C. Gen. Stat. § 67-4.1(c)).

This Court held: "The plain language of N.C. Gen. Stat. § 67-4.1(c) . . . requires that the superior court must hear the case on its merits from beginning to end as if no hearing had been held by the Board and without any presumption in favor of the Board's decision." *Id.*

As with N.C. Gen. Stat. § 67-4.1(c), N.C. Gen. Stat. § 1-301.2(e) expressly provides for "a hearing *de novo*" on appeal to the superior court, and not just *de novo* or whole record review. The order appealed from is vacated and remanded. Upon remand, the superior court is required to conduct "a hearing *de novo*" of Petitioner's petition for revocation of letters testamentary, "as if no hearing had been held by the [clerk] and without any presumption in favor of the [clerk's] decision." *Hanks*, 120 N.C. App. at 491, 462 S.E.2d at 843.

B. *The Deficiency Order*

[2] Petitioner also argues the superior court applied the wrong standard of review to Respondent's appeal of the Deficiency Order. We agree.

Unlike petitions for revocation of letters testamentary under N.C. Gen. Stat. § 28A-9-4, no statute expressly addresses appeals of a clerk of court's order awarding or denying a deficiency for a surviving spouse's year's allowance under N.C. Gen. Stat. § 30-15 (2017).

The appeal of a clerk of court's order regarding a deficiency in a year's allowance falls under the general area of "[a]ppeal[s] of trust and estate matters determined by clerk," and is governed by N.C. Gen. Stat. § 1-301.3. This statute provides, in relevant part:

> (a) Applicability. -- This section applies to matters arising in the administration of trusts and of estates of decedents, incompetents, and minors. . . .
>
> (b) Clerk to Decide Estate Matters. -- In matters covered by this section, the clerk shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.
>
> (c) Appeal to Superior Court. -- A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of entry of the order or judgment after service of the order on that party. . . .
>
> (d) Duty of Judge on Appeal. -- Upon appeal, the judge of the superior court shall review the order or judgment of the clerk *for the purpose of determining only the following:*
>
> *(1) Whether the findings of fact are supported by the evidence.*
>
> *(2) Whether the conclusions of law are supported by the findings of facts.*
>
> *(3) Whether the order or judgment is consistent with the conclusions of law and applicable law.*

N.C. Gen. Stat. § 1-301.3(a)-(d) (emphasis supplied).

This Court has stated:

> On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court. When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the

> trial judge on appeal is to apply the whole record test. In doing so, the trial judge reviews the Clerk's findings and may either affirm, reverse, or modify them. If there is evidence to support the findings of the Clerk, the judge must affirm. Moreover, even though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings.

Pate, 119 N.C. App. at 402-03, 459 S.E.2d at 2-3 (citations and quotation marks omitted). The superior court's order granting Respondent's appeal and vacating the clerk of court's Deficiency Order states, in relevant part:

> [U]pon the Respondent's appeal of the November 20, 2017 Order of the Honorable Mark Hammonds, Clerk of Superior Court for Anson County, finding a year's allowance deficiency, and after review of the court file, evidence presented, petitioner's post hearing brief, applicable law, and arguments of counsel, the Court finds that the Honorable Mark Hammonds, Clerk of Superior Court for Anson County, entered an Order on January 20, 2016 Assigning Spouse['s] Year's Allowance of $13,349.50, as a credit against the spouse['s] testate share, without any deficiency. The court finds that the January 20, 2016 Order to be the controlling Order, and that the Order entered on November 20, 2017 by Clerk Hammonds finding a year's allowance deficiency of $16,650.50 is null and void and of no effect.

The superior court's order does not indicate the court applied the deferential standard of review as is required by N.C. Gen. Stat. § 1-301.3(d), but instead disregarded the clerk of court's findings of fact and conducted a *de novo* review. The superior court's ruling on Respondent's appeal of the clerk's Deficiency Order must also be vacated and remanded to the superior court for application of the correct standard of review as is required by N.C. Gen. Stat. § 1-301.3(d). *See Concerned Citizens*, 329 N.C. at 54-55, 404 S.E.2d at 688.

VI. Conclusion

The superior court applied the wrong scope of review to the clerk of court's Revocation Order and the wrong standard of review to the clerk's Deficiency Order. We vacate and remand these matters to the

superior court for application of the statutorily mandated scopes of review. Upon remand, the superior court must conduct "a hearing *de novo*" of Petitioner's appeal of the Revocation Order in accordance with N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b), and 1-301.2. The superior court must apply the controlling standard of review required by N.C. Gen. Stat. § 1-301.3(d) to Respondent's appeal of the Deficiency Order. *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and COLLINS concur.

IN THE MATTER OF PROPOSED FORECLOSURE OF CLAIM OF LIEN FILED ON CALMORE GEORGE AND HYGIENA JENNIFER GEORGE BY THE CROSSINGS COMMUNITY ASSOCIATION, INC. DATED AUGUST 22, 2016, RECORDED IN DOCKET NO. 16-M-6465 IN THE OFFICE OF THE CLERK OF COURT OF SUPERIOR COURT FOR MECKLENBURG COUNTY REGISTRY BY SELLERS, AYRES, DORTCH & LYONS, P.A.

No. COA18-611

Filed 19 February 2019

1. Parties—joinder—necessary party—trustee

In an action to foreclose a homeowners' association claim of lien for failure to pay association fees, the trial court did not err by failing to join a trustee as a necessary party. The proceeding was not a foreclosure of the deed of trust for which the trustee served, but of the lien held by the association.

2. Process and Service—notice of non-judicial foreclosure—service on record owners—dwelling or usual place of abode

In an action to foreclose a homeowners' association claim of lien for failure to pay association fees, the trial court properly voided the foreclosure sale for lack of personal jurisdiction over one of the owners who had not been properly served with the notice of foreclosure. The owners lived out of state and only returned to the subject property a few times a year; therefore, leaving copies of the notice there was insufficient service since the property was not the owners' dwelling house or usual place of abode.

3. Real Property—foreclosure sale—deficient service—good faith purchasers for value

In an action to foreclose a homeowners' association claim of lien for failure to pay association fees, the trial court's findings of fact did not support its conclusion that the buyer at foreclosure was not a good faith purchaser for value. Although the record owners of the subject property had not been properly served with the notice of foreclosure in accordance with Civil Procedure Rule 4, they received constitutionally sufficient notice, and there was no record evidence that the buyer had actual knowledge or constructive notice of the improper statutory service. Moreover, the low sale price was not, by itself, reason to set aside the foreclosure, and it constituted adequate value.

Judge DILLON concurring by separate opinion.

Judge BRYANT concurring in part and dissenting in part by separate opinion.

Appeal by respondents from orders entered 17 July 2017, 9 August 2017, and 15 March 2018 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 November 2018.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and DeVore Acton & Stafford, PA, by Derek P. Adler, for respondents-appellants.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for petitioners-appellees.

ZACHARY, Judge.

KPC Holdings and National Indemnity Group ("National Indemnity" and collectively "Respondents") appeal orders adding them as parties to this action, setting aside an order for foreclosure, canceling a deed, and denying an indicative joint motion for relief under Rule 60(b)(6). After careful review, we conclude that the trial court correctly determined that the foreclosure sale in this case was invalid due to lack of proper service of the notice of foreclosure, and that the trustee on a deed of trust other than that on which foreclosure was instituted was not a necessary party to the proceedings; however, KPC Holdings was a good faith purchaser for value. Therefore, the trial court should not have

voided the deed conveying the property to KPC Holdings or the subsequent deed to National Indemnity.

Background

Calmore George and his wife, Hygiena Jennifer George, owned a home in Mecklenburg County, North Carolina. On 22 August 2016, The Crossings Community Association, Inc., the Georges' homeowners' association, filed a planned community claim of lien against the Georges' property for unpaid association fees totaling $204.75. The homeowners' association appointed a trustee to represent the association on its claim of lien, and the trustee commenced a non-judicial foreclosure proceeding on the property. Included in the documents filed in the foreclosure proceeding were two sheriff's returns of service indicating personal service of the notice of foreclosure upon Hygiena Jennifer George and substitute service upon Calmore George by leaving the notice with his wife at their residence. The foreclosure trustee also filed an affidavit of attempted service of process by certified mail, return receipt requested, and by first class mail sent to both the Mecklenburg County property and to the Georges' other known address in the Virgin Islands.

On 9 December 2016, an Assistant Clerk of Mecklenburg County Superior Court filed an order permitting foreclosure with a notice of sale indicating that the property would be sold at auction on 12 January 2017. KPC Holdings purchased the property on 12 January 2017 for $2,650.22. No party filed an upset bid by the deadline and on 3 February 2017, the foreclosure trustee deeded the land to KPC Holdings. On 21 March 2017, KPC Holdings conveyed the property to National Indemnity in consideration for National Indemnity's promise to pay KPC Holdings $150,000.00, evidenced by a promissory note and deed of trust naming Jonathan Hankin as trustee.

On 18 April 2017, the Georges filed a motion to set aside the foreclosure sale under Rule 60(c) of the North Carolina Rules of Civil Procedure alleging that "[n]o type of personal service was effectuated [upon] the Georges." National Indemnity moved to intervene on 10 May 2017. On 17 July 2017, the Honorable Nathaniel J. Poovey heard the Rule 60 motion and subsequently entered an order joining National Indemnity and KPC Holdings as necessary parties to the proceeding. After a hearing, on 9 August 2017, Judge Poovey entered an order setting aside the order for foreclosure, canceling the trustee's foreclosure deed to KPC Holdings, and canceling KPC Holdings' deed to National Indemnity.

National Indemnity appealed the 9 August 2017 order setting aside the foreclosure on 1 September 2017. That same day, KPC Holdings

appealed both the 17 July 2017 order joining KPC Holdings as a necessary party and the 9 August 2017 order setting aside the foreclosure and canceling the deeds.

Thereafter, Respondents filed a Joint Motion for Relief under Rule 60(b)(6) with the trial court, and requested that this Court temporarily remand the case for the trial court to hear the motion and enter an indicative ruling. This Court granted Respondent's Motion to Remand.[1] On 15 March 2018, the trial court entered an Indicative Denial of Joint Motion for Relief under Rule 60(b)(6). Respondents timely filed notices of appeal from the Indicative Denial.

Discussion

Respondents argue on appeal that the trial court erred in: (1) failing to join the trustee on the deed of trust between KPC Holdings and National Indemnity as a necessary party to the Rule 60 proceeding; (2) ruling that the foreclosure trustee failed to give sufficient notice of the non-judicial foreclosure proceeding to Calmore George; and (3) determining that Respondents were not good faith purchasers for value.[2] We address each argument in turn.

Rule 60(b) Motions

Rule 60 of the North Carolina Rules of Civil Procedure allows the trial court to relieve a party from a final judgment or order for several reasons, including that "[t]he judgment is void" and "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4), (6) (2017). "A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only

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1. Generally, the filing of an appeal divests the trial court's jurisdiction over a case; however, "[t]he trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion." *Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006). When a party notifies this Court that a Rule 60(b) motion has been filed in the trial court, "this Court will remand the matter to the trial court so the trial court may hold an evidentiary hearing and indicate 'how it [is] inclined to rule on the motion were the appeal not pending.' " *Id.* (quoting *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980)). If the trial court indicates it would grant the motion, then the party could ask this Court to remand the case for a final judgment on the motion. *Bell*, 43 N.C. App. at 142, 258 S.E.2d at 409. "An indication by the trial court that it would deny the motion would be considered binding on that court and [the] appellant could then request appellate court review of the lower court's action." *Id.*

2. KPC Holdings noticed for appeal the 17 July 2017 order joining it as a necessary party; however, KPC Holdings presents no argument in its brief concerning this alleged error. Thus, this argument is abandoned and we will not review it. N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992). A trial court cannot set aside a judgment or order pursuant to Rule 60(b)(6) without showing that: (1) extraordinary circumstances exist, and (2) justice demands relief. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987). Additionally, to obtain relief under Rule 60(b)(6), the moving party must show that it has a meritorious defense. *In re Oxford Plastics v. Goodson*, 74 N.C. App. 256, 258, 328 S.E.2d 7, 9 (1985).

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 such, this Court reviews Rule 60(b) motions for an abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). "A trial court abuses its discretion when its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 71, 717 S.E.2d 9, 18 (2011) (quotation marks omitted), *appeal dismissed and disc. review denied*, 366 N.C. 420, 735 S.E.2d 332 (2012).

North Carolina Planned Community Act

The General Assembly enacted the North Carolina Planned Community Act to regulate "the creation, alteration, termination, and management of planned subdivision communities." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 399, 584 S.E.2d 731, 734, *reh'g denied*, 357 N.C. 582, 588 S.E.2d 891 (2003); *see also generally* "An Act to Establish the North Carolina Planned Community Act," 1998 N.C. Sess. Laws 674, ch. 199 (codified as amended at N.C. Gen. Stat. §§ 47F-1-101 to -3-122). A "planned community" is "real estate with respect to which any person, by virtue of that person's ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration." N.C. Gen. Stat. § 47F-1-103(23) (2017). A planned community's owners' association is empowered to, among other things, "[i]mpose and receive any payments, fees, or charges for the use, rental, or operation of the common elements . . . and for services provided to lot owners." *Id.* § 47F-3-102(10). Any assessment levied upon a lot owner that is unpaid for thirty days or more constitutes a lien on the property when a claim of lien is filed with the clerk of superior court in the county in which the land is situated. *Id.*

§ 47F-3-116(a). The owners' association "may foreclose a claim of lien in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes, if the assessment remains unpaid for 90 days or more." *Id.* § 47F-3-116(f). Thus, a foreclosure of an owners' association claim of lien proceeds as a power of sale foreclosure.

I. Failure to Join a Necessary Party

[1] Respondents argue that the trial court erred by failing to join Jonathan Hankin, the trustee named on the deed of trust between KPC Holdings and National Indemnity, as a necessary party to the Rule 60(b) proceedings. We disagree.

Parties "who are united in interest must be joined as plaintiffs or defendants." *Id.* § 1A-1, Rule 19(a). "A person is 'united in interest' with another party when that person's presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272, *disc. review denied*, 297 N.C. 454, 256 S.E.2d 807 (1979). "A 'necessary' party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *In re Foreclosure of Barbot*, 200 N.C. App. 316, 319, 683 S.E.2d 450, 453 (2009). "A judgment which is determinative of a claim arising in an action to which one who is 'united in interest' with one of the parties has not been joined is void." *Ludwig*, 40 N.C. App. at 190, 252 S.E.2d at 272. When the absence of a necessary party is brought to the attention of the trial court, it should not address the merits of the case until the necessary party is joined to the action, and the trial court should bring in the necessary party *ex mero motu* if no other party moves to do so. *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978).

Generally, when a party seeks "to have [a] deed declared null and void[,] . . . . the court would have to have jurisdiction over the parties necessary to convey good title." *Brown v. Miller*, 63 N.C. App. 694, 699, 306 S.E.2d 502, 505 (1983), *appeal dismissed and disc. review denied*, 310 N.C. 476, 312 S.E.2d 882 (1984). A trustee is one of three parties involved in a deed of trust,

> [wherein] the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan . . . . When the loan is repaid, the trustee cancels the deed of trust, restoring legal title

> to the borrower, who at all times retains equitable title in the property.

Skinner v. Preferred Credit, 361 N.C. 114, 120-21, 638 S.E.2d 203, 209 (2006) (citations omitted), *reh'g denied*, 361 N.C. 371, 643 S.E.2d 519 (2007). Accordingly, in foreclosure proceedings, "[t]rustees are necessary parties . . . because the trustee is the party tasked with facilitating the [foreclosure] process." *Greene v. Tr. Servs. of Carolina, LLC*, 244 N.C. App. 583, 596, 781 S.E.2d 664, 673, *disc. review denied*, 368 N.C. 911, 786 S.E.2d 268 (2016).

The trustee on a deed of trust is not, however, inevitably a necessary party to all litigation involving property for which the trustee holds the deed of trust. In 2011, the General Assembly enacted a statute titled, "An Act to Modernize and Enact Certain Provisions Regarding Deeds of Trust . . . Eliminating Trustee of Deed of Trust as Necessary Party for Certain Transactions and Litigation . . . ." 2011 N.C. Sess. Laws 1212, 1231-32, ch. 312, § 15 (codified as amended at N.C. Gen. Stat. § 45-45.3). This Act provides that

> [e]xcept in matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust, *the trustee is neither a necessary nor a proper party to any civil action or proceeding involving (i) title to the real property encumbered by the lien of the deed of trust* or (ii) the priority of the lien of the deed of trust.

N.C. Gen. Stat. § 45-45.3(c) (2017) (emphasis added). Proceedings in which the trustee on the deed of trust is not a necessary party include "*[t]he foreclosure of a lien other than the lien of the deed of trust*, regardless of whether the lien is superior or subordinate to the lien of the deed of trust, including, but not limited to, the foreclosure of mortgages, other deeds of trust, tax liens, and assessment liens." *Id.* § 45-45.3(c)(6) (emphasis added).

Here, Jonathan Hankin is named as trustee on the deed of trust between KPC Holdings and National Indemnity. The proceedings in this case did not endeavor to foreclose upon the deed of trust for which Hankin is trustee, but rather concerned the foreclosure of the homeowners' association's claim of lien on the property—"a lien other than the lien of the deed of trust." *Id.* Thus, Hankin was not a necessary party to either Rule 60 proceeding. Accordingly, the trial court did not err in declining to join Hankin as a necessary party.

II. Notice of Foreclosure

[2] Respondents next argue that the trial court erred by ruling that the foreclosure trustee failed to give proper notice of the non-judicial foreclosure proceeding to Calmore George. This argument lacks merit.

To foreclose upon a claim of lien, a homeowners' association must do so "in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes." N.C. Gen. Stat. § 47F-3-116(f) (2017). Chapter 45 of the General Statutes provides that

> [a]fter the notice of hearing is filed, *the notice of hearing shall be served upon each party entitled to notice under this section*. . . . The notice shall be served and proof of service shall be made in *any manner provided by the Rules of Civil Procedure for service of summons*, including service by registered mail or certified mail, return receipt requested.

Id. § 45-21.16(a) (emphases added). The notice must be provided to "[e]very record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county." *Id.* § 45-21.16(b)(3). "The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice." *Jester v. Steam Packet Co.*, 131 N.C. 54, 55, 42 S.E. 447, 447 (1902). "It is well established that a court may obtain personal jurisdiction over a defendant only by the issuance of summons and service of process by one of the statutorily specified methods." *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997), *disc. review denied*, 347 N.C. 575, 502 S.E.2d 590 (1998). "Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Id.*

Rule 4 of our Rules of Civil Procedure provides the acceptable methods of service of process required in order to properly exercise personal jurisdiction upon a natural person in this State. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (2017). Relevant to this case, a party may accomplish service upon a natural person not under disability in one of the following ways:

> a. By delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode

> with some person of suitable age and discretion then residing therein.
>
> . . . .
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

Id. § 1A-1, Rule 4(j)(1)(a), (c).

Service by personal delivery is accomplished by either: (1) delivering the complaint and summons to "the natural person" named therein, or (2) leaving a copy of those documents "at the defendant's dwelling house or usual place of abode" with someone "of suitable age and discretion" who resides at the residence. *Id.* § 1A-1, Rule 4(j)(1)(a). "[N]o hard-and-fast definition can be laid down" for what constitutes an individual's dwelling house or usual place of abode, but it "is a question to be determined on the facts of the particular case." *Van Buren v. Glasco*, 27 N.C. App. 1, 5, 217 S.E.2d 579, 582 (1975), *overruled on other grounds by Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982). "[I]t is unrealistic to interpret Rule 4[ ] so that the person to be served only has one dwelling house or usual place of abode at which process may be left." *Id.* at 6, 217 S.E.2d at 582.

When attempting to effectuate service by certified mail, return receipt requested, "the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(a)(4)." N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2017). The affidavit must aver:

> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

Id. § 1-75.10(a)(4). The requirement that an affidavit contain information showing the circumstances warranting the use of service by registered mail under Rule 4(j2)(2) in order to constitute proof of service is mandatory. *See Dawkins v. Dawkins*, 32 N.C. App. 497, 499, 232 S.E.2d 456,

457 (1977) (applying a former version of Rule 4). "[F]ailure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit." *Hunter v. Hunter*, 69 N.C. App. 659, 662, 317 S.E.2d 910, 911 (1984).

Here, while the Georges owned the Mecklenburg County property at issue, they did not reside there; they lived in the Virgin Islands. The Georges' three daughters lived at the Mecklenburg County residence in order to attend college. Hygiena Jennifer George testified that she visited the Mecklenburg County property when she was on vacation. Calmore George testified that he usually visited the Mecklenburg County property once per year around the Christmas holiday or once every few years if there was a significant maintenance issue that required his presence. Whenever the Georges did visit the Mecklenburg County property, they "stay[ed] in the study area with [an] inflatable bed."

Deputy Shakita Barnes of the Mecklenburg County Sheriff's Office attempted personal service of the notice of foreclosure upon the Georges. According to the Foreclosure Notice of Return, Deputy Barnes personally served Hygiena Jennifer George and served Calmore George by leaving copies of the notice with his wife Jennifer, "who is a person of suitable age and discretion and who resides in the respondent's dwelling house or usual place of abode." However, Deputy Barnes *actually* served one of the Georges' daughters, Janine, a younger female who "said that she was . . . Ms. Jennifer George."

In voiding the foreclosure sale of the property, the trial court found that the property was "not the dwelling or usual place of abode for Calmore George" and that "proper service upon Calmore George did not occur and the court did not have personal jurisdiction to enter an order adverse to him." The trial court further determined "that no findings are necessary regarding the determination of whether [the Mecklenburg County property] is the dwelling or usual place of abode for [Hygiena] Jennifer George." As a result, the trial court set aside the foreclosure of the Georges' property, canceled the foreclosure deed to KPC Holdings, and canceled the subsequent conveyance of the property from KPC Holdings to National Indemnity.

The trial court correctly determined that the foreclosure trustee failed to serve all record owners of the property as required by N.C. Gen. Stat. § 45-21.16. The attempted service of the notice of foreclosure upon Calmore George by leaving a copy at the Mecklenburg County property was inadequate because the property was not his dwelling house or usual place of abode.

A place of residence to which the owners only return once or twice each year over the holidays or for maintenance issues does not qualify as a dwelling house or usual place of abode for purposes of Rule 4 service. In *Van Buren*, service was accomplished by delivering copies of the summons to the appellant's fifteen-year-old son. 27 N.C. App. at 5, 217 S.E.2d at 582. The appellant owned the home with his wife as tenants by the entirety, and his wife and children resided there. *Id.* Although the appellant spent most of his time working in South Carolina, he "regularly returned [to the home] on a frequently recurring basis." *Id.* The appellant stated in an affidavit that he would normally be present at the home "at least twice during any 30-day period." *Id.* This Court held that the appellant's "relationship and connection with the North Carolina dwelling were such that there was a reasonable probability that substitute service of process at that dwelling would, as it in fact here did, inform him of the proceedings against him." *Id.* at 6, 217 S.E.2d at 582.

By contrast, in this case, the Georges were present at the property far less than "twice during any 30-day period." *Id.* at 5, 217 S.E.2d at 582. The evidence presented to the trial court demonstrated that, at most, the Georges were present on the property a few times each year, mostly around the holiday season, as well as when maintenance issues arose requiring Calmore George's attention. Such an infrequent and temporary presence is not enough to qualify the residence as the dwelling house or place of abode for Calmore George, rendering the attempted substitute service improper. Accordingly, the trial court correctly determined that the foreclosure sale was void due to lack of personal jurisdiction over Calmore George.

III. Purchaser in Good Faith

[3] Respondents next argue that the trial court erred in determining that neither KPC Holdings nor National Indemnity were good faith purchasers for value, and by thereafter voiding KPC Holdings' title to the property as well as its subsequent deed to National Indemnity. We agree.

Our General Statutes provide that title to property sold under a judgment to a good faith purchaser for value cannot be set aside:

> If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected.

N.C. Gen. Stat. § 1-108 (2017). "A person is an innocent purchaser when he purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith." *Morehead v. Harris*, 262 N.C. 330, 338, 137 S.E.2d 174, 182 (1964). A buyer purchases without notice of defects when "(a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect." *Swindell v. Overton*, 310 N.C. 707, 714-15, 314 S.E.2d 512, 517 (1984).

Absent actual notice of any defect, a purchaser may rely on the record's facial validity in determining that title to the land in question is devoid of defects. *See Goodson v. Goodson*, 145 N.C. App. 356, 363, 551 S.E.2d 200, 206 (2001) ("[T]he deficiencies in the conveyance must be expressly or by reference set out in the muniments of record title, or brought to the notice of the purchaser so as to put him on inquiry." (citing *Morehead*, 262 N.C. at 340-41, 137 S.E.2d at 184)). There is a presumption of effective service "[w]hen the return shows legal service by an authorized officer, nothing else appearing." *Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1957). "Allegations of inadequacy of the purchase price realized at a foreclosure sale which has in all other respects been duly and properly conducted in strict conformity with the power of sale will not be sufficient to upset a sale." *Swindell*, 310 N.C. at 713, 314 S.E.2d at 516.

An individual purchases something when they acquire an "interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction." *Purchase*, *Black's Law Dictionary* (10th ed. 2014). Consideration is "[s]omething such as an act, a forbearance, or a return promise bargained for and received by a promisor from a promisee." *Consideration*, *Black's Law Dictionary* (10th ed. 2014) (parentheses omitted). "What constitutes valuable consideration depends upon the context of a particular case." *Estate of Graham v. Morrison*, 168 N.C. App. 63, 68, 607 S.E.2d 295, 299 (2005). A deed of trust is a conveyance for valuable consideration. *Edwards v. Bank*, 39 N.C. App. 261, 271, 250 S.E.2d 651, 659 (1979). A purchaser acts in good faith when possessing "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *Good Faith*, *Black's Law Dictionary* (10th ed. 2014).

A bedrock principle of both our federal and state constitutions is that a person's property cannot be taken without due process of law. U.S. Const. amends. V, XIV; N.C. Const. art. I, § 19. "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment 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)). N.C. Gen. Stat. § 1-108, which provides that title to property sold under a judgment to a good faith purchaser for value cannot be set aside, "may be unconstitutional *as applied* if the property owner being divested of her property has not received notice which is at least *constitutionally* sufficient." *In re Ackah*, ___ N.C. App. ___, ___, 804 S.E.2d 794, 797 (2017), *aff'd per curiam*, 370 N.C. 594, 811 S.E.2d 143 (2018). Notice is "constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent." *Id.* at ___, 804 S.E.2d at 797 (quoting *Jones v. Flowers*, 547 U.S. 220, 226, 164 L. Ed. 2d 415, 426 (2006)). This Court in *Ackah*, citing *Jones*, stated that "constitutional due process does not require that the property owner receive *actual* notice," *id.* at ___, 804 S.E.2d at 797 (quotation marks omitted), and "where notice sent by certified mail is returned 'unclaimed,' due process requires only that the sender must take *some* reasonable follow-up measure to provide other notice where it is practicable to do so." *Id.* at ___, 804 S.E.2d at 797.

In the instant case, the trial court concluded in its Indicative Denial of Joint Motion for Relief Under Rule 60(b)(6) that "[n]either KPC Holdings nor National Indemnity Group qualifies under N.C. Gen. Stat. § 1-108 as a purchaser in good faith." The trial court found that "[t]he respective principals of [Respondents] are colleagues that have known each other for several years and have had transactions in the past." The trial court also made findings regarding, *inter alia*, KPC Holdings' $2,650.22 purchase of the property at the non-judicial foreclosure sale; the $150,000.00 promissory note, secured by a deed of trust, between KPC Holdings and National Indemnity; and National Indemnity's intention to refurbish and eventually sell the property for $240,000.00. At the hearing to set aside the foreclosure, the trial court stated that the credibility of Laura Schoening, principal of National Indemnity, was negatively affected by her inability to remember the details concerning the deed of trust or whether Respondents had done business in the past.

Nonetheless, KPC Holdings was a good faith purchaser for value at the foreclosure sale. No record evidence exists that either KPC Holdings or National Indemnity had actual knowledge or constructive notice of the improper service of the foreclosure notice. No infirmities

or irregularities existed in the foreclosure record that would reasonably put KPC Holdings or any other prospective purchaser on notice that service was improper. The sheriff's return of service indicated that personal service was made upon Hygiena Jennifer George and that substitute service was accomplished for Calmore George by leaving copies with Hygiena Jennifer George. KPC Holdings was entitled to rely upon that record in purchasing the property at the foreclosure sale. Further, as our Supreme Court has held, the low price of the foreclosure sale alone, absent actual or constructive notice of any infirmities, is not sufficient grounds to set aside a purchase by an otherwise good faith purchaser. *Swindell*, 310 N.C. at 713, 314 S.E.2d at 516. It is also clear that KPC Holdings paid value for the property. Accordingly, the trial court's findings of fact do not support the conclusion that KPC Holdings was not a good faith purchaser. In that KPC Holdings was a good faith purchaser for value, we need not consider whether National Indemnity was as well.

Our dissenting colleague on this issue contends that Respondents are not good faith purchasers within the meaning of N.C. Gen. Stat. § 1-108. Our colleague argues that the inadequate sale price at the foreclosure coupled with the failure to obtain proper service upon the Georges prevents Respondents from retaining title to the land as good faith purchasers. *Dissent* at 2 ("[G]ross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." (quoting *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37, 62 S.E.2d 521, 523 (1950))). However, *Swindell* instructs that

> *Foust* stands for the proposition that it is the *materiality* of the irregularity in such a sale, not mere inadequacy of the purchase price, which is determinative of a decision in equity to set the sale aside. Where an irregularity is first alleged, gross inadequacy of purchase price may then be considered on the question of the materiality of the irregularity.

Swindell, 310 N.C. at 713, 314 S.E.2d at 516 (emphasis added). We think the failure to effectuate service is not a material irregularity where, as here, the Georges have experienced at least two previous foreclosures on this same Mecklenburg County property, and are familiar with the procedure. Accordingly, we do not agree with our dissenting colleague that the equities weigh in the Georges' favor.

While Calmore George did not receive proper Rule 4 notice of the foreclosure sale of the property, as explained above, the Georges did receive constitutionally sufficient notice. Thus, pursuant to N.C. Gen. Stat. § 1-108, the deed to the property sold under the foreclosure judgment to KPC Holdings, a purchaser in good faith, should not have been canceled by the trial court. After a manner of service fails, some follow-up measure reasonably calculated to reach the intended recipient suffices as constitutionally sufficient service. *Ackah*, ___ N.C. App. at ___, 804 S.E.2d at 797. In *Ackah*, the homeowners' association attempted service by certified mail, but the notice letter came back unclaimed. *Id.* at ___, 804 S.E.2d at 796. The homeowners' association then posted notice of the hearing on the front door of the property. *Id.* at ___, 804 S.E.2d at 796. This Court held that the further measure of posting notice on the front door was constitutionally sufficient. *Id.* at ___, 804 S.E.2d at 797. We noted that the homeowners' association did even more than post notice—they also sent several letters by regular mail. *Id.* at ___, 804 S.E.2d at 797.

Here, the trustee for the homeowners' association attempted to inform the Georges of the foreclosure sale by: (1) attempted personal service on Hygiena Jennifer George; (2) attempted personal service on Calmore George; (3) attempted certified mail to the Georges at the Mecklenburg County property address; (4) attempted certified mail to the Georges at the Virgin Islands address; (5) regular mail to the Georges at the Mecklenburg County property address; (6) regular mail to the Georges at the Virgin Islands address; and (7) an email exchange between "Jennifer George" and the foreclosure trustee on 17 January 2017, before the upset-bid period expired, in which Jennifer George requested the reinstatement quote.[3] These attempts are more than enough to establish constitutionally sufficient notice under *Ackah* and *Jones*.

Accordingly, because KPC Holdings was a good faith purchaser for value and because the Georges received constitutionally sufficient notice of the foreclosure sale, the trial court abused its discretion in voiding the order of foreclosure and in canceling both the deed to KPC Holdings and its subsequent deed to National Indemnity. While a harsh result for the Georges, they are not without a remedy. N.C. Gen. Stat. § 1-108 permits the Georges to seek restitution. *Id.* at ___, 804 S.E.2d at 797.

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3. It is unclear whether this "Jennifer George" was Hygiena Jennifer George or one of the Georges' daughters.

In any event, our General Assembly has made the policy decision to favor the good faith purchaser at a foreclosure over the debtor where there is a deficiency in the procedure. As this Court has explained,

> it is our duty to follow the policy decision made by our General Assembly, as set forth in N.C. Gen. Stat. § 1-108, which would favor the interests of [KPC Holdings], as a good faith purchaser at a judicial sale, ahead of the interests of [the Georges] in the Property. We note that the General Assembly's policy decision favoring [KPC Holdings] is rational because it encourages higher bids at judicial sales . . . .

Id. at ___, 804 S.E.2d at 798. "This Court is an error-correcting body, not a policy-making or law-making one. We lack the authority to change the law on the ground that it might make good policy sense to do so." *Fagundes v. Ammons Dev. Grp.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 533 (citation and quotation marks omitted), *disc. review denied*, 370 N.C. 66, 803 S.E.2d 626 (2017).

In addition to encouraging higher bids at foreclosure sales, our Supreme Court has long recognized that this policy fosters reliance on the integrity of record title to property and judicial proceedings concerning property. *See*, *e.g.*, *Sutton v. Schonwald*, 86 N.C. 198, 202-04 (1882); *see also Bolton v. Harrison*, 250 N.C. 290, 298, 108 S.E.2d 666, 671 (1959) ("Necessarily, purchasers of property, especially land, must have faith in and place reliance on the validity of judicial proceedings.").

Conclusion

KPC Holdings abandoned its appeal of the 17 July 2017 order joining it as a necessary party; thus, that appeal is dismissed. Jonathan Hankin, trustee on the deed of trust between KPC Holdings and National Indemnity, was not a necessary party to either Rule 60 proceeding. The trial court correctly determined that Calmore George was not properly served with notice of the foreclosure sale and that the clerk of court therefore lacked personal jurisdiction to enter a foreclosure against him. However, KPC Holdings was a good faith purchaser for value, and the Georges received constitutionally sufficient notice of the foreclosure sale.

Accordingly, we affirm the portion of the 9 August 2017 order voiding the foreclosure. The portion of that order canceling and setting aside the trustee's foreclosure deed to KPC Holdings, canceling and setting aside the deed between KPC Holdings and National Indemnity,

and canceling and voiding the deed of trust between KPC Holdings and National Indemnity is reversed and remanded. On remand, the trial court may enter an order not inconsistent with this opinion, which may include, for example, relief to the Georges in the form of restitution, as authorized by N.C. Gen. Stat. § 1-108. *Ackah*, ___ N.C. App. at ___, 804 S.E.2d at 800.

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

Judge DILLON concurs by separate opinion.

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

DILLON, Judge, concurring.

The facts of this case produce a harsh result. The Georges have lost much wealth due to the low purchase price paid at the foreclosure sale of their property. However, we are compelled to follow the law. And the law does not require that the party who purchased their property at the foreclosure sale to have paid a "valuable consideration," as that term is understood in cases cited by the dissent, to be entitled to protection.

Our General Assembly protects the title of anyone who purchases property at a judicial sale so long as the purchaser is "a purchaser in good faith[.]" N.C. Gen. Stat. § 1-108 (2017). There is nothing in Section 1-108 which requires that the consideration that was paid be substantial, unlike in other contexts. Indeed, the language in Section 1-108 is a little different than other statutes which provide protection to purchasers of real estate. For instance, under the Connor Act, any "purchaser[] *for a valuable consideration"* who records first is protected against any prior, unrecorded conveyance. N.C. Gen. Stat. § 47-18 (2017) (emphasis added). Accordingly, under the Connor Act, a purchaser is not protected unless (s)he has paid a "valuable consideration." *Id.* Our Supreme Court has held that a purchaser must have paid "substantial consideration" in order to fall within the protections of the Connor Act. *See*, *e.g.*, *King v. McRackan*, 168 N.C. 621, 624, 84 S.E. 1027, 1029 (1915) ("The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the land for nothing! There must have been some fraud or contrivance about it.' ").

But Section 1-108 does not require that the purchaser at a judicial sale have paid "a valuable consideration" in order to be protected, so long as purchaser believed in good faith that the sale was properly conducted. Indeed, as long as the purchaser at a judicial sale believed in good faith that the sale was proper, the "inadequacy of the purchase price realized [from the sale] . . . will not be sufficient to upset a sale." *Swindell v. Overton*, 310 N.C. 707, 713, 314 S.E.2d 512, 516 (1984). Therefore, any cases cited by the dissent which concern the application of the Connor Act or similar laws are not relevant here.

In the present case, KPC Holdings purchased the Georges' property at the foreclosure sale. Though the consideration it paid would probably not be adequate enough to qualify them for protection under the Connor Act against a prior, unrecorded conveyance, the amount it paid is not relevant to determine whether it is entitled to protection under Section 1-108. There is nothing in the record to indicate that KPC Holdings was not a purchaser in good faith. There is nothing in the record to indicate that the sale was not duly advertised, etc., or that KPC Holdings thwarted the ability of anyone else from bidding at the judicial sale. KPC Holdings was simply the high bidder. KPC Holdings then sold the property to the current owner, National Indemnity, who seeks protection based on its title from KPC Holdings. There is some allegation that KPC Holdings and National Indemnity may have been self-dealing. However, the nature of the relationship between KPC Holdings and National Indemnity or the consideration paid by National Indemnity to KPC Holdings is irrelevant in this case. The only relevant issue is whether KPC Holdings was a good faith purchaser and, therefore, possessed good title. If it was and it did, then the nature of KPC Holdings' relationship with National Indemnity is irrelevant.

This result is, indeed, a harsh one. "Be that as it may, we must remember that hard cases are the quicksands of the law and [we must] confine ourselves to our appointed task of declaring the legal rights of the parties." *Fulghum v. Selma*, 238 N.C. 100, 103, 76 S.E.2d 368, 370 (1953). I, therefore, concur in the majority opinion.

BRYANT, Judge, concurring in part, dissenting in part.

While I agree with the majority's holding that the trustee with legal title was not a necessary party and the Georges were not properly served with notice of the foreclosure sale, I disagree with the majority's holding that Respondents KPC Holdings and National Indemnity qualify as purchasers in good faith within the meaning of N.C. Gen. Stat. § 1-108. Section 1-108 allows restitution as a remedy, as opposed to setting aside

a deed, only if a purchaser satisfies the burden of proving good faith purchaser status. The premise behind the good faith purchaser doctrine is to protect "an *innocent* purchaser when he purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith." *Morehead v. Harris*, 262 N.C. 330, 338, 137 S.E.2d. 174, 182 (1964) (emphasis added). "As to this, the true rule is that a bona fide purchaser for value without notice of outstanding equities takes title absolute" and, therefore, is subject to the greatest protection against adverse claims of title. *Perkins v. Langdon*, 237 N.C. 159, 165, 74 S.E.2d 634, 640 (1953). Courts must carefully examine conveyances when applying good faith purchaser status to a purchaser of title. Because I do not believe the record establishes Respondents as innocent purchasers acting in good faith, I do not believe Respondents are entitled to the protections of a purchaser in good faith. Accordingly, I respectfully dissent.

The uncontroverted evidence before the trial court reflected that, at the time of the foreclosure sale, KPC Holdings was made aware of the property value at approximately $150,000, no pending mortgage, and the outstanding debt of $204.75 in homeowners' dues. As the majority details, KPC Holdings purchased the property for $2,650.22, an amount that is grossly disproportionate to the value of the property. Such actions call into question "notice" and "acting in good faith" which are necessary to justify the applicability of a purchaser in good faith under N.C.G.S. § 1-108.

The protection accorded to a purchaser in good faith will not be given to a purchaser for a grossly inadequate consideration. He must have paid a fair consideration, though not necessarily the full value. *See Worthy v. Caddell*, 76 N.C. 82, __ S.E.2d __ (1877). Our Supreme Court has recognized that "when the purchase price is so grossly inadequate [it is] to be prima facie evidence of fraud." *Thompson v. Watkins*, 285 N.C. 616, 626, 207 S.E.2d 740, 747 (1974). In *Foust v. Gate City Sav. & Loan Ass'n*, where the North Carolina Supreme Court addressed a property valued around $5,500 but was actually sold for $825 at a foreclosure sale, the Court stated that "gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37, 62 S.E.2d 521, 523 (1950). The inequitable element in this case is the foreclosure trustee's failure to effectuate service for all record owners of the property—the Georges—as required by N.C. Gen. Stat. § 45-21.16. This inequity is material based on

the circumstances, and as such, in the interest of justice, this Court must look at the adequacy of the consideration. Moreover, the burden rests on Respondents to further establish that they are purchasers in good faith, which I believe was not done.

KPC Holdings took the property with notice—actual and constructive—of the estimated value of the property and outstanding debt: both appeared on the face of the record. While KPC Holdings may not have possessed actual knowledge of the defective service to the Georges, there was a public record of the HOA's Claim of Lien and KPC Holdings was on reasonable notice that there were no other liens when it placed a bid of $2,650.22 notwithstanding the property value.[1] This conveyance refutes the legitimacy of the sale where it creates a strong inference of an inequitable element and a reasonable person would find the purchase price appears shockingly unfair. Also, it challenges the notion that Respondents acted in good faith when there was questionable evidence of wrongdoing—Respondents were colleagues, dealt with each other in the past, and both made a substantial profit with their respective conveyances of the property. *Worthy*, 76 N.C. at 86, __ S.E.2d at __ ("[T]he party assuming to be a purchaser for valuable consideration, must prove a fair consideration, not up to the full value, but a price paid which would not cause surprise, or make any one exclaim, 'he got the land for nothing, there must have been some fraud or contrivance about it.' ").

As I believe KPC Holdings is unable to establish good faith purchaser status, National Indemnity, as the subsequent purchaser, cannot attain such status from KPC Holdings: KPC Holdings cannot convey what it does not have.

Given the insufficiency of notice of the foreclosure sale combined with the gross inadequacy of the ultimate sales price, I would affirm the trial court's ruling that Respondents were not purchasers in good faith and thus it was proper to void the sale and cancel the deed.

1. The Georges owned the property free and clear of any mortgage or other liens.

IN RE J.P.S.

[264 N.C. App. 58 (2019)]

IN THE MATTER OF J.P.S.

No. COA18-708

Filed 19 February 2019

1. Appeal and Error—mootness—expired involuntary commitment order—collateral legal consequences

The appeal of an expired involuntary commitment order was not moot because the judgment could have collateral legal consequences such as impeachment, character attacks, or future commitment.

2. Mental Illness—involuntary commitment—dangerous to oneself—future danger required

The trial court's findings were not sufficient to justify the involuntary commitment of respondent based on a danger to himself where the findings reflected respondent's mental illness but did not indicate that his symptoms would persist and endanger him in the near future.

3. Mental Illness—involuntary commitment—danger to others—future danger required

The trial court's findings were not sufficient to justify the involuntary commitment of respondent on the grounds of being a danger to others where there was no explicit finding that there was a reasonable probability of future harm to others.

Appeal by respondent from order entered 15 September 2017 by Judge Tyyawdi M. Hands in Mecklenburg County District Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for respondent-appellant.

ZACHARY, Judge.

J.P.S.[1] ("Respondent") appeals from an Involuntary Commitment Order entered against him. Respondent argues that the trial court made

1. Given the sensitive nature of this appeal, initials are used to protect Respondent's identity.

insufficient findings of fact to support its conclusion that Respondent was dangerous to himself and others. We agree. As a result, the order is vacated and remanded to the trial court for additional findings of fact.

I. Background

After examining Respondent on 6 September 2017, Dr. Kelly Hobgood of Carolinas Medical Center-Randolph ("CMC-Randolph") in Charlotte executed an Affidavit and Petition for Involuntary Commitment alleging that Respondent was "a substance abuser" who was "mentally ill and dangerous to self or others." The magistrate ordered that Respondent be taken into custody on 7 September 2017. Later that day, Dr. W. Carlton Gay of the Behavioral Health Center at CMC-Randolph examined Respondent and completed an "Examination and Recommendation to Determine Necessity for Involuntary Commitment" form. On the form, Dr. Gay marked boxes indicating that Respondent was "mentally ill," "dangerous to self," "dangerous to others," and "a substance abuser." To support his conclusions, Dr. Gay included in the "Description of Findings" that Respondent

> [m]aintains that he has 5 military staff members stationed around the area giving his [sic] intelligence information to help in his lawsuit against York County Court system/jail. Has made threatening statements toward the judicial staff there in general for the way that he was treated (threat made while here). Feels the Constitution provides him justification. Prior to coming to ED, he took a large # of Valium and Ativan in a suicide attempt.

A commitment hearing was held on 15 September 2017 before the Honorable Tyyawdi M. Hands. After hearing testimony, Judge Hands stated that "[b]ased on the evidence, the Court concludes that Respondent is mentally ill and is . . . dangerous to either himself and/or others. For those reasons, I enter the order that he be committed for up to 30 additional days here and for a 90-day outpatient order." In the trial court's written Involuntary Commitment Order, the trial court marked boxes indicating that Respondent was mentally ill and dangerous to himself or others. To support those conclusions, the trial court marked another box that stated: "Based on the evidence presented, the Court . . . by clear, cogent, and convincing evidence, finds as facts all matters set out in [Dr. Gay's 7 September 2017 report], and the report is incorporated by reference as findings." In addition, the trial court found the following additional facts in support of involuntary commitment:

> Resp[ondent] followed by [outpatient psychiatrist] where he has high dose of Adderall [and] Valium meds. Brought by mom—agitated [and] required multiple forced meds [and] restraints. Sent texts that he was going to start a war [and] had 400 rounds. Has grandiose thoughts. He says he is a commander [and] if judge makes wrong decision in his court case he will extract the judge [and] have his own hearing [and] same [at] Rock Hill PD. Refuses to consider reasonable meds for mania [and] psychosis. Remains on forced meds [and] is calmer today because [of] multiple doses. Resp[ondent] admits he has PTSD from Iraq and retired early. Resp[ondent] is unhappy about the side effects of the medication including feeling very groggy. Resp[ondent] denies mak[ing] the comments about the rounds.

The trial court ordered a thirty-day inpatient commitment for Respondent, followed by a ninety-day period of outpatient commitment. Respondent timely appealed.

II. Discussion

Respondent argues on appeal that the trial court erred in concluding that he was a danger to himself or others, without making sufficient findings of fact to support that conclusion. For the reasons explained below, we agree.

[1] Although Respondent's Commitment Order has already expired, we note that the argument before us is not moot because "the challenged judgment may cause collateral legal consequences for the appellant." *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008). Such collateral legal consequences might include use of the judgment to attack the capacity of a trial witness, for impeachment purposes, to attack the character of a defendant if he has put character in issue, or to form the basis for a future commitment. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

When deciding whether to involuntarily commit an individual for inpatient treatment, the trial court must make two specific findings "by clear, cogent, and convincing evidence." N.C. Gen. Stat. § 122C-268(j) (2017). First, the trial court must find "that the respondent is mentally ill." *Id.* Second, the trial court must find that the respondent is "dangerous to self, . . . or dangerous to others." *Id.* In its order, the trial court "shall record the facts that support its findings." *Id.*

Upon review of a commitment order, this Court must "determine whether there was *any* competent evidence to support the 'facts' recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the 'facts' recorded in the order." *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980). However, "[i]t is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof[,]" that is, "whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing." *Id.*

In the case before us, Respondent specifically challenges the trial court's conclusions that Respondent was dangerous to himself and dangerous to others. We address each in turn.

A. Dangerous to Self

[2] The General Assembly has defined what it means for an individual to be "dangerous to himself":

> a. "Dangerous to himself" means that within the relevant past:
>
> 1. The individual has acted in such a way as to show:
>
> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
>
> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself; or
>
> 2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of

> suicide unless adequate treatment is given pursuant to this Chapter; or
>
> 3. The individual has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given pursuant to this Chapter.
>
> Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation.

N.C. Gen. Stat. § 122C-3(11)(a). The trial court must find sufficient evidence to support one of the three prongs of this statute in order to conclude that an individual is a danger to himself. *Id.*

A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's "history of mental illness or . . . behavior prior to and leading up to the commitment hearing," but must include findings of "a reasonable probability" of some future harm absent treatment as required by N.C. Gen. Stat. § 122C-3(11)(a). *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012). Any commitment order that fails to include such findings is "insufficient to support its conclusions that [the] [r]espondent presented a danger to [himself] and others." *Id.* at 274, 736 S.E.2d at 532.

In *Whatley*, the trial court determined that the respondent was a danger to herself. *Id.* at 270, 736 S.E.2d at 529. To support that conclusion, the trial court incorporated the findings from a physician's report and also made its own findings regarding the respondent's mental illness at the time and the events leading up to her commitment hearing. *See id.* at 271-72, 736 S.E.2d at 530. On appeal, however, this Court determined that "the second prong of the 'dangerous to self' inquiry [was] not satisfied [because] none of the [trial] court's findings demonstrate[d] that there was a reasonable probability of [the] [r]espondent suffering serious physical debilitation within the near future absent her commitment." *Id.* at 272-73, 736 S.E.2d at 531 (quotation marks and brackets omitted). While the findings "reflect[ed] [the] [r]espondent's mental illness, . . . they d[id] not indicate that [the] [r]espondent's illness or any of her aforementioned symptoms [would] persist and endanger her within the near future." *Id.* at 273, 736 S.E.2d at 531. As a result, this Court could not "uphold the trial court's commitment order on the basis that [the] [r]espondent was dangerous to herself." *Id.*

Here, the following evidence was presented at the commitment hearing to support that Respondent was dangerous to himself: (1) Respondent maintained grandiose thoughts that he had a military staff providing him with intelligence information; (2) Respondent ingested a large number of pills in an apparent suicide attempt; (3) Respondent had "a high dose of Adderall [and] Valium meds"; (4) Respondent presented with an agitated manner and required forced medication and restraints; (5) Respondent refused medication for mania and psychosis; and (6) Respondent suffered from post-traumatic stress disorder as a result of prior military service. However, the trial court failed to make any finding that there was "a reasonable probability of [Respondent] suffering serious physical debilitation within the near future unless adequate treatment is given" or that there was "a reasonable probability of suicide unless adequate treatment is given." N.C. Gen. Stat. § 122C-3(11)(a)(1), (2). As in *Whatley*, the trial court's findings in this case "reflect Respondent's mental illness, but they do not indicate that Respondent's illness or any of [his] aforementioned symptoms will persist and endanger [him] within the near future." *Whatley*, 224 N.C. App. at 273, 736 S.E.2d at 531. Although the trial court need not say the magic words "reasonable probability of future harm," it must draw a nexus between past conduct and future danger. *Id.*

Accordingly, because of the trial court's failure to include a finding of a reasonable probability of some future harm, "we cannot uphold the trial court's commitment order on the basis that Respondent posed a danger to [himself]." *Id.*

B. Dangerous to Others

[3] An individual is "dangerous to others" when evidence is presented

> that within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct.

N.C. Gen. Stat. § 122C-3(11)(b). As a result, in order to conclude that the respondent is dangerous to others, the trial court must find three elements:

> (1) Within the [relevant] past

(2) Respondent has

(a) inflicted serious bodily harm on another, *or*

(b) attempted to inflict serious bodily harm on another, *or*

(c) threatened to inflict serious bodily harm on another, *or*

(d) has acted in such a manner as to create a substantial risk of serious bodily harm to another, [or (e) has engaged in extreme destruction of property,] and

(3) There is a reasonable probability that such conduct will occur again.

In re Monroe, 49 N.C. App. 23, 30-31, 270 S.E.2d 537, 541 (1980).[2] No finding of an overt act is required to support a conclusion that an individual is dangerous to others. *Id.* at 31, 270 S.E.2d at 541.

In the instant case, the only findings of fact relevant to the conclusion that Respondent was dangerous to others were (1) Respondent's statement that he was a "commander [and] if [a York County, South Carolina] judge makes [the] wrong decision in his court case [then] he will extract the judge [and] have his own hearing [and] same [at] Rock Hill PD"; and (2) Respondent's texts that he "had 400 rounds" and "was going to start a war." However, there was no explicit finding that there was a reasonable probability of future harm to others. *Whatley*, 224 N.C. App. at 274, 736 S.E.2d at 531 (holding that the trial court's conclusion that the respondent was a danger to others was unsupported because the trial court's findings described past conduct and drew no connection to future danger to others). Again, although the trial court need not say the magic words "reasonable probability of future harm," it must draw a nexus between past conduct and future danger. *Id.* at 273, 736 S.E.2d at 531.

The trial court's findings fail to support its conclusion that Respondent was a danger to others absent commitment, and accordingly the Commitment Order cannot be upheld.

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2. *Monroe* was decided under a definition of "dangerous to others" provided in N.C. Gen. Stat. § 122-58.2(1)(b) that did not include engaging in extreme destruction of property. That statute was repealed and recodified into the current definition in Chapter 122C that includes engaging in extreme destruction of property. *See* 1979 N.C. Sess. Laws. 1260, 1261, ch. 915, § 1; 1985 N.C. Sess. Laws. 670, 672, ch. 589, §§ 1, 2.

III. Conclusion

The trial court's findings were insufficient to justify the involuntary commitment of Respondent. The trial court's order lacked any finding that a reasonable probability of some future harm existed, either to Respondent or to others, absent his commitment. Thus, the Involuntary Commitment Order is vacated, and this matter is remanded to the trial court for it to make additional findings to support its conclusions.

VACATED AND REMANDED.

Judges TYSON and COLLINS concur.

JOCELYN KENNEDY, PLAINTIFF
v.
SAMUEL DEANGELO, DDS; SAMUEL J. DEANGELO, DDS, MS, P.A.; KELLY C. PRETTYMAN, DDS; CHARLES FERZLI, DDS, P.A. D/B/A SMILES OF CARY AND CHARLES FERZLI, DDS, P.A., DEFENDANTS

No. COA18-603

Filed 19 February 2019

Medical Malpractice—Rule 9(j)—general dentist—experts of different specialties—required findings

In a medical malpractice action, the record supported the trial court's determination that plaintiff could not reasonably have expected her Rule 9(j) experts (a periodontist and an oral surgeon) to testify to the standard of care applicable to defendant (a general dentist). However, the order dismissing the medical malpractice claims for failure to comply with Rule 9(j) was vacated and remanded because it did not contain the required findings of fact.

Appeal by plaintiff from order entered 26 February 2018 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 14 November 2018.

The Epstein Law Firm, PLLC, by Andrew J. Epstein, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and David M. Fothergill, for defendants-appellees.

DIETZ, Judge.

Plaintiff Jocelyn Kennedy appeals the dismissal of her medical malpractice claims against Dr. Kelly Prettyman and her employer for failure to comply with Rule 9(j) of the Rules of Civil Procedure. Dr. Prettyman is a general dentist and the malpractice claims against her relate to the practice of general dentistry. But the experts Kennedy identified in the Rule 9(j) certification are a periodontist and an oral surgeon, neither of whom regularly practices in the field of general dentistry.

As explained below, the record supports the trial court's determination that Kennedy could not reasonably have expected these experts to testify to the standard of care applicable to Dr. Prettyman. But, as Dr. Prettyman concedes, the trial court's order does not contain the necessary findings of fact required by our precedent. Accordingly, we vacate the trial court's order and remand for further proceedings. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct any further proceedings that the court deems necessary for the just resolution of this matter.

Facts and Procedural History

Dr. Kelly C. Prettyman is a general dentist who works for Dr. Charles Ferzli, DDS, P.A. d/b/a Smiles of Cary. In August 2013, Jocelyn Kennedy consulted Dr. Prettyman about a toothache. At the appointment, Kennedy told Dr. Prettyman that she previously had undergone surgery and radiation treatment for oral cancer. Dr. Prettyman diagnosed Kennedy with a severe periodontal defect and referred Kennedy to Dr. Samuel DeAngelo, a periodontist who specialized in treating these conditions.

Dr. DeAngelo developed a treatment plan for Kennedy that involved extracting several of her teeth and placing multiple implants. Later, Dr. Prettyman met with Dr. DeAngelo to review the treatment plan and agreed to order and place a temporary partial denture for Kennedy after the surgery. This was the full extent of Dr. Prettyman's involvement in the initial treatment planning. Although the proposed surgery typically poses risks of osteoradionecrosis and other healing issues in patients with prior oral radiation therapy, Dr. Prettyman did not discuss these risks with Kennedy or with Dr. DeAngelo.

On 19 September 2013, Dr. DeAngelo extracted eleven of Kennedy's teeth and placed seven implants. That same day, Dr. Prettyman delivered and placed a denture after the surgery was complete.

By early October 2013, Kennedy's surgical wound on her lower gums opened up. When Dr. DeAngelo could not close up the wound, he referred Kennedy to an oral surgeon, Dr. Jeffrey Jelic, who sent her to the Center for Hyperbaric Medicine at Duke University to receive hyperbaric oxygen treatments. Kennedy's treating physicians at Duke diagnosed her with osteoradionecrosis. Today, Kennedy continues to suffer severe post-surgical complications, including difficulty speaking and eating, permanent tooth loss, distortion of her face, and a high pain level.

On 22 July 2016, Kennedy filed a malpractice suit against Dr. Prettyman and her employer, as well as Dr. DeAngelo and others involved in her treatment. The complaint alleged that Dr. Prettyman was negligent when she placed the temporary denture in Kennedy's mouth, without support, immediately after her teeth were extracted; failed to discuss the relevant risks with Kennedy beforehand; and failed to refer Kennedy to another provider with more experience treating patients with a history of oral cancer treatment. Kennedy's complaint also included expert witness certifications as required by Rule 9(j) of the North Carolina Rules of Civil Procedure.

At the time Kennedy filed her complaint, she designated only two experts: Dr. Jelic, the oral surgeon who referred her to Duke, and Dr. Jeffery Thomas, her periodontist. Both experts hold dental licenses and are board-certified in their respective specialties. During depositions, both experts testified that Dr. Prettyman had breached the standard of care for general dentists.

Dr. Jelic testified that oral surgeons "do the same thing" general dentists do but that Dr. Prettyman's general dentistry practice "is not the same specialty as [his] practice." Similarly, Dr. Thomas testified he did not "have the exact same practice" as Dr. Prettyman, explaining he "did procedures that the general dentist would do" but that he "wasn't doing general dentistry." Both experts testified they did not hold themselves out as general dentists.

Both experts also testified to having some experience working with dentures. Dr. Jelic explained that his practice prohibits him from actually making dentures—a task he defers to general dentists—but he does "deliver them all the time." He also replied affirmatively when asked whether he ever modified dentures, saying it is "part of what oral surgeons do. . . . You realign them. You take away pressure sores. That's very common." Dr. Thomas testified that he fabricates temporary dentures and that he did so multiple times in the year preceding Kennedy's

surgery. When asked about delivering and placing temporary dentures, Dr. Thomas testified that his role ran the "gamut from doing it independently completely myself, attaching it to temporary implants, to having the general dentist come in there and just watch me, to having a general dentist come in, deliver, and adjust the bite, and then I check it."

Following a mediated settlement, Kennedy voluntarily dismissed with prejudice her claims against all defendants except Dr. Prettyman and her employer. On 10 January 2018, Dr. Prettyman and her employer moved to dismiss under Rule 9(j) and moved for summary judgment. Following a hearing, the trial court entered an order granting Defendants' motion to dismiss and declining to hear the motion for summary judgment as moot. Kennedy timely appealed.

Analysis

Kennedy challenges the trial court's dismissal of her claims against Dr. Prettyman and her employer for failure to comply with Rule 9(j) of the Rules of Civil Procedure. Whether a litigant satisfied Rule 9(j) in a medical malpractice action is a question of law that this Court reviews *de novo*. *Braden v. Lowe*, 223 N.C. App. 213, 217, 734 S.E.2d 591, 595 (2012).

Rule 9(j) is a special pleading requirement for medical malpractice actions. The rule "serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 401, 731 S.E.2d 500, 504 (2012). The relevant provision for our analysis is Rule 9(j)(1), which requires the complaint to specifically assert "that the medical care . . . ha[s] been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1).

Even if a complaint facially complies with the requirements of Rule 9(j), the trial court may dismiss it "if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Estate of Wooden*, 222 N.C. App. at 403, 731 S.E.2d at 506.

But, importantly, if the trial court determines that a complaint is subject to dismissal on this ground, "the court must make written findings of fact to allow a reviewing appellate court to determine whether

those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination." *Id.*

With this standard in mind, we turn to the trial court's order in this case. The critical facts relevant to this Court's review are not disputed by the parties: Dr. Prettyman is a general dentist. The health care treatment Dr. Prettyman provided to Kennedy was consistent with the care provided by a general dentist—Dr. Prettyman saw Kennedy for severe tooth pain; referred Kennedy to a periodontist; and, after the periodontist extracted a number of Kennedy's teeth, placed a temporary denture to replace the extracted teeth.

The two experts on which Kennedy relied in the Rule 9(j) certification are not general dentists. Dr. Jelic is an oral surgeon. Dr. Jelic does not practice general dentistry and testified that, as an oral surgeon, he does not practice the "same specialty" as Dr. Prettyman. Similarly, Dr. Thomas is a periodontist, a health care professional who treats diseases of the gums and other structures supporting the teeth. He does not practice general dentistry and likewise testified that, as a periodontist, he does not have the "same practice" as Dr. Prettyman.

The parties also concede that this case is governed by Rule 702(b) of the Rules of Evidence, which addresses expert testimony against a "specialist." N.C. Gen. Stat. § 8C-1, Rule 702(b). Although there are separate evidentiary standards in Rule 702(c) for expert testimony against a "general practitioner," and a general dentist like Dr. Prettyman certainly could be thought of as a "general practitioner" in the ordinary sense, this Court has interpreted that term to apply only "to physicians" and not to those practicing in the fields of "dentistry, pharmacy, optometry, chiropractic, and nursing." *FormyDuval v. Bunn*, 138 N.C. App. 381, 387, 530 S.E.2d 96, 100 (2000).

We thus examine the standard for expert testimony against a specialist in Rule 702(b). The relevant portion of the rule states that experts can testify about the applicable standard of care for a specialist only if the experts "[s]pecialize in the same specialty" or "[s]pecialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1).

Kennedy first asserts that "[d]entistry is its own specialty, and therefore Dr. Jelic and Dr. Thomas, both of whom practice within the specialty of 'dentistry' and were licensed dentists at the time of the initial pleading in this case, qualify as experts against Dr. Prettyman." This argument is

squarely precluded by our precedent. *See Roush v. Kennon*, 188 N.C. App. 570, 574–76, 656 S.E.2d 603, 606–07 (2008). In *Roush*, this Court held that a general dentist practices a different specialty than an oral surgeon. *Id*. Under *Roush*, Dr. Prettyman, a general dentist, Dr. Thomas, a periodontist, and Dr. Jelic, an oral surgeon, all practice in separate, distinct specialties.

Kennedy next argues that, even if the two experts were not specialists in general dentistry, they can testify to the standard of care for a general dentist because Kennedy established that these experts specialize in a similar specialty; perform the same procedures that Dr. Prettyman performed in this case; and have prior experience treating similar patients. *See* N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)(b). Here, Kennedy relies heavily on *Roush*, where this Court permitted a general dentist to testify to the standard of care for an oral surgeon. But in this argument, Kennedy downplays the key holding from *Roush*: although the expert in that case was a general dentist, he "possessed significant experience in the field of oral surgery." 188 N.C. App. at 575, 656 S.E.2d at 607. Indeed, the expert chose to make oral surgery a large part of his practice, although many general dentists do not. As the Court observed, "there is a clear difference between a general dentist, and one who chooses to also practice oral surgery." *Id*. at 576, 656 S.E.2d at 607.

The experts in this case appear readily distinguishable from the expert in *Roush*. There is no evidence in the record that either Dr. Thomas or Dr. Jelic chose to also practice general dentistry as well as their primary specialty. To the contrary, their deposition testimony and other evidence indicates that these experts did the opposite; they eschewed general dentistry and instead focus their skills on a separate specialized field, either periodontics or oral surgery. Moreover, the record before this Court indicates that, in these separate specialties, these experts treat patients in a different context than a general dentist—focusing on patients with particular conditions that fit their specializations. This raises legitimate concerns that the standard of care these experts apply in their more specialized practices would differ from the standard applicable to a general dentist who sees patients with a broad range of conditions.

As a result, we are persuaded that, on this record, the trial court could have made findings that would have supported a determination that these experts did not qualify to testify to the standard of care applicable to a general dentist. But, as Dr. Prettyman concedes, the trial court did not make the findings required by our precedent, and that, in turn, prevents this Court from engaging in meaningful appellate review of the

trial court's determination. *Estate of Wooden*, 222 N.C. App. at 403, 731 S.E.2d at 506. Dr. Prettyman asserts that this Court should "remand the case to the trial court to have the trial court revise the Order to include findings of fact."

We agree that the appropriate disposition of this case is to vacate the trial court's order and remand. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct any further proceedings that the court deems necessary for the just resolution of this matter.

Conclusion

We vacate and remand the trial court's order for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges STROUD and MURPHY concur.

NANNY'S KORNER DAY CARE CENTER, INC., PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF CHILD DEVELOPMENT AND EARLY EDUCATION, DEFENDANT

No. COA18-679

Filed 19 February 2019

1. Statutes of Limitation and Repose—negligence claim—not tolled by pursuit of administrative remedies

The three-year statute of limitations for negligence claims was not tolled by the pursuit of an administrative remedy in a claim against the State arising from the failure of the Department of Health and Human Services to conduct an independent investigation of an allegation of child abuse at a day care center. Plaintiff sought monetary damages, a remedy not available through appeal from the final agency decision under the North Carolina Administrative Procedure Act.

2. Constitutional Law—due process—state constitution—availability of adequate state remedy

The Tort Claims Act provided an adequate state remedy for a due process claim arising from alleged agency negligence in not

conducting an independent investigation of a child abuse claim against a day care center. If plaintiff's claim under the Tort Claims Act had been successful, that remedy would have compensated plaintiff for the same injury alleged in the constitutional claim. Plaintiff's failure to comply with the applicable statute of limitations did not render its remedy inadequate.

Appeal by Plaintiff Nanny's Korner Day Care Center, Inc. from order entered 12 March 2018 by Judge C. Winston Gilchrist in Robeson County Superior Court. Heard in the Court of Appeals 14 January 2019.

Ralph T. Bryant, Jr., for Plaintiff-Appellant Nanny's Korner Day Care Center, Inc.

North Carolina Attorney General Josh Stein, by Assistant Attorney General Alexandra Gruber, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Plaintiff Nanny's Korner Day Care Center, Inc. ("Plaintiff") appeals from an order dismissing its complaint against the North Carolina Department of Health and Human Services, Division of Child Development and Early Education ("Defendant") for failure to state a claim upon which relief may be granted based on the statute of limitations. We affirm.

I. Factual & Procedural History

On 5 November 2009, Defendant received a report that an eight-year-old girl enrolled at Plaintiff's daycare center complained a staff member at the facility had touched her inappropriately. The complaint prompted an investigation by Sharon Miller ("Ms. Miller"), an abuse and neglect consultant for Defendant, and a social worker from the Robeson County Department of Social Services ("DSS"). The investigation consisted of visits to the child's school and home to interview the child, as well as the child's guidance counselor, teacher, mother, and sibling. Ms. Miller and the social worker then visited Plaintiff's facility to interview staff members. While there, Ms. Miller and the social worker also interviewed Plaintiff's CEO, Bernice Cromartie ("Mrs. Cromartie"), as well as the accused, her husband Ricky Cromartie ("Mr. Cromartie"). Mr. Cromartie, now deceased, was a teacher and maintenance worker at Plaintiff's facility. Mr. Cromartie denied inappropriately touching the

child, and requested a polygraph test, which he passed with no deception. No criminal charges were filed against Mr. Cromartie.

On 2 February 2010, Ms. Miller received notice that DSS completed its investigation and "substantiated" the allegations of sexual abuse against Mr. Cromartie.[1] On 4 February 2010, Ms. Miller submitted a Case Decision Summary of Defendant's investigation to her supervisor, noting DSS had substantiated the allegations of inappropriate touching of a child at Plaintiff's facility by Mr. Cromartie.

In June 2010, Defendant's Internal Review Panel ("the Panel") determined the appropriate administrative action was a written warning. The Panel also reviewed its decision to prohibit Mr. Cromartie from Plaintiff's facility during operating hours, and upheld the decision, citing DSS's substantiation of child sexual abuse. The Panel agreed the decision would remain in effect unless substantiation was overturned. Defendant never conducted an independent investigation into the allegations, but rather relied on DSS's substantiation of child sexual abuse in its decision to issue a written warning to Plaintiff. Defendant did not give Plaintiff or Mr. Cromartie a hearing to contest the finding of substantiation of abuse.

After a timely petition by Plaintiff for a contested case hearing in the Office of Administrative Hearings ("OAH"), a hearing on the petition was held on 12 July 2011. Despite expressing doubts about whether Mr. Cromartie sexually abused the child at Plaintiff's facility, the Administrative Law Judge affirmed the Division's decision to issue a written warning to Plaintiff and restrict Mr. Cromartie from the property when children were present. In its conclusion of law, the Administrative Law Judge concluded:

> 11. The only issue before the undersigned is whether respondent acted properly in issuing the written warning to Petitioner's family child care center, and in implementing the Correct Action plan prohibiting Ricky Cromartie from being on the child care facility premises while children are in care.

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1. N.C. Gen. Stat. § 7B-302 details the required assessment that must be completed by the Director of the Department of Social Services when a report of abuse, neglect, or dependency is received. *See* N.C. Gen. Stat. § 7B-101 for definitions. We note "substantiated" as used in the statute does not involve an impartial review by a neutral magistrate where an accused has the right to traditional due process protections. *See* discussion *supra*.

> 12. While the preponderance of the evidence before me raises serious questions and/or doubts about whether Mr. Cromartie sexually abused the minor child at Petitioner's center on November 5, 2009, the undersigned lacks the authority and/or jurisdiction to issue a formal determination on the merits of that substantiation. Review of DSS' substantiation is located in another forum other than the Office of Administrative Hearings.

On or about 12 March 2012, Defendant adopted the Administrative Law Judge's order as its Final Agency Decision. Plaintiff then filed a petition in Wake County Superior Court seeking judicial review of Defendant's Final Agency Decision pursuant to N.C. Gen. Stat. § 150B-36[2] of the North Carolina Administrative Procedure Act ("NCAPA"). The Wake County Superior Court upheld the Administrative Law Judge's decision in an order entered on 9 January 2013.

Plaintiff filed a timely notice of appeal to the North Carolina Court of Appeals ("*Nanny's Korner I*"). On 20 May 2014, the Court of Appeals held Defendant erred when it relied upon DSS's substantiation of abuse to issue the written warning to Plaintiff and order Mr. Cromartie to remain off the premises.[3] The Court stated that Defendant was required to conduct an independent investigation into the allegations of abuse, and upon substantiation, allow Plaintiff an opportunity to contest the agency's determination. The Court further stated: "Thus, given the documented evidence in the record showing the impact of [Defendant's] administrative action on [Plaintiff's] livelihood, [Plaintiff] has arguably suffered a deprivation of her liberty interests guaranteed by our State's constitution, necessitating a procedural due process analysis." *Nanny's Korner Care Ctr. v. N.C. HHS*, 234 N.C. App. 51, 64, 758 S.E.2d 423, 431 (2014).

Even though the Court found for Plaintiff in *Nanny's Korner I* and reversed the final agency decision, the damage to Plaintiff had already occurred. The administrative penalty required Plaintiff to notify its

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2. In 2011, the General Assembly revised the contested case procedure set forth in the NCAPA by amending and repealing various statutory provisions in Chapter 150B of the North Carolina General Statutes. *See* 2011 N.C. Sess. Law 1678, 1685-97, ch. 398, §§ 15-55. The amendments went into effect on 1 January 2012. Plaintiff's contested case commenced on 21 July 2010. We therefore conduct our review pursuant to the statutory procedures in effect at the time Plaintiff's contested case was filed with the OAH.

3. In 2016, the General Assembly revised the required process Defendant must take when it receives a report of child maltreatment. *See* 2015 Sess. Law 123. Under the revised law, the Defendant is required to conduct its own investigations of child maltreatment. *See* N.C. Gen. Stat. § 110-105.3. The amendments went into effect on 1 January 2016.

customers on or around 15 June 2010 that a report of child abuse at the daycare center had been substantiated. Consequently, Plaintiff began to lose customers and was eventually forced to close its doors. "The injury was real, immediate, and inescapable."

On 23 January 2017, Plaintiff filed a Tort Claims Act Affidavit with the North Carolina Industrial Commission alleging negligence by Defendant for failing to conduct an independent investigation into the allegations of child sexual abuse. In the Affidavit, Plaintiff claimed $600,000 in damages under the North Carolina Tort Claims Act ("Tort Claims Act"). On 20 March 2017, Defendant filed a Motion to Dismiss in accordance with Rule 12(b)(6), and on 4 May 2017, Deputy Commissioner Robert J. Harris granted Defendant's motion and dismissed the claim with prejudice. Plaintiff then appealed to the Full Commission, which heard the matter on 18 October 2017. On 21 December 2018, after Plaintiff filed notice of appeal for the instant action, the Industrial Commission dismissed Plaintiff's tort claim, stating that the claim fell outside the Tort Claims Act's three-year statute of limitations.

On 22 May 2017, Plaintiff filed the instant action in Robeson County Superior Court, alleging a violation of its due process rights under Article 1, section 19 of the North Carolina Constitution. Plaintiff's complaint alleged in pertinent part:

> 22. The defendant enforced the administrative action without conducting an independent determination of whether child abuse had occurred at plaintiff's facility.
>
> 23. Plaintiff was never allowed the opportunity to have a hearing to contest the finding of substantiation of abuse occurring at plaintiff's facility.
>
> 25. The defendant merely adopted the local DSS finding of a substantiation of abuse.
>
> 26. The defendant violated plaintiff's constitutional right to due process when it issued administrative action, without conducting an independent investigation to substantiate abuse. In so doing the plaintiff was deprived on [its] due process right in that plaintiff had a protected interest in the day care licensing and a right to be free from administrative action without due process of law.
>
> 32. The Administrative Procedure Act does not provide a remedy for the plaintiff to recover for the harm caused

> by the deprivation of plaintiff's due process rights, namely, harm to reputation, loss of goodwill, lost income and profits.
>
> 33. Because of the defendant's violation of plaintiff's due process rights, plaintiff's business was completely decimated and plaintiff lost all income from the day care operation.
>
> 34. There is no adequate remedy at state law for plaintiff to redress the violation of [its] constitutional rights and the resultant harm of lost reputation, business goodwill and lost profits from the business.
>
> 43. Article I, Section 19 of the North Carolina Constitution warrants that "[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. N.C. Const. art. I § 19.
>
> 51. Plaintiff was deprived of the liberty interest guaranteed under the North Carolina Constitution.

On 17 October 2017, Defendant filed an Answer and Motion to Dismiss for failure to state a claim upon which relief may be granted. Defendant notified Plaintiff of a hearing on the Motion to Dismiss to take place on 12 February 2018, and on 5 February 2018, Defendant submitted a brief in support of the Motion to Dismiss. On 12 February 2018, Plaintiff filed its brief in opposition to the Motion to Dismiss. On 12 March 2018, the Honorable Judge C. Winston Gilchrist of Robeson County Superior Court granted Defendant's motion and dismissed Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 9 April 2018, Plaintiff filed a timely notice of appeal to the North Carolina Court of Appeals from the judgment and order of the superior court.

II. Jurisdiction & Standard of Review

Plaintiff's appeal from the superior court order lies as of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017). "We review a motion to dismiss for failure to state a claim *de novo*." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 365, 731 S.E.2d 245, 249 (2012) (citing *Bobbitt ex. rel. Bobbitt v. Eizenga*, 215 N.C. App. 378, 379, 715 S.E.2d 613, 615 (2011)).

When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, we consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014). "[O]nce a defendant raises the affirmative defense of the statute of limitations, the burden shifts to the plaintiff[] to show their action was filed within the prescribed period." *Asheville Lakeview Properties, LLC v. Lake View Park Commission, Inc.*, 803 S.E.2d 632, 636 (2017). "Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013). "A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred." *Reunion Land Co. v. Village of Marvin*, 129 N.C. App 249, 250, 497 S.E.2d 446, 447 (1998) (citations omitted). It is well settled that "[q]estions of statutory interpretations are ultimately questions of law for the courts." *Ray v. North Carolina Dept. of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681-82 (2012). Accordingly, we review *de novo* the superior court's order granting dismissal.

III. Analysis

Plaintiff argues its constitutional procedural due process claim was improperly dismissed under Rule 12(b)(6) of the Rules of Civil Procedure because the statute of limitations was tolled while Plaintiff exhausted its administrative remedies. Unfortunately, we must disagree.

On appeal, Plaintiff raises two primary issues for the Court: (1) whether the superior court erred when it granted Defendant's Motion to Dismiss Plaintiff's procedural due process claim; and (2) whether the superior court erred when it failed to apply the Doctrine of Judicial Estoppel to prevent Defendant from taking an inconsistent position before the Industrial Commission. Because Plaintiff at oral argument on 14 January 2019 waived the Judicial Estoppel issue, we need not address it here.

In support of its position that the superior court erred in granting Defendant's Motion to Dismiss its procedural due process claim, Plaintiff argues (1) Plaintiff alleged sufficient facts to support a constitutional claim; (2) The Law of the Land Clause provides a remedy; (3)

Plaintiff's claim is not barred by sovereign immunity; (4) The statute of limitations was tolled while Plaintiff pursued administrative remedies through *Nanny's Korner I*; and (5) Plaintiff is entitled to recover monetary damages for its direct constitutional claim. Even though this appeal is resolved by a determination of the statute of limitations issue, we will briefly address the procedural due process claim.

A. Statute of Limitations

[1] The statute of limitations in North Carolina for both constitutional and negligence claims is three years. *See* N.C. Gen. Stat. § 1-52 (2017). The accrual of the statute of limitations period typically begins "when the plaintiff is injured or discovers he or she has been injured." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014). However, "[w]hen the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts." *Jackson for Jackson v. North Carolina Dept. of Human Resources Div. of Mental Health, Developmental Disabilities, & Substance Abuse Servs.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 903-04 (1998). Nevertheless, the exhaustion of administrative remedies doctrine is inapplicable when the remedies sought are not considered in the administrative proceeding. *Philips v. Pitt County Mem. Hosp., Inc.*, 222 N.C. App. 511, 522, 731 S.E.2d 462, 470 (2012). Under those circumstances, "the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court." *Johnson v. First Union Corp.*, 128 N.C. App. 450, 456, 496 S.E.2d 1, 5 (1998).

Plaintiff argues the statute of limitations was tolled while Plaintiff exhausted its administrative remedies through the appeal of Defendant's final agency decision in *Nanny's Korner I*. Plaintiff contends the exhaustion of administrative remedies doctrine required Plaintiff to exhaust its remedy through the claim under the NCAPA before Plaintiff's right to bring a constitutional claim arose. Accordingly, Plaintiff argues that its cause of action for the alleged due process violation did not accrue until 9 June 2014, when this Court issued its mandate in *Nanny's Korner I*.

Conversely, Defendant contends the statute of limitations began to run on or about 15 June 2010, around the time Defendant issued its written warning to Plaintiff. Defendant argues it is reasonable to conclude the alleged damages occurred near the time of the issuance of the written warning requiring Plaintiff to warn its customers and keep Mr. Cromartie off the premises. Defendant also argues the statute of

limitations was not tolled by the pursuit of administrative remedies under the exhaustion of administrative remedies doctrine since Plaintiff sought monetary damages, a remedy not available under the NCAPA. Defendant further suggests that even Plaintiff viewed the remedy under the statute as inadequate, "since it prevailed in its case against the agency, *i.e. Nanny's Korner I*, but now seeks a monetary remedy under both the North Carolina Tort Claims Act and the Law of the Land Clause." Accordingly, Defendant argues the statute of limitations was not tolled, and has long since run.

We hold the statute of limitations began to run on or about 15 June 2010, when Defendant issued the written warning to Plaintiff. Defendant's written warning was the "breach" that proximately caused—in Plaintiff's own words—a "real, immediate, and inescapable" injury. The statute of limitations began to run when Plaintiff was injured or discovered the injury, which in this case happened almost simultaneously. The statute of limitations was not tolled while Plaintiff pursued its administrative remedies in *Nanny's Korner I* because in that action, Plaintiff sought a remedy not available through the NCAPA—namely, monetary damages. In its complaint, Plaintiff acknowledges that the NCAPA "does not provide a remedy for . . . lost income and profits." Therefore, the statute of limitations was not tolled while Plaintiff pursued its administrative remedies, and the filing of the instant claim on 22 May 2017 fell outside the statute of limitations. We affirm the trial court.

B. Constitutional Procedural Due Process Claim

[2] Plaintiff contends it sufficiently plead a direct claim against the State of North Carolina for a violation of its due process rights guaranteed under the state constitution. " '[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.' " *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (quoting *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). "[P]laintiffs have the burden of showing, by allegations in the complaint, that the particular remedy is inadequate." *Shell Island Homeowners Ass'n Inc. v. Tomlinson*, 134 N.C. App. 217, 223, 517 S.E.2d 406, 411 (1999). "An adequate remedy must provide the possibility of relief under the circumstances." *Craig* at 340, 678 S.E.2d at 355. "An adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim." *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d 911, 915-16 (2000) (*rev'd on other grounds by* 354 N.C. 327, 554 S.E.2d 629 (2001)). Further,

a plaintiff must still win other pretrial motions, including filing a timely claim. *Craig* at 340, 678 S.E.2d at 355.

Plaintiff argues it has the right to bring a direct constitutional claim since no adequate state remedy exists. In its complaint, Plaintiff states that the NCAPA "does not provide a remedy for the plaintiff to recover for the harm caused by the deprivation of plaintiff's due process rights, namely, harm to reputation, loss of goodwill, lost income and profits." Plaintiff also argues the dismissal of its claim at the Industrial Commission proves it does not have an adequate state remedy. "Certainly, a cause of action under the Tort Claims Act that expires before the right to bring the constitutional law claim even arose, cannot be an adequate remedy at law."

Defendant argues Plaintiff does not have a direct constitutional claim because it had an adequate state remedy in the form of the Industrial Commission through the Torts Claim Act. We agree. The Tort Claims Act explicitly grants authority to the North Carolina Industrial Commission to hear tort claims against State agencies. *See* N.C. Gen. Stat. § 143.291(a) (2017). Plaintiff pursued that remedy when it filed an affidavit at the Industrial Commission on 23 January 2017, alleging negligence on the part of Defendant and seeking $600,000 in damages. Nonetheless, the Full Commission dismissed Plaintiff's claim on 21 December 2018, citing the Tort Claims Act's three-year statute of limitations.[4] Plaintiff's failure to comply with the applicable statute of limitations does not render its remedy inadequate. An adequate state remedy existed because, assuming Plaintiff's claim under the Tort Claims Act had been successful, the remedy would have compensated Plaintiff for the same injury alleged in the constitutional claim.

Accordingly, because the Tort Claims Act provided an adequate state remedy for Plaintiff's claim, Plaintiff does not have a direct constitutional claim against the State under the North Carolina Constitution.

IV. Conclusion

Because Plaintiff had an adequate state remedy for its procedural due process claim but did not pursue it within the three-year statute of limitations, we affirm the trial court.

AFFIRMED.

Chief Judge McGEE and Judge HAMPSON concur.

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4. *See* N.C. Gen. Stat. § 1-52 (2017).

STATE OF NORTH CAROLINA
v.
REINE STRUDDY AUGUSTIN, DEFENDANT

No. COA18-373

Filed 19 February 2019

Search and Seizure—reasonable suspicion—totality of evidence—defendant backing away from officer

The trial judge did not err by denying defendant's motion to suppress evidence of a handgun that fell from defendant's waistband when he was seized. The trial court found that defendant was out at an unusual hour in deteriorating weather, defendant was in an area where a crime spree had occurred, defendant's companion lied about his name and both gave vague answers about where they were coming from, and defendant's companion ran as he was being searched. The findings, taken together, support the conclusion that the officer had reasonable suspicion to search defendant. There was no need to determine whether it was appropriate to consider the fact that defendant was backing away; the findings concerning the pair's behavior prior to that occurring were sufficient.

Appeal by Defendant from judgment entered 7 December 2017 by Judge Anna M. Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton III, for the State.

Irons & Irons, PA., by Ben G. Irons, II, for the Defendant.

DILLON, Judge.

Defendant Reine Struddy Augustin appeals from the trial court's judgment following his guilty plea for carrying a concealed handgun. Defendant challenges the trial court's denial of his motion to suppress the gun. We find no error.

I. Background

The arresting officer discovered Defendant carrying a concealed handgun during a stop. Defendant moved to suppress the discovery of the gun, contending that the officer did not have reasonable suspicion to

seize Defendant. The findings the trial court made based on the evidence presented at the suppression hearing tended to show as follows:

On 22 January 2016 at 1:37 a.m., the arresting officer was patrolling a high-crime area in Salisbury when he saw Defendant and Ariel Peterson walking together on a sidewalk. It was snowing, and the officer had not seen anyone else out on the roads. The officer stopped his car and approached the two men. Though he was not investigating anything at the time, the officer was aware of multiple recent crimes in the area. The officer had prior interactions with Defendant and knew Defendant lived some distance away.[1]

The officer asked Defendant and Mr. Peterson their names. Initially, Mr. Peterson gave a false name. Defendant did not.

The officer asked Defendant and Mr. Peterson where they were coming from and where they were going. Both Mr. Peterson and Defendant gave vague answers. Specifically, though both claimed that they had been at the house of Mr. Peterson's girlfriend and were walking back to Defendant's home, they were unable or unwilling to provide the location where Mr. Peterson's girlfriend lived.

Defendant then asked the officer for a ride to his house. The officer agreed, and the three walked to the rear passenger door of the patrol car. The officer then informed Defendant and Mr. Peterson that police procedure required him to search them prior to allowing them in the patrol car. Up to this point, Defendant had been polite, cooperative, and courteous.

As the officer began to frisk Mr. Peterson, Mr. Peterson turned and quickly ran away. The officer turned to Defendant, who had begun taking steps away from the officer. The officer believed that Defendant was about to run away as well, so he grabbed Defendant's shoulders, placed Defendant face-down on the ground, and handcuffed him. As the officer rolled Defendant over to help him stand to his feet, the officer observed a handgun that had fallen out of Defendant's waistband.

The trial court's order also included the following findings of fact:

> 28. Prior to [Mr. Peterson] running away, the officer's encounter with these two young men was a consensual encounter.

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1. The officer met Defendant on a prior occasion. The officer noted at the suppression hearing that he knew Defendant, and was aware that Defendant lived roughly twenty (20) blocks from the location of the encounter.

> 29. [Mr. Peterson's] flight and the officer's belief Defendant was going to flee provided the officer reasonable suspicion a crime is, was, or was about to be committed and permitted the officer to physically detain Defendant for further investigation.

Based on its findings, the trial court concluded, in part, as follows:

> 1. Based on the totality of the circumstances, to include these individuals [sic] young age, the icy weather conditions, the time of night that [the officer] encountered them, Peterson initially providing a false name and date of birth and saying he did so because he didn't like cops, and that the encounter up to the point that Peterson fled was consensual, the court finds that [the officer] had reasonable suspicion to physically detain Defendant for further investigation.

After his motion to suppress was denied, Defendant pleaded guilty to carrying a concealed handgun, reserving his right to appeal the denial of his motion to suppress. Defendant timely appealed.

II. Analysis

Defendant argues that he was unlawfully seized when the officer discovered the gun. We disagree.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Saldierna*, 369 N.C. 401, 405, 794 S.E.2d 474, 477 (2016) (citation omitted). Factual findings by the trial judge are binding on appeal if there is evidence to support them, even if the evidence might lead to an alternate finding. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Conclusions of law made by the trial judge are reviewed *de novo*. *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013).

Both the federal and North Carolina constitutions protect persons from "unreasonable searches and seizures." U.S. Const. amend. IV; N.C. Const. art. I, § 20. In order to seize and detain a person, an officer must have reasonable suspicion that a crime has been or is about to be committed. *See State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). Reasonable suspicion "must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* at 441-42, 446 S.E.2d at 70.

The trial court made a number of findings. Though each finding, standing alone, may not give rise to reasonable suspicion, we must determine whether the findings, *taken together*, do give rise to reasonable suspicion.

Here, Defendant challenges the trial court's finding that he was likely to flee and argues that this finding should not have been included in the trial court's reasonable suspicion calculus. That is, if the officer did not yet have reasonable suspicion just prior to Defendant's act of backing away, then Defendant was constitutionally free to leave at that point. And the fact that Defendant may have been simply exercising his right to end a consensual encounter should not tip the scales to support reasonable suspicion. We agree that a finding that a defendant was simply exercising his constitutional right to leave a consensual encounter should not be used against Defendant to tip the scale towards reasonable suspicion. *See State v. Icard*, 363 N.C. 303, 318, 677 S.E.2d 822, 832 (2009) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)) (stating that the long-established hallmark of a consensual encounter is that a reasonable person would feel free to leave). We do note, though, that the *manner* in which Defendant exercises this right could, in some cases, be used to tip the scale. *Compare Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (stating that the defendant's running away from a consensual encounter with officers may contribute to a reasonable suspicion calculus), *with In re J.L.B.M.*, 176 N.C. App. 613, 622, 627 S.E.2d 239, 245 (2006) (stating that the defendant merely walking away from a patrol car did not support reasonable suspicion).

In any event, we need not determine whether it was appropriate for the trial court to consider the fact that Defendant was backing away in its reasonable suspicion calculus in this case. Rather, for the reasons stated below, we conclude that the findings pertaining to the behavior of Defendant and his companion *prior to* Defendant backing away were sufficient to give rise to reasonable suspicion. *See State v. Mello*, 200 N.C. App. 437, 446-47, 684 S.E.2d 483, 490 (2009), *aff'd per curiam*, 364 N.C. 421, 421, 700 S.E.2d 224, 225 (2010) (holding that erratic behavior and flight exhibited *by the defendant's companions* could be used in the reasonable suspicion calculus). Specifically, the trial court found that Defendant was out at an unusual hour in deteriorating weather. *See State v. Rinck*, 303 N.C. 551, 560, 280 S.E.2d 912, 920 (1981) ("It must be remembered that defendants were walking along the road at an unusual hour for persons to be going about their business."); *State v. Eaton*, 210 N.C. App 142, 145, 707 S.E.2d 642, 645 (2011) (considering bad weather conditions as a factor for reasonable suspicion). The

trial court found that Defendant was present in an area where a spree of crime had occurred. *State v. Tillet*, 50 N.C. App. 520, 524, 274 S.E.2d 361, 364 (1981); *see also State v. Thompson*, 296 N.C. 703, 707, 252 S.E.2d 776, 779 (1979). The trial court found that Defendant's companion lied about his name and that they both gave vague answers about where they were coming from. *State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012) (considering vague answers about travel as factors in the reasonable suspicion calculus). And the trial court found that Defendant's companion ran away as he was being searched. *See State v. Mitchell*, 358 N.C. 63, 69, 592 S.E.2d 543, 547 (2004) (quoting *Wardlow*, 528 U.S. at 125, for the proposition that headlong flight is the "consummate act of evasion" and is "certainly suggestive" of wrongdoing).

We conclude that there was sufficient evidence at the suppression hearing to support the above findings and that these findings, when taken together, support the trial court's conclusion that the officer had reasonable suspicion to seize Defendant. We, therefore, conclude that the trial judge did not err in denying Defendant's motion to suppress.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

STATE OF NORTH CAROLINA
v.
ADAM WARREN CONLEY

No. COA18-305

Filed 19 February 2019

1. Appeal and Error—preservation of issues—constitutional issue—double jeopardy—failure to argue at trial

The Court of Appeals dismissed defendant's argument that the trial court violated his constitutional right against double jeopardy by entering judgment on multiple counts of possession of a gun on educational property, where defendant failed to preserve the argument by presenting it at trial. The court declined to invoke Appellate Rule 2 to reach the merits of the argument because, even assuming error, defendant's sentence would be within the range authorized by the General Statutes.

2. Firearms and Other Weapons—possession on educational property—simultaneous possession of multiple firearms—statute ambiguous—rule of lenity

The trial court erred by entering multiple convictions for defendant's simultaneous possession of multiple firearms on educational property (N.C.G.S. § 14-269.2(b)). Because the statute was ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms was authorized, the rule of lenity applied, so the evidence supported entry of only one conviction.

Appeal by defendant from judgment entered 16 August 2017 by Judge Robert T. Sumner in Macon County Superior Court. Heard in the Court of Appeals 13 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

BRYANT, Judge.

Where defendant Adam Warren Conley failed to present his constitutional double jeopardy argument before the trial court, it was not properly preserved for our review. Accordingly, we dismiss the constitutional argument defendant presents on appeal. However, where the trial court entered a sentence in excess of statutory authority, we reverse and remand the matter for resentencing on the offenses of possession of a gun on educational property.

On 29 June 2015, a Macon County grand jury issued an indictment which contained eleven offenses against defendant: attempted murder, discharge of a firearm on educational property, six counts of possession of a firearm on educational property, assault by pointing a gun, cruelty to animals, and possession of firearms in violation of a DVPO. The matter came on for trial before a jury during the 7 August 2017 session of Macon County Superior Court, the Honorable Robert T. Sumner, Judge presiding.

The evidence at trial tended to show that on 4 June 2015 at 4:40 a.m., a resident who lived on Union School Road heard several gunshots. Shortly thereafter, the resident observed two people walking down his driveway toward Union School Road. Law enforcement officers

responded to the resident's address and searched the area, but no person, gun, bullets, or shell casings were found.

At 5:00 a.m. that same morning, Alice Bradley was at South Macon Elementary School to prepare her school bus for the morning route. Using her car, Bradley picked up her sister who was parked in the teacher's lot and drove to the school building, where they turned on inside lights and conducted a safety check. At 5:15 a.m., Bradley drove back to her school bus, parked, and noted the presence of two people in the parking lot about twenty yards away. Bradley later identified the two people as defendant and Kathryn Jeter. Defendant pointed a silver handgun at Bradley before he headed toward the athletic field. Bradley boarded her school bus and radioed the bus garage to request a deputy sheriff.

At 5:20 a.m., Sheriff Deputy Audrey Parrish with the Macon County Sheriff's Department responded to South Macon Elementary in response to a 9-1-1 call. When Deputy Parrish encountered defendant and Jeter, she directed them to stop walking away, to turn, and walk toward her. About fifty yards away from Deputy Parrish, defendant turned, raised a "large silver [handgun]," and pointed it at Deputy Parrish. Deputy Parrish testified that it was very quiet; she heard the handgun trigger "snap"; but the gun did not fire. Deputy Parrish retreated to her vehicle, where she radioed for assistance. By 5:30 a.m., several sheriff's deputies had responded to the school and engaged defendant. When defendant was taken into custody, law enforcement officers observed "a large silver gun" and a smaller "Derringer, pocket-style [gun]" on the ground. And in addition to the firearms on the ground, "[defendant] had two guns, one on each side on his waist and holsters, as well as other [large] knives . . . on his person that we could see sticking out of his boot . . . ." Moreover, law enforcement officers located defendant's tote bag on Bradley's school bus. Bradley mentioned that the bag was not there when she walked through the bus at 5:00 a.m., before she and her sister entered the school building. The bag contained a pistol.

At the close of the State's evidence, the trial court dismissed the charge of discharge of a firearm on educational property and violation of the DVPO. Defendant did not present any evidence. The jury returned guilty verdicts against defendant on the charges of attempted first-degree murder, five counts of possession of a gun on educational property, possession of knives on educational property, and assault by pointing a gun. The trial court entered judgments in accordance with the jury verdicts. For attempted first-degree murder, defendant was sentenced to an active term of 170 to 216 months. In a consolidated judgment for three counts of possession of a gun on educational property, defendant was

sentenced to an active term of 6 to 17 months to be served consecutive to the sentence for attempted first-degree murder. In a separate consolidated judgment for two counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals, defendant was again sentenced to 6 to 17 months to be served consecutive to the judgment for three counts of possession of a gun on educational property; however, this sentence was suspended. The court ordered that for this judgment, following his release from incarceration, defendant was to be placed on supervised probation for a 24-month period. Defendant appeals.

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[1] On appeal, defendant argues that the trial court erred by entering judgments on five counts of possession of a gun on educational property. Defendant contends that constitutional protections against double jeopardy guard against entry of judgment on more than one count of the offense of simultaneous possession of "any gun" on educational property. We dismiss this issue.

Defendant acknowledges that his constitutional challenge to the entry of judgments against him was not presented before the trial court. Pursuant to our Rules of Appellate Procedure, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C.R. App. P. 10(a)(1) (2018). "It is a well established rule of [our appellate courts] that [we] will not decide a constitutional question which was not raised or considered in the court below." *Bland v. City of Wilmington*, 278 N.C. 657, 660, 180 S.E.2d 813, 816 (1971) (citation omitted); *see State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)); *see also State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (holding that to the extent the defendant relies on an unpreserved constitutional double jeopardy argument, the argument would not be addressed); *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (same); *State v. Mitchell*, 317 N.C. 661, 670, 346 S.E.2d 458, 463 (1986) (same). In order to reach the merits of his argument, defendant asks that we invoke Rule 2 of our Rules of Appellate Procedure in order to suspend the Rules of Appellate Procedure.

Pursuant to Rule 2, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions

of any of the[] [appellate] rules in a case pending before it . . . ." N.C.R. App. P. 2 (2017).

> Rule 2 must be applied cautiously. . . . "While it is certainly true that Rule 2 has been and may be so applied in the discretion of the Court, we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." [*Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)] (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)).
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> . . . .
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> Before exercising Rule 2[,] . . . the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option. Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority.

State v. Hart, 361 N.C. 309, 315–17, 644 S.E.2d 201, 205–06 (2007). "Appellate Rule 2 has most consistently been invoked to prevent manifest injustice in criminal cases in which substantial rights of a defendant are affected." *State v. Spencer*, 187 N.C. App. 605, 612, 654 S.E.2d 69, 73 (2007) (citation omitted) (invoking Rule 2 to reach the merits of the defendant's argument where defendant was erroneously convicted of both larceny and possession of the same stolen property).

> This assessment—whether a particular case is one of the rare "instances" appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citing, *inter alia*, *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam) ("*In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed*, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and

> order a new trial.") (emphasis added)). In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis. *See* [*Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008)]; [*Hart*, 361 N.C. 309, 315–17, 644 S.E.2d 201, 204-06 [2007]; *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299–300.

State v. Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602–03 (2017); *see also State v. Miller*, 245 N.C. App. 313, 315–16, 782 S.E.2d 328, 330 (declining to invoke Rule 2 to reach the merits of the defendant's unpreserved constitutional double jeopardy argument), *review denied*, ___ N.C. ___, 787 S.E.2d 40 (2016); *State v. Rawlings*, 236 N.C. App. 437, 443–44, 762 S.E.2d 909, 914–15 (2014) (same).

Here, the trial court entered judgments against defendant for the offenses of attempted first-degree murder, five counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals. The offenses were consolidated into three judgments, each committing defendant to an active term to be served consecutively: 170 to 216 months for attempted first-degree murder; 6 to 17 months for three counts of possession of a gun on educational property; and 6 to 17 months for two counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals. However, the court suspended the 6 to 17 month active sentence imposed in the judgment entered on two counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals, instead placing defendant on supervised probation for a period of 24 months. The offenses of possession of a weapon on educational property and cruelty to animals are each Class 1 misdemeanors. N.C. Gen. Stat. §§ 14-269.2(d), -360(a) (2017). The offense of assault by pointing a gun is a Class A1 misdemeanor. *Id.* § 14-34. A conviction for a Class A1 misdemeanor authorizes a trial court to impose on a defendant with a Level III prior record level (such as defendant's misdemeanor prior record level, here) a term of 1 to 150 days of community, intermediate, or active punishment, *id.* § 15A-1340.23(c), and authority to suspend that sentence and place defendant on supervised probation for a period of up to 24 months, *id.* § 15A-1343.2(d)(2). Thus, even if we presume

error in entering judgment on multiple counts of possession of a gun on educational property, defendant's current sentence is within the range of sentences authorized.

Where defendant failed to raise his constitutional double jeopardy argument before the trial court and thus failed to preserve it for our review and where—even presuming error in the judgment and remand for resentencing—the sentence currently imposed would be within the sentence range intended by our legislature and authorized by our General Statutes, we do not believe the circumstances of this case so impact defendant's substantial rights or present such an exceptional circumstance, *see Campbell*, 369 N.C. at 603, 799 S.E.2d at 602, an issue of public interest, or manifest injustice to merit the suspension of our Rules of Appellate Procedure pursuant to Rule 2. N.C.R. App. P. 2. Accordingly, we dismiss this argument.

[2] Apart from his double jeopardy argument, defendant asks whether section 14-269.2(b) permits entry of multiple convictions for the simultaneous possession of multiple guns and further contends that the State's evidence only supported entry of one conviction.

> It is well established that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citing *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925)); *see also* [*State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)] (finding waiver of the constitutional argument that the defendant was denied a fair and impartial jury, but addressing the interrelated contention that the trial court violated its statutory duty to ensure a randomly selected jury).

State v. Davis, 364 N.C. 297, 301–02, 698 S.E.2d 65, 67–68 (2010); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (2017) (preserving for appellate review asserted errors occurring where "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" "even though no objection, exception or motion has been made in the trial division"); *State v. Meadows*, No. 400PA17, slip. op. *7–8 (N.C. Dec. 7, 2018).

In support of his argument that the "any gun" language of General Statutes, section 14-269.2(b), only permits entry of one conviction for

possession of a gun on educational property, defendant cites *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340 (2008). In *Garris*, the Court addressed whether the "any firearm" language of section 14-415.1 (prohibiting possession of a firearm by a felon) precluded entry of multiple convictions for possession of a firearm by a felon though several weapons were possessed simultaneously. *Id.* at 282–85, 663 S.E.2d at 346–48. At the time a matter of first impression, the Court observed that the statutory language "any firearm" was

> ambiguous in that it could be construed as referring to a single firearm or multiple firearms. If construed as any single firearm, [section 14-415.1] would allow for multiple convictions for possession if multiple firearms were possessed, even if they were possessed simultaneously. Alternatively, if construed as any group of firearms, the statute would allow for only one conviction where multiple firearms were possessed simultaneously.

Id. at 283, 663 S.E.2d at 346. Having looked to federal law, this Court wrote "[t]he United States Supreme Court holds that ambiguity in the statute should be resolved in favor of lenity, and doubt must be resolved against turning a single transaction into multiple offenses." *Id.* at 283–84, 663 S.E.2d at 347 (citing *Bell v. United States*, 349 U.S. 81, 83–84, 99 L. Ed. 905, 910–11 (1955))); *see also United States v. Dunford*, 148 F.3d 385, 389–90 (4th Cir.1998) (holding that six firearms simultaneously seized from a defendant's home only supported one conviction under 18 U.S.C. § 922(g) (prohibiting the possession of "any firearm" by a person coming within an enumerated category)). Moreover, within the jurisprudence of this State, "[i]n construing a criminal statute, the presumption is against multiple punishments in the absence of a contrary legislative intent." *Garris*, 191 N.C. App. at 284, 663 S.E.2d at 347 (citing *State v. Boykin*, 78 N.C. App. 572, 576–77, 337 S.E.2d 678, 681 (1985) (holding that N.C. Gen. Stat. § 14-72(b)(4) (larceny of a firearm) did not intend to create a separate unit of prosecution for each firearm stolen or allow multiple punishments for the theft of multiple firearms)).

As in *Garris*, we hold that the language of section 14-269.2(b) describing the offense of "knowingly . . . possess[ing] or carry[ing], whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property," N.C.G.S. § 14-269.2(b), is ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms is authorized. And consistent with this Court's application of the rule of lenity, also as applied in *Garris*, we hold that section

14-269.2(b) does not allow multiple punishments for the simultaneous possession of multiple firearms on educational property. Accordingly, we reverse and remand this matter to the trial court for resentencing of the judgments entered on the offenses of possession of a gun on educational property.

REVERSED AND REMANDED.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RONALD T. CORBETT

No. COA18-327

Filed 19 February 2019

1. Rape—statutory—sexual act—penetration—touch between labia

There was sufficient evidence of a sexual act—penetration—for the charge of statutory rape to be submitted to the jury where the victim testified that defendant touched her "between" her labia.

2. Sexual Offenses—sexual exploitation of a minor—nude photograph—lascivious

There was sufficient evidence to submit sexual exploitation of a minor charges to the jury where defendant photographed the victim while she was naked, standing in his bedroom, and attempting to cover her private areas with her hands. A reasonable jury could conclude that the photograph was lascivious.

Appeal by defendant from judgment entered 11 May 2017 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 18 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Josephine N. Tetteh, for the State.

Mark L. Hayes, for defendant-appellant.

DAVIS, Judge.

In this appeal, we address the question of when charges of statutory rape and sexual exploitation are properly submitted to a jury. Ronald T. Corbett ("Defendant") appeals from his convictions for statutory rape of a person who is 13, 14, or 15 years old, first-degree sexual exploitation of a minor, second-degree sexual exploitation of a minor, and five counts of taking indecent liberties with a child. Because we hold that the evidence — when viewed in the light most favorable to the State — was sufficient for a reasonable juror to have found Defendant guilty of these charges, we conclude that he received a fair trial free from error.

Factual and Procedural Background

The State introduced evidence at trial tending to establish the following facts: "Amy"[1] was born in October 2001 in Toledo, Ohio to Defendant and Simone Hamilton. Amy lived with her mother and younger brother in Ohio until she was nine years old when the family moved to Raleigh. At that time, Defendant was living in Nebraska.

During the 2013-14 school year when Amy was in the sixth grade, Defendant moved to Fayetteville to live with his mother. Following Defendant's move to North Carolina, Amy began staying at his residence on weekends. During the summer of 2014, Defendant began living with Hamilton and her children in their apartment.

Within a month after moving into the apartment, Defendant became verbally and physically abusive toward Hamilton. He also sexually assaulted her on multiple occasions by forcing her to have sexual intercourse with him and to perform oral sex on him. In addition, Defendant began disciplining Amy by beating her. These punishments occurred frequently in response to "[a]nything little" such as when Amy "forgot something at school or didn't take a shower." Defendant also forced Amy to read and memorize passages from the Bible and punished her if she did not remember everything she had read.

On several occasions during 2014, Defendant took Amy into his room while Hamilton was at work and ordered her to remove her clothes. The first time this occurred, Amy initially refused to remove her clothing but ultimately acceded to Defendant's demand because she was scared he would hurt her if she refused. After taking off her clothes, Amy stood in front of Defendant for approximately an hour reading the Bible and listening to him read the Bible to her. During this incident, Defendant was

1. A pseudonym is used throughout this opinion to protect the identity of the minor child.

wearing only a towel. Although Amy did not actually observe Defendant photographing her on this occasion, she identified at trial a photograph introduced into evidence by the State showing her standing naked in her father's room that was taken on that same day.

On multiple occasions that year, Defendant took Amy into his bedroom and forced her to rub Vaseline on his penis. The first time this occurred, Amy did not understand what Defendant wanted her to do and he "kept explaining it over and over" and "ended up . . . saying it step-by-step." Defendant threatened Amy by telling her that if she did not "do this now something else will happen. I'll do something harder. I'll do something worse." He also told Amy that if she wanted a boyfriend she would "have to learn how to please him."

During one such instance, Defendant became upset with Amy because she was not "doing it correctly." He pushed her down onto his bed and got on top of her, which resulted in Vaseline getting onto Amy's pants. Defendant then ordered Amy to take her pants off and began touching her and "telling [her] to stop covering [herself]." He also tried "to put his penis inside [Amy] but [she] screamed loud and he got up because he wanted [her] to be quiet."

On another occasion, Defendant told Amy that he would return a cell phone that he had confiscated from her if she opened her legs for him. Amy was naked at the time. When she refused, he "grabbed [her] legs open" and "tried to touch [her] vagina." Although Defendant was able to touch Amy between her labia, he was unable to "get much further" because Amy continued to push his hand away.

On 27 July 2014, Defendant asked Amy to bring him lotion that he had previously purchased for her. Upon learning that Amy had left the lotion at school, Defendant became very upset. He told Amy to go to her room and began physically abusing Hamilton. Because she was upset that Defendant was hitting her mother, Amy ran out the front door and went to the apartment complex's leasing office. Defendant attempted to chase Amy but eventually gave up. Amy called the police from the leasing office, and law enforcement officers subsequently arrived at the apartment complex and arrested Defendant.

Defendant was indicted by a Wake County grand jury for statutory rape of a person who is 13, 14, or 15 years old, first-degree sexual exploitation of a minor, second-degree sexual exploitation of a minor, and five counts of taking indecent liberties with a child. On 17 September 2014, Defendant's counsel filed a motion to have him examined for the purpose of determining his capacity to stand trial. Following an examination

by the medical staff of the Forensic Services Unit of Central Regional Hospital, Defendant was found to be competent. After requesting leave to proceed *pro se* at trial, Defendant was allowed to represent himself. On 15 January 2015, an order was entered appointing standby counsel for Defendant.

A jury trial was held beginning on 8 May 2017 before the Honorable Reuben F. Young. Amy, her mother, and several law enforcement officers testified for the State. Defendant did not present any evidence. At the close of the State's evidence, Defendant's standby counsel moved to dismiss both sexual exploitation charges and the statutory rape charge based on insufficiency of the evidence. The trial court denied these motions. Defendant renewed his motions to dismiss at the close of all the evidence and the trial court once again denied them.

On 11 May 2017, the jury convicted Defendant of all charges. The trial court sentenced him to consecutive terms of 16-29 months imprisonment for each charge of taking indecent liberties, 73-148 months for the first-degree sexual exploitation charge, 25-90 months for the second-degree exploitation charge, and 240-348 months for the charge of statutory rape. Defendant gave timely notice of appeal to this Court.

Analysis

On appeal, Defendant argues that the trial court erred by denying his motions to dismiss, contending that (1) no evidence of penetration was presented to support the statutory rape charge; and (2) the photograph upon which the sexual exploitation charges were based did not depict Amy engaged in "sexual activity" as that term is defined in the North Carolina General Statutes. We address each argument in turn.

I. Statutory Rape

[1] Defendant first argues that the trial court erred by failing to dismiss the statutory rape charge because the State presented no evidence of penetration constituting a "sexual act" under N.C. Gen. Stat. § 14-27.1. We disagree.

"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).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Defendant was indicted for statutory rape pursuant to N.C. Gen. Stat. § 14-27.7A(a)[2], which provides that a defendant "is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person[.]" N.C. Gen. Stat. § 14-27.7A(a) (2014). For purposes of N.C. Gen. Stat. § 14-27.7A(a), the term " '[s]exual 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[.]" N.C. Gen. Stat. § 14-27.1 (2014). Our appellate courts have held that for purposes of rape offenses, "evidence that the defendant entered the labia is sufficient to prove the element of penetration." *State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005) (citation omitted), *appeal dismissed and disc. review denied*, 360 N.C. 290, 628 S.E.2d 384 (2006).

In *Bellamy*, the defendant was convicted of first-degree sexual offense. *Id.* at 657, 617 S.E.2d at 88. At trial, evidence was presented that the defendant "used the barrel of his gun to separate [the victim's] labia." *Id.* During her testimony, the victim "clarified that she felt the barrel of the gun on the *inside* of her labia." *Id.* On appeal, the defendant argued that insufficient evidence of penetration was presented to support the submission of the first-degree sexual offense charge to the jury. This Court held that the trial court properly denied the defendant's motion to dismiss where "all of the evidence . . . shows that Bellamy used the barrel of his gun to spread the labia of [the victim]." *Id.* at 658, 617 S.E.2d at 88.

In the present case, the following exchange occurred at trial between the prosecutor and Amy on direct examination:

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2. N.C. Gen. Stat. § 14-27.7A(a) was recodified as N.C. Gen. Stat. § 14-27.25 on 1 December 2015. Because the offense in the present case occurred prior to 1 December 2015, however, N.C. Gen. Stat. § 14-27.7A(a) remains applicable in this case.

[PROSECUTOR]: And can you tell us the areas that [Defendant] would touch you?

[AMY]: My vaginal area.

. . . .

[PROSECUTOR]: And so what did he physically do?

[AMY]: He, like, grabbed my legs open.

[PROSECUTOR]: And what did he do?

[AMY]: He tried to touch my vagina.

[PROSECUTOR]: Do you recall what you were wearing?

[AMY]: I think I was wearing no clothes.

[PROSECUTOR]: And what was he able to touch?

[AMY]: Just the outside and he tried to get in, but I kept hitting him.

[PROSECUTOR]: I hate to talk about anatomy, but you sort of have the outside labia part, was he able to touch the skin there?

[AMY]: Yes.

[PROSECUTOR] And how would you [be] able to get him away?

[AMY]: He's stronger than me. Just, he eventually stopped because I guess he got tired.

. . . .

[PROSECUTOR]: *How far would you say he was able to get with -- did he actually go between your labia? Do you understand my question?*

[AMY]: *Yes.*

[PROSECUTOR]: *Was he able to do that?*

[AMY]: *Yes.*

(Emphasis added.)

Citing *Bellamy*, Defendant contends that Amy's testimony that he touched her "between" her labia does not constitute sufficient evidence

of penetration. This is so, he asserts, because " 'between' the labia does not equate to 'inside' the labia" for purposes of penetration pursuant to N.C. Gen. Stat. § 14-27.7A. We disagree.

In the above-quoted exchange, Amy testified that Defendant touched her in her "vaginal area." She stated that he "grabbed [her] legs open" and "tried to touch [her] vagina[.]" In addition, she expressly testified that Defendant *was* able to touch her "between" her labia before giving up after Amy repeatedly pushed him away.

Viewing Amy's testimony in the light most favorable to the State — as we must — we are satisfied that reasonable jurors could have concluded that the State presented sufficient evidence that Defendant penetrated Amy's labia. Therefore, we hold that the trial court properly denied Defendant's motion to dismiss the statutory rape charge. *See State v. Kitchengs*, 183 N.C. App. 369, 376, 645 S.E.2d 166, 171-72 ("[W]e cannot conclude . . . that the State failed to meet its burden of showing substantial evidence of penetration. Thus, the trial court did not err in denying Defendant's motions to dismiss [his statutory rape charge]."), *disc. review denied*, 361 N.C. 572, 651 S.E.2d 370 (2007).

II. Sexual Exploitation

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the first-degree and second-degree sexual exploitation charges because the photograph submitted into evidence by the State that formed the basis for those charges did not depict Amy engaged in "sexual activity" as defined by the North Carolina General Statutes. Specifically, he contends that (1) the photograph was not "lascivious"; and (2) it did not include the exhibition of Amy's genitals or pubic area.

N.C. Gen. Stat. § 14-190.16 provides, in pertinent part, as follows:

> A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he . . . [u]ses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in *sexual activity* for a live performance or for the purpose of producing material that contains a visual representation depicting this activity[.]

N.C. Gen. Stat. § 14-190.16(a) (2017) (emphasis added).

Second-degree sexual exploitation of a minor criminalizes, among other things, the act of "photograph[ing] . . . or duplicat[ing] material that contains a visual representation of a minor engaged in sexual activity[.]"

N.C. Gen. Stat. § 14-190.17 (2017). The definition of "sexual activity" for purposes of both first-degree and second-degree sexual exploitation of a minor includes "[t]he lascivious exhibition of the genitals or pubic area[.]" N.C. Gen. Stat. § 14-190.13(g) (2017). This prong of the definition of "sexual activity" was the theory on which the State proceeded at trial for purposes of the sexual exploitation charges.

Our appellate courts have defined the term "lascivious" as "tending to arouse sexual desire." *State v. Hammett*, 182 N.C. App. 316, 322, 642 S.E.2d 454, 458 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 361 N.C. 572, 651 S.E.2d 227 (2007). In *Hammett*, the defendant was convicted of taking indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1 for conduct that included "french kissing" his minor daughter. *Id.* at 323, 642 S.E.2d at 458. This Court concluded that the defendant's actions were lascivious for purposes of the statute because "the jury could find that defendant's actions . . . tended to arouse sexual desire in defendant." *Id.* at 322-23, 642 S.E.2d at 459.

Here, the photograph forming the basis for Defendant's convictions for sexual exploitation of a minor depicts Amy standing naked in her father's bedroom except for her socks. Her arms are crossed in front of her body, and she is attempting to cover her pubic area with her hands.

A reasonable jury could have found that this photograph meets the definition of "lascivious." The focal point of the picture is Amy's naked body. She is standing in her father's bedroom, a setting generally associated with sexual activity. She is fully nude except for her socks. Furthermore, the photograph is clearly intended to elicit a sexual response based upon the context in which it was taken, which included Defendant's repeated attempts to touch Amy sexually.

Finally, we address Defendant's contention that the photograph does not actually contain an exhibition of Amy's genitals or pubic area. He argues that "[w]hile Amy is unclothed, her arms are crossed in front of her body and her hands block any view of her genital area."

Although it is true that Amy's hands are positioned over her genitalia in the photograph, the fingers of her left hand are spread far enough apart that clearly visible gaps exist between them such that her pubic area is at least partially visible. Viewing the evidence in the light most favorable to the State, reasonable jurors could have determined that the photograph at issue depicted Amy's pubic area.

Therefore, we hold that the trial court properly denied Defendant's motion to dismiss the sexual exploitation charges. *See State v. Riffe*, 191

N.C. App. 86, 96, 661 S.E.2d 899, 906 (2008) (trial court did not err in denying defendant's motion to dismiss sexual exploitation of a minor charges where State presented substantial evidence to support those charges).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges HUNTER, JR. and MURPHY concur.

STATE OF NORTH CAROLINA
v.
PETER DANE KOKE

No. COA18-662

Filed 19 February 2019

1. Evidence—insurance fraud—vehicle reported stolen—evidence regarding submerged truck—prejudice analysis

In a prosecution for insurance fraud and obtaining property by false pretenses, defendant was not prejudiced by the trial court's admission of evidence concerning a truck recovered from a river after defendant reported it stolen, even though the evidence should not have been admitted since it did not have a tendency to make any fact of the charged insurance fraud any more or less probable. There was sufficient other evidence supporting the jury's conviction for fraud (based on defendant's failure to disclose during the insurance investigation that major repairs had been done to the truck).

2. False Pretense—jury instruction—specificity regarding false representation—conformity with indictment

In a prosecution for obtaining property by false pretenses and insurance fraud, the jury instruction on false pretense was not so vague as to be erroneous, and there was no fatal variance between the indictment, the evidence produced at trial, and the jury instructions. Further, the trial court gave the jury a limiting instruction that evidence regarding a submerged truck could be considered only for the purpose of showing the element of intent for the insurance fraud charge.

3. Fraud—insurance—jury instruction—specificity regarding misrepresentation

In a prosecution for obtaining property by false pretenses and insurance fraud, the jury instruction on insurance fraud was not so vague as to be erroneous, and there was no fatal variance between the indictment, the evidence produced at trial, and the jury instructions. The only evidence of a written misrepresentation by defendant was the affidavit he submitted as part of his insurance claim after he reported his truck stolen, in which he failed to disclose that major repairs had been done to the truck.

Appeal by defendant from judgments entered 9 February 2018 by Judge Joshua W. Willey Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Edward Eldred for defendant-appellant.

TYSON, Judge.

Peter Dane Koke ("Defendant") appeals from judgments entered after a jury found him guilty of obtaining property by false pretenses and insurance fraud. We find no plain error.

I. Background

Defendant obtained a personal automobile insurance policy for a Jeep Patriot Sport vehicle from National General Insurance through AAC Insurance Agency on 1 August 2014. Twelve days later, Defendant bought a new black Dodge Ram pick-up truck ("Ram"), and traded in the Jeep. Sometime after purchasing the truck, Defendant removed the Jeep from coverage under his insurance policy and added coverage for the Ram. The insurance policy was renewed for the Ram on 1 February 2015 for a six-month term. The policy was cancelled on 19 May 2015 for non-payment.

While uninsured, the Ram was involved in an accident on 3 July 2015. Defendant was not driving the Ram at the time of the accident, but was following behind in another vehicle. The driver of the Ram was found to be at fault. The responding officer estimated the damage to the Ram to be $9,000, and rated the damage to be a "4" on a scale from 1 to 7.

The officer observed the front of the Ram to be "pushed in" and opined it was not "roadworthy."

Defendant hired a self-employed mechanic, Archer Brawner, to repair the front end of the truck. Defendant procured replacement parts for the truck and agreed to pay Brawner $500 to make the repairs, which Defendant did not pay. At trial, Brawner was unsure of all the parts he had replaced. He consistently stated he had replaced the hood and the driver's side fender, but could not recall if he had replaced the grill or any other damaged parts. Brawner described the damage to the Ram as "cosmetic," but testified he did not know whether the truck was functional. Brawner did not provide Defendant with an invoice detailing the repairs, nor did he take any pictures or make notes about the extent of the damage.

On 7 August 2015, Defendant applied for a commercial automobile insurance policy for coverage on the Ram. The application included various questions, including a question inquiring whether "the applicant or any listed driver [had] been convicted, plead guilty, nolo contendere, or no contest to any felony other than alcohol-related driving offenses during the last 10 years." A felony conviction would preclude issuance of a commercial insurance policy, per company regulations.

The insurance agent presented Defendant with a pre-filled application, which answered the above question, and all other questions, as "no." Defendant reviewed and signed the application. Defendant had pled guilty to a felony offense of obtaining property by false pretenses on 1 April 2006.

Defendant was issued a commercial automobile insurance policy, which valued the Ram at $22,500. The policy provided for comprehensive insurance, which included coverage for theft.

Five days after securing coverage, on 12 August 2015, Defendant reported the Ram had been stolen. National General Insurance sent Defendant an affidavit to complete, sign, and have notarized. Defendant filled in most of the requested information but left some spaces blank, including one inquiring about "major repairs since purchase."

Defendant did not disclose the prior accident on 3 July 2015 to National General, but it was discovered by the company during the course of its investigation of the theft. Once confronted about the previous accident, Defendant disclosed the repairs completed by Brawner. Defendant did not provide any documentation concerning the repairs or the parts used.

North Carolina Department of Insurance investigator Tyler Braswell was contacted by the Wilmington Police Department in September 2015, to assist with locating the Ram. After the investigation was completed, National General reviewed Defendant's claim, conducted a manager's "round table review," and concluded the company did not have evidence to refute the claim that the truck had been stolen.

National General issued two checks to Defendant, each for $11,000, on 2 October and 8 October 2015. National General attempted to stop payment on both checks after they had been mailed, as its underwriting department had determined Defendant's omission to disclose his prior felony conviction required the insurance policy to be rescinded. National General was able to stop payment on the check issued 8 October, but Defendant had already cashed the previous check.

After a year with no sightings of the Ram, Braswell requested the help of the Wilmington Police Department to use sonar to search for the truck in the Cape Fear River on 16 September 2016. They specifically looked in the area near the bridge where Defendant was known to keep vehicles and where the repairs to the Ram had been made. The sonar indicated something under the water near the bridge that appeared to be a vehicle. This was confirmed when Braswell and the officer were assisted by surveyors who were also present on the river that day. Braswell testified that what he saw on the surveyors' imaging equipment "looked consistent with the make and model of a Dodge Ram."

Braswell contacted the Wilmington Fire Department dive team for assistance. The dive team went out to the river on 21 September 2016. The divers confirmed it was a submerged truck and recovered a Dodge Ram emblem from the tailgate and a side mirror.

The river provided extremely low visibility. The testifying firefighter indicated, based upon touch, the truck did not display a license plate. He also had felt there was damage on the front end of the truck, including "large gaps and missing areas." Braswell tried to find assistance to tow the truck out of the water, but was unsuccessful. In May 2017, Braswell discovered the Ram had already been towed out of the river at Defendant's request.

James Haight, of Ace Wrecker Service, Inc., testified Defendant had employed him to remove a truck out of the river on 1 October 2016. Haight identified the truck as a "very dark blue" Dodge, covered with barnacles, and appeared to have "been down there awhile." No license plate or VIN number from the recovered vehicle was identified or noted. Haight towed the truck about half a block away from the boat ramp,

and left it in a locked, fenced-in area. Haight took photographs of the truck he towed out of the river, but the copies included in the record on appeal are not discernable. Defendant's reportedly missing truck was never recovered by investigators.

Braswell took out an arrest warrant for Defendant on 16 October 2015. Defendant was indicted on one count of obtaining property by false pretenses and one count of insurance fraud.

At trial, Defendant made a motion to exclude all evidence related to the truck found in the river. The trial court agreed in part and allowed the evidence only for the limited purpose of proof of Defendant's intent to commit insurance fraud. Limiting instructions were given to the jury at the time the evidence was presented and in the final jury instruction.

The jury found Defendant guilty of obtaining property by false pretenses and of insurance fraud. Defendant was sentenced within the presumptive range of 11 to 23 months for obtaining property by false pretenses. This sentence was suspended, and Defendant was placed on 36 months of probation, which required Defendant to serve 42 days in jail. Defendant was sentenced within the presumptive range of 11 to 23 months for insurance fraud, which was also suspended for 36 months of probation to be served at the conclusion of the first sentence. Defendant was required to pay $11,000 in restitution. Defendant appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant asserts the trial court committed plain error by: (1) admitting the evidence concerning the truck recovered from the Cape Fear River; (2) failing to instruct the jury that he was guilty of insurance fraud only if he failed to report major repairs; and, (3) failing to instruct the jury that he was guilty of obtaining property by false pretenses only if he represented he had no prior felonies.

IV. Evidence of Sunken Truck

[1] Defendant argues the evidence concerning the truck found in the river was not relevant to the charged offenses. He asserts it was prejudicial error for the trial court to allow the evidence.

A. Standard of Review

At trial, Defendant made a motion *in limine* to exclude all the evidence related to the truck found in and removed from the river. The trial court excluded all such evidence for the charge of obtaining property by false pretenses due to lack of relevance, but concluded the evidence was relevant to the alleged insurance fraud. Four witnesses testified concerning the sunken truck: the surveyor whose sonar identified what appeared to be a Dodge Ram submerged in the river; the firefighter-diver who recovered the Ram emblem and the side-view mirror from the submerged truck; Haight, the tow truck operator who pulled the truck from the river; and Investigator Braswell.

In order to preserve an issue for appeal, a defendant must have made a timely motion or objection to the trial court. N.C. R. App. P 10(a)(1). Our appellate courts have consistently held that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Tutt*, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005) (alteration in original; citations and internal quotation marks omitted).

Defendant failed to object prior to the testimony of the surveyor or the introduction of the two images from his sonar, which the surveyor identified as a Dodge Ram. Defendant objected after the images were admitted and requested a limiting instruction. Defendant did not object to the testimony of the firefighter-diver, but requested the limiting instruction after his pre-dive checklist was admitted. The trial court gave the limiting instruction prior to Haight's testimony. Defendant failed to object to Investigator Braswell's testimony related to the submerged truck.

Defendant acknowledges that his failure to object to the proffered testimony has waived appellate review for preserved error. *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) ("It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.").

The State argues this Court is barred from reviewing Defendant's claim under plain error review, and asserts our appellate courts have refused to apply plain error review to matters within the trial court's discretion. *See State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000). The State accurately asserts a trial court's decision to admit "relevant but prejudicial evidence under Rule 403 is a matter left to the sound

discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). However, whether the evidence admitted is relevant or not is a question of law, which this Court reviews *de novo*. *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). We review this issue for plain error.

Where a defendant fails to preserve errors at trial, this Court reviews any alleged errors under plain error review. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

> The plain error rule "is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record," the error is found to have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done" or that it had "a probable impact on the jury's finding that the defendant was guilty."

State v. Theer, 181 N.C. App. 349, 363, 639 S.E.2d 655, 665 (2007) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Relevancy

Defendant argues the evidence related to the sunken truck was irrelevant to the alleged insurance fraud. The trial court denied admission of the evidence for obtaining property by false pretenses, but allowed the evidence of the sunken truck for the purpose of proving Defendant's intent to commit insurance fraud.

The elements of insurance fraud are: (1) a defendant presents a statement for a claim under an insurance policy; (2) that statement contained false or misleading information; (3) the defendant knows the statement is false or misleading; and, (4) the defendant acted with the intent to defraud. N.C. Gen. Stat. § 58-2-161(b); *State v. Payne*, 149 N.C. App. 421, 426-27, 561 S.E.2d 507, 511 (2002).

The alleged false statement made by Defendant was his failure "to disclose on the affidavit of vehicle theft from National General Insurance that his vehicle had major repairs since it was purchased." At trial, the State's asserted theory was the towing of the truck from the river indicated Defendant's intent to defraud, as his charged crimes were "crimes of deceit." The State argued that not allowing the evidence about the submerged truck to be admitted would be "in effect punishing the State" for Defendant's removal of the truck.

The State now asserts on appeal a new theory that the evidence of the submerged vehicle falls under the "chain of circumstances"

rationale, which allows for the admission of evidence "if it forms part of the history of the event or serves to enhance the natural development of the facts." *State v. Agee*, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990) (citations and internal quotations omitted).

The State concedes no direct evidence tends to show Defendant or someone directed by Defendant drove or placed his allegedly stolen Ram into the Cape Fear River. A Dodge Ram was located in the river near property Defendant was known to have used. Divers pulled off an emblem and a side-view mirror, but did not find a license plate or look for a VIN plate or other identification. A "very dark blue" Ram was towed out of the river at Defendant's request, while his purportedly stolen Ram was noted to be black. The diver and tow truck driver who removed the truck both indicated the truck in the river had damage to the front area, including a missing grill.

Defendant was charged with insurance fraud for failure to report major repairs to the Ram, and the State presented evidence of damage to the submerged truck. The State's use of the evidence of the submerged truck is not within a "chain of circumstances," but is more like a logical fallacy. As defense counsel argued at trial, the State cannot have it both ways: "They can't say [they have] a statement where he denies making any repairs, but [the State has evidence of] a truck where no repairs [have] been made, therefore that must be his truck."

The evidence of the submerged truck does not have a tendency to make any fact of the charged insurance fraud of failing to disclose major repairs more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401. The trial court erred in admitting that evidence.

C. Prejudice

Because of Defendant's failure to preserve error at trial, his burden to prove the error was prejudicial is heavier. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. This requires an examination of the entire record to determine whether "the error had a probable impact on the jury finding Defendant guilty." *Id.* at 518, 723 S.E.2d at 334.

Defendant has failed to meet or carry his burden on appeal. Sufficient evidence exists in the record to support a jury's finding of guilty for insurance fraud for Defendant's failure to disclose major repairs on the Ram. The Ram was involved in an accident, where the responding officer estimated the damages to the Ram to be $9,000, and opined the truck did not appear "roadworthy." Further, Brawner's testimony supports a finding that the repairs he performed on the Ram were "major." He testified to

replacing at least the hood and one fender, and possibly other damaged areas. Brawner's testimony that the repairs were "cosmetic," and that he was only to be paid $500 for his labor, are not determinative of whether the repairs he performed were "major," and were issues for the jury to determine together with the properly admitted evidence.

After review of the entire record, we hold sufficient evidence supports the jury's conviction of Defendant for the charged offense. Defendant has failed to demonstrate the limited testimony of the submerged truck had a probable impact on the jury's verdict. *State v. Perkins*, 154 N.C. App. 148, 153, 571 S.E.2d 645, 648-49 (2002). Defendant has failed to show the trial court committed plain error in admitting the evidence of the submerged truck to award a new trial. *See id.*

V. Jury Instructions

Defendant argues the trial court erred by providing jury instructions that allowed the jury to convict him on a theory not alleged in the indictment. We find no error concerning the given instructions.

A. Standard of Review

Because Defendant failed to object at trial and preserve error, we review this issue for plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

B. False Pretenses

[2] The trial court, using the pattern jury instructions, instructed the jury that in order to find Defendant guilty of obtaining property by false pretenses the State must have proved:

> First, that the defendant made a representation to another; second, that this representation was false; third, that this representation was calculated and intended to deceive. Fourth, that the victim was in fact deceived by this representation; and fifth, that the defendant thereby obtained or attempted to obtain property from the victim.

Defendant argues the lack of specificity in the instructions would allow the jury to convict him if they found any false representation. We disagree.

"A jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury." *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (citation and internal quotation marks omitted).

Defendant's indictment alleged he had obtained property by false pretenses by failing to disclose on his application for insurance that he had previously pled guilty to a felony offense. At trial, Defendant stipulated that he pled guilty to a felony offense on 1 April 2006. Just prior to providing the pattern jury instruction above, the trial court reminded the jury of the stipulated fact of Defendant's previous guilty plea, instructing the jury "to take these facts as true for the purposes of this case."

Further, after a summation of the evidence concerning the submerged truck, the trial court provided the limiting instruction:

> You may not consider this evidence in your deliberations under the false pretenses charge. You may consider this evidence in your deliberations on the insurance fraud charge. This evidence is received *solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crime of insurance fraud* as charged in the indictment. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. *You may not consider it for any other purpose.* (Emphasis supplied).

Our appellate courts have "repeatedly held that jurors are presumed to pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given." *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998).

Defendant has failed to show a fatal variance between the indictment, the proof presented at trial, and the jury instructions. We find no error in the trial court's instructions on the charge of obtaining property by false pretenses. Defendant's argument is overruled.

C. Insurance Fraud

[3] The provided instruction for insurance fraud required the State to prove:

> First, that an insurance policy existed between Peter Dane Koke and National General Insurance Company;

> second, that the defendant presented a written statement in support of a claim for payment pursuant to that insurance policy; third, that the statement contained false or misleading information concerning a fact or matter material to the Claim. Fourth, that the defendant knew the statement contained false or misleading information concerning a fact or matter material to the claim; and fifth, that the defendant acted with the intent to defraud National General Insurance Company.

This Court has found plain error "[w]here there is evidence of various misrepresentations which the jury could have considered in reaching a verdict" and the trial court fails to instruct on the specific misrepresentation. *State v. Locklear*, __ N.C. App. __, __, 816 S.E.2d 197, 206 (2018). Here, the only evidence of a written statement that contained false or misleading information was Defendant's theft affidavit where he failed to disclose major repairs to the Ram.

Analogous to the analysis above, no fatal variance exists between the indictment, the evidence presented at trial, and the jury instructions. *Ledwell*, 171 N.C. App. at 320, 614 S.E.2d at 566. We find no error in the trial court's instructions on the charge of insurance fraud. Defendant's argument is overruled.

VI. Conclusion

The trial court correctly limited the admissions of the evidence of the submerged truck on the obtaining property by false pretenses charge and correctly instructed the jury not to consider it for that purpose. The evidence of the submerged truck was irrelevant to Defendant's alleged misleading statement as charged. Admission of such irrelevant, but limited, evidence was error. After review of the entire record for plain error, we conclude Defendant has failed to show prejudice or that this error had a probable impact on the jury's verdict to rise to the level of plain error in light of properly admitted evidence. *Perkins*, 154 N.C. App. at 153, 571 S.E.2d at 648-49.

We find no error in the trial court's instructions to the jury. Defendant's arguments are overruled. *It is so ordered.*

NO PLAIN ERROR.

Judges ZACHARY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
TOUSSANT LOVERTURE PARKS, DEFENDANT

No. COA18-422

Filed 19 February 2019

1. Assault—with a deadly weapon—jury instructions—self-defense

The trial court erred by denying defendant's request to instruct the jury on the use of deadly force in self-defense where, in the light most favorable to defendant, there was evidence supporting the instruction. Even though the State presented conflicting evidence, there was testimony that defendant was attacked outside of a restaurant without provocation, defendant was backing away with his hands raised, and numerous people described as a riot were kicking and hitting him. The error was prejudicial because it prevented the jury from considering whether defendant reasonably believed deadly force was necessary to prevent imminent death or great bodily harm to him.

2. Criminal Law—jury instructions—flight—as evidence of guilt—running after altercation

The trial court did not err by instructing the jury that it could consider defendant's alleged flight as evidence of guilt where there was evidence that defendant "took off running" after an altercation in a restaurant parking lot.

Appeal by Defendant from judgment entered 27 October 2017 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 28 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Joseph P. Lattimore, for defendant-appellant.

MURPHY, Judge.

A trial court must instruct a jury on self-defense where, taking the evidence in the light most favorable to the defendant as true, there is competent evidence to support such an instruction. Failure to do so

is error, even if the State presents conflicting evidence. Additionally, a trial court does not err in instructing the jury on flight evidence where there is some evidence to reasonably support the theory that the defendant fled after commission of the crime charged. Here, there was evidence to support both a self-defense instruction and a flight instruction. The trial court committed prejudicial error by failing to instruct the jury on self-defense, thus entitling Defendant to a new trial.

BACKGROUND

On 2 April 2017, Aubrey Chapman ("Chapman") attended the birthday party of his cousin, Timothy Sims ("Sims"), at Red Bowl Asian Bistro in Raleigh. Also in attendance at the party was Chapman's childhood friend, Alan McGill ("McGill"). While McGill was ordering a drink from the restaurant's bar and talking to a female attendee, Defendant approached him. Defendant asked McGill, "How do you know her? Where do you know her from?" McGill responded that he did not want any trouble. At this time, Defendant hit McGill in the face with a closed fist. Chapman observed this sudden confrontation and struck Defendant in the face. Security escorted Defendant out of the restaurant. Chapman followed shortly thereafter, stating, "This guy is ruining this party for everybody." A group of people "stampeded out" of the restaurant behind Chapman.

The sequence of events after Defendant, Chapman, and the group of attendees exited the restaurant conflicts. Chapman stated that when he exited the restaurant, Defendant immediately "came charging up" to him with an orange box cutter in his hand. As Defendant approached him with the box cutter, Chapman stated that he started "swinging" at Defendant. At this time, Chapman recalled the crowd grew and intervened. Chapman then stated that Defendant came charging at him again with the box cutter and cut him below his left kidney as Chapman tripped over a curb. Sims also recalled a male rushing towards Chapman outside of the restaurant. One of the security guards working the event also observed Defendant charge towards Chapman twice and cut Chapman on his back. Another security guard stated that [Chapman's] "friends had realized that [Defendant] had a box cutter, and [tried] to basically fight him and beat him up." Amidst the altercation between Defendant and the group, Reggie Penny ("Penny"), a security guard, was also cut "on his front half and his back."

Penny, the injured security guard, and Sherrel Outlaw ("Outlaw"), an attendee, however, recalled a different sequence of events outside of the restaurant. Penny stated that he observed Defendant trying to

reenter the restaurant after being escorted out. As he was speaking with Defendant, Penny recalled "two people rushing up to [Defendant]" on both sides to start an altercation with Defendant. Amidst the altercation, Penny observed the group "kicking and stomping." Outlaw stated that she went outside after hearing "commotion" inside the restaurant. She then saw Defendant with "his hands up" when "a group of guys [started] walking towards him . . . ." At this time, Defendant "took a couple of steps back and then there was a guy on the left side of him that hit him in the face, and then there was a guy like probably two steps to the right of [Defendant], and once he got hit, the guy on the right side swung." Outlaw stated, "that is when the group of guys started jumping on him and I seen [sic] them go down." Outlaw stated that she did not see Defendant with a weapon.

Defendant was indicted on two counts of Assault with a Deadly Weapon Inflicting Serious Injury. At trial, Defendant requested a jury instruction on self-defense using N.C.P.I. – Crim. 308.45. The trial court denied this request, stating, "I don't believe that there is evidence that has been presented that supports a self defense claim." The trial court also overruled Defendant's objection to instructing the jury on flight. A jury convicted Defendant for Assault with a Deadly Weapon for the injuries sustained by Penny and Assault with a Deadly Weapon Inflicting Serious Injury for those sustained by Chapman. Defendant was sentenced to an active term of 29 to 47 months.

ANALYSIS

A. Standard of Review

We review a challenge to the trial court's decision regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "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 internal quotation marks omitted). Defendant preserved his arguments regarding jury instructions for appeal. Accordingly, he must demonstrate that "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." N.C.G.S. § 15A-1443(a) (2017).

B. Self-Defense Instruction

[1] Defendant first contends the trial court erred in failing to instruct the jury on the use of deadly force in self-defense. We agree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case . . . ." *State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974). For this reason, a defendant is entitled to an instruction on self-defense when he or she presents competent evidence of such. *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986). In determining whether a defendant has presented competent evidence sufficient to support an instruction for self-defense, we take the defendant's evidence as true and consider it in the light most favorable to the defendant. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). Once this showing of competent evidence is made, "the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979) (quoting *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974)).

N.C.G.S. § 14-51.3 provides:

> (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.G.S. § 14-51.3(a) (2017). However, subject to certain exceptions, our law does not permit a defendant to receive "the benefit of self-defense if he was the aggressor" or initially provokes the use of force against himself or herself. *State v. Lee*, ___ N.C. App. ___, ___, 811 S.E.2d 233, 236 (2018); N.C.G.S. § 14-51.4(2) (2017). "An individual is the aggressor if he or she aggressively and willingly enters into a fight without legal excuse or provocation." *Lee*, ___ N.C. App. at ___, 811 S.E.2d at 236. Moreover, the limited circumstances under which an initial aggressor may regain his or her right to use defensive force under N.C.G.S.

§ 14-51.4 are unavailable to a defendant who used deadly force in his or her initial aggression. *State v. Holloman*, 369 N.C. 615, 628-29, 799 S.E.2d 824, 833 (2017).

Here, Defendant does not dispute the trial court's finding that the box cutter is a deadly weapon as a matter of law. Thus, we analyze the use of the box cutter in self-defense as the use of deadly force. Accordingly, our inquiry is into whether Defendant presented competent evidence that he "reasonably believe[d] that such force [was] necessary to prevent imminent death or great bodily harm to himself" so as to warrant an instruction on self-defense.[1] N.C.G.S. § 14-51.3(a)(1).

At trial, Defendant's counsel asked Penny, "As you were talking to [Defendant], the man who was hosting the party and his buddy came up and rushed around you and attacked [Defendant]?" Penny replied, "Yes." More explicitly, Penny testified that "[t]hey attacked him." Penny further stated that he did not see any weapon in Defendant's hand at that time. Outlaw, another attendee of the party, similarly testified that she did not see a weapon in Defendant's hand and that she observed the group of people attack Defendant while he was backing up with his hands raised. When the group attacked Defendant, Outlaw described it as a "riot," with multiple people hitting and kicking Defendant. Outlaw even testified that she believed Defendant would die in the attack "because there was [sic] so many of them." Taken as true and in the light most favorable to Defendant, this evidence is sufficient to support Defendant's proposition that the assault on him gave rise to his reasonable apprehension of death or great bodily harm. *See State v. Whetstone*, 212 N.C. App. 551, 560, 711 S.E.2d 778, 784-85 (2011) (finding sufficient evidence to support the proposition that an assault on the defendant gave rise to his reasonable apprehension of death or great bodily harm when the defendant was knocked to the ground, held there, and choked). As such, the trial court erred in failing to instruct the jury on the use of self-defense.

The State contends that there is no evidence from which self-defense may be inferred, arguing that all of the evidence indicates that Defendant was the initial aggressor, thus depriving him of a self-defense instruction. The State is correct in its recitation of some of the evidence presented showing that Defendant *was* the initial aggressor of the altercation outside of the restaurant when he twice charged at Chapman with a box cutter; however, the State omits the conflicting evidence

1. N.C.G.S. § 14-51.3(a)(2) is inapplicable, as the circumstances permitted under N.C.G.S. § 14-51.2 are inapplicable to this case.

from Penny and Outlaw indicating that Defendant had not brandished a weapon and was attacked without provocation when attendees flanked and attacked him on both sides. The credibility of such evidence does not factor into our analysis, as we must view the evidence in the light most favorable to Defendant and take such evidence as true. We have "held that when a defendant's evidence tended to show he acted in self-defense, 'the trial judge was obligated to instruct on self-defense but because the State's evidence tended to show that defendant was the aggressor, he properly instructed further that self-defense would be an excuse only if defendant was not the aggressor." *Lee*, ___ N.C. App. at ____, 811 S.E.2d at 237 (quoting *State v. Joyner*, 54 N.C. App. 129, 135, 282 S.E.2d 520, 524 (1981)). With conflicting evidence, it was for the jury to determine which individual was the initial aggressor.

Having concluded the trial court erred in failing to instruct the jury on self-defense, we must next determine whether Defendant has met his burden of showing a reasonable possibility that, had this error not been committed, a different result would have been reached. The State contends that no such reasonable possibility exists, as "Defendant only put on one witness, Ms. Outlaw" and "[h]er testimony was not credible." However, the determination of the credibility of witness testimony rests firmly with the jury. The trial court's erroneous denial of Defendant's request for a self-defense instruction prevented the jury from considering whether Defendant reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself. *See State v. Ramos*, 363 N.C. 352, 356, 678 S.E.2d 224, 227 (2009) ("Evaluating the credibility of defendant's testimony in light of the other evidence was properly for the jury and the trial court's instructional error prevented the jury from considering the willfulness of defendant's actions.") Based on the testimony of Penny and Outlaw, the trial court's error was prejudicial, as there is a reasonable possibility that the jury could have found that Defendant reasonably believed deadly force to be necessary.

C. Flight Instruction

[2] Defendant also contends that the trial court erred in instructing the jury that it could consider Defendant's alleged flight as evidence of guilt. We disagree.

"A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001) (citation and internal quotation marks omitted). "Mere evidence that defendant left the scene of

the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). However, "[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977).

The probative value of flight evidence has been "consistently doubted" in our legal system, and we note at the outset that we similarly doubt the probative value of Defendant's alleged flight here. *See Wong Sun v. U.S.*, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 415 n. 10, 9 L.Ed.2d 441 (1963). However, there is "some evidence in the record" that "reasonably support[s] the theory that the defendant fled after the commission of the crime charged." *See Lloyd*, 354 N.C. at 119, 552 S.E.2d at 625. Sims reported to a responding officer that after Penny was injured, Defendant "took off running[,]" and "the other bouncers chased after [Defendant] and tackled him to the ground." Moreover, Officer Michael Curci testified that Defendant "had run in this direction so [the] victims were to my left and the suspect was to my right." Such evidence reasonably supports the theory that Defendant not only left the scene of the altercation, but also took steps to avoid apprehension. The trial court did not err in instructing the jury on flight.

CONCLUSION

Although the evidence of self-defense presented at trial was conflicting, taking the evidence in the light most favorable to Defendant as true, there was competent evidence sufficient to support a self-defense instruction. This error was prejudicial. The trial court, however, did not err in instructing the jury on flight. Defendant is entitled to a new trial.

NEW TRIAL.

Judges STROUD and DIETZ concur.

WALKER v. K&W CAFETERIAS

[264 N.C. App. 119 (2019)]

GWENDOLYN DIANETTE WALKER, WIDOW OF ROBERT LEE WALKER, DECEASED EMPLOYEE, PLAINTIFF
v.
K&W CAFETERIAS, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA18-429

Filed 19 February 2019

1. Workers' Compensation—death benefits—third-party settlement—subrogation—from claimants who never received any workers' compensation benefits

Where plaintiff was awarded workers' compensation benefits for her husband's death ($333,763) and the estate subsequently settled a lawsuit against the at-fault driver ($962,500), the Industrial Commission had jurisdiction to order subrogation of portions of the third-party settlement that were the distributive shares of the decedent's adult children—even though the adult children never received any workers' compensation benefits. The Court of Appeals was bound by its decision in *In re Estate of Bullock*, 188 N.C. App. 518 (2008).

2. Workers' Compensation—death benefits—third-party settlement—subrogation lien—out-of-state funds

The Court of Appeals rejected plaintiff's argument that the Industrial Commission lacked jurisdiction to order her to distribute money "located in South Carolina and paid under South Carolina law in a South Carolina wrongful death action before a South Carolina court" pursuant to a section 97-10.2 subrogation lien on workers' compensation death benefits. Even if the money was not present in North Carolina, defendants could enforce the order under South Carolina's version of the Uniform Enforcement of Foreign Judgments Act.

3. Workers' Compensation—death benefits—third-party settlement—subrogation lien—out-of-state policies

The Industrial Commission correctly concluded that the Workers' Compensation Act subrogation provisions (N.C.G.S. § 97-10.2(f)) controlled over South Carolina's anti-subrogation law on underinsured motorist proceeds, pursuant to *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203 (2013).

Appeal by plaintiff from Opinion and Award entered 27 February 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 January 2019.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Roy G. Pettigrew, for defendant-appellees.

TYSON, Judge.

I. Background

Robert Lee Walker ("Decedent") was killed in a motor vehicle accident while driving a truck owned by K&W Cafeterias, Inc. ("Employer") in South Carolina on 16 May 2012. Decedent was a resident of South Carolina. Employer is a North Carolina corporation and headquartered in Winston-Salem. Employer's vehicle Decedent was driving when the accident occurred was insured under an automobile liability policy underwritten by Liberty Mutual Insurance Company ("Insurer") (Employer and Insurer collectively referred to as "Defendants"). The automobile liability policy was purchased and entered into within North Carolina.

On 21 August 2012, Decedent's widow, Gwendolyn Walker ("Plaintiff"), filed a claim for death benefits pursuant to the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-38 (2017). With the consent of the parties, the Industrial Commission entered an opinion and award, which included several joint stipulations, including, in relevant part:

> 1. . . . [Decedent] died as the result of a motor vehicle accident arising out of and in the course of his employment with Defendant-Employer.
>
> 2. At all relevant times, the parties hereto were subject to and bound by the provisions of the North Carolina Workers' Compensation Act.
>
> . . .
>
> 6. The North Carolina Industrial Commission has jurisdiction over the parties and the subject matter involved in this case.
>
> . . .

> 8. On the date of [Decedent's] death, [Decedent] had six children. However, all children were over the age of eighteen on the date of [Decedent's] death. . . .
>
> 11. Plaintiff Gwendolyn Dianette Walker is the widow and sole surviving dependent of [Decedent].

Based upon the parties' stipulations, and with the consent of the parties, the Industrial Commission ordered Defendants to pay Plaintiff five hundred weekly payments of $650.89 each and an additional payment of $8,318 for funeral expenses, for total anticipated benefits of $333,763.

Plaintiff was appointed the personal representative of Decedent's estate in South Carolina. On 26 August 2014, Plaintiff, as personal representative of the estate, filed a wrongful death and survival action against the at-fault driver and his father in the Horry County Court of Common Pleas in South Carolina. In March 2016, Plaintiff, the at-fault driver and his father settled the lawsuit and Plaintiff received a total of $962,500 under the settlement ("the third-party settlement"). The total settlement amount of $962,500 came from the following sources:

> 1. $50,000 in liability benefits from the at-fault driver's insurer;
>
> 2. $12,500 in personal underinsured motorist ("UIM") coverage covering Plaintiff and Decedent's own personal vehicle from Plaintiff's own automobile insurance carrier; and
>
> 3. $900,000 in commercial UIM coverage covering the vehicle Decedent was driving when the accident occurred from Employer's automobile insurance carrier, Insurer.

On 21 March 2016, Defendants filed a Form 33 request for hearing with the North Carolina Industrial Commission seeking a subrogation lien against $333,763 of the $962,500 Plaintiff had received from the third-party settlement. On 30 March 2016, Plaintiff filed a declaratory judgment action in the Horry County Court of Common Pleas in South Carolina seeking a declaration of "whether the Defendants are entitled to assert a claim against any and all settlement proceeds, including those settlement proceeds paid under the [underinsured motorist] coverage."

Defendants removed Plaintiff's declaratory judgment action to the United States District Court for the District of South Carolina based upon the diversity of state citizenship of the parties on 2 May 2016. On 13 June 2016, Plaintiff filed a motion with the North Carolina Industrial

Commission to stay the proceedings, pending the outcome of the declaratory judgment action in the United States District Court. The Industrial Commission denied Plaintiff's motion to stay the proceedings by an order filed 28 June 2016.

On 28 July 2016, Plaintiff filed an appeal for a hearing before a deputy commissioner. Before the scheduled hearing, "the parties jointly requested that in lieu of testimony, they be allowed to try the case on stipulated facts and exhibits with the submission of briefs and proposed decisions[.]" Plaintiff argued South Carolina law controlled over North Carolina law to the extent South Carolina forbids subrogation of UIM proceeds for workers' compensation benefits under S.C. Code § 38-77-160.

On 10 July 2017, the deputy commissioner filed an opinion and award ruling in favor of Defendants and requiring Plaintiff to apply the $962,500 from the third-party settlement to satisfy Defendants' $333,763 subrogation lien. Plaintiff appealed the deputy commissioner's opinion and award to the full Industrial Commission ("the Full Commission").

On 26 January 2018, while Plaintiff's appeal to the Full Commission was pending, the United States District Court entered an order holding it "will abstain from exercising jurisdiction over [Plaintiff's] declaratory action, and will dismiss it without prejudice to the parties pursuing their claims before the Industrial Commission and the North Carolina appellate courts."

On 27 February 2018, the Full Commission issued an opinion and award. The Full Commission found, in relevant part:

> 3. . . . Decedent was killed when his vehicle was struck by another vehicle operated by . . . "third parties," as defined in . . . N.C. Gen. Stat. § 97-10.2(a).
>
> . . .
>
> 12. Under the terms of the Consent Opinion and Award, Plaintiff and Defendants stipulated to the Industrial Commission's jurisdiction over Plaintiff's workers' compensation claim. Furthermore, N.C. Gen. Stat. §§ 97-91 and 97-10.2 confer[] the Industrial Commission with personal jurisdiction over Plaintiff and subject matter jurisdiction over all aspects of the workers' compensation claim, including Defendant's lien.
>
> . . .

> 14. Plaintiff conceded in her brief to the Deputy Commissioner that the distribution formula in N.C. Gen. Stat. § 97-10.2(f) would apply to the $50,000.00 in liability insurance proceeds.
>
> 15. Plaintiff's $900,000.00 in commercial UIM proceeds were paid pursuant to a North Carolina liability policy. While the policy contains a South Carolina endorsement (as well as endorsements or financial responsibility identification cards for Florida, West Virginia, and Virginia), the UIM policy was made in North Carolina, was paid pursuant to the provisions of a North Carolina policy, and is subject to the laws of this State.

The Full Commission concluded Defendants were entitled to a subrogation lien on the entire third-party settlement proceeds "and not just [Plaintiff's] share of the Third-Party Recovery." The Full Commission's opinion and award directed the distribution of the third-party settlement amount of $962,500 as follows:

> a. The sum of $5,921.91 shall be paid to Plaintiff's counsel for payment of actual costs pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(a);
>
> b. The sum of $320,833.33 shall be paid to Plaintiff's counsel for payment of attorney's fees pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(b);
>
> c. The sum of $222,507.63 shall be paid to Defendants pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(c) and (f)(2); and
>
> d. The remaining sum of $413,237.13 shall be paid to Plaintiff pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(d).

Plaintiff filed timely notice of appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 97-86 (2017).

III. Issues

Plaintiff argues: (1) the Full Commission exceeded its subject matter jurisdiction by ordering the distribution of out-of-state UIM proceeds to satisfy a workers' compensation lien, when the proceeds were shares of an out-of-state wrongful death recovery for some recipients who

never received workers' compensation benefits under North Carolina law; (2) the UIM insurance proceeds were paid under South Carolina insurance policies; and (3) S.C. Code. § 38-77-160 immunizes the South Carolina UIM proceeds from all subrogation.

IV. Standard of Review

An opinion and award from the Industrial Commission is reviewed to determine:

> (1) whether its findings of fact are supported by any competent evidence in the record; and (2) whether the Industrial Commission's findings of fact justify its legal conclusions. The Industrial Commission's conclusions of law are reviewable de novo by this Court.

Moore v. City of Raleigh, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999) (citation and quotation marks omitted).

"Whether North Carolina law or South Carolina law governs is a question of law which we review *de novo*." *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 206, 742 S.E.2d 205, 207 (2013).

V. Analysis

A. *In re Bullock*

[1] Plaintiff acknowledges she "does not dispute that Defendants have a workers' compensation lien." Plaintiff argues the Full Commission exceeded its subject matter jurisdiction "to the extent that the Full Commission held that the workers' compensation lien extends to funds other than [Plaintiff's] share of the wrongful death recovery[.]"

N.C. Gen. Stat. § 97-10.2 (2017) provides authority for an employer to obtain a subrogation lien for workers' compensation benefits paid by the employer against amounts recovered from and against a third-party tortfeasor. The statute provides, in relevant part:

> (f)(1) . . . if an award final in nature in favor of the employee has been entered by the Industrial Commission, *then any amount obtained by any person by settlement with, judgment against*, or otherwise from the third party by reason of such injury or death *shall* be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . .

> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
>
> . . .
>
> (h) *In any . . . settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest* under (f) hereof upon any payment made by the third party by reason of such injury . . . . and such lien may be enforced *against any person receiving such funds*.

N.C. Gen. Stat. §§ 97-10.2(f)(1), (h) (emphasis supplied).

Plaintiff contends the Full Commission lacks subject matter jurisdiction to order subrogation of the portions of the third-party settlement that are the distributive shares of the wrongful death recovery of Decedent's six adult children.

Plaintiff acknowledges this Court's binding and prior published opinion in *In re Estate of Bullock*, 188 N.C. App. 518, 655 S.E.2d 869 (2008). Plaintiff states "*Bullock* is the only opinion indicating that the distributive shares of a wrongful death recovery can be used to satisfy a workers' compensation lien, even when the recipients of that recovery never received workers' compensation."

In *Bullock*, a construction worker was killed in the course of his employment. *Bullock*, 188 N.C. App. at 519, 655 S.E.2d at 870. The decedent construction worker was not married and had no children. *Id*. The decedent's girlfriend and his two minor nephews had lived with him prior to his death. *Id*. The decedent died intestate and his only heir, pursuant to the Intestate Succession Act, was his mother. *Id*.

The construction worker's family members filed a workers' compensation claim for death benefits. *Id*. The Industrial Commission issued an opinion and award finding that the minor nephews were wholly and fully dependent on the decedent for support and that they were the only persons entitled to receive death benefits. *Id*.

The decedent's estate separately brought a wrongful death claim against the dump truck driver, who had run over decedent, and the driver's employer. After the decedent's estate entered into a settlement agreement of the wrongful death claim with the dump truck driver and the driver's employer, the estate sought approval of the agreement by

the trial court. *Id.* The decedent's employer and insurer filed a motion seeking to set aside the settlement agreement and for a declaration they possessed a workers' compensation lien on the settlement proceeds. *Id.*

The trial court denied decedent's employer and insurer's motion to set aside the settlement agreement, approved the settlement agreement, and ruled in part that the decedent's employer and its insurance carrier did not have a valid workers' compensation lien on the settlement proceeds. *Id.* at 520-21, 655 S.E.2d at 871.

This Court reversed the trial court's ruling. *Id.* at 521, 655 S.E.2d at 871. The Court analyzed the plain language of N.C. Gen. Stat. § 97-10.2 and held the decedent's employer and insurance carrier had "a statutory lien against *any* payment made by a third-party tortfeasor arising out of an injury or death of an employee subject to the [Workers' Compensation] Act." *Id.* at 524, 655 S.E.2d at 873 (emphasis in original). This Court also held "[t]his lien may be enforced against '*any* person receiving such funds.' " *Id.* (quoting N.C. Gen. Stat. § 97-10.2(h)) (emphasis in original)).

In reaching its holding, this Court stated:

> Although the General Assembly expressly subrogated the rights of an employer's insurance carrier to that of an employer, *see* N.C. Gen. Stat. § 97-10.2(g), we find no language in section 97-10.2 subrogating the rights of an employer to that of the beneficiaries of the workers' compensation award. If the General Assembly intended to subrogate the employer's rights to that of the beneficiaries of the award, they would have done so expressly as they did in subsection (g). Instead, the extent of an employer's subrogation interest under subsection (f) is measured by compensation paid or to be paid by the employer.

Id.

Bullock holds that even though the beneficiaries under the third-party wrongful death claim never received any workers' compensation benefits, they were nevertheless subject to the subrogation lien statute under N.C. Gen. Stat. § 97-10.2(h). *See id.*

Plaintiff does not contend that *Bullock* is distinguishable from the matter at hand nor does she argue *Bullock* is not controlling. Plaintiff instead contends that *Bullock* was wrongly decided and places her, as the personal representative of Decedent's estate, in a conflict of interest *vis-à-vis* Decedent's six adult children. Plaintiff requests that "[t]o the

extent that the Court feels obligated to follow *Bullock*, which produces this conflict of interest, [Plaintiff] asks the panel members of the Court for at least a dissenting opinion[.]"

The Supreme Court of North Carolina and this Court have long recognized that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This Court recently discussed *In re Civil Penalty* in *State v. Gonzalez* and stated:

> *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.

State v. Gonzalez, __ N.C. App. __, __, __ S.E.2d __, __, 2019 WL 189853 at *3 (2019).

This Court is bound by our prior holding in *Bullock*. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Any recovery obtained by "any person receiving such funds" through a wrongful death claim against third parties is subject to a subrogation lien under N.C. Gen. Stat. § 97-10.2(h) when workers' compensation benefits have been advanced because of a covered employee's death, even if the claimants never received any workers' compensation benefits. *Bullock,* 188 N.C. App. at 524, 655 S.E.2d at 873.

Being bound by *In re Civil Penalty*, we are without authority to overturn a prior panel of this Court. 324 N.C. at 384, 379 S.E.2d at 37. Plaintiff's argument is overruled.

B. *Jurisdiction Over Property Located Outside North Carolina*

[2] Plaintiff argues that "[e]ven if the Industrial Commission could reach the property belonging to non-'employees' and non-'dependents' under N.C. Gen. Stat. § 97-10.2, the Commission cannot exercise its jurisdiction to affect the rights to that property when it is located outside of North Carolina."

Plaintiff asserts the UIM proceeds are "located in South Carolina and paid under South Carolina law in a South Carolina wrongful death action before a South Carolina court" and the Industrial Commission lacks *in rem* jurisdiction over the proceeds and lacks the jurisdiction to order distribution of the UIM proceeds.

Plaintiff does not contend the Industrial Commission lacked *in personam* jurisdiction over her. Plaintiff jointly stipulated with Defendants to the North Carolina Industrial Commission that "[*a*]*ll parties are properly before the Industrial Commission* and the Industrial Commission has subject matter jurisdiction over this matter." (Emphasis supplied). Regarding the location of the funds from the third-party settlement, the parties stipulated "Plaintiff's attorneys are currently holding the entirety of Plaintiff's $962,500.00 from the Third-Party Recovery in their trust account."

" '*In rem*' proceedings encompass any action brought against a person in which essential purpose of suit is to determine title to or affect interests in specific property located within territory over which court has jurisdiction." *Green v. Wilson*, 163 N.C. App. 186, 189, 592 S.E.2d 579, 581 (2004) (quoting *Black's Law Dictionary* 793 (6th ed. 1990)). In *Green*, this Court recognized

> that a foreign court with *in personam* jurisdiction could render judgments that indirectly affect ownership of property over which that court would have no *in rem* jurisdiction in certain specific instances. However, a court in a jurisdiction foreign to the subject property could not determine title to the property. An example of the former would be an equitable distribution in which the divorcing couple hold property in North Carolina but bring the divorce action in another state. The foreign court would have the authority, under principles of *in personam* jurisdiction, to divide the commonly held title. But where the ownership of the deed is in dispute or there is a cloud on the title, a court must have *in rem* jurisdiction to decide such matters.

Id. "By means of its power over the person of the parties before it, a court may, in proper cases, compel them to act in relation to property not within its jurisdiction, but its decrees do not operate directly upon the property nor affect its title." *McRary v. McRary*, 228 N.C. 714, 718, 47 S.E.2d 27, 30 (1948).

The Industrial Commission acted within its proper and stipulated personal jurisdiction over Plaintiff to order her to distribute the amount she had obtained from the third-party settlement in accordance with N.C. Gen. Stat. § 97-10.2. Even if the $962,500 from the third-party settlement is not present within North Carolina, Defendants may enforce the Commission's opinion and award in South Carolina under South Carolina's version of the Uniform Enforcement of Foreign Judgments Act, S.C. Code. §§ 15-35-900 to -960 (2018).

Plaintiff's argument is also suspect in light of her stipulation that the Industrial Commission's order of distribution could be applied to the $50,000 portion of the third-party settlement obtained from the liability insurance proceeds from the at-fault driver's South Carolina insurance policy. It is uncontested by the parties that the $50,000 portion of the third-party settlement from the liability insurance proceeds is located within South Carolina, was obtained from a South Carolina insurance policy from the wrongful death action brought in South Carolina. Plaintiff's argument is overruled.

C. *Anglin v. Dunbar Armored*

[3] The Full Commission's opinion and award also relied, in part, upon this Court's opinion in *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 742 S.E.2d 205 (2013), to conclude North Carolina law allowing for subrogation liens over third-party wrongful death awards in workers' compensation cases applies in this situation.

The Commission concluded, in part:

> 2. Under traditional conflict of laws rules, matters affecting the parties' substantive rights are determined by *lex loci*, the law of the situs of the claim, while procedural or remedial issues are determined by the *lex fori*, or law of the forum where the remedy is sought . . . It is well-established that rights arising from the subrogation lien under N.C. Gen. Stat. § 97-10.2 are remedial or procedural in nature, not substantive. . . . Therefore, the forum where relief is sought is North Carolina, specifically, the Industrial Commission. . . . Thus, N.C. Gen. Stat. § 97-10.2, rather than South Carolina law, controls the rights of parties concerning Defendants' statutory subrogation lien. *Anglin v. Dunbar Armored* 226 N.C. App. 203, 209-10, 742 S.E.2d 205, 209 (2013).

Plaintiff asserts "[i]n *Anglin*, the Court considered if the proceeds from a South Carolina UIM policy affected the *existence* of a workers' compensation lien under North Carolina Law against those proceeds[,]" but did not consider how parties may attach property to satisfy the lien.

In *Anglin*, a South Carolina resident who worked for Dunbar Armored, Inc., a company doing business out of North Carolina, was injured in the course and scope of his employment in an automobile accident which occurred in South Carolina. 226 N.C. App. at 204, 742 S.E.2d at 206. The injured employee received workers' compensation benefits from Dunbar under the North Carolina Workers' Compensation Act. *Id.* The injured employee subsequently settled a liability claim with the at-fault driver. *Id.*

Dunbar agreed to settle its subrogation lien on the liability settlement for one-third of the amount of the lien. *Id.* A few months later, the injured employee settled with his UIM insurance carrier. *Id.* Dunbar was unaware of the UIM funds at the time it settled its lien with the injured employee. *Id.*

The injured employee then filed a complaint in superior court seeking "declaratory relief and to eliminate or reduce [Dunbar's] subrogation interest[,]" pursuant to N.C. Gen. Stat. § 97-10.2(j). *Id.* The injured employee "contend[ed] that South Carolina law applies because [he] was entitled to UIM funds pursuant to a South Carolina Policy." The employee further contended that Dunbar could not subrogate UIM funds under South Carolina law, S.C. Code Ann. § 38-77-160. *Id.* The trial court ruled, in part, that North Carolina law applied over South Carolina law and that Dunbar was entitled to the full amount of its subrogation lien. *Id.*

On appeal, this Court analyzed the case of *Cook v. Lowe's Home Centers, Inc.*, 209 N.C. App. 364, 704 S.E.2d 567 (2011), which had held "that N.C. Gen. Stat. § 97-10.2(j) 'is remedial in nature' and that 'remedial rights are determined by the law of the forum.' " *Anglin*, 226 N.C. App. at 207, 742 S.E.2d at 208 (quoting *Cook*, 209 N.C. App. at 367-68, 704 S.E.2d at 570-71).

This Court reasoned in *Cook*:

> As to substantive laws, or laws affecting the cause of action, the *lex loci*—or law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based—will govern; as to the law merely going to the remedy, or procedural in its nature, the *lex*

> *fori*—or law of the forum in which the remedy is sought—will control.
>
> Where a lien is intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated, *it is remedial in nature*. A statute that provides a remedial benefit must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

Cook, 209 N.C. App. at 366-67, 704 S.E.2d at 569-70 (emphasis supplied) (citations, quotation marks, ellipses, and brackets omitted).

Following *Cook*, this Court held in *Anglin* that because "N.C. Gen. Stat. § 97-10.2(j) is remedial in nature and remedial rights are determined by the law of the forum[,] . . . the trial court did not err in applying N.C. Gen. Stat. § 97-10.2(j) to [the injured employee's] UIM funds received under a South Carolina insurance policy." *Anglin*, 226 N.C. App. at 209-10, 742 S.E.2d at 209 (citation and internal quotation marks omitted) (alteration in original); *see Robinson v. Leach*, 133 N.C. App. 436, 514 S.E.2d 567 (determining that subrogation rights on UIM funds are procedural in nature and controlled by the law of North Carolina as the forum state).

This Court affirmed the trial court's judgment that North Carolina law applied to allow subrogation of UIM proceeds procured under an out-of-state UIM policy and that Dunbar was entitled to the remaining proceeds from the lien on the UIM funds. *Id.* at 205, 742 S.E.2d at 207.

Anglin involved a proceeding brought in the trial court pursuant to N.C. Gen. Stat. § 97-10.2(j) of the Workers' Compensation Act. The instant case concerns whether the Industrial Commission possessed the authority to award a subrogation lien to Defendants and order disbursement pursuant to N.C. Gen. Stat. § 97-10.2(f). The reasoning this Court applied in *Cook*, and followed in *Anglin*, to N.C. Gen. Stat. § 97-10.2(j) is applicable here. N.C. Gen. Stat. § 97-10.2(f) is remedial in nature because it provides for "a lien [] intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated." *Cook*, 209 N.C. App. at 366-67, 704 S.E.2d at 569-70.

North Carolina is the forum state in this dispute, and N.C. Gen. Stat. § 97-10.2(f) is remedial in nature. The precedents hold our statute applies over South Carolina law to grant Defendants a subrogation lien on the UIM proceeds recovered in the third-party settlement. *See Anglin*, 226 N.C. App. at 209-10, 742 S.E.2d at 209.

Plaintiff contends that because the UIM policies were South Carolina policies, the Industrial Commission erred in concluding that N.C. Gen. Stat. § 97-10.2(f) applied over South Carolina's anti-subrogation law on UIM proceeds, S.C. Code. § 38-77-160. Plaintiff asserts the commercial UIM policy, though purchased and issued in North Carolina, is a South Carolina policy because of an endorsement attached thereto, which states:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> SOUTH CAROLINA UNDERINSURED MOTORIST COVERAGE
>
> For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, South Carolina, this endorsement modifies insurance provided under the following:
>
> BUSINESS AUTO COVERAGE FORM
>
> GARAGE COVERAGE FORM
>
> MOTOR CARRIER COVERAGE FORM
>
> TRUCKERS COVERAGE FORM
>
> With respect to the coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement. . . .
>
> CONFORMITY TO STATUTE
>
> This endorsement is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this endorsement conflicts with that law, it is changed to comply with the law.

Plaintiff also contends that her and her decedent's personal UIM policy was also a South Carolina policy "because it insured the Walkers as South Carolina residents with vehicles located in that state."

Presuming, *arguendo*, as Plaintiff asserts, the UIM policies are South Carolina policies, North Carolina's subrogation law applies over South Carolina law as the law of the forum state, pursuant to *Anglin*. *See Anglin*, 226 N.C. App. at 209-10, 742 S.E.2d at 209. The UIM policy at issue in *Anglin* was a South Carolina policy, the injured employee was a South Carolina resident, and the automobile accident occurred in South Carolina. *Id*. at 204, 742 S.E.2d at 206. This Court held North Carolina

law, allowing for subrogation over the UIM policy proceeds, controlled over South Carolina law, and affirmed the trial court's order. *Id.* at 205, 742 S.E.2d at 207. Plaintiff's argument is overruled.

VI. Conclusion

The Full Commission correctly concluded Defendants could assert a subrogation lien for workers' compensation benefits paid to Plaintiff on the UIM policy proceeds obtained by Plaintiff in the South Carolina wrongful death action. The Industrial Commission possessed the jurisdiction to order disbursement of the third-party settlement proceeds. The opinion and award of the Industrial Commission is affirmed. *It is so ordered.*

AFFIRMED.

Judges STROUD and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 FEBRUARY 2019)

CALDWELL MEM'L HOSP., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 18-586	Office of Admin. Hearings (17DHR05373)	Affirmed
CANNIZZARO v. SET IN STONE, INC. No. 18-594	Iredell (16CVD990)	Affirmed
CHEATHAM v. TOWN OF TAYLORTOWN No. 18-625	Moore (16CVS374)	Affirmed
FUNDERBURK v. CITY OF GREENSBORO, N.C. No. 18-632	Guilford (17CVS5607)	Affirmed
HAMPTON v. N.C. DEP'T OF TRANSP. No. 18-684	N.C. Industrial Commission (TA-21605)	Affirmed
IN RE A.W. No. 18-877	New Hanover (18JA57)	Dismissed
IN RE D.P. No. 18-857	Wake (16JA96-98)	Affirmed
IN RE J.E.O. No. 18-585	Onslow (09JT6)	Affirmed
IN RE K.S. No. 18-763	Orange (15JA87)	Vacated in part and remanded
IN RE P.R.T. No. 18-730	Guilford (16JT304)	Reversed
KING v. PIKE ELEC. No. 18-440	N.C. Industrial Commission (15-748197) (I.C.)	Affirmed
NORDMAN v. NORDMAN No. 18-405	Iredell (14CVD738)	Vacated in part, Affirmed in part, and remanded.
ROBINSON v. GGNSC HOLDINGS, LLC No. 18-706	Pitt (16CVS2712)	Affirmed

STATE v. BRINKLEY No. 18-435	Johnston (15CRS54051) (15CRS54165)	No error in part, Reversed and Remanded in part.
STATE v. BRYAN No. 18-605	Cumberland (16CRS63076-78)	Vacated and Remanded
STATE v. BUNKLEY No. 18-545	Cumberland (13CRS52130) (15CRS50641) (16CRS59403)	Affirmed; Remanded for correction of clerical error
STATE v. EVERETT No. 18-449	Scotland (16CRS52631)	No error in part; Vacated in part
STATE v. FOSTER No. 18-540	Polk (17CRS50042-43) (17CRS50046)	Affirmed
STATE v. LITTLE No. 18-757	Mecklenburg (16CRS244470) (16CRS245167) (17CRS13739)	No Error
STATE v. LOGAN No. 18-723	McDowell (17CRS246) (17CRS50159) (17CRS50466)	Dismissed
STATE v. RENDEROS No. 18-590	Wake (15CRS212057)	No Error
STATE v. ROBINSON No. 18-661	Mecklenburg (16CRS225641) (16CRS29781)	Affirmed
STATE v. SADLER No. 18-812	Mecklenburg (14CRS232621)	No error in part; Dismissed in part
STATE v. SLADE No. 18-352	Alamance (14CR51986)	Vacated
STATE v. WARD No. 18-369	Forsyth (15CRS55900) (16CRS2451)	NO PLAIN ERROR.
STATE v. WARDRETT No. 18-434	Nash (16CRS51053)	Dismissed in part; no error in part.

STATE v. WHITMORE No. 18-798	Halifax (15CRS358-59)	No error in trial; remanded for resentencing.
STATE v. WOODS No. 18-442	Guilford (17CRS24156-57) (17CRS66077-78)	Dismissed

BROWN v. THOMPSON

[264 N.C. App. 137 (2019)]

SHAKEEVIA BROWN, Plaintiff-Appellee
v.
STEPHEN SHAW THOMPSON, Defendant-Appellant

No. COA18-919

Filed 5 March 2019

Appeal and Error—interlocutory orders—summary judgment motion—based on res judicata—possibility of inconsistent verdicts

An interlocutory appeal from an order denying defendant's motion for summary judgment (MSJ) was dismissed. Defendant's argument—that the order affected a substantial right because his MSJ was based on the defense of res judicata—was misplaced because there was no possibility of inconsistent verdicts if the case proceeded to trial.

Appeal by defendant from order entered 6 June 2018 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 February 2019.

No brief filed for plaintiff-appellee.

Blue LLP, by Dhamian A. Blue, for defendant-appellant.

ARROWOOD, Judge.

Stephen Shaw Thompson ("defendant") appeals from the trial court's order denying his motion for summary judgment. For the following reasons, we dismiss the appeal.

I. Background

Shakeevia Brown ("plaintiff") commenced this action against defendant on 27 July 2017. Plaintiff asserted allegations including defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and sexual harassment. Defendant filed a motion to dismiss and an answer on 11 October 2017.

On 25 April 2018, defendant filed a motion for summary judgment, or in the alternative, a motion to dismiss for failure to prosecute. Defendant sought summary judgment on the basis that principles of *res judicata* precluded plaintiff from any recovery. Defendant attached to the motion a copy of a "Complaint for No-contact Order for Stalking or Nonconsensual Sexual Conduct" filed by plaintiff in Wake County

District Court on 5 October 2017. Defendant also attached to the motion a copy of the district court's 2 November 2017 "No Contact Order for Stalking or Nonconsensual Sexual Conduct" denying plaintiff's complaint and dismissing the matter upon finding a failure to prosecute.

Defendant's motion for summary judgment was heard at the 31 May 2018 session of Wake County Superior Court. On 6 June 2018, the trial court entered an order denying defendant's motion for summary judgment. Defendant filed notice of appeal on 27 June 2018.

II. Discussion

At the outset, we must address the interlocutory nature of defendant's appeal.

An order denying of a motion for summary judgment is an interlocutory order because it leaves the matter for further action by the trial court. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted).[1]

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

Defendant concedes this appeal is interlocutory, but contends it affects a substantial right because the basis of his motion for summary

1. Immediate appeal is also available if the trial court certifies the matter for immediate appeal. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (b) (2017); *Sharpe*, 351 N.C. at 161-62, 522 S.E.2d at 579. However, the trial court did not certify its order in this case as immediately appealable under Rule 54(b).

judgment was that recovery in this action is barred by principles of *res judicata*.

As defendant points out, this Court has acknowledged that "our Supreme Court has ruled that the denial of a motion for summary judgment based on the defense of *res judicata* . . . is immediately appealable." *McCallum v. N.C. Co-op. Ext. Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (citing *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). When considered in isolation, the above quote seems to be an absolute statement of the law; however, in context, it is clear that this Court was simply noting that, in *Bockweg*, the denial of the defendant's motion for summary judgment based on the defense of *res judicata* was held to affect a substantial right. In *McCallum*, this Court further stated, "the denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed." *Id.* (citing *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161).

In *Bockweg*, the Supreme Court explained why the denial of a motion for summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealable:

> As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a substantial right. However, we have noted that while [t]he right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, . . . the right to avoid the possibility of two trials on the same issues can be such a substantial right.

333 N.C. at 490-91, 428 S.E.2d at 160 (quotation marks and citations omitted).

> Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial

> in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable.

Id. at 491, 428 S.E.2d at 161 (internal citations omitted).

Subsequent to the Court's decision in *Bockweg*, this Court has noted the permissive language in *Bockweg*, emphasizing that *Bockweg* holds the denial of summary judgment based on a defense of *res judicata* "may" affect a substantial right. *See Country Club of Johnston Cnty., Inc. v. U.S. Fidelity and Gaur. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999) ("[W]e do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* 'may affect a substantial right.' ") (quoting *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161 (emphasis added)), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). In *Country Club of Johnston Cnty.*, this Court explained that,

> in an opinion issued shortly after *Bockweg*, *Community Bank v. Whitley*, 116 N.C. App. 731, 449 S.E.2d 226, *disc. review denied*, 338 N.C. 667, 453 S.E.2d 175 (1994), [it] interpreted the permissive language of *Bockweg* as allowing, under the substantial right exception, immediate appeal of the denial of a motion for summary judgment based, *inter alia*, upon defense of *res judicata* "*where a possibility of inconsistent verdicts exists if the case proceeds to trial*." *Id.* at 733, 449 S.E.2d at 227 (emphasis added); *see also Little v. Hamel*, 134 N.C. App. 485, 517 S.E.2d 901 (1999) (appeal of denial of summary judgment motion based upon *res judicata* considered to affect substantial right where, although not directly noted by the Court, defendants had been absolved of liability in previous suit between the parties and faced possibility of inconsistent verdicts).
>
> In short, denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only "where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Community Bank*, 116 N.C. App. at 733, 449 S.E.2d at 227.

135 N.C. App. at 166-67, 519 S.E.2d at 545-46. There was no possibility of inconsistent verdicts in *Country Club of Johnston Cnty.*, *id.* at 167, 519 S.E.2d at 546, and this Court dismissed the appeal, *id.* at 168, 519 S.E.2d at 546; *see also Northwestern Fin. Group, Inc. v. Cnty. Of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding there was no possibility for inconsistent verdicts because there had yet to be a trial in the matter because the initial action sought only equitable relief), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). Citing *Country Club of Johnston Cnty.* and *Northwestern Fin. Group, Inc.*, this Court has more recently stated that it "has previously limited interlocutory appeals to the situation when the rejection of [a *res judicata* defense] gave rise to a risk of two actual trials resulting in two different verdicts." *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007).

The present case is easily distinguishable from cases holding the denial of a motion for summary judgment on the basis of *res judicata* raises a substantial right to permit immediate appellate review. First, the posture of this case is unique in that the complaint in the present action was filed prior to the complaint in the district court case that defendant now claims precludes recovery. Second, the district court case, which sought only a no contact order under Chapter 50C of the General Statutes based on factual allegations similar to those made in the present case, was dismissed for plaintiff's failure to prosecute. Although a dismissal that does not indicate otherwise operates as an adjudication on the merits, *see* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017), there was no determination of the underlying issues that would raise the potential for an inconsistent verdict in the present case. Additionally, the issues to be decided in a Chapter 50C action for a no contact order are substantially more narrow than those to be determined in the present action seeking additional relief including money damages, relief not afforded in a Chapter 50C action. As a result, we hold the doctrine of *res judicata* does not raise a substantial right in this case to permit an immediate appeal of the trial court's denial of defendant's motion for summary judgment.

III. Conclusion

The denial of defendant's motion for summary judgment on the basis of *res judicata* does not affect a substantial right in this instance. Therefore, immediate appeal is not proper and defendant's appeal is dismissed.

DISMISSED.

Judges STROUD and TYSON concur.

JOHN P. CONKLIN, PLAINTIFF
v.
TOMMIE JEAN CONKLIN, DEFENDANT

No. COA18-509

Filed 5 March 2019

1. Attorney Fees—child custody—good faith requirement—genuine dispute

In awarding $45,000 in attorney fees to a mother in a child custody action, the trial court's conclusion that the mother acted in good faith was supported by abundant evidence that the parties had a genuine dispute over custody of the children, including numerous motions filed by both parties.

2. Attorney Fees—child custody—sufficiency of means to defray expense of the case—evidentiary support

In awarding $45,000 in attorney fees to a mother in a child custody action, the trial court's conclusion that the mother had insufficient means to defray the cost of the litigation was supported by unchallenged findings regarding the disparity in income between the parties, the mother's minimal savings, the complexity of the litigation, and other factors.

3. Attorney Fees—child custody—amount—abuse of discretion argument

In awarding $45,000 in attorney fees to a mother in a child custody action, the trial court did not abuse its discretion regarding the amount of the award where the court considered the reasonableness of the attorney's rate and considered and rejected the father's argument that the mother's attorney did not expect to be paid.

Appeal by plaintiff from order entered 29 November 2017 by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 31 October 2018.

Church Watson Law, PLLC, by Seth A. Glazer, for plaintiff-appellant.

Myers Law Firm, PLLC, by R. Lee Myers, for defendant-appellee.

STROUD, Judge.

Father appeals from an order awarding attorney's fees. Although the parties ultimately settled their custody dispute in a manner more favorable to Father than Mother initially sought, the trial court did not err in determining that Mother acted in good faith in defending against Father's claims regarding child custody and child support and pursuing her own counterclaims. Where Father's monthly income was approximately nine times more than Mother's income, and she had recently declared bankruptcy, the trial court did not err in finding that Mother had insufficient means to defray the expense of this suit and was entitled to an award of attorney's fees. We therefore affirm the trial court's order.

I. Background

The parties married in 1999, separated in 2008, and later divorced. In 2009, they entered into a Separation and Property Settlement agreement which addressed child custody and child support for their three children; the parties had joint legal custody of the children, and Mother had primary physical custody. Father had visitation every other weekend and on designated holidays. In 2013, Father filed a complaint for child custody, child support, and attorney's fees, requesting that he have "no less than joint physical and legal custody of the minor children," for the court to establish child support, for attorney's fees, and for a temporary parenting arrangement. Mother filed a response to the request for temporary parenting arrangement and an answer and counterclaims for custody, child support, specific performance, and attorney's fees.

Over the next three years, the parties engaged in discovery and filed many motions and counter-motions, and the trial court entered many orders. Finally, on 2 June 2016, the trial court entered a "Consent Order for Modification Permanent Child Custody and Dismissal of Motions for Contempt and Orders to Show Cause." The Consent order granted joint legal and physical custody of the children to the parties and includes extensive detailed provisions regarding decision-making, regular and holiday schedules, extracurricular activities, communications between the parties, use of drugs and alcohol by the parties, relocation, appointment of a parenting coordinator, and other matters. The Consent order provided that "[a]ny pending claims for attorney's fees and costs not resolved by this Order, shall remain open for determination by this Court." The trial court held a hearing on Mother's request for attorney's fees on 20 July 2017. The trial court entered an order awarding Mother $45,000.00 in attorney's fees on 29 November 2017, and Father timely appealed.

II. Standard of Review

The issues on appeal arise from the trial court's award of attorney's fees to Mother under N.C. Gen. Stat. § 50-13.6:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

N.C. Gen. Stat. § 50-13.6 (2017). Before awarding fees, the trial court must conclude that the party seeking an award of fees is "an interested party acting in good faith who has insufficient means to defray the expense of the suit." *Id.* "Whether these statutory requirements have been met is a question of law, reviewable on appeal. Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Schneider v. Schneider*, ___ N.C. App. ___, ___, 807 S.E.2d 165, 166 (2017). In addition, the trial court's findings of fact must be supported by competent evidence. *See Simpson v. Simpson*, 209 N.C. App. 320, 324, 703 S.E.2d 890, 893 (2011).

III. Acting in Good Faith

[1] Father first argues that Mother has not acted or proceeded in good faith.[1] He argues that "[t]he reality of this case is that there was never a 'legitimate dispute' between the parties with respect to the custody of the minor children. The 'dispute' was at all times one-sided and manufactured by the [Mother's] bad faith resistance to allow [Father] to increase his parenting time of the minor children." He claims the trial court was "unjustly punishing" him with the award of attorney's fees. Father challenges the trial court's finding that "Mother has conducted herself as a reasonable party acting in good faith" and the trial court's related conclusion:

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1. We note that Father's arguments in his brief broadly cross-reference his 21 proposed issues on appeal. We have addressed only those issues for which he has set forth a specific argument, challenge to a specific finding or conclusion, and legal authority. The listing of issue numbers alone is not sufficient to make or preserve challenges that are not specifically made in his brief, and we have considered only the arguments actually made in the brief. *See* N.C. R. App. P. 28(b)(6).

> 5. Mother has proceeded and acted in this matter in "good faith" pursuant to N.C.G.S. §50-13.6.

While there is not a legal definition of good faith in this context, our Supreme Court has previously adopted the definition of good faith as "honesty of intention, and freedom from knowledge of circumstances which ought to put one upon inquiry" for Rule 11 sanctions. *Bryson v. Sullivan*, 330 N.C. 644, 662, 412 S.E.2d 327, 336 (1992) (brackets omitted). "Because the element of good faith is seldom in issue a party satisfies it by demonstrating that he or she seeks custody in a genuine dispute with the other party." *Setzler v. Setzler*, 244 N.C. App. 465, 467, 781 S.E.2d 64, 66 (2015) (citation, quotation marks, and ellipsis omitted).

Here, the record and transcript abundantly demonstrate that the parties had a genuine dispute over custody of the children. Father wanted joint legal and physical custody, with the children spending equal time with each parent, while Mother wanted to maintain their previous custody arrangement of weekend and holiday visitation to provide more stability for the children. Father argues that because the parties ultimately agreed to an equal custody arrangement in a consent order, that Mother did not act in good faith by defending against Father's custody claim and pursuing her own custody claim.

Father's argument overlooks the history of the litigation regarding custody in this case and the many issues beyond the precise custodial schedule of the children. We will not recite the entire history of the litigation, but both parties filed many motions, including motions for contempt and to compel discovery. The trial court entered orders on many of these motions. In 2014, the trial court entered a custody order including these findings of fact:

> 42. Father is asking the Court to allow the minor children to equally (50/50) spend time with each parent so that he has quality time to spend with the minor children on a regular basis. Father's life and current work schedule would permit him have joint (50/50) physical custody of the minor children.
>
> 43. Mother believes that the current parenting time schedule provides stability and that is what is important for the minor children. She does not want to see their routine changed. However, Mother is amenable to a week-on/week-off parenting time schedule during the summer, so long as Father is not drinking.

> 44. This Court finds that it is in the best interests of the minor children that they do have a routine which provides stability, but they also have the opportunity to spend quality time with both parents.
>
> 45. This Court finds that it is in the best interests of the minor children that Father's parenting time be expanded, but that the minor children are also not forced into a schedule that does not provide for stability and continuity. Particularly concerning to this court is [R.C.] with his struggle in school and how a huge change in his every day schedule and structure might affect him as the parties work towards helping him progress in school.
>
> 46. This Court finds that it is in the best interests of the minor children for their primary physical custody to remain with Mother and for Father to have secondary physical custody of the minor children. Father's parenting time with the minor children shall be expanded from what he currently has.

In the Consent Custody order, the trial court noted some of the history of the case and the disposition of the pending motions:

> 6. On September 14, 2014, this Court entered an Order for Permanent Child Custody (hereinafter the "First Custody Order").
>
> 7. On April 13, 2015, Father filed a Motion for Modification of Child Custody and Motion for Contempt and Order to Show Cause. An Order to Show Cause was entered on April 16, 2015.
>
> 8. On July 27, 2015, Father filed a Second Motion for Modification of Child Custody and Motion for Contempt and Order to Show Cause. No Order to Show Cause was entered with respect to this Motion for Contempt.
>
> 9. On October 30, 2015, Mother filed a Motion for Contempt. An Order to Show Cause was entered on November 6, 2015.
>
> 10. On December 15, 2015, Father filed a Motion for Emergency Child Custody; Motion for Temporary Parenting Arrangement; and Third Motion to Modify Child Custody.

> 11. On December 17, 2015, this Court entered an Order Denying Temporary Emergency Custody and Father's Motion for Temporary Parenting Arrangement.
>
> 12. On February 26, 2016, Mother filed a Motion for Contempt. No Order to show Cause was entered with respect to this Motion for Contempt.
>
> . . . .
>
> 5. DISMISSAL OF MOTIONS FOR CONTEMPT. Father's April 13, 2015 Motion for Contempt and Order to Show Cause is hereby dismissed. This Court's Order to Show Cause issued on April 16, 2015 is hereby dismissed. Father's July 27, 2015 Motion for Contempt and Order to Show Cause is hereby dismissed. Mother's October 30, 2015 Motion for Contempt is hereby dismissed. This Court's Order to Show Cause issued on November 6, 2016 is hereby dismissed. Mother's February 26, 2016 Motion for Contempt is here by [sic] dismissed. Any and all attorney's fees claims with respect to these Motion for Contempt are hereby dismissed.

In the attorney fee order on appeal, the trial court also carefully allocated the attorney fees attributable to the various claims and motions and specifically noted:

> 12. This Order deals only with attorney's fees in connection with the original permanent child custody and original child support Orders.
>
> 13. While there have been other issues that the Court has ruled on, those have been dealt with separately and no fees for those other issues are included in this Order.

Father also does not challenge the trial court's allocation of fees to the child custody and support issue; he challenges just the conclusion of good faith because the case was ultimately, after years of litigation, settled.[2]

Father's logic that the existence of a genuine disagreement is determined solely by the outcome is seriously flawed and not supported by

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2. Again, as noted above, Father's listing of issue numbers from the record on appeal is not sufficient to preserve his argument as to any particular finding of fact or conclusion of law, and we have addressed only those clearly identified in his brief.

the law. *See id.* at 468, 781 S.E.2d at 66 ("[I]t is undisputed that defendant was in a genuine dispute with plaintiff—plaintiff initiated a claim for custody and defendant brought a counterclaim for custody."). Were we to adopt Father's argument, parties would have a strong disincentive to settle a custody or child support case, since the party who ultimately agrees to a resolution more similar to the one sought by the other party would risk liability for attorney's fees for not acting in good faith. Instead, they would opt to pursue the litigation to its bitter end even if they may be otherwise willing to settle. This is exactly the opposite result encouraged by our statutes and case law. *Dixie Lines v. Grannick*, 238 N.C. 552, 555, 78 S.E.2d 410, 413 (1953) ("The law favors the settlement of controversies out of court. It encourages such action by securing to every man the opportunity to negotiate for the purchase of his peace without prejudice to his rights." (citations omitted)).

As Mother's brief notes, Father's statement of the facts in his brief is argumentative and blames the entire dispute on Mother's unreasonable refusal to agree with his wishes. Father's arguments on appeal bear some similarity to the arguments made in the hearing regarding attorney's fees. The trial court noted the obvious discord between counsel for the parties at the hearing:

> This case perplexes me so much, the way both of the attorneys have behaved in this case towards each other. I know all three of you, and I have never seen any of this behavior in other cases with y'all. And it's just perplexing to the Court how it can get this out of hand. I have asked both sides to seriously consider whether or not they want to go down that path[3] and proceed with the hearing. And I have asked to have an answer after lunch because it's the last thing scheduled. We've got three other matters or two other matters to finish up. . . . So I really want everybody to cool down. I want to hear your argument on the child support, on the -- on the attorney's fees, your argument on the attorney's fees, and then I'm going to recess for lunch and go to my [meeting]. . . . And then I want to know when we resume, probably 1:45, whether or not both sides are still insisting on pursuing whatever claims they may or may not have, and I'll be happy to hear arguments about whether

3. At this point in the hearing, counsel for both parties were requesting sanctions under N.C. Gen. Stat. § 1A-1, Rule 11 against the other. They ultimately agreed to dismiss their Rule 11 motions.

> or not there's actually a pending Rule 11 motion against Ms. Watson, since that's not how the pleading is titled, if -- all of this is going to continue to be pursued; okay?

The trial court was in the best position to evaluate the merits and sincerity of the claims of both parties and to determine whether Mother was acting in good faith. *See Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 903 (2008) ("This Court has recognized that the trial judge is in the best position to make such a determination as he or she can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." (quotation marks omitted)). The challenged finding and conclusion regarding good faith are based on competent evidence. The trial court properly concluded that the parties' dispute as to custody was genuine, and Mother acted in good faith.

IV. Insufficient Means to Defray the Expense of the Case

[2] Father next argues "that at all times, [Mother] was able to employ counsel to meet [Father] on a level playing field without the award of attorney's fees." Father challenges the court's finding that Mother had "insufficient means to defray the expense of this suit" and related conclusion:

> 6. Mother has insufficient means to defray the expense of the custody and child support action, including attorney's fees as provided in N.C.G.S. §50-13.6.

Yet Father does not challenge the trial court's related findings of fact upon which this conclusion is based:

> 15. When this action was initiated by Father in 2013, Mother had worked for about half of the year, and earned approximately $20,000.00. Subsequent to 2013, she has earned gross income of approximately $40,000.00 per year.
>
> 16. Mother also received $1,800.00 per month in alimony in 2013, and has received child support under the terms of a Separation Agreement, and then under the terms of the permanent child support Order entered September 28, 2015.
>
> 17. The Court does not consider it appropriate to consider the fact that Mother has money for child support as it would not be appropriate for her to have to deplete her monthly child support allotment in order to pay attorney's fees.

18. Father, on the other hand, earns approximately $30,000.00 per month.

19. Mother has incurred substantial fees from Mr. Myers for the various issues that he has represented her on (child custody and child support).

. . . .

25. The Court finds that the complexity of the case, the amount of discovery that was required in order to proceed with this case, and the number of hearing [sic] that these particular issues have required is all something the Court considers in determining what would be a reasonable attorney's fee.

. . . .

29. Mother received $10,000.00 from her parents, and that while the Court does find that she does have some resources with which to pay attorney's fees, she should not have to deplete her estate, little that it is, or that she should have to deplete her monthly income in order to be able to pay attorney's fees to meet Father in this litigation.

30. Arguments were made by Father's attorney, and the Court has considered the arguments that this was a de facto "pro bono" attorney-client relationship where Mother was running up thousands of dollars of attorney's fees, but that she had an agreement with her attorney to pay $100.00 per month; the Court does not find that this is a pro bono arrangement.

31. Based on what the Court deems to be reasonable attorney's fees and considering the findings that I have made, the Court finds that a reasonable attorneys fee for custody and child support for Father to pay to Mother is $45,000.00 of the almost $75,000.00 that Mother is requesting.

"A party has insufficient means to defray the expense of the suit when he or she is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Dixon v. Gordon*, 223 N.C. App. 365, 372, 734 S.E.2d 299, 304 (2012). Here, Father does not dispute that Mother's estate is significantly smaller than his own and that there is a large disparity in the income between Mother and Father. Mother's income was approximately $40,000.00 per year

when Father filed the complaint in 2013, and Father earns approximately $30,000.00 per month. In addition, Mother filed for bankruptcy in 2015, and she testified at the trial on attorney's fees that she only had $500.00 in her savings account. The challenged finding is based on competent evidence, and we conclude the trial court did not err in that Mother "has insufficient means to defray the expense of the suit."

V. Amount of Attorney's Fees

[3] Finally, Father argues that the amount of the attorney's fees is an abuse of discretion "as the facts and Record of this case do not support the Trial Court's erroneous finding that '[Mother] has conducted herself as [sic] reasonable party acting in good faith[.]' " This is not a new argument but merely repeats the argument Father made earlier in his brief. It is well settled that the amount of attorney's fees is within the trial court's discretion and is reviewed for an abuse of discretion. *See Schneider*, ___ N.C. App. at ___, 807 S.E.2d at 166. The trial court found Mother's attorney's rate to be reasonable, and only awarded $45,000.00 out of approximately $75,000.00 that Mother requested. The trial court considered and rejected Father's argument that Mother's counsel did not really expect to be paid and addressed only the fees attributable to the pending motions, as provided by the consent order. The trial court acted well within its discretion in awarding the attorney's fees.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's award of attorney's fees.

Affirmed.

Judges DILLON and BERGER concur.

CREWS v. CREWS

[264 N.C. App. 152 (2019)]

LISA DAWN CREWS, PLAINTIFF
v.
JAMES SCOTT CREWS, DEFENDANT

No. COA18-42

Filed 5 March 2019

1. Specific Performance—separation agreement—alimony—missed payments—adequacy of remedy at law

In an action alleging breach of a separation agreement, the trial court did not abuse its discretion by entering an order of specific performance directing a husband to pay alimony, where the husband stopped paying alimony, clearly establishing the inadequacy of the remedy of damages and thereby necessitating an equitable remedy.

2. Specific Performance—separation agreement—alimony—ability to pay

In an action alleging breach of a separation agreement, the trial court did not abuse its discretion by entering an order of specific performance directing a husband to pay alimony, even though the order did not contain specific findings of fact regarding the husband's ability to pay, where evidence was presented that the husband was gainfully employed in a profitable business at the time of the hearing, and the husband did not present any evidence to the contrary.

3. Specific Performance—separation agreement—defense against failure to pay alimony—allegation of material breach by complaining party

In an action alleging breach of a separation agreement, the Court of Appeals rejected the husband's argument that an order of specific performance requiring him to pay alimony was erroneous based on the wife's own material breach of the agreement. The trial court did order the wife to return certain vehicles to the husband after determining that her prior failure to return them did not constitute a material breach, and it correctly concluded that the wife performed her other obligations under the agreement.

4. Appeal and Error—breach of separation agreement—denial of summary judgment—no review

In an appeal from an order of specific performance directing a husband to pay alimony after his failure to pay pursuant to a

separation agreement, the Court of Appeals rejected the husband's attempt to challenge the trial court's denial of his motion for summary judgment, because denial of summary judgment is not subject to appellate review after a full evidentiary hearing.

5. Divorce—separation agreement—cohabitation—sufficiency of findings of fact

In an action alleging breach of a separation agreement, the trial court's findings of fact, supported by evidence, adequately addressed allegations that the wife cohabited with another man and included the trial court's determination as to which pieces of evidence the court found credible or not credible. The trial court resolved the conflicts in the evidence and did not merely recite the evidence in its findings.

Judge BERGER concurring in part and dissenting in part.

Appeal by defendant from order entered 19 July 2017 by Judge J. Rodwell Penry, Jr. in District Court, Davidson County. Heard in the Court of Appeals 17 October 2018.

Jon W. Myers, for plaintiff-appellee.

Woodruff Law Firm, P.A., by Jessica S. Bullock and Carolyn J. Woodruff, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order enforcing the Separation Agreement he had entered into with plaintiff. Because the trial court's findings support its conclusions regarding the enforceability of the Separation Agreement and its order requiring specific performance of Husband's alimony obligation, we affirm.

I. Background

On 21 July 2016, plaintiff-wife filed a verified complaint against defendant-husband alleging that the parties had separated in February of 2016 and had entered into a Separation and Property Settlement agreement on 4 March 2016. Wife alleged Husband had breached the Agreement by failing to timely pay his alimony obligation and that he had paid only once or twice since entry of the Agreement. On 25 January 2017, Husband answered Wife's complaint, denying the substantive

allegations; he counterclaimed for rescission of the Agreement based upon fraud in the inducement, material breach of contract by Wife, and attorney fees. Husband alleged Wife had concealed sexual relationships and failed to disclose material assets. Husband alleged duress, unfairness, and unconscionability as to the Agreement. Husband also alleged that even if the Agreement was valid, his obligation to pay alimony was terminated by Wife's cohabitation with another man. Husband claimed Wife had breached the Agreement by her failure to return twenty items of personal property which were listed in the counterclaim.

On 30 March 2017, Husband filed a motion for summary judgment. The trial court denied Husband's motion for summary judgment and heard all pending claims and counterclaims. On 19 July 2017, the trial court entered an order denying summary judgment; concluding that the Separation Agreement was enforceable, Husband had breached the Agreement, and Wife had not breached the Agreement; and ordering specific performance of Husband's alimony obligation. Husband appealed.

II. Specific Performance

Defendant makes three arguments regarding specific performance. Husband does not challenge the findings of fact as unsupported by the evidence, but contends that the findings of fact are not sufficient to support the trial court's conclusions of law. " The remedy of specific performance rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Lasecki v. Lasecki*, 246 N.C. App. 518, 540, 786 S.E.2d 286, 302 (2016) (citation, quotation marks, and brackets omitted).

> To receive specific performance, the law requires the moving party to prove that (i) the remedy at law is inadequate, (ii) the obligor can perform, and (iii) the obligee has performed her obligations. We now elaborate on each of these requirements.
>
> First, the movant must prove the legal remedy is inadequate. In *Moore*, our Supreme Court clarified that:
>
> > an adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

For separation agreements, *Moore established that damages are usually an inadequate remedy* because:

> the plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply. The expense and delay involved in this remedy at law is evident.

In this context, *even one missed payment can indicate the remedy at law is inadequate.*

Second, the movant must prove the obligor has the ability to perform. To meet this burden, the movant need not necessarily present direct evidence of the obligee's current income. For instance, the movant can meet her burden by showing the obligee has depressed his income to avoid payment. Additionally, if the obligor has offered evidence tending to show that he is unable to fulfill his obligation under a separation agreement, the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance.

Third, the movant must prove she has not breached the terms of the separation agreement. Still, general contract principles recognize that immaterial breaches do not eliminate the possibility of specific performance.

Reeder v. Carter, 226 N.C. App. 270, 275–76, 740 S.E.2d 913, 917–18 (2013) (citations, quotation marks, ellipses, and brackets omitted). Defendant challenges all prongs supporting the trial court's order of specific performance.

A. Inadequate Remedy at Law

[1] Husband contends that "the remedy of damages is the only remedy available because the defendant cannot perform under the contract. Additionally, there are no findings of fact or conclusions of law that the remedy of damages is inadequate." (Original in all caps.) As noted

above, for separation agreements, "damages are usually an inadequate remedy[.]" *Id.* at 275, 740 S.E.2d at 918. In *Stewart v. Stewart*, this Court determined,

> *The breachor's initial failure to comply establishes the inadequacy of the breachee's remedy at law.* To make iteration of breach prerequisite to equitable relief would afflict the equitable remedy with the very inadequacy it was designed to amend. Given plaintiff's allegation regarding defendant's statement of intent not to comply, and defendant's failure to make a payment when due, we find no abuse of the court's discretion in ordering specific performance.

61 N.C. App. 112, 117, 300 S.E.2d 263, 266 (1983) (emphasis added).

Here, plaintiff's evidence showed and the trial court found that Husband had failed to pay his alimony obligation multiple times. Husband cites to *Reeder* to argue "that there must be findings of fact to support conclusion of law on the prong of legal remedy being inadequate[;]" it appears Husband contends that the trial court must include the magic words that "the legal remedy is inadequate" in its findings. But *Stewart* establishes that a finding of a "failure to comply establishe[d] the inadequacy of" the remedy at law. *Id.* Here, the trial court made a finding that "[t]he Defendant stopped paying alimony in August of 2016" in its July 2017 order; this finding established the inadequacy of Wife's remedy at law. *See id.*

B. Husband's Ability to Perform under the Agreement

[2] Husband also contends that "the trial court erred by failing to make any findings of fact or conclusions of law whatsoever regarding specific performance or defendant's ability to pay alimony." (Original in all caps.)

> As a general proposition, the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that defendant can perform. In the absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant has deliberately depressed his income or dissipated his resources.
>
> In finding that the defendant is able to perform a separation agreement, the trial court is not required to

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

Condellone v. Condellone, 129 N.C. App. 675, 682–83, 501 S.E.2d 690, 695–96 (1998) (citations, quotation marks, and brackets omitted).

Husband is correct that the trial court did not make specific findings of fact or conclusions of law regarding his ability to specifically perform the contract by paying the alimony. There was never any question of Husband's ability to pay raised at trial and the evidence tended to show his business was successful and profitable. In fact, one of Husband's counterclaims – which was rejected by the trial court in finding of fact 8 – was based upon his allegation that Wife had breached the "Molestation Clause" of the agreement and that she was trying to damage his business. In the Agreement, Husband received the business he established and operated, Quality Transportation and Transports. One of Husband's counterclaims was based upon his allegation that Wife had breached the agreement by harassing him and threatening to contact his customers and "ruin [his] business[.]" Husband testified about his business, including his relationships with Foreign Cars Italia and Bentley; his business transported foreign cars for "high-end customers" and Husband believed Wife was contacting them and trying to "blackmail" him. Husband did not present any evidence of any actual financial damage to his business – although his failure to file income tax returns for nine to ten years may have made it difficult to establish anything about his business's financial status – and he did not give any financial reason for stopping his alimony payments in August of 2016 but rather relied upon the allegations of fault on the part of plaintiff in his defense. At the time of the hearing, Husband was still operating his business as he had done for many years. When asked how much he had paid his attorneys in this case, he replied that he wasn't sure, but he had borrowed $65,000, $40,000 of which was from a "handshake deal" with his girlfriend, and did not use all of that money for his attorney fees.

Even if Wife did not present any specific evidence of Husband's income at the time of the hearing, the evidence showed he was still gainfully employed exactly as he had been for most of their marriage. And most significantly, Husband did not present any evidence of his *inability* to pay or even argue that he was unable to pay. Instead, Husband's entire defense relied upon trying to set aside the Agreement based on fraud or

duress and his defense of Wife's cohabitation. Wife had the burden to present evidence that Husband had the ability to pay, which she met by the evidence noted above. Husband did not counter that evidence and did not make any *argument* to the trial court regarding his ability to pay or Wife's alleged failure to present sufficient evidence of his inability to pay. He has improperly raised this argument for the first time on appeal. *See Lee v. Keck*, 68 N.C. App. 320, 328, 315 S.E.2d 323, 329 (1984) ("Even the sufficiency of the evidence cannot be raised for the first time on appeal. On appeal, defendants argue several grounds, including the sufficiency of the evidence, which were not advanced at trial. They are, therefore, not properly before this Court." (citations omitted)).

While Husband and the dissent rely on *Cavenaugh* in support of the argument that the trial court was required to make findings of fact regarding his ability to pay, Husband omitted the intalicized portion below in his quote from the holding he cited:

> We hold that *when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract* the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance. Because the trial judge did not make such findings in this case, he could not have properly exercised his discretion in decreeing specific performance of the separation agreement and ordering payment of arrearages. Therefore, this case must be remanded for additional findings of fact on defendant's ability to pay the arrearages and to comply with the terms of the separation agreement in the future. If the trial judge finds that defendant is unable to fulfill his obligations under the agreement, specific performance of the entire agreement may not be ordered absent evidence that defendant has deliberately depressed his income or dissipated his resources. If he finds that the state of defendant's finances warrants it, the trial judge may order specific performance of all or any part of the separation agreement unless plaintiff otherwise has an adequate remedy at law.

Cavenaugh v. Cavenaugh, 317 N.C. 652, 657-58, 347 S.E.2d 19, 23 (1986) (emphasis added) (citations omitted). Husband did not "offer[ ] evidence tending to show that he is unable to fulfill his obligations under [the] separation agreement or other contract[,]" *id.*, nor did he make this

argument to the trial court. *See Lee*, 68 N.C. App. as 328, 315 S.E.2d as 329. This argument is without merit.

C. Wife's Performance under the Agreement

[3] Last, Husband argues Wife "did not perform her obligations under the contract." This argument is commingled with Husband's argument regarding material breach of contract. Husband contends "the trial court erred by finding that . . . [Wife] did not materially breach the parties' separation agreement by failing to return [Husband's] one-of-a-kind Ferrari model cars and at least $5,400 of other personal property items[.]" (Original in all caps.) "In order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003).

The Agreement addressed the division of "Miscellaneous Tangible Property" and provided that Husband would receive his "tools, four wheeler, golf cart and washer/dryer and personal effects including his clothing." Husband was also to get such other items "as the parties mutually agree." Since the model cars are not specifically mentioned in the Agreement, Husband and Wife apparently agreed after signing the Agreement that Husband would get the cars. The "one-of-a-kind Ferrari model cars" Husband claims are worth $22,500 were not mentioned in the Agreement. If the cars were so important that they "defeat the purpose of the" Agreement as Husband contends, they should have been specifically listed; otherwise, Wife could have refused to allow Husband to have the cars. "[R]escission of a separation agreement requires proof of a material breach -- a substantial failure to perform." *Cator v. Cator*, 70 N.C. App. 719, 722-23, 321 S.E.2d 36, 38 (1984). The trial court ultimately ordered Wife to return the cars to Husband but determined that she did not breach the Agreement by her failure to return them. Furthermore, the trial court correctly determined that Wife had performed her other obligations under the Agreement. Husband's argument as to Wife's material breach as a bar to her claims for specific performance and breach of contract is overruled.

III. Summary Judgment

[4] Husband next contends that "the trial court erred in (a) preserving ruling until after trial on the defendant-appellant's motion for summary judgment and (b) by denying defendant's motion for summary judgment." (Original in all caps.) But denial of summary judgment is not subject to appellate review after a full evidentiary hearing:

> To grant a review of the denial of the summary judgment motion after a final judgment on the merits, however, would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985).

IV. Cohabitation

[5] Husband next contends the trial court erred in failing to determine Wife was cohabiting with another man. While Husband does claim to challenge the findings of facts regarding cohabitation as unsupported by the competent evidence, Husband actually focuses less on a lack of evidence and instead asks us to reweigh the evidence in his favor, which we cannot do. *See Garrett v. Burris*, 224 N.C. App. 32, 38, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013) ("It is not the function of this Court to reweigh the evidence on appeal."). "Where evidence of cohabitation is conflicting, the trial court must evaluate the parties' subjective intent." *Craddock v. Craddock*, 188 N.C. App. 806, 812, 656 S.E.2d 716, 720 (2008). The trial court found:

> 10. Based upon the evidence independent of Lisa Crews and Mr. Henderson, the Court concludes they were not cohabitating pursuant to N.C.G.S. § 50-16.9(b).
>
> 11. There was no evidence of joint financial obligations of a home, combining finances, pooling of resources or consistent merging of families.
>
> 12. The court does not [find] that there was a dwelling together continuously and habitally.
>
> . . . .
>
> 14. The Plaintiff took a weekend trip to Chicago to see a male friend. There was no evidence of a sexual relationship other than a statement by Mr. Henderson when he had been cast aside by Lisa Crews which the Court puts no credence in his statement.

The trial court specifically noted the evidence it found credible and the evidence which was not credible. Husband is correct that Mr. Henderson had said he was living with Wife at one point, but the trial court put "no credence in his statement." Ultimately, the trial court made its findings on the evidence it deemed credible; those findings are supported by the evidence and we do not review the trial court's determinations of credibility. *See In re C.J.H.*, 240 N.C. App. 489, 493, 772 S.E.2d 82, 86 (2015) ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." (citations and quotation marks omitted)). The trial court resolved any conflicts in the evidence in favor of Wife, and even if the trial court could have reached a different conclusion, the trial court's findings are supported by the evidence.

Husband also contends

> the trial court found that "Mr. Henderson told third parties that they were living together when he was mad at Lisa Crews because they broke up, but later indicated that was a lie." (R p 157). Mere recitations of a witness's testimony are not findings of fact to support the court's conclusions of law. *Schmeltzle v. Schmeltzle*, 147 N.C. App. 127, 555 S.E.2d 326, 328 (2001).

But Husband's argument takes this finding out of context. This finding is in a list of 15 findings addressing the issue of cohabitation. The other findings address surveillance of plaintiff's residence on several occasions and other facts relevant to the issue of cohabitation and then indicate that the trial court did not find Mr. Henderson to be credible: "Mr. Henderson and [Plaintiff] often had contradicting testimony of their own facts and made it extremely difficult for the court to r[e]ly on anything they said." Because the trial court did not find Mr. Henderson's or plaintiff's testimony to be credible, the trial court also found that it based its conclusions "upon the evidence *independent of* [Plaintiff] and Mr. Henderson[.]" The trial court's findings clearly resolve the factual issues and are not merely recitations of evidence. This argument is overruled.

V. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judge DILLON concurs.

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

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

Because the trial court's order of specific performance should be vacated and the matter remanded for a new hearing, I respectfully dissent. I concur in the remainder of the majority opinion.

In April, a two-day hearing was conducted in Davidson County District Court that focused on many aspects of the parties' separation agreement. The primary focus of this hearing was breach of contract and rescission of the separation agreement. The hearing did not address specific performance.

> To receive specific performance, the law requires the moving party to prove that [(i)] the remedy at law is inadequate, [(ii)] the obligor can perform, and [(iii)] the obligee has performed [her] obligations. 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.35 (5th ed. 2002).
>
> . . . .
>
> [Therefore,] the movant must prove the obligor has the ability to perform. To meet this burden, the movant need not necessarily present direct evidence of the obligee's current income.

Reeder v. Carter, 226 N.C. App. 270, 275-76, 740 S.E.2d 913, 917-18 (2013) (citation and quotation marks omitted).

Over the course of the two-day hearing, the term specific performance was not mentioned by any party, attorney, or the trial court. In more than five hundred pages of testimony and proceedings recorded in the transcript of hearing, neither inadequate remedy at law nor ability to perform were uttered by any party, attorney, or the trial court. It is peculiar then that the majority is able to divine the necessary findings of fact to support an order of specific performance from a proceeding that, based upon the transcript, had nothing to do with specific performance.

The trial court's order wholly fails to address or otherwise mention adequacy of legal remedies. More striking, however, is the complete

absence of any mention in the record concerning Defendant's ability to perform. There is no evidence in the record to support a finding of fact that Defendant had the ability to perform and there is no finding of fact by the trial court regarding Defendant's ability to perform. While magic words may not be necessary, evidence is.

The majority justifies its result by simply stating that "the evidence tended to show [Defendant's] business was successful and profitable." The majority, however, fails to support this conclusory statement with any evidence or citation to the record. The fact that someone is deemed successful in his or her employment is purely subjective. And, while technically, even a minimal profit makes a venture profitable, the majority fails to state what evidence it relied on to make such a concrete statement.

Even if we assume that this was a hearing on specific performance and that there was evidence presented of Defendant's ability to perform when the parties separated, there was no evidence presented about Defendant's ability to perform at the time of the hearing. *See Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 23 (1986); *Condellone v. Condellone*, 129 N.C. App. 675, 682-83, 501 S.E.2d 690, 695-96 (1998). On this point, the majority is silent.

In addition, the majority impermissibly shifts the burden on ability to perform from Plaintiff, as obligee, to Defendant, as obligor. Plaintiff here was required to produce some evidence that Defendant had the ability to perform at the time of the hearing. Plaintiff failed to present any evidence to support such a finding or conclusion.

The majority acknowledges this shortcoming at trial by stating that "[t]here was never any question of Husband's ability to pay raised at trial." That is the problem with Plaintiff's claim for specific performance and the majority opinion: *Plaintiff* was required to "prove the obligor has the ability to perform." *Reeder*, 226 N.C. App. at 276, 740 S.E.2d at 918. The fact that ability to perform was not raised at the hearing runs counter to the majority's reasoning. In the absence of any evidence by the Plaintiff of Defendant's ability to perform, Defendant was not required to show inability to pay as the majority contends.

However, the majority discusses evidence presented by Defendant concerning Plaintiff's efforts to damage Defendant's business interests, but concludes that "Husband did not present any evidence of actual financial damage to his business[.]" It would be interesting to see the outcome of this case if the majority applied such a critical approach Plaintiff's case in chief.

SANDRA J. DONNELL-SMITH AND HUSBAND, LANGSTON SMITH, PETITIONERS
v.
RUSSELL E. MCLEAN, UNMARRIED, ET AL.; RESPONDENTS

No. COA18-613

Filed 5 March 2019

1. Appeal and Error—preservation of issues—partition by sale—appellant limited to stated exceptions

In an action to partition real property that had been distributed to eleven children in equal shares, respondent waived an argument on appeal that the superior court failed to conduct a proper inquiry to support a partition by sale, a ground that he did not state when he excepted to the commissioners' report on dividing the property. Although respondent was not required to state specific grounds for his exception, he alleged an unequal allocation of the value of the property or timber, but he argued a different basis in the hearing before the clerk.

2. Partition—partial sale—consent by parties—abuse of discretion analysis

In an action to partition real property that had been distributed to eleven children in equal shares (but after subsequent transfers and acquisitions belonged to sixteen tenants in common with unequal shares), the trial court did not abuse its discretion in confirming a partial sale of 2.27 acres of an approximately 102-acre lot (with the remainder partitioned in kind), where all parties were included in the action and expressly consented to the in-kind division of the larger tract. It was reasonable for the court to consider the express consent to include consent to the sale of the separated 2.27-acre tract. Moreover, since the smaller tract had not yet been sold, the party challenging the sale could purchase the tract and still be entitled to his portion of the sale proceeds as a tenant in common owner of that tract.

3. Partition—unequal partition—based on allocated shares—value of whole

In an action to partition real property that had been distributed to eleven children in equal shares (but after subsequent transfers and acquisitions belonged to sixteen tenants in common with unequal shares), the trial court did not abuse its discretion in confirming the commissioners' report, which detailed the method by which the property was valued, and which demonstrated that the

valuation of the land was consistently applied to all tracts during the division of the property according to each party's interest. Even though the tracts were valued differently, the commissioners took into account various factors affecting value, including timber, structures, and road access that differed between tracts. The Court of Appeals rejected respondent's argument that the commissioners should have considered the post-division value of each tract.

4. Partition—report by commissioners—confirmation by clerk—review by superior court

In an action to partition real property that had been distributed to eleven children in equal shares, the trial court did not abuse its discretion when it confirmed the commissioners' report recommending partition in kind and partial sale, where the commissioners testified at the hearing regarding their methodology used to divide the property, many of the parties gave testimony and were given an opportunity to ask questions, and the challenging party (respondent) did not testify and presented only one witness. The trial court made specific findings of fact and conclusions of law in support of its ruling.

Appeal by respondent Russell E. McLean from judgment entered 20 November 2017 by Judge Richard T. Brown in Harnett County Superior Court. Heard in the Court of Appeals 31 January 2019.

Ryan McKaig and Joseph L. Tart for petitioner-appellees.

Johnson and Johnson, P.A., by Rebecca J. Davidson, for respondent-appellant Russell E. McLean.

TYSON, Judge.

Russell E. McLean ("Respondent") appeals from an order confirming the commissioners' report dividing partitioned property among the tenants in common. We affirm the superior court's order.

I. Background

At the time of her death in 1987, Mettie McLean owned approximately 102 acres in fee simple situated in Harnett County (the "property"). Petitioners filed a petition for partition on 28 April 2011, alleging the property was devised to ten of Mettie's children, in equal shares. Petitioners requested the clerk to divide the land in kind and to appoint

commissioners to allocate the partitioned property in accordance with the individual interests.

In their amended petition for partition, Petitioners alleged Mettie had died intestate, as no original will was found, thus the property was distributed among all eleven children, in equal shares. Petitioners noted that since Mettie's death, "some of the undivided interest has been transferred by deed, devise, and intestate succession to other tenants in common." Petitioners requested the clerk of superior court to appoint a commissioner to sell approximately 1.66 acres of the property lying on the north side of McDougald Road, which was separate and divided from the rest of the acreage, and to apply the proceeds from that sale to the costs of the partition proceedings. Petitioners also requested for a guardian *ad litem* to be appointed to represent unknown potential claimants.

In their second amended petition for actual partition and partition by sale, Petitioners identified several additional parties to the proceedings and specified sixteen tenants in common, each owning various shares of the eleven interests. Petitioners again requested for the clerk to appoint a commissioner to sell the separate 1.66 acres tract to pay for the costs of the partition, and to appoint commissioners to divide the land in kind among the tenants in common.

On 11 August 2015, Petitioners filed a motion for sale of the 1.66 acres and a motion for partition in kind of the remaining 98.34 acres. After a hearing, the clerk of superior court filed a written order on 10 November 2015. The clerk found Mettie McLean had died intestate, leaving eleven equal shares of the property, which had been subject to further transfers since her death. The clerk concluded:

> 4. The listed tenants are entitled to the allotment of their interests in severalty as follows:
>
> a. 4/22nd to Sandra Donnell-Smith;
>
> b. 7/22nd to Russell Eugene McLean;
>
> c. 4/22nd to Florence Elaine McLean Lyons; and
>
> d. 1/22nd to Aaron Thomas.
>
> 5. Under N.C. Gen. Stat. § 46-13, the listed co-tenants, two or more tenants in common have requested the court to authorize the commissioners to allot their several shares to them in common, as one parcel, evidenced by their consent to the entry of this order.

e. 2/22nd in common, as one parcel, to William McLean, who will hold a 1/4th interest in the share; Liddell R. McLean, Jr., who will hold a 1/2 interest in the share; and to Shirley McLean Carter, who will own a 1/4th interest in the share;

f. 2/22nd in common, as one parcel, to David P. Raymond, Carol A. Williams, and Edward Raymond, who will hold said share in equal interests; and

g. 2/22nd to Andree Lessey, Kevin Callaway, and Lisa Atkinson, in common, as one parcel, who will hold said share in equal interests.

The clerk also allowed for each party to submit special requests concerning the division of the property. Several of the parties submitted special requests, including Respondent. Respondent requested "as much open cropland as possible" and "[i]f feasible . . . to join property of [his] sole surviving sibling." These requests to the commissioners were non-binding.

The commissioners were appointed, and, after consultations with a surveyor and a forestry expert, they filed their report on 31 March 2017. The report identified 2.27 acres, originally believed to be 1.66 acres, in the separated tract on the north side of McDougald Road to be sold, and the remainder of the property was apportioned in kind, based upon each party's interest in the property, in accordance with the clerk's conclusions and order. The proposed division of the property was indicated on plats and surveys attached to the report. Respondent was allocated the largest portion, which contained 36.64 acres and the greatest amount of open crop land, but did not adjoin the property line of the 4.27 acre share allotted to his sister.

Respondent filed an exception to the report on 10 April 2017. In his exception, Respondent alleged the report did not "divide land and timber in accordance with the respective interests of the tenants in common[.]" Following a hearing, the clerk confirmed the report on 9 August 2017.

Respondent appealed to the superior court. After a *de novo* hearing, the superior court confirmed the report. Respondent timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issue

Respondent argues the superior court abused its discretion in confirming the report of the commissioners.

IV. Standard of Review

For a trial 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. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Lyons-Hart v. Hart, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010) (citation omitted). "[W]hether a partition order and sale should [be] issue[d] is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law." *Whatley v. Whatley*, 126 N.C. App. 193, 194, 484 S.E.2d 420, 421 (1997) (citation omitted).

V. Analysis

A. Waiver of Review

[1] Respondent first argues the superior court erred by not conducting the proper inquiry to support a partition by sale. Petitioners contend Respondent has waived this argument on appeal.

Any tenant in common has the right to petition for partition of the shared real estate. N.C. Gen. Stat. § 46-3 (2017). Upon petition, the clerk of superior court appoints three disinterested commissioners to divide the property. N.C. Gen. Stat. § 46-7 (2017). Any party may make an exception to the commissioners' report within ten days. N.C. Gen. Stat. § 46-19(a) (2017). The statute does not require an exception to be specific or state specific grounds. *Jenkins v. Fox*, 98 N.C. App. 224, 226, 390 S.E.2d 683, 684 (1990). If an exception is filed, "whether the report of the commissioners should be confirmed is for determination by the clerk and, upon appeal from his order, by the judge." *Allen v. Allen*, 258 N.C. 305, 307, 128 S.E.2d 385, 386 (1962) (emphasis omitted).

When a partition proceeding is appealed to the superior court, the court is not limited in its review to only the actions of the clerk. *Langley*

v. Langley, 236 N.C. 184, 186, 72 S.E.2d 235, 236 (1952). Rather, the court may "*review the report in the light of the exceptions filed*, hear evidence as to the alleged inequality of division, and render such judgment, within the limits provided by law, as [it] deemed proper under all the circumstances made to appear to him." *Id.* (emphasis supplied).

Though Respondent was not required to state specific grounds for his exception, he did so. He took exception to the report for its purported failure to divide the property and timber "in accordance with the respective interests of the tenants in common." At the hearing before the clerk, Respondent testified he excepted to the division "because the tract allotted to him fails to adjoin the land he owned outside the division." Respondent presented no evidence concerning, or to dispute, the allocation or value of the property or timber. After considering "Respondent's testimony, the documents on file, and the arguments of the attorneys," the clerk found the division to be fair and confirmed the report.

The clerk, and later the superior court, considered whether the commissioners' report should be confirmed in light of the noted exception. *See Langley*, 236 N.C. at 186, 72 S.E.2d at 236. Respondent expressly excepted and sought review of the purported inequality of the division of the property and may not swap his position on appeal. *See Cushman v. Cushman*, 244 N.C. App. 555, 562, 781 S.E.2d 499, 504 (2016). Respondent's argument is dismissed.

B. Abuse of Discretion

1. Partial Sale

[2] Even if Respondent had preserved his argument on partial sale, we find no abuse of discretion in the superior court's order.

Under Chapter 46 of the General Statutes, any "actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy." N.C. Gen. Stat. § 46-16 (2017).

In *Brooks v. Austin*, a widow had signed an antenuptial agreement, which entitled her to a child's share of her husband's estate, in lieu of dowager allowance. 95 N.C. 474, 475 (1886). Heirs of the decedent petitioned for partition by sale of the land, with the proceeds to be divided among the tenants in common. *Id.* The issue on appeal was whether this antenuptial agreement was binding. *Id.* at 477. Our Supreme Court

affirmed the widow's waiver of dowager. *Id.* The Supreme Court analyzed the proper partition of the estate. *Id.* at 477-78.

One manner, following N.C. Gen. Stat. § 46-16 and applicable only when all parties are before the superior court, was to divide the estate into several parts, with the residue to be held in common. *Id.* at 478. Then, if all parties were "united," this undivided interest could be sold and the proceeds divided and disbursed according to each party's interest. *Id.*

In *Patillo v. Lytle*, the Supreme Court again acknowledged the applicability of N.C. Gen. Stat. § 46-16 to partial partition in kind. 158 N.C. 92, 95, 73 S.E. 200, 201 (1911). However, as alluded to in *Brooks*, "[t]he actual divisibility of the land into parts is an inquiry to be made before an order of sale [and] can only be legally made when all the tenants [in common] are before the court." *Id.* at 95-96, 73 S.E. at 201. The land at issue in *Patillo* had been sold without the knowledge or consent of several tenants in common. *Id.* at 94, 73 S.E. at 200. The petitioner argued the other parties consented to the sale, but as at least one party claimed no prior knowledge of the sale, the other parties could not "by consent impair the rights of those in interest, who [were] not made parties." *Id.* at 98, 73 S.E. at 202. The sale was ordered to be set aside. *Id.*

In this case, all parties to the action have been properly included and were before the court. Under the application of N.C. Gen. Stat. § 46-22, the property can be divided into several parts. *See Brooks*, 95 N.C. at 478; *Patillo*, 158 N.C. at 95-96, 73 S.E. at 201. Unlike in *Patillo*, there was consent to the partition, as each party, including Respondent, signed a consent order for in kind division of the unitary 98.34 acres more or less. As the entirety of the property is approximately 102 acres, it is reasonable for the court to consider the express consent to in kind division to also include consent to the sale of the separated tract.

Additionally, the sale of the 2.27 acres across the road has not yet occurred. Under the commissioners' report, the property has been divided according to each party's interest, and title to the 2.27 acres remains being held in common. If these 2.27 acres are sold any party can purchase the tract, and after accounting for costs of the partition, each party will be entitled to the remaining proceeds according to his or her respective interest. *See Brooks*, 95 N.C. at 478. Nothing prevents Respondent from purchasing the 2.27 acres, if and when it is sold. Respondent is entitled to his portion of the proceeds at that time, less his portion of the expenses and costs. Respondent has shown no abuse in the superior court's discretion in confirming the division of the property. Respondent's argument is overruled.

2. Unequal Partition of the Property

[3] Respondent argues it was error for the commissioners to divide the property without going back and considering the post-division value of each tract. We disagree.

As required by statute, to partition a tract:

> The commissioners, who shall be summoned by the sheriff, must meet on the premises and partition the same among the tenants in common, or joint tenants, *according to their respective rights and interests therein*, *by dividing the land into equal shares* in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition.

N.C. Gen. Stat. § 46-10 (2017) (emphasis supplied).

Respondent filed a memorandum of additional authority to support his assertion the commissioners are to consider post-division valuation. His citations to *Robertson v. Robertson*, and *Phillips v. Phillips* are inapplicable to the present case, as both involve partition of land in kind into two equal shares. *Robertson v. Robertson*, 126 N.C. App. 298, 300, 484 S.E.2d 831, 832 (1997); *Phillips v. Phillips*, 37 N.C. App. 388, 392, 246 S.E.2d 41, 44 (1978). In the present case, the partition of the original eleven shares in kind is now based upon unequal shares of ownership through transfers and acquisitions.

The commissioners testified they looked at the value of the whole property and divided that value into 1/22nd interests. The 1/22nd interest was used to assign each party, individually or collectively, the value of their interest. The total value of the property was $345,500, giving each 1/22nd interest a value of $15,704.55. The total value took into account the values of open land; the timbered land and the value of the standing timber; and the house, surrounding structures, and supporting land. The commissioners acknowledged the differences in valuing the property as a whole versus each lot as it was partitioned. For example, the commissioners testified the value of the timber is greater on the property as a whole than what it would be on each individual lot, due to the economy of scale in harvesting or clearing. There is also a difference in value

between lots with access to road frontage and those sharing dedicated easements to the public road.

At oral argument, Respondent's counsel did not dispute the commissioners' pre-division value of the property, but argued the post-division values were not equal. In actuality, few of the values were equal, but this division was not based on equal value, but rather upon the allocated shares of the value of the whole. Respondent had a 7/22nd interest of the whole tract. Two other parties had a 4/22nd interest each. There were three 2/22nd interests, each jointly held by three parties. One party had a 1/22nd interest. While each 1/22nd interest was valued the same, the division of the property was based on the parties' respective interests. N.C. Gen. Stat. § 46-10.

The valuation of the land was consistently applied by the commissioners to all tracts. Each tract was valued differently, even pre-division, due to the factors noted above and the percentage of ownership to be allocated. Respondent's assertion of post-division value is irrelevant to the allocation of interests. Further, if Respondent has appealed because he was unhappy with his tract not adjoining property he already owned or being adjacent to his sibling, such a determination rests within the discretion of the court and will not be upset on appeal without a finding of abuse of discretion. *Robertson*, 126 N.C. App. at 304, 484 S.E.2d at 834.

The evidence in the record supports a conclusion that the property was valued consistently, and the consistent value was applied in dividing the property according to each party's interest. Presuming, *arguendo*, the method used by the commissioners erroneously failed to take into consideration the value of the underlying property after the lots were divided and the value of the acreage within the lots could have varied depending on where they were ultimately positioned, Respondent failed to show an abuse of discretion and presented no evidence to support a finding that the tract he received was less valuable than the share to which he was otherwise entitled. We find no abuse of discretion in the superior court's confirmation of the commissioners' report. Respondent's argument is overruled.

C. De Novo Review by Superior Court

[4] Respondent appears to argue the superior court did not conduct a proper *de novo* review of the commissioners' report and confirmation by the clerk. The question at the *de novo* hearing by the superior court is whether the commissioners' report should be confirmed. *Allen*, 258 N.C. at 307, 128 S.E.2d at 386.

At the hearing, the commissioners all testified regarding their methodology used to divide the property and issue the report. The parties who were present were given the opportunity to ask questions during the course of the hearing, and many of the parties gave testimony in support of confirmation. Respondent did not testify, and only presented one witness. After hearing all the evidence, the superior court made specific findings of fact and conclusions of law regarding the confirmation of the commissioners' report. Respondent has failed to show any abuse of discretion in the superior court's conclusions or decision. Respondent's argument is overruled.

VI. Conclusion

Respondent failed to preserve his argument pertaining to the proposed sale of the undivided 2.27 acres for appellate review. The commissioners properly divided the land into as equal shares as possible, according to the interests of the parties.

We find no abuse of discretion in the superior court's decision to confirm the report of the commissioners. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges ZACHARY and COLLINS concur.

LAKE v. STATE HEALTH PLAN FOR TEACHERS & STATE EMPS.

[264 N.C. App. 174 (2019)]

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, THE ESTATE OF JAMES D. WILSON, BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, AND JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, DALE R. FOLWELL, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA17-1280

Filed 5 March 2019

1. Appeal and Error—interlocutory appeal—substantial right—statutory duties of public entities—state budget

In an action challenging amendments to the State Health Plan (SHP) that removed premium-free options for retired state employees, the Court of Appeals elected to hear an appeal from an order granting partial summary judgment, even though the appeal was interlocutory. The order affected a substantial right by preventing public entities from enforcing statutory provisions related to premiums for health coverage and had the potential to affect the financial stability of the state budget.

2. Public Officers and Employees—State Health Plan amendments—removal of non-contributory benefits—impairment of contract claim

In an action challenging amendments to the State Health Plan (SHP) that removed premium-free options for retired state employees, plaintiffs failed to carry their burden of showing that the SHP statutes created a contractual obligation so as to prevail on their impairment of contract claim. The Court of Appeals considered the issue of first impression whether the SHP created a vested right or contractual obligation similar to pension benefits, and concluded it did not, declining to treat SHP benefits, including non-contributory benefits, as deferred compensation. The plain language of the statutes governing the SHP clearly signaled the legislature's intent that

the statutes give rise to a policy subject to amendment and repeal and did not confer a contractual right on state employees regarding health care insurance benefits.

3. Constitutional Law—state—reduction in retiree benefits under State Health Plan—taking claim requires valid contract

In an action challenging amendments to the State Health Plan (SHP) that removed premium-free options for retired state employees, the State's action did not constitute an impermissible taking of private property where plaintiffs failed to show that the SHP statutes created a contractual obligation between the State and its employees.

Appeal by defendants from order entered 19 May 2017 by Judge Edwin G. Wilson, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 29 November 2018.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by Michael L. Carpenter, Christopher M. Welchel, Marcus R. Carpenter, and Marshall P. Walker; Tin, Fulton, Walker & Owen, PLLC, by Sam McGee; and The Law Office of James Scott Farrin, by Gary W. Jackson, for plaintiff-appellees.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy Solicitor General Ryan Y. Park, Special Deputy Attorney General Marc Bernstein, Special Deputy Attorney General Joseph A. Newsome, and Assistant Solicitor General Kenzie M. Rakes, for defendant-appellants.

TYSON, Judge.

Defendants appeal from an order granting Plaintiffs' motion for partial summary judgment and entry of judgment for liability and permanent injunction in favor of Plaintiffs. The judgment: (1) ordered Defendants to provide premium-free 80/20 "Enhanced" or Base Medicare Advantage Plan health benefits for the remainder of Plaintiffs' retirements; (2) enjoined Defendants from charging Plaintiffs for health insurance premiums; (3) required Defendants to determine monetary damages to reimburse Plaintiffs who had paid premiums since 1 September 2011, and to deposit the money into a common fund; (4) entered a declaratory judgment finding retirement health benefits are contractual and a part of Plaintiff's deferred compensation; and, (5) concluded Defendants had breached this contract with Plaintiffs. We reverse and remand.

I. Background

The General Assembly extended health care insurance benefits ("State Health Plan") to retired state employees and their dependents in 1974 under an indemnity plan. Act of April 11, 1974, ch. 1278, sec. 1, 1973 N.C. Sess. Laws 454. The State Health Plan previously had been provided only to active state employees. Act of July 20, 1971, ch. 1009, sec. 1, 1971 N.C. Sess. Laws 1588. From the outset of coverage, retirees were required to pay "the established applicable premium for the plan[.]" Act of April 11, 1974, ch. 1278, sec. 1, 1973 N.C. Sess. Laws 454. In 1981, the General Assembly amended the statutes related to the State Health Plan and provided for active employees and retirees to receive health insurance benefits "on a noncontributory basis." Act of June 23, 1982, ch. 1398, sec. 6, 1981 N.C. Sess. Laws 276, 295. Over the next thirty years, the State Health Plan's levels of benefits and coverage, deductibles, co-insurance rates, and out-of-pocket maximums were amended, and fluctuated, but retirees' benefits were provided without contribution from them.

In 2005, the General Assembly authorized the State Health Plan to introduce preferred provider organization ("PPO") plans for all active and retired State employees. Act of August 11, 2005, ch. 276, sec. 29.33(a), 2005 N.C. Sess. Laws 688, 1003-04. In 2006, the State Health Plan offered participants a choice of three PPO plans, with varying rates of co-insurance. Active and retired employees could choose the 70/30 PPO plan, the 80/20 PPO plan, or the 90/10 PPO plan. The 70/30 PPO and the 80/20 PPO were non-contributory. The contributory premium 90/10 PPO plan was discontinued in 2009.

In 2011, the General Assembly again amended the State Health Plan to require active employees and retirees to contribute a premium to receive benefits under the 80/20 PPO plan. Act of May 11, 2011, ch. 85, sec. 1.2(a), 2011 N.C. Sess. Laws 119, 120. The 70/30 PPO plan was, and still remains, premium-free for retirees, but not for active employees. *Id.*

In 2014, the State began to offer a premium-free Medicare Advantage plan, to age-eligible members, and a Consumer-Directed Health Plan ("CDHP"). Three "Wellness Activities" were also introduced, completion of which would reduce the premium for the CDHP, and would make that plan premium-free upon the completion of all three. The "Wellness Activities" required selecting a primary care physician, completing a health assessment questionnaire, and attesting to not using tobacco products or being enrolled in a tobacco-cessation program. These "Wellness Activities" can also significantly reduce premiums under the 80/20 PPO plan. Over 75% of state retirees are eligible to enroll in the

Medicare Advantage plan. Over 90% of retirees enrolled in either the CDHP or the 80/20 PPO plan completed all three "Wellness Activities."

Plaintiffs filed a complaint against the State and related governmental Defendants in 2012, challenging the 2011 amendments and asserting the State and Plaintiffs had entered into a non-amendable contract, which entitled Plaintiffs to premium-free, non-contributory static health benefits under an 80/20 health care plan for the remainder of their lives. Plaintiffs' causes of action assert claims for: (1) breach of contract, for removing the non-contributory 80/20 PPO plan and eliminating the optional 90/10 PPO plan; (2) impairment of contract under the Constitution of the United States and North Carolina Constitution; and, (3) deprivation of property without due process and equal protection under the North Carolina Constitution.

Defendants moved to dismiss the lawsuit in June 2012, under the theories of: (1) lack of jurisdiction over Defendants; (2) lack of subject matter jurisdiction due to the State's claim of sovereign immunity; (3) Plaintiffs' failure to exhaust all administrative remedies; and, (4) Plaintiffs' failure to state a claim upon which relief may be granted.

The trial court denied Defendants' motion to dismiss in May 2013. This Court affirmed the trial court's order, denying Defendants' motion to dismiss based upon sovereign immunity, and dismissed Defendants' appeal regarding the other issues. *Lake v. State Health Plan for Teachers & State Emples.*, 234 N.C. App. 368, 375, 760 S.E.2d 268, 274 (2014).

Defendants filed a motion for partial summary judgment on the issue of liability in September 2016. Plaintiffs also filed a motion for partial summary judgment in September 2016 to resolve all issues except the issue of damages for excess out-of-pocket expenses. After a hearing, the trial court granted Plaintiffs' motion for partial summary judgment and denied Defendants' motion in an order filed 19 May 2017. Defendants timely appealed.

II. Jurisdiction

[1] Defendants' appeal is from a grant of partial summary judgment. "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Grp., Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

A party may appeal an interlocutory order if either: (1) the trial court makes a final determination regarding at least one claim and certifies there is no just reason to delay under N.C. Gen. Stat. § 1A-1, Rule 54(b);

or, (2) if delaying the appeal would affect a substantial right. *Id.* at 23-24, 437 S.E.2d at 677. The record does not include the trial court's Rule 54(b) certification. The only basis upon which Defendants' interlocutory appeal may proceed is to demonstrate a substantial right is impacted.

"A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (citation and internal quotation marks omitted). In order for a party to appeal from an interlocutory order based upon a substantial right, it must show the right is substantial and "the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Defendants assert the trial court's ruling affects a substantial right in two ways: (1) the decision prevents the State from enforcing its statutes; and, (2) the decision imposes significant economic impacts upon the state budget.

The trial court granted a permanent injunction to enforce its order. The order requires Defendants to provide to Plaintiffs either the 80/20 PPO plan as it was offered in 2011, or the Base Medicare Advantage Plan, as it was offered in 2014, or their equivalents, for the remainder of their retirements. Defendants were enjoined from collecting any premiums from Plaintiffs for those plans. This order prevents the State from enforcing the 2011 statutory amendments on premium rates for contributory coverage. *See* Act of May 11, 2011, ch. 85, sec. 1.2(a), 2011 N.C. Sess. Laws 119, 120.

The Supreme Court of North Carolina has held a defendant's right to carry out its statutory duties is substantial. *Gilbert*, 363 N.C. at 77, 678 S.E.2d at 606. When a public entity is prevented from carrying out its statutory duties, the "continuance of the injunction in effect and the denial of the motion to dismiss . . . do adversely affect important rights" of that entity. *Freeland v. Greene*, 33 N.C. App. 537, 540, 235 S.E.2d 852, 854 (1977). Further, the protection of the financial stability of the state budget is also a substantial right, which carries the potential injury of a budget crisis. *Dunn v. State*, 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2006).

Because Defendants are enjoined from enforcing duly-enacted statutory provisions requiring state retirees to pay premiums for certain levels of health coverage, and the cost of this premium-free health insurance at those higher levels could severely impact the state budget, we allow this interlocutory appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017).

III. Standard of Review

"When the party bringing the cause of action moves for summary judgment, he must establish that all of the facts on all of the essential elements of his claim are in his favor[.]" *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). This rule requires the movant to "show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury." *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976).

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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56.

We review a grant of summary judgment *de novo*. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47, 727 S.E.2d 866, 869 (2012).

IV. Impairment of Contract

[2] North Carolina appellate courts "presume[] that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found [to be] unconstitutional beyond a reasonable doubt." *N.C. Ass'n of Educators v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) [hereinafter *NCAE*] (citations omitted). Plaintiffs argued, and the trial court found, the 2011 amendment to the General Statutes requiring active state employees and retirees to contribute a premium for the 80/20 PPO plan substantially impaired a contract made between the State and Plaintiffs, and as such, violated the Constitution of the United States.

The "Contract Clause" in the Constitution of the United States provides, in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U.S. Const. art. I, § 10. A three-part test to determine whether a contractual right has been impaired was set forth by the Supreme Court of the United States in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92 (1977).

North Carolina adopted this test in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), when our Supreme Court acknowledged "[t]he *U.S. Trust* test requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract,

and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141, 500 S.E.2d at 60.

Defendants argue Plaintiffs cannot prevail on their Contract Clause claim and contend the trial court erred by granting Plaintiffs' motion for summary judgment on that basis. We agree.

A. No Statutory Contractual Obligation Exists

Plaintiffs assert health insurance is an employment benefit, which arose in the course of state employment, and constitutes a part of the compensation contract between the State and state employees. Furthermore, because the employees did not have to pay any premiums for health insurance during their service, after vesting for retirement benefits, Plaintiffs assert they also acquired a lifetime guarantee of premium-free health insurance in retirement. They contend when the State required premium payments, it impaired their employment contract or took their vested property rights to premium-free, 80/20 level health care. They further argue our courts have employed a unilateral contract analysis, not only in "retirement benefits," but also to "employment benefits," such as tenure, special separation allowances, severance pay, and vacation pay. *NCAE*, 368 N.C. 777, 786 S.E.2d 255 (applying the analysis to tenure); *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 643 S.E.2d 904 (2007) (applying the analysis to special separation allowances); *Bolick v. Cty. of Caldwell*, 182 N.C. App. 95, 641 S.E.2d 386 (2007) (applying the analysis to severance pay); *Pritchard v. Elizabeth City*, 81 N.C. App 543, 344 S.E.2d 821 (1986) (applying the analysis to vacation pay).

The Supreme Courts of the United States and of North Carolina have both "recognized a presumption that a state statute 'is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *NCAE*, 368 N.C. at 786, 786 S.E.2d at 262 (citing *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 82 L. Ed. 57, 62 (1937)).

"Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Nat'l R.R. Passenger Corp. v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451, 466, 84 L. Ed. 2d 432, 446 (1985).

Our Supreme Court has held: "Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and

repeals." *NCAE*, 368 N.C. at 786, 786 S.E.2d at 262-63. The party asserting the creation of an express or implied and unamenable contract bears the burden of overcoming this presumption. *Id.* at 786, 786 S.E.2d 255, 262; *Nat'l R.R.*, 470 U.S. at 466, 84 L. Ed. 2d at 446.

1. Health Care Benefits Are Not Analogous to Pension Benefits

Plaintiffs contend this unilateral contract, requiring the provision of non-contributory and prescribed levels of health care insurance benefits, was formed once Plaintiffs had worked for the number of years required for them to vest into the State's retirement system. Plaintiffs cite to case law pertaining to and interpreting pension and disability retirement benefits to support their argument. In *Bailey v. State*, the plaintiffs challenged an amendment to the General Statutes, which had removed the exemption from state taxation on retirement benefits paid by the State. 348 N.C. at 139, 500 S.E.2d at 59.

The Supreme Court in *Bailey* relied upon previous cases where a contractual relationship was found based on "the principle that where a party in entering an obligation relies on the State, he or she obtains vested rights that cannot be diminished by subsequent state action." *Id.* at 144, 500 S.E.2d at 62. Previous case law had concluded pension benefits were a vested contractual right because they were a form of "deferred compensation." *Id.* at 141, 500 S.E.2d at 60. The Court held because the "relationship between the Retirement Systems and employees vested in the system is contractual in nature, the right to benefits exempt from state taxation is a term of such contract." *Id.* at 150, 500 S.E.2d at 66.

Our Supreme Court applied the same reasoning to disability pension benefits in *Faulkenbury v. Teachers' & State Emples. Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997). "At the time the plaintiffs' rights to pensions became vested, the law provided that they would have disability retirement benefits calculated in a certain way." *Id.* at 690, 483 S.E.2d at 427. The Supreme Court distinguished the vesting of both pension and disability benefits as benefits that had been presently earned and vested through performance, and not "based upon future actions by the plaintiffs." *NCAE*, 368 N.C. at 788, 786 S.E.2d at 264.

Plaintiffs argued, and the trial court found, that non-contributory retirement health care insurance benefits were part of the overall compensation package and the provision of such created a contract between the State and Plaintiffs. Defendants assert the State Health Plan statute does not create a contractual relationship between the State and Plaintiffs. Whether or not non-contributory health care insurance

benefits are vested rights, which create a contract between the State and state employees, is an issue of first impression for this Court. After review of the governing statutes and how other jurisdictions have defined health care benefits, we decline to extend contractual rights based upon a notion of deferred compensation to require Defendants to provide static and non-contributory health care insurance benefits under the State Health Plan.

Pension benefit costs are shared contributions and expenses between an employee and the State. A mandatory six percent (6%) of salary is deducted from the employee's paycheck to be deposited towards payment of future pension benefits. N.C. Gen. Stat. § 135-8(b)(1) (2017). The employee's future pension benefit is calculated based upon the employee's salary and length of service. *See* N.C. Gen. Stat. § 135-5 (2017). These future, deferred compensation payments are protected from abolition, liquidation, or diminution by law. N.C. Gen. Stat. § 135-12 (2017); *Bailey*, 348 N.C. at 144, 500 S.E.2d at 62. Employees have a "nonforfeitable" right to the return of their contributions to the retirement system. N.C. Gen. Stat. § 135-18.6 (2017).

Conversely, non-contributory health care insurance benefits are not mandatory. Employees become "eligible" for health care benefits upon employment and may use payroll deduction to pay for the benefits, but are not required to do so. N.C. Gen. Stat. §§ 135-48.1(15), 135-48.2(b) (2017). Unlike pensions, the level of retirement health care benefits is not dependent upon an employee's position, retirement plan, salary, or length of service. All eligible participants, active and retired, have equal access to the same choices in health care plans. The State endeavors to "make available a State Health Plan," but amendments thereto are not prohibited. N.C. Gen. Stat. § 135-48.2(a) (2017); *see also* N.C. Gen. Stat. § 135-48.3 (2017).

2. Sister States' Experiences

i. Michigan

Other jurisdictions have found health care insurance benefits were not vested benefits, unlike pensions, based upon some of the distinctions above. The Supreme Court of Michigan declined to afford vested pension protection to health care benefits under their state's constitution, in part, due to differences in how the benefits were earned and calculated. *Studier v. Mich. Pub. Sch. Emples. Ret. Bd.*, 698 N.W.2d 350 (Mich. 2005). In distinguishing pension benefits and health care insurance benefits, the court noted pension benefits increase in relation to how many years of service a state employee has completed and their

salary, whereas neither the amount of health care benefits an employee received nor the premiums paid are tied to an employee's salary or the accrued number of years of service. *Id.* at 358.

ii. Tennessee

The Supreme Court of Tennessee also distinguished between the health insurance plan offered to state employees, which it classified as a "welfare benefit," and the retirement pension plan provided to state employees. *Davis v. Wilson Cty.*, 70 S.W.3d 724, 727 (Tenn. 2002). County governments were authorized to provide health insurance coverage, but there was no legal requirement to provide a "welfare benefit" plan. *Id.* The court relied upon previous case law, distinguishing between automatically vesting pension benefits and health care benefits, noting as to the latter, "no contractual rights exist 'simply by reason of employment.' " *Id.* at 728 (quoting *Blackwell v. Quarterly Cty. Court of Shelby Cty.*, 622 S.W.2d 535, 540 (Tenn. 1981)).

iii. Alaska, Hawaii, and Illinois

The Plaintiffs cite cases from other jurisdictions to support a conclusion that the State Health Plan is part of the overall retirement package, and thus subject to vesting. All three cases Plaintiffs cite, *Kanerva v. Weems*, 13 N.E.3d 1228 (Ill. 2014), *Everson v. State*, 228 P.3d 282 (Haw. 2010), and *Duncan v. Retired Pub. Emples. of Alaska, Inc.*, 71 P.3d 882 (Alaska 2003), involve interpretation of provisions that are contained in those states' respective constitutions.

Each state's constitution includes specific language asserting the contractual nature of the states' retirement programs. *See* Illinois Const., Art. XIII, § 5 ("Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, *shall be* an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.") (emphasis supplied); HRS Const. Art. XVI, § 2 ("Membership in any employees' retirement system of the State or any political subdivision thereof *shall be* a contractual relationship, the accrued benefits of which shall not be diminished or impaired.") (emphasis supplied); Alaska Const. Art. XII, § 7 ("Membership in employee retirement systems of the State or its political subdivisions *shall constitute* a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.") (emphasis supplied).

These cases are inapplicable to the issue of the relationship between retirement pensions and health care benefits in North Carolina. First,

North Carolina's Constitution does not contain a specific provision mandating a contractual relationship exists between the State and its employees as participants in the state retirement systems.

Second, each of the states in the cases cited by Plaintiffs have statutes mandating the provision of health care benefit plans to state employees. *See* 5 Ill. Comp. Stat. Ann. 375/10 (2005 & Supp. 2012) ("The State *shall* pay the cost of basic non-contributory group life insurance and . . . the basic program of group health benefits on each eligible member") (emphasis supplied); Haw. Rev. Stat. Ann. § 87A-15 (Supp. 2009) ("The board *shall* administer and carry out the purpose of the fund. Health and other benefit plans *shall* be provided at a cost affordable to both the public employers and the public employees.") (emphasis supplied); Alaska Stat. Ann. § 39.30.095(a) (2010) ("The commissioner of administration *shall* establish the group health and life benefits fund as a special account in the general fund to provide for group life and health insurance") (emphasis supplied).

As stated above, the provision of static, non-contributory health insurance benefits are not mandated by North Carolina's Constitution or in the General Statutes. N.C. Gen. Stat. § 135-48.2(a). Plaintiffs' reliance on these other states' cases as persuasive support is misplaced.

The General Assembly has clearly distinguished between the mandatory retirement benefits and the optional health care insurance benefits the statutes have historically provided. The retirement system was enacted and created in 1941. Act of February 17, 1941, ch. 20, sec. 2, 1941 N.C. Sess. Laws 20, 23. Health care benefits were not provided to any state employees until thirty years later, in 1971, and were only authorized for active employees of the State. Act of July 20, 1971, ch. 1009, sec. 1, 1971 N.C. Sess. Laws 1588. As previously mentioned, health care coverage was extended to qualified retirees in 1974, and these retirees were required to pay for premiums and contribute to the costs. Act of April 11, 1974, ch. 1278, sec. 1, 1973 N.C. Sess. Laws 454. Non-contributory retirement health care benefits only began in 1981. Act of June 23, 1982, ch. 1398, sec. 6, N.C. Sess. Laws 276, 295. Every other substantive change to the State Health Plan occurred after 1981.

The trial court's purported decision, and Plaintiffs' attempt on appeal, to conflate and equate the retirement plan and the health care plan, because both are included in Chapter 135 of the General Statutes, is error. No congruent relationship between the retirement benefits and the health care benefits exists to allow the trial court or this Court to construe and conclude an express and unalterable contractual relationship

exists, on any basis, for the State to provide static and non-contributory heath care insurance benefits to retirees.

3. Statutory Language Does Not Expressly Provide for Vesting

Plaintiffs assert the lack of express contractual language in the statute or North Carolina's Constitution is not determinative. Defendants cite to the lack of contractual language in the State Health Plan, which further supports a finding and conclusion that no contract exists. *NCAE*, 368 N.C. at 787, 786 S.E.2d at 263. We find Defendants' argument persuasive.

Plaintiffs rely upon cases that look to additional evidence, such as pamphlets, handbooks, and oral representations, to support a finding of a contractual relationship. In *Stone v. State*, 191 N.C. App. 402, 664 S.E.2d 32 (2008), this Court looked to pamphlets, distributed by the State to its employees to explain the retirement benefits, to support its holding that State employees have a contractual right to have the retirement system funded in an "actuarially sound manner." *Id.* at 414-15, 664 S.E.2d at 40.

This Court found the statements in those pamphlets, including references to "actuarial calculations" and the retirement system being maintained as "actuarially sound," became a term or condition of the retirement contracts. *Id.* at 414, 664 S.E.2d at 40. We have already distinguished the differences between the mandatory and contributory retirement benefits and the State's policy to offer optional health care benefits. *Stone* has no application to the case at bar.

The other cases Plaintiffs cite for support, *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63; *Bolick*, 182 N.C. App. at 100-01, 641 S.E.2d at 390; and *Pritchard*, 81 N.C. App. at 552-53, 344 S.E.2d at 826-27, fail to support their arguments for similar reasons.

Our Supreme Court, following precedent from the Supreme Court of the United States, has found whether or not a statute contains the word "contract" is critical to find legislative intent to create such a relationship. *NCAE*, 368 N.C. at 787, 786 S.E.2d at 263. The statutes governing the State Health Plan do not refer to a "contract" between the employees and the State. The term "contract" *is* used in the statute to describe the relationship between the State Health Plan and its service providers. *E.g.*, N.C. Gen. Stat. § 135-48.1(3) (2017) ("Claims Processor. -- One or more administrators, third-party administrators, or other parties *contracting* with the Plan to administer Plan benefits") (emphasis supplied); N.C. Gen. Stat. § 135-48.10(b) (2017) ("The terms of a *contract* between the Plan and its third party administrator or between the Plan

and its pharmacy benefit manager are public record") (emphasis supplied); N.C. Gen. Stat. § 135-48.12(f) (2017) ("The Committee shall designate either the actuary under *contract* with the Department of State Treasurer, Retirement Systems Division, or the actuary under *contract* with the State Health Plan for Teachers and State Employees as the technical adviser") (emphasis supplied); N.C. Gen. Stat. § 135-48.33(b) (2017) ("The Plan shall: (i) submit all proposed *contracts* for supplies, materials, printing, equipment, and contractual services . . . for review") (emphasis supplied).

The use of contractual language in the statute in reference to service providers indicates the General Assembly specified situations and knew when to use the word "contract," and it did not intend to form a contractual relationship between the State and its employees related to health care insurance benefits. *See NCAE*, 368 N.C. at 787, 786 S.E.2d at 263. The use of contractual language elsewhere in the statute merely indicates the provisions and benefits in the statute is "an articulated policy that, like all policies, is subject to revision or repeal[,]" as the General Assembly has enacted on many prior occasions. *See Nat'l R.R.*, 470 U.S. at 467, 84 L. Ed. 2d at 447.

In fact, the statute contains and reserves an express right to amend provision, which empowers the General Assembly "the right to alter, amend, or repeal" the State Health Plan. N.C. Gen. Stat. § 135-48.3. This express reservation by the General Assembly "is hardly the language of contract." *Nat'l R.R.*, 470 U.S. at 467, 84 L. Ed. 2d at 447. To construe this clear language of the statute to create a contractual relationship "would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals" and would remove the flexibility required to meet changing conditions, benefits, and future advances in rendering and receiving medical and health-related services. *NCAE*, 368 N.C. at 786, 786 S.E.2d at 262-63.

The State Health Plan has undergone multiple and extensive revisions since its initial enactment in 1971. *See* Act of July 20, 1971, ch. 1009, sec. 1, 1971 N.C. Sess. Laws 1588. The General Assembly reserved this power "to alter, amend, or repeal" in the same legislation that provided premium-free health care benefits to retirees. Act of June 23, 1982, ch. 1398, sec. 1, 1983 N.C. Sess. Laws 276, 311. The General Assembly has exercised this reserved power to revise and amend approximately 200 times without challenge since 1983. As part of the record, Defendants included a nine-page document cataloguing these revisions. Some of these changes were minor, and often "clarified" some aspect of the legislation. *See, e.g.*, Act of July 15, 1986, ch. 1020, sec. 24, 26, 1985 N.C. Sess.

Laws 594, 597 (clarifying covered services must be "medically necessary," not just "necessary").

Some changes added benefits. Coverage was often added for various ailments and procedures. *See*, *e.g.*, Act of July 6, 1984, ch. 1110, sec. 11, 1984 N.C. Sess. Laws 300, 305-06 (adding coverage for chemical dependency); Act of June 27, 1991, ch. 427, sec. 41, 1991 N.C. Sess. Laws 833, 850 (providing coverage for lung, heart-lung, and pancreas transplants); Act of July 28, 1995, ch. 507, sec. 7.26, 1995 N.C. Sess. Laws 1525, 1574 (adding coverage for oral surgery necessitated because of medical treatment).

Many other amendments arguably reduced the type and level of benefits. Many of these changes increased the amount of co-insurance and co-pays that beneficiaries were required to cover. *See*, *e.g.*, Act of May 16, 1985, ch. 192, sec. 1-4, 1985 N.C. Sess. Laws 157 (reducing co-insurance rate from 95% to 90%); Act of June 27, 1991, ch. 427, sec. 19, 33, 1991 N.C. Sess. Laws 833, 843, 848 (reducing co-insurance rates from 90% to 80%). Other changes raised the deductible or increased the out-of-pocket maximums. *See*, *e.g.*, Act of June 28, 2001, ch. 253, sec. 1.(b), 1.(c), 1.(f), 1.(m), 2001 N.C. Sess. Laws 663-64, 666, 670-71; Act of August 11, 2005, ch. 276, sec. 29.31(b), (d), 2005 N.C. Sess. Laws 1001, 1002-03.

This "oft-amended course" of statutory amendments is further evidence of the lack of intent by the State to create an unalterable static contract. *NCAE*, 368 N.C. at 788, 786 S.E.2d at 264. Such extensive revisions support a holding that the establishment and maintenance of the North Carolina State Health Plan is a legislative policy, which is expressly and "inherently subject to revision and repeal" by the General Assembly. *Nat'l R.R.*, 470 U.S. at 466, 84 L. Ed. 2d at 446.

Plaintiffs ignore the more than 200 unchallenged amendments and revisions, and contend the right to amend provision in the statute is inapplicable to cases that involve vested rights and deferred compensation. Based upon our conclusion and holding that the State Health Plan is not a vested right nor a contract for deferred compensation like the pension, this argument is without merit. Plaintiffs' argument that the State Health Plan must be allowed to change as health care evolves, but cannot reduce the "value" of what has been vested is specious, and also fails.

In addition to the State Health Plan not being a vested right, the General Assembly has often amended, altered, and reduced the "value" of the benefit offered by increasing co-insurance rates, co-pays, and out-of-pocket maximums or excluding coverage. Plaintiffs erroneously

contend Defendants' arguments pertaining to the statutory right to amend provision are "tired," and have been struck down by both the trial court and this Court. When the matter was previously before this Court, the sole issue decided concerned the applicability of sovereign immunity. *Lake*, 234 N.C. App. at 375, 760 S.E.2d at 274. This Court did not reach either Plaintiffs' or Defendants' arguments on the merits. *Id.*

The trial court erred in holding a contractual relationship existed between the State and its employees in regards to the provision of unalterable and static non-contributory health insurance benefits to Plaintiffs.

B. No Impairment of Contract

To succeed on an impairments claim under the Contract Clause, asserting the State impermissibly impaired a contract, Plaintiffs must first show the existence of a valid contract. *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60. Only upon a showing of a contractual obligation can the courts proceed to the second and third parts of the analysis: whether the State, in fact, impaired the contract and, if so, whether the impairment was reasonable. *Id.*

Plaintiffs failed to carry their burden to prove the existence of a valid contract, and consequently the existence of any valid claim fails. *See NCAE*, 368 N.C. at 786, 786 S.E.2d at 262-63. The trial court erred by granting partial summary judgment in favor of Plaintiffs.

V. No "Taking" Under State Constitution

[3] At summary judgment, Plaintiffs asserted claims under the "Law of the Land" clause of the North Carolina Constitution. This clause provides, in relevant part: "[n]o person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. A contractual right is a property right, and the impairment of a valid contract is an impermissible taking of property. *Bailey*, 348 N.C. at 155, 500 S.E.2d at 69.

The trial court erroneously concluded a contractual relationship existed, and as a result, also concluded Defendants had violated Article I, section 19 of the Constitution and taken Plaintiffs' private property without just compensation. "For an unconstitutional taking to occur, Plaintiffs must have a recognized property interest for the State to take." *Adams v. State*, __ N.C. App. __, __, 790 S.E.2d 339, 344 (2016). Without a valid contract, Plaintiffs' state constitutional claims also fail. *Id.* The trial court erred in granting partial summary judgment on Plaintiffs' state takings claims. Neither party argues any violations of other state constitutional provisions.

VI. Conclusion

Plaintiffs failed to establish the essential elements of their asserted contract, as is required to support an impairments claim in their favor. *See Steel Creek Dev. Corp.*, 300 N.C. at 637, 268 S.E.2d at 209. The vested, contractual rights state employees enjoy under the state retirement plan do not transfer to and are not congruent with the provision of mandatory premium-free benefits under the State Health Plan.

The plain language of the statute prohibits a finding and conclusion of the General Assembly's intent to create an unalterable contractual relationship between the State and active or retired employees in regards to static provisions in the State Health Plan. In fact, the Constitution's and the statutes' omission of contractual language, the General Assembly's express statutory reservation of the right to amend clause, and the hundreds of unchallenged revisions and amendments to the statute in the past, refutes any contrary finding.

An objective reading of the State Health Plan statute, and the extensive statutory amendments since 1981, indicates retired state employees are promised nothing more than equal access to health care benefits on an equal basis with active state employees. Under the current statute revisions and policy regarding the State Health Plan, retirees still have access to at least one premium-free option, the 70/30 plan, and, if qualified, to the premium-free Medicare Advantage plan. Active state employees have no premium-free health care options.

The State endeavors to "make available a State Health Plan." N.C. Gen. Stat. § 135-48.2(a). Making available and providing access does not create any specific contractual financial obligation. *See id.* Without a showing of a valid contractual financial obligation, Plaintiffs claims under either the Contract Clause of the Constitution of the United States or the Law of the Land clause of the North Carolina Constitution fail. The trial court erred in granting partial summary judgment in favor of Plaintiffs.

We reverse the grant of partial summary judgment and remand for entry of summary judgment in favor of Defendants and dismissal of Plaintiffs' complaint. *It is so ordered.*

REVERSED AND REMANDED.

Judges BRYANT and HUNTER concur.

DONNA J. PRESTON, ADMINISTRATOR OF THE ESTATE OF WILLIAM M. PRESTON, PLAINTIFF
v.
ASSADOLLAH MOVAHED, M.D., DEEPAK JOSHI, M.D., AND PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, D/B/A, VIDANT MEDICAL CENTER, DEFENDANTS

No. COA18-674

Filed 5 March 2019

Medical Malpractice—Rule 9(j) certification—substantive noncompliance—at time of complaint

The trial court's dismissal of a medical malpractice action for substantive Rule 9(j) noncompliance was affirmed where competent evidence supported the trial court's findings, which in turn supported its conclusion that the Rule 9(j) certificate was factually unsupported at the time plaintiff filed her complaint. Plaintiff had no cardiologist willing to testify against defendant-cardiologist at the time she filed her complaint (the cardiologist identified in her Rule 9(j) certificate agreed to testify against defendant-cardiologist only if plaintiff retained a nuclear cardiologist)—and only consulted and retained such an expert months later and after expiration of the statute of limitations.

Appeal by Plaintiff from order entered 25 October 2017 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 17 January 2019.

Edwards Kirby, LLP, by David F. Kirby, John R. Edwards, and Mary Kathryn Kurth; Laurie Armstrong Law, PLLC, by Laurie Armstrong; for Plaintiff-Appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by John D. Madden and Eva Gullick Frongello, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Donna Preston, decedent William M. Preston's widow and estate representative, appeals an order dismissing her wrongful death action alleging medical malpractice against Defendant Assadollah Movahed, M.D.[1] After a compliance hearing, the trial court concluded

1. The remaining Defendants have settled the claims against them and Plaintiff has voluntarily dismissed them from this appeal pursuant to N.C. R. App. P. 37(e)(2) (2018).

the facially valid Rule 9(j) pre-lawsuit medical expert review certification in Plaintiff's medical malpractice complaint was factually unsupported when it was filed, which was two days before the expiration of the applicable statute of limitations period. Therefore, the trial court granted Defendant's motion to dismiss the complaint for substantive Rule 9(j) noncompliance.

On appeal, Plaintiff contends the trial court erred by dismissing her complaint because the certificate substantively complied with Rule 9(j). We disagree. Because competent evidence supported the trial court's factual findings, which in turn supported its legal conclusions and ultimate decision that the Rule 9(j) certificate was factually unsupported at the time Plaintiff had filed her complaint and before the statute of limitations period had expired, we affirm the trial court's order dismissing her complaint for substantive Rule 9(j) noncompliance.

I. Procedural History and Factual Background

Plaintiff's complaint and later medical expert deposition testimony reveals the following facts: Around 8:30 a.m. on 3 February 2014, William M. Preston (Preston) presented to Vidant Medical Center's emergency department complaining of chest pain and shortness of breath. Preston's emergency room electrocardiogram (EKG) test revealed abnormalities consistent with myocardial ischemia, a condition where not enough blood reaches the heart. That evening, Preston was admitted to the hospital's observation unit under the care of attending physician Pranitha Prodduturvar, M.D. After Dr. Prodduturvar examined Preston, she ordered a cardiac workup including, *inter alia*, a nuclear stress test (NST).

Around noon the next day, hospital providers administered Preston's NST. An NST involves injecting a patient with radioactive material and subjecting him to cardiovascular exercise in order to obtain nuclear images of the heart revealing blood flow while under stress and at rest. Dr. Movahed, the hospital's attending nuclear cardiologist, who was neither acting as a formal cardiology consult nor had personally examined Preston, was assigned to interpret Preston's NST results. Interpreting the results of an NST involves assessing the treadmill stress test and EKG tracings taken of the heart, in conjunction with analyzing the nuclear cardiology images.

Following the test, Dr. Movahed orally reported his interpretation of Preston's NST to cardiology fellow Deepak Joshi, M.D., with instructions for Dr. Joshi to communicate his findings to Preston's then-attending physician, Neha Doctor, M.D. In Dr. Movahed's later-dictated report, he noted "a perfusion defect in [Preston's] heart . . . might be due to significant gas

in the stomach, but . . . he could not rule out ischemia as a possible cause of the abnormality." Dr. Movahed also suggested, based upon Preston's abnormal NST, "[o]ne may consider a [coronary computed tomography angiogram, also known as a] CTA," which is an additional cardiac test to evaluate suspected coronary artery disease.

Subsequently, on 4 February 2014, attending physician Dr. Doctor personally examined Preston and ordered his discharge from the hospital. Preston was instructed to follow up with his primary care physician about ordering an MRI to assess potential neurological causes for his symptoms and was scheduled for an outpatient cardiology follow-up on 20 February 2014.

On 6 February 2014, Preston was examined by his primary care physician, who ordered the MRI. On 10 February 2014, Preston returned to his primary care physician to discuss the MRI results, which revealed no neurological explanation for Preston's symptoms. On 13 February 2014, six days before his scheduled outpatient cardiology follow-up, Preston suffered a fatal heart attack in his home.

On 25 November 2015, Plaintiff filed a wrongful death medical malpractice complaint against Dr. Prodduturvar and Dr. Doctor, and four medical entities associated with Vidant Medical Center (first complaint). Plaintiff alleged the physicians were medically negligent in their care of Preston during his admission to the hospital and their failure to order further immediate testing and medical treatment before he was discharged from the hospital. Neither Dr. Movahed nor Dr. Joshi were named in the first complaint.

On 12 February 2016, two days before the applicable statute of limitations period expired, Plaintiff filed a second wrongful death medical malpractice complaint, this time naming Dr. Movahed and Dr. Joshi, and their employer, Pitt County Memorial Hospital, Incorporated, d/b/a Vidant Medical Center (second complaint). The second complaint asserted Dr. Movahed was negligent in that he

> a. Failed to accurately interpret and communicate the findings and significance of diagnostic tests performed on Mr. Preston;
>
> b. [F]ailed to adequately, appropriately and timely suggest and perform a full assessment and work-up to rule out life-threatening acute coronary artery disease for a patient at high risk for the disease, including, but not limited to, cardiac catheterization;

> c. [F]ailed to recommend a cardiology consult for Mr. Preston prior to his discharge from Vidant Medical Center with acute chest pain;
>
> d. [F]ailed to conduct an adequate assessment of Mr. Preston's risk factors for coronary artery syndrome;
>
> e. [F]ailed to prescribe any treatment to Mr. Preston for possibility of acute coronary artery disease before discharging him from the hospital; [and]
>
> f. [F]ailed to comply with standards of practice among physicians and cardiolovascular [sic] disease specialists with the same or similar training and experience in Pitt County, North Carolina, or similar communities in 2014[.]

The complaint also included the following Rule 9(j) certificate:

> the medical care of the defendant and all medical records pertaining to the alleged negligence of this defendant that are available to the plaintiff after reasonable inquiry have been reviewed before the filing of this complaint by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

On 25 April 2016, Defendant filed his answer to the second complaint, denying all allegations of negligence and breach of the standard of care, and moving to dismiss Plaintiff's action, *inter alia*, "[i]f discovery indicates that Plaintiff did not comply with the requirements of Rule 9(j)[.]"

On 9 August 2016, in response to Defendant's Rule 9(j) interrogatories, Plaintiff identified Stuart Toporoff, M.D., "a physician specializing in the area of cardiology," and Andy S. Pierce, M.D., "a physician specializing in the area of internal medicine and hospitalist care," as her Rule 9(j) pre-review medical experts. Attached to her response, Plaintiff included, *inter alia*, Dr. Toporoff's curriculum vitae and a Rule 9(j) pre-review medical expert affidavit signed by Dr. Toporoff.[2] In his affidavit, Dr. Toporoff stated he had "reviewed the medical records related to

2. Plaintiff attached Dr. Toporoff's 10 November 2015 affidavit, which was relevant to her first lawsuit against the hospitalists. She later supplied Defendant with Dr. Toporoff's 12 February 2016 affidavit, which was relevant to her second lawsuit and intended to be attached to her response. We discuss only Dr. Toporoff's second affidavit.

medical care provided to William Preston during his presentation with chest pain to Vidant Medical Center on February 3–4, 2014" and had "been provided a packet of information . . . about the training and experience of . . . [Dr.] Movahed" and "the Answer of Defendant Neha Doctor, MD" to the first complaint. Based upon his review of these materials, Dr. Toporoff opined that the "medical care provided to William Preston during his admission to Vidant Medical Center . . . for chest pain, failed to comply with the applicable standard of care for the evaluation of a patient with chest and arm pain who presented with Mr. Preston's signs, symptoms and medical history" and "expressed [his] willingness to testify to the above if called upon to do so."

On 15 December 2016, Plaintiff submitted an expert witness designation, identifying her Rule 9(j) experts Dr. Toporoff and Dr. Pierce, as well as nuclear cardiologists Mark I. Travin, M.D., and Salvador Borges-Neto, M.D.

On 23 March 2017, Defendant deposed Dr. Toporoff. During his deposition, Dr. Toporoff confirmed that Dr. Movahed's involvement in Preston's care was limited to interpreting his NST results. Dr. Toporoff also admitted that, as a non-nuclear cardiologist who never interpreted the results of an NST, he was incompetent to qualify as a nuclear cardiologist against Dr. Movahed or criticize his interpretation of the nuclear imaging component of Preston's NST. But, Dr. Toporoff testified that he felt qualified as a clinical cardiologist who interpreted EKG tracings when administering treadmill stress tests to patients and thus comfortable stating Dr. Movahed's interpretation of the EKG component of Preston's NST fell below the applicable standard of care. However, Dr. Toporoff further testified that, when initially consulted to review the case before Plaintiff filed her first lawsuit against the physicians, he told Plaintiff not to name Dr. Movahed because Dr. Toporoff refused to testify against him unless Plaintiff retained a nuclear cardiologist competent and willing to testify that Dr. Movahed's interpretation of the nuclear imaging component of Preston's NST fell below the applicable standard of care. As to what new information Dr. Toporoff reviewed in between the filings of the first and second lawsuit, he admitted that the only additional medical record was the nuclear images from Preston's NST, which he confirmed he was incompetent to interpret, and Dr. Doctor's pleading in response to the first lawsuit.

On 16 June 2017, Defendant filed a second motion to dismiss Plaintiff's second complaint under North Carolina Civil Procedure Rules 12(b)(6), 9(j), and 41. In response, Plaintiff submitted a third affidavit from Dr. Toporoff signed 15 September 2017. In his third affidavit, Dr.

Toporoff explained in greater detail the significance of Dr. Doctor's pleading in response to the first complaint, which Dr. Toporoff had reviewed prior to signing his second Rule 9(j) affidavit naming Dr. Movahed before Plaintiff filed the second complaint. Dr. Toporoff stated as follows:

> 7) Based on the representation by Dr. Doctor in those documents of the following information: that Dr. Movahed's report was NOT available to her prior to Mr. Preston's discharge; that Dr. Movahed had specifically made recommendations to the hospitalist; and that Dr. Joshi communicated the results of the nuclear stress test with "cardiology's" recommendation for an outpatient CT angiogram, I informed [Plaintiff] I was willing to testify that Dr. Movahed and Dr. Joshi violated standards of care in their collaboration and treatment of Mr. Preston.
>
> 8) My criticisms of Drs. Movahed and Joshi include: failures to interpret, diagnose, document and communicate to the ordering physician the presence of chest pain and ST wave depression changes during Mr. Preston's nuclear treadmill stress test that were consistent with ischemia; and failure to recommend an immediate cardiology consult for Mr. Preston prior to his discharge.

On 18 September 2017, the trial court held a Rule 9(j) compliance hearing on Defendant's motion to dismiss Plaintiff's complaint. On 25 October 2017, the trial court entered an order, concluding in relevant part that Dr. Movahed's deposition testimony established the facially valid Rule 9(j) certificate in Plaintiff's second complaint was factually unsupported when filed, and that Plaintiff had failed to comply with Rule 9(j)'s substantive requirements before the applicable statute of limitations period had expired. Accordingly, the trial court granted Defendant's motion to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance. Plaintiff appeals.

II. Discussion

On appeal, Plaintiff contends the trial court erred by granting Defendant's motion to dismiss her action for noncompliance with Rule 9(j) because (1) her complaint satisfied the purpose and substantive requirements underlying Rule 9(j); (2) the trial court erred by determining it was unreasonable for Plaintiff to expect Dr. Toporoff to qualify as an expert witness against Dr. Movahed; and (3) three of the trial court's twenty-seven factual findings supporting its ultimate ruling were not

supported by competent evidence. Because Plaintiff's challenges to the trial court's factual findings inform our analysis as to whether her first two issues presented have merit, we first address Plaintiff's challenges to the evidentiary sufficiency of the trial court's factual findings.

A. North Carolina Civil Procedure Rule 9(j)

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Vaughan v. Mashburn*, ___ N.C. ___, ___, 817 S.E.2d 370, 375 (2018) (quoting *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012)). The Rule mandates that a medical malpractice complaint "shall be dismissed unless"

> [t]he pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence . . . have been reviewed by a person [(1)] who is *reasonably expected to qualify as an expert witness* under Rule 702 of the Rules of Evidence and [(2)] *who is willing to testify* that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2017) (emphases added). However, "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Moore*, 366 N.C. at 31–32, 726 S.E.2d at 817 (internal citations omitted).

"Because Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing[,]" *id.* at 31, 726 S.E.2d at 817 (citations omitted), and "when conducting this analysis, a court should look at 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing[,]" *id.* (quoting *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998)).

B. Standard of Review

We review *de novo* a trial court's dismissal of a medical malpractice complaint for substantive Rule 9(j) noncompliance. *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citations omitted). Where, as here, "a trial court determines a Rule 9(j) certification is not supported by the facts, 'the court must make written findings of fact to allow a reviewing

appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination.' " *Id.* (quoting *Moore*, 366 N.C. at 32, 726 S.E.2d at 818).

Additionally, because Rule 9(j) imposes multiple threshold pleading requirements that must be satisfied to survive dismissal, each one must be factually supported in order to be substantively compliant with Rule 9(j). Thus, if subsequent discovery establishes a facially valid certificate has no factual support for one of Rule 9(j)'s strict pleading requirements, a medical malpractice complaint is properly dismissed for substantive Rule 9(j) noncompliance. *See*, *e.g.*, *McGuire v. Riedle*, 190 N.C. App. 785, 788, 661 S.E.2d 754, 758 (2008) (affirming dismissal for substantive Rule 9(j) noncompliance solely on the ground that the "[p]laintiff did not present the trial court with an expert who was 'willing to testify that the medical care did not comply with the applicable standard of care.' " (quoting N.C. Gen. Stat. § 1A-1, Rule 9(j)(1))).

C. Sufficiency of Factual Findings

The trial court here entered twenty-seven findings supporting its ultimate decision to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance. In her brief, Plaintiff challenges only the evidentiary sufficiency of factual findings 22, 24, and 27, rendering the remaining twenty-four findings binding on appeal. *Ingram v. Henderson Cty. Hosp. Corp., Inc.*, ___ N.C. App. ___, ___, 815 S.E.2d 719, 733 (2018) (citation omitted). We thus first address the evidentiary sufficiency of each challenged finding, and then assess whether the trial court's findings supported its conclusions and ultimate decision.

1. Factual Finding 22

Plaintiff first challenges factual finding 22, which reads: "Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston." During his deposition, Dr. Toporoff specifically confirmed that "Dr. Movahed's involvement in this case is the interpretation of the nuclear stress test that was performed on Mr. Preston[.]" This exchange supplied competent evidence to support the finding.

Plaintiff argues the finding was erroneous because "the nuclear stress test involves two parts: the exercise treadmill stress test and the nuclear heart images" and "Dr. Toporoff was critical of Dr. Movahed's interpretation of the . . . exercise treadmill portion, which revealed

issues with Mr. Preston's heart requiring immediate further testing." Plaintiff's explanation of the NST does not make the challenged finding erroneous, nor does it contradict or undermine the competent evidence supporting the finding. Moreover, "[t]he well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citation omitted)).

2. Factual Finding 24

Plaintiff next challenges factual finding 24, which reads: "Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist." She argues this finding was erroneous because Dr. Toporoff (1) opined in his Rule 9(j) affidavits that Preston's medical care failed to comply with the standard of care and "expressed [his] willingness to testify to the above if called upon to do so"; and (2) testified when deposed that, at the time he signed his second Rule 9(j) affidavit prior to the filing of the second lawsuit, he "felt comfortable saying that Dr. Movahed failed to meet the standard of care as to the interpretation of the exercise treadmill test."

When deposed, Dr. Toporoff testified that during his initial prelawsuit review before Plaintiff filed her first complaint against the hospitalists, he said to Plaintiff that he would not add Dr. Movahed to the lawsuit unless she got another nuclear cardiologist to interpret the images because Dr. Toporoff "did not want to get into an across-the-table where [Dr. Movahed was] highly competent in that field on paper and [he] ha[d] no business criticizing his summaries." After Dr. Toporoff acknowledged he was unqualified to testify against Dr. Movahed as a nuclear cardiologist, he explained: "[T]hat's how [Dr. Movahed's] name got added later [to the second lawsuit]. I refused to be a nuclear cardiologist against [Dr. Movahed]." Later, when asked whether he wanted to change any answers to his prior testimony, Dr. Toporoff stated:

> At the beginning, I just wanted to make it clear, because I remember a conversation I had with [Plaintiff's attorney], that I would not testify against Dr. Movahed unless she came up with a nuclear cardiologist because I did not want to be across from him where he's talking about nuclear images and I have to say, I know nothing. And once we agreed that she would get somebody else, then I felt I could handle myself clinically.

The above testimony, including Dr. Toporoff's testimony that "he would not testify against Dr. Movahed unless [Plaintiff] came up with a nuclear cardiologist" provides competent evidence directly supporting the trial court's challenged finding number 24 that "Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist." To the extent Plaintiff argues that Dr. Toporoff's Rule 9(j) affidavits or other deposition testimony may have supported a different finding, "findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Id.* (citation omitted). We overrule this argument.

Although unnecessary to our resolution of this issue, we nonetheless address Plaintiff's argument that "Dr. Toporoff consistently and sufficiently indicated his ability to render opinions regarding the treadmill stress test and the communication failure of those results." To support this argument, Plaintiff emphasizes Dr. Toporoff's later deposition testimony in which he confirmed he "had opinions separate and apart from the NST images" and was "comfortable . . . when [he] did the 9(j) affidavit[ ] . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test[.]"

Dr. Toporoff's statement that he "had opinions separate and apart from the NST images" was immediately followed by his confirmation that he "didn't feel as confident expressing those [opinions] until [he] had some kind . . . of support for the NST images as well." Moreover, merely having an opinion does not indicate one's willingness to testify as to that opinion. Additionally, Dr. Toporoff's confirmation that he was "comfortable . . . when [he] did the 9(j) affidavit . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test" was not an unequivocal assertion that he was "willing to testify" against Dr. Movahed. Regardless of whether Dr. Toporoff had opinions or was comfortable saying something about Dr. Movahed regarding the treadmill-stress-test component of interpreting the NST, Dr. Toporoff's testimony considered contextually establishes that his *willingness* to testify against Dr. Movahed in any capacity was conditioned upon having the support of a nuclear cardiologist who was competent and willing to testify against Dr. Movahed as to the nuclear-imaging component.

3. Factual Finding 27

Plaintiff next challenges factual finding 27, which reads: "[A]s of the date the Second Lawsuit was filed, Plaintiff had no cardiologist

competent or willing to testify against . . . Dr. Movahed . . . ." Plaintiff argues this finding was unsupported because "[t]he record makes clear that Dr. Toporoff was able and willing to testify against Dr. Movahed, and . . . was qualified to do so."

The unchallenged findings establish that Dr. Toporoff was Plaintiff's only Rule 9(j) pre-lawsuit review cardiologist, and the two nuclear cardiologists were consulted months after the second lawsuit was filed and after the statute of limitations had expired. Having concluded above that Dr. Toporoff's testimony supported challenged factual finding 24—"Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist"—that finding, along with unchallenged factual finding 8 establishing that Plaintiff failed to retain a nuclear cardiologist until months after she filed the second lawsuit, support the part of challenged finding 27 that "as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist . . . willing to testify against . . . Dr. Movahed . . . ."

In light of our conclusion that competent evidence supported that part of the finding that no cardiologist was willing to testify against Dr. Movahed at the time Plaintiff filed her second lawsuit, we need not address the sufficiency of evidence supporting that part of the finding as to whether Dr. Toporoff was competent to testify in any capacity against Dr. Movahed. *See Vaughan*, ___ N.C. at ___, 817 S.E.2d at 375 ("[R]ule [9(j)] averts frivolous actions by precluding any filing in the first place by a plaintiff who is unable to procure an expert who *both* meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care." (emphasis added)).

D. Sufficiency of Legal Conclusions

Having concluded challenged factual findings 22, 24, and the no cardiologist willing to testify portion of finding 27 were supported by competent evidence, our review is whether those findings and the trial court's remaining unchallenged findings supported its conclusions and ultimate decision to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance.

The trial court made the following relevant factual findings:

> 2. . . . Mr. Preston . . . had a nuclear stress test ("NST") conducted.
>
> 3. The NST was interpreted by an attending nuclear cardiologist . . . , Dr. Movahed.

. . . .

8. On February 12, 2016, [Plaintiff] filed a second malpractice lawsuit . . . .

. . . .

10. This Second Lawsuit alleges that Dr. Movahed . . . w[as] negligent in [his] care and treatment of Mr. Preston prior to his discharge from VMC.

. . . .

12. The Second Lawsuit . . . contained a certification paragraph that was facially compliant with Rule 9(j). . . .

13. . . . Plaintiff identified two 9(j) expert witnesses: Dr. Stuart Toporoff, a non-nuclear cardiologist . . . , and Dr. Andy Pierce, a hospitalist . . . .

14. On December 15, 2016, Plaintiff formally designated her expert witnesses, which, in addition to Drs. Toporoff and Pierce, included two nuclear cardiologists, Dr. Mark Travin . . . and Dr. Salvadore Borges-Neto . . . .

15. Plaintiff does not contend, nor would the record support, that these two nuclear cardiologists were consulted with, or agreed to provide testimony, prior to the Plaintiff filing either of the two lawsuits.

16. On March 31, 2017, Defendants deposed Dr. Pierce, who admitted that he is not a cardiologist and, therefore, is "not really the person to critique Movahed."

. . . .

19. On March 23, 2017, Defendants [deposed] Dr. Toporoff, a clinical cardiologist. Dr. Toporoff admitted that he is not a nuclear cardiologist, and has never interpreted nuclear stress tests.

. . . .

22. Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston.

23. Dr. Toporoff . . . testified that he had no business criticizing and did not feel competent criticizing Dr. Movahed's

> interpretation of the NST, and that he "would look like a fool trying to interpret the [NST] images." Dr. Toporoff further testified that he "would not testify against Dr. Movahed unless [Plaintiff's attorney] came up with a nuclear cardiologist [expert]."
>
> 24. Accordingly, Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist.
>
> 25. Plaintiff did not consult with [nuclear cardiologist] Dr. Travin until March 30, 2016.
>
> 26. Plaintiff did not consult with [nuclear cardiologist] Dr. Borges-Neto until mid-November, 2016.
>
> 27. Accordingly, as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist . . . willing to testify against . . . Dr. Movahed . . . .

Upon the findings, the trial court made the following relevant legal conclusions:

> 31. Dr. Toporoff's deposition testimony demonstrated that, at the time the Second Lawsuit was filed, he was "not willing" to testify that the medical care at issue failed to comply with the applicable standard of care.
>
> . . . .
>
> 34. Dr. Pierce testified that he had no opinions that were critical of the medical care provided by Dr. Movahed . . . .
>
> 35. As Mr. Preston died February 13, 2014, Plaintiff had two years to file a medical malpractice action. . . .
>
> 36. As of the date that the statute of limitations expired for the Second Lawsuit, February 13, 2016, Plaintiff had not complied with Rule 9(j).
>
> 37. Despite the fact that Plaintiff subsequently obtained a nuclear cardiologist willing to testify regarding Dr. Movahed, it was only after the Second Lawsuit had been filed and after the statute of limitations had expired. . . .

We hold these findings support the conclusions, and the conclusions support the trial court's ultimate determination that "Plaintiff has failed to comply with the requirements of Rule 9(j) in regard to her

Complaint in the Second Lawsuit, and that therefore, [her complaint] should be dismissed in its entirety, with prejudice." Specifically, finding 13 establishes that Dr. Toporoff was Plaintiff's only Rule 9(j) cardiologist who had reviewed Preston's care before the second lawsuit was filed. Finding 24 establishes that Dr. Toporoff only agreed to testify against Dr. Movahed if Plaintiff hired a nuclear cardiologist. And findings 14, 15, 25, and 26 establish that Plaintiff failed to consult with the nuclear cardiologists she retained until months after she filed the second lawsuit. Those findings support the part of finding 27 that, "as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist . . . willing to testify against . . . Dr. Movahed . . . ." These findings support the trial court's dispositive conclusion that "Plaintiff has failed to comply with the requirements of Rule 9(j) in regard to her Complaint in the Second Lawsuit" and its ultimate decision to dismiss her complaint for substantive Rule 9(j) noncompliance. *Cf. Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166–67 (2002) ("Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j)."). Accordingly, we affirm the trial court's order.

In light of our holding that the trial court's findings and conclusions supported its determination that Plaintiff failed to substantively comply with Rule 9(j)'s requirement of securing a pre-lawsuit review medical expert willing to testify against Dr. Movahed, we need not address Plaintiff's remaining challenges to the sufficiency of the findings or conclusions supporting the trial court's additional determination that Plaintiff failed to substantively comply with Rule 9(j)'s requirement that it was reasonable for Plaintiff to expect Dr. Toporoff to qualify as an expert witness against Dr. Movahed. *Cf. McGuire*, 190 N.C. App. at 788, 661 S.E.2d at 758 (affirming dismissal of a medical malpractice complaint for substantive Rule 9(j) noncompliance solely on the ground that the "[p]laintiff did not present the trial court with an expert who was 'willing to testify . . . .' " (citation omitted)); *id.* at 788 n.1, 661 S.E.2d at 758 n.1 ("We decline to address the parties' arguments regarding Dr. Majors' review of the care given. In order to satisfy the Rule 9(j)(1) requirements, plaintiff's expert must have been willing to testify. Because he was not so willing, it is irrelevant whether he in fact reviewed the care that plaintiff received.").

III. Conclusion

Because the trial court's findings supported by Dr. Toporoff's deposition testimony established that his willingness to testify against Dr. Movahed was conditioned upon Plaintiff securing a nuclear cardiologist,

both of whom were consulted and retained months after she filed her second complaint and the applicable statute of limitations period had expired, no factual support existed for that part of Plaintiff's Rule 9(j) certification that her second complaint had been "reviewed by a person . . . willing to testify that the medical care did not comply with the applicable standard of care." Accordingly, we affirm the trial court's order granting Defendant's motion to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance.

AFFIRMED.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TYRONE MARCERO CHEVALLIER

No. COA18-860

Filed 5 March 2019

1. Evidence—hearsay—exceptions—co-conspirator—prima facie case of conspiracy

A drug dealer's statement over the phone, "them are my boys, deal with them," was admissible under the hearsay rule's co-conspirator exception (Evidence Rule 801(d)(E)) where the State established a prima facie case of conspiracy between the drug dealer and three men in a car (including defendant). The undercover officer had successfully purchased cocaine from the drug dealer at the same location on two prior occasions, and the drug dealer had agreed to sell the officer one ounce of cocaine at the same location for $1,200—the same amount of counterfeit cocaine that the men in the car attempted to sell him at the agreed-upon place and time.

2. Drugs—attempted sale and delivery—counterfeit controlled substance—acting in concert—sufficiency of evidence

There was sufficient evidence to send the charges of attempted sale of a counterfeit controlled substance and delivery of a counterfeit controlled substance, under the theory of acting in concert, to the jury where a police detective agreed to purchase cocaine from a drug dealer, defendant and two others arrived in a car at the agreed-upon place with a plastic bag of white powder, defendant

instructed the officer to enter their car, and the white substance was later determined to be counterfeit cocaine. However, because the acts underlying both charges arose from a single transaction, the jury was improperly allowed to convict defendant of two offenses (attempted sale and delivery).

3. Firearms and Other Weapons—possession—actual—personal custody—on floor of vehicle

There was sufficient evidence to charge the jury on "actual" firearm possession where defendant was sitting in the front passenger seat of a vehicle, he had his hands low to the floor of the vehicle, and upon opening the vehicle's door an officer found a firearm on the floor where defendant's hands had been.

Appeal by Defendant from judgments entered 30 November 2017 by Judge Jeffery B. Foster in Duplin County Superior Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.

James R. Parish for Defendant.

COLLINS, Judge.

Defendant Tyrone Marcero Chevallier appeals judgments entered upon jury verdicts of guilty of possession of a firearm by a felon, possession with intent to sell a counterfeit controlled substance, attempted sale of a counterfeit controlled substance, and delivery of a counterfeit controlled substance, and upon Defendant's guilty plea of having attained habitual felon status. The charges against Defendant resulted from his participation in a drug transfer which was foiled by police. We find no merit in Defendant's challenges to the trial court's evidentiary rulings or jury instructions.

I. Procedural History and Factual Background

At trial, the State's evidence tended to show the following: Detective Michael Tyndall of the Duplin County Police Department was participating in an undercover sting operation targeting cocaine dealer James Williams. On 29 July 2015, Detective Tyndall, along with a confidential informant, purchased cocaine from Williams at a Bojangles restaurant in Warsaw. A few days later, Detective Tyndall attempted to make a second purchase from Williams, but the deal fell through due to a conflict

between Williams and the confidential informant. As a result, Williams gave Detective Tyndall his cell phone number with instructions to contact him directly in the future. Detective Tyndall contacted Williams directly and set up another purchase of cocaine at the same Bojangles in Warsaw. On 7 August 2015, Detective Tyndall completed a second purchase of cocaine from Williams.

On 20 October 2015, Detective Tyndall called Williams' cell phone to set up a third purchase of cocaine. After a few phone calls back and forth negotiating price, Williams agreed to sell Detective Tyndall one ounce of cocaine for $1,200.00, and instructed Detective Tyndall to call him back when he was ready to complete the exchange. The next day, on 21 October 2015, Detective Tyndall called Williams and they agreed to meet at the same Bojangles restaurant in Warsaw to effectuate the sale. Williams informed Detective Tyndall he was on his way. Detective Tyndall arrived at the Bojangles with $1,200.00 and parked his car to wait for Williams to arrive. A team of hidden officers surveilled the area from nearby.

After waiting about twenty minutes, Detective Tyndall called Williams again; Williams said he was on his way and to keep waiting. Detective Tyndall then heard yelling coming from behind his vehicle. He saw a car with three occupants, including Defendant, had parked behind his vehicle. The men waved Detective Tyndall over to their car. While still on the phone with Williams, Detective Tyndall walked over and told the men he was waiting for Williams. The man sitting in the backseat leaned forward, held up a plastic bag of white powder, and told Detective Tyndall he knew him from previous drug transactions. At that point, Williams told Detective Tyndall, "them are my boys, deal with them" and then hung up the phone.

When Detective Tyndall walked back to the car, Defendant told him to get in and shut the door. Detective Tyndall told him he first needed to get his scale. He retrieved his scale from his vehicle and then returned to the car with the men. Detective Tyndall opened the door, sat down on the edge of the car seat, and placed his scale on the center console in the back of the vehicle. The man holding the plastic bag of white powder placed it on Detective Tyndall's scale. As soon as Detective Tyndall saw that the weight registered one ounce—the amount of cocaine Williams had agreed to sell him for $1,200.00—he signaled the surveilling officers for a takedown. The substance was still on the scale when the men in the car spotted the officers. As the driver of the car started trying to drive away, Detective Tyndall grabbed the white powder off the

scale; however, the backseat passenger ripped the bag out of Detective Tyndall's hands. The car was quickly stopped.

When an arresting officer approached the passenger-side door where Defendant was sitting, he observed that Defendant's hands were low and not visible, so he instructed Defendant to show him his hands. Defendant hesitated but eventually complied. The officer immediately opened the passenger-side door and discovered a long firearm lying upside down on the floor of the vehicle between the seat and door, with its handgrip facing up, right where he had observed Defendant's lowered hand to be. Defendant was arrested and charged with several drug-related offenses as well as possession of a firearm by a felon. A Duplin County Grand Jury indicted Defendant for conspiracy to sell cocaine, conspiracy to deliver cocaine, possession with intent to sell or deliver a counterfeit controlled substance, attempted sale of a counterfeit controlled substance, delivery of a counterfeit controlled substance, and having attained habitual felon status. Defendant was tried by a jury on 27 November 2017. The cocaine-related charges were dismissed at the close of the State's evidence. The jury found Defendant guilty on all remaining charges, and Defendant later pled guilty to having attained habitual felon status.

Defendant was sentenced as a habitual felon. Judgment was entered on the possession of a firearm by a felon conviction, imposing a sentence of 135 to 174 months imprisonment. A consolidated judgment was entered on the attempted sale or delivery of a counterfeit controlled substance convictions, imposing a concurrent sentence of 50 to 72 months imprisonment. Finally, judgment was entered on the possession with intent to sell or deliver a counterfeit controlled substance conviction, imposing a concurrent sentence of 50 to 72 months imprisonment. From the judgments entered upon the jury's guilty verdicts, Defendant appeals.

II. Issues

On appeal, Defendant contends the trial court erred by (1) admitting a hearsay statement under Rule 801(d)(E)'s co-conspirator exception; (2) denying his motion to dismiss for insufficient evidence of attempted sale of a counterfeit controlled substance; (3) denying his motion to dismiss for insufficient evidence of delivery of a counterfeit controlled substance; and (4) instructing the jury on the theory of "actual" possession for the possession of a firearm by a felon charge.

III. Discussion

A. Co-conspirator Hearsay Exception

[1] Defendant first contends the trial court erred by admitting into evidence Williams' statement "them are my boys, deal with them" under the co-conspirator exception to the rule against hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (2017). He argues Williams' statement was inadmissible under the co-conspirator exception because the State failed to prove a conspiracy existed between Williams and the three men in the car, including Defendant. We disagree.

1. Standard of Review

We review *de novo* a properly preserved objection to the admission of hearsay evidence. *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citation omitted).

2. Analysis

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). Generally, hearsay is inadmissible. *State v. Valentine*, 357 N.C. 512, 515, 591 S.E.2d 846, 851 (2003) (citation omitted). However, an exception to the general rule against hearsay exists for a statement "offered against a party and . . . made by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d)(E).

To be admissible under the co-conspirator hearsay exception, the State's evidence must "establish that: '(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended.' " *Valentine*, 357 N.C. at 521, 591 S.E.2d at 854 (quoting *State v. Lee*, 277 N.C. 205, 213, 176 S.E.2d 765, 769–70 (1970)). The State must prove "a *prima facie* case of conspiracy, without reliance on the statement at issue." *Valentine*, 357 N.C. at 521, 591 S.E.2d at 854 (citations omitted). "In establishing the *prima facie* case, the State is granted wide latitude, and the evidence is viewed in a light most favorable to the State." *Id.* (citations omitted).

"A criminal conspiracy is an express or implied agreement between two or more persons to do an unlawful act. . . ." *State v. Barnes*, 345 N.C. 184, 216, 481 S.E.2d 44, 61 (1997) (citation omitted).

> In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual,

> implied understanding will suffice. Nor is it necessary that the unlawful act be completed. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.

State v. Morgan, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (internal quotation marks and citations omitted). Stated differently, although "[t]he State's burden of proof is to produce evidence sufficient to permit the jury to find the existence of a conspiracy, . . . [it need not] produce evidence sufficient to compel the jury to find a conspiracy." *State v. Williams*, 345 N.C. 137, 142, 478 S.E.2d 782, 784–85 (1996) (citations omitted).

Here, Detective Tyndall testified he had on three prior occasions planned buys of cocaine from Williams. The two successful transactions occurred at the Bojangles restaurant in Warsaw, and Williams had personally delivered the cocaine to Detective Tyndall in exchange for cash. On 20 October 2015, Detective Tyndall contacted Williams for a third purchase, and Williams agreed to sell Detective Tyndall one ounce of cocaine for $1,200.00. On 21 October 2015, Williams agreed to meet Detective Tyndall at the same Bojangles in Warsaw to effectuate this third buy. When Detective Tyndall arrived at the prearranged meeting place and Williams failed to show, he called Williams on the phone. Detective Tyndall was talking to Williams when he was met by three men who had parked behind Detective Tyndall's vehicle. They waved him over to their car.

The man in the back seat displayed a plastic bag of white powder. After Detective Tyndall told the men he was waiting for Williams, the man holding the powder told Detective Tyndall he knew him from prior drug transactions, and Detective Tyndall was instructed to get in the car and shut the door. Detective Tyndall told the men he needed to get his scale, retrieved the scale, opened the backseat door, and sat down in the car with the three men, who all appeared to be looking around and fidgeting nervously. The man holding the bag of white powder placed it on Detective Tyndall's scale, which registered the exact weight of cocaine Williams had agreed to sell Detective Tyndall for $1,200.00 the day prior.

Based upon our review of this evidence in the light most favorable to the State, we conclude the State satisfied its burden of establishing a *prima facie* case of conspiracy between Williams and the three men, including Defendant. Williams' statement, "them are my boys, deal with them," made in furtherance of the objective to transfer Detective Tyndall an unlawful substance, merely provided further support for the showing

of the conspiracy. Thus, the trial court did not err in admitting the challenged statement under Rule 801(d)(E)'s co-conspirator exception.

Despite conceding that Williams "may have . . . told his people in the car to bring cocaine[,]" Defendant primarily argues that because the men instead brought counterfeit cocaine, there was no "agreement or union of wills" between Williams and the men, and thus "no conspiracy." We disagree.

Defendant fails to supply controlling legal authority to support this argument. *See* N.C. R. App. P. 28(b)(6). Moreover, it is irrelevant whether the unlawful substance the men brought to effectuate Williams' planned drug transaction with Detective Tyndall was actual cocaine, proscribed by N.C. Gen. Stat. § 90-95(a)(1) (2017), or counterfeit cocaine, proscribed by N.C. Gen. Stat. § 90-95(a)(2) (2017). The State's evidence here was sufficient to establish a *prima facie* case of conspiracy by way of an agreement between Williams and the men to "do an unlawful act," *Barnes*, 345 N.C. at 216, 481 S.E.2d at 61—that is, to transfer an unlawful substance by sale or delivery to Detective Tyndall in violation of N.C. Gen. Stat. § 90-95(a). *Cf. Valentine*, 357 N.C. at 522, 591 S.E.2d at 855 ("In finding the existence of a criminal conspiracy, jurors are allowed to make the logical inference that 'one who conspires to bring about a result intends the accomplishment of that result, or of *anything which naturally flows from its attempted accomplishment*.' " (quoting *State v. Small*, 301 N.C. 407, 419, 272 S.E.2d 128, 136 (1980))).

Accordingly, we overrule Defendant's argument.

B. Attempted Sale or Delivery of a Counterfeit Controlled Substance Charges

[2] Defendant next contends the trial court erred by denying his motions to dismiss for insufficient evidence the charges of attempted sale of a counterfeit controlled substance and delivery of a counterfeit controlled substance.

1. Standard of Review

We review *de novo* a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence. *See State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citation omitted). The scope of judicial review is "whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citation

omitted). In determining whether substantial evidence was adduced to withstand a motion to dismiss, we "consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* at 492, 809 S.E.2d at 549–50 (citation omitted).

2. Analysis

It is unlawful for a person "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a counterfeit controlled substance." N.C. Gen. Stat. § 90-95(a)(2). This statute establishes three separate offenses: "(1) *manufacture* of a [counterfeit] controlled substance, (2) *transfer* of a [counterfeit] controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a [counterfeit] controlled substance." *State v. Moore*, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (interpreting N.C. Gen. Stat. § 90-95(a)(1)[1]). "To prove sale and/or delivery of a [counterfeit] controlled substance, the State must show a transfer of a [counterfeit] controlled substance by either sale or delivery, or both." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing *Moore*, 327 N.C. at 382, 395 S.E.2d at 127).

Our Supreme Court has defined a "sale" in this context as "a *transfer* of property for a specified price payable in money." *Moore*, 327 N.C. at 382, 395 S.E.2d at 127 (quoting *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985)). An attempted sale in this context requires the intent to sell and an overt act done for that purpose which goes beyond mere preparation, but which falls short of the completed sale. *See State v. Melton*, ___ N.C. ___, ___, 821 S.E.2d 424, 428 (2018) (citations omitted). Our Controlled Substances Act defines " '[d]eliver' or 'delivery' " as "the actual[,] constructive, or attempted transfer from one person to another of a controlled substance. . . ." N.C. Gen. Stat. § 90-87(7) (2017).

The State proceeded upon the principle of acting in concert in an attempt to prove Defendant acted in concert with Williams and the two other men in the car in the commission of the attempted sale or delivery of a counterfeit controlled substance. Under the doctrine of acting in concert, when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other

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1. The statutory language of subsection (a)(1) interpreted in *Moore* mirrors that of subsection (a)(2) save only for the unlawful substance identified. *Compare* N.C. Gen. Stat. § 90-95(a)(1) (identifying a "controlled substance"), *with id.* § 90-95(a)(2) (identifying a "counterfeit controlled substance").

in pursuance of the common plan or purpose. *State v. Barts*, 316 N.C. 666, 688, 343 S.E.2d 828, 843 (1986) (citations omitted).

Here, Detective Tyndall testified he had twice before purchased cocaine from Williams at the Bojangles restaurant in Warsaw and contacted Williams again on 20 October 2015 for a third purchase. Williams, after negotiations, agreed to sell Detective Tyndall one ounce of cocaine for $1,200.00 the next day at the same Bojangles in Warsaw where the two prior buys occurred. On 21 October 2015, when Detective Tyndall arrived at the prearranged meeting place expecting to meet up with Williams, after about twenty or thirty minutes three men in an unknown car parked behind Detective Tyndall's vehicle. The three men yelled to Detective Tyndall and waved him over to their car, as one displayed a plastic bag containing white powder.

While Detective Tyndall was speaking on the phone with Williams attempting figure out his whereabouts to effectuate the planned buy, Detective Tyndall told the men in the car he was waiting for Williams, and Williams stated, "them are my boys, deal with them" and then hung up. When Detective Tyndall reengaged the men, the one holding the plastic bag of white powder stated he knew Detective Tyndall from prior drug transactions, and Defendant instructed Detective Tyndall to enter the car and close the door.

After Detective Tyndall informed the men he needed to get his scale, Detective Tyndall retrieved a scale from his vehicle and returned, partially entering the men's car. The man holding the substance placed it on Detective Tyndall's scale, and its weight registered one ounce, the amount of cocaine Williams agreed to sell Detective Tyndall for $1,200.00. Detective Tyndall then immediately signaled the takedown, and police intervention prevented the men from actually delivering the substance to Detective Tyndall, or Detective Tyndall from actually delivering the money to the men. The white powder was later determined not to be a controlled substance but counterfeit cocaine.

Viewing this evidence and all reasonable inferences therefrom in the light most favorable to the State, including Williams' and the other men's acts performed in furtherance of effectuating the transaction, we conclude the State presented sufficient evidence of transferring a counterfeit controlled substance under both the attempted sale and delivery theories of transfer. *See State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003) (holding defendant's "possess[ing] the drugs and scales while attempting to effectuate the sale [were] sufficient to establish both intent and an act in preparation of an actual transfer of cocaine" and

thus "sufficient to satisfy the elements of attempted sale of cocaine"); *State v. Beam*, 201 N.C. App. 643, 648, 688 S.E.2d 40, 44 (2010) (holding sufficient evidence existed to sustain a charge of unlawful transfer of a controlled substance by delivery where, after planning a drug transaction with an undercover officer posing as a buyer, the defendant got out of her vehicle, went to the trunk, and retrieved the drugs; "re-entered the vehicle, took the drugs out of her purse, and told [the undercover officer] to put the money on the dashboard of her vehicle"; but was arrested before handing the undercover officer the drugs). Defendant's argument is overruled.

However, "[t]he transfer by sale or delivery of a [counterfeit] controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug." *Moore*, 327 N.C. at 383, 395 S.E.2d at 127. A violation of N.C. Gen. Stat. § 90-95(a)(2) arising from a "single transaction involving transfer of a [counterfeit] controlled substance" constitutes "one criminal offense, which is either committed by either or both of two acts—sale or delivery." *Id.* at 382, 395 S.E.2d at 126–27. Thus, while "[a] defendant may be indicted and tried under N.C.G.S. § 90-95(a)([2]) in such instances for the transfer of a [counterfeit] controlled substance, whether it be by selling the substance, or by delivering the substance, or both[,]" *id.* at 382, 395 S.E.2d at 127, "a defendant may not[ ] . . . be convicted under N.C.G.S. § 90-95(a)([2]) of both the sale *and* the delivery of a [counterfeit] controlled substance arising from a single transfer[,]" *id.*

Here, Defendant was permissibly separately indicted and tried for transfer of a counterfeit controlled substance by both attempted sale and delivery arising from a single transaction. As concluded above, substantial evidence was presented to support both theories of transfer, and the trial court properly denied Defendant's motions to dismiss the attempted sale and delivery charges for insufficient evidence. However, the acts of attempted sale and delivery underlying both charges arose from a single transaction of the same counterfeit controlled substance. Accordingly, the jury in this case was improperly allowed to convict Defendant of two offenses— attempted sale and delivery—arising from a single transfer. *Moore*, 327 N.C. at 383, 395 S.E.2d at 127.

Defendant failed to raise or argue on appeal the improper conviction of two offenses arising from a single transfer. Thus, it is not before us. However, the failure to raise this issue does not preclude Defendant from filing a motion for appropriate relief in the trial court pursuant to N.C. Gen. Stat. § 15A-1415 (2017), does not preclude the trial court from considering a motion for appropriate relief *sua sponte* under N.C.

Gen. Stat. § 15A-1420(d) (2017), and does not prevent the parties to this action from entering into an agreement for appropriate relief under N.C. Gen. Stat. § 15A-1420(e) (2017).

C. Jury Instructions on Actual Possession of a Firearm

[3] Defendant next asserts the trial court erred when charging the jury on possession of a firearm by a felon. Over Defendant's objection that insufficient evidence was presented to support an instruction on the criminal liability theory of "actual" firearm possession, the trial court charged the jury on both "actual" and "constructive" possession theories. On appeal, Defendant again argues the evidence was insufficient to support an instruction on "actual" firearm possession. We disagree.

1. Standard of Review

We review *de novo* properly preserved sufficiency-of-the-evidence challenges to jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted).

2. Analysis

The trial court must "fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E. 2d 391, 393 (1982) (citation omitted). However, it is error for the trial court "to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Malachi*, ___ N.C. ___, ___, 821 S.E.2d 407, 416 (2018) (quotation marks and citation omitted). In determining whether the trial evidence adduced was sufficient to instruct on a particular theory of criminal liability, we review the evidence and any reasonable inference from that evidence in the light most favorable to the State. *Cf. State v. Anthony*, 354 N.C. 372, 425, 555 S.E.2d 557, 591 (2001) ("The evidence presented in this case, when considered in a light most favorable to the State, was sufficient to warrant the trial court's instruction on flight."). An instruction on a criminal liability theory is proper when "there is some evidence in the record reasonably supporting the theory. . . ." *State v. Taylor*, 362 N.C. 514, 540, 669 S.E.2d 239, 261 (2008) (quotation marks and citation omitted). Additionally, "challenges to jury instructions allowing juries to convict criminal defendants on the basis of legal theories that lack evidentiary support are . . . subject to harmless error analysis. . . ." *Malachi*, ___ N.C. at ___, 821 S.E.2d at 422.

The State must prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm. N.C. Gen. Stat. § 14-415.1

(2017). Possession may be actual or constructive. *Malachi*, ___ N.C. at ___, 821 S.E.2d at 416 (citation omitted). "Actual possession requires that a party have physical or personal custody of the item." *Id.* (quotation marks and citation omitted). "[A]ctual possession may be proven by circumstantial evidence . . . ." *State v. McNeil*, 359 N.C. 800, 813, 617 S.E.2d 271, 279 (2005). Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the firearm. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citations omitted).

When viewing the evidence adduced in the light most favorable to the State, we conclude it was sufficient to support an instruction on the theory of actual possession of a firearm. Detective Tyndall testified that he observed Defendant "fidgeting and looking around, nervous, acting as if he was the lookout over the vehicle." Officer Miller testified that when approaching the men's vehicle to effectuate the arrest, he observed Defendant sitting in the front passenger seat and "[a]t that point in time his hands were low" and not visible, so Officer Miller "told [Defendant] to get his hands where [he] could see them." Although Defendant eventually complied, "[h]e was slow to show [Officer Miller] his hands." Immediately thereafter, Officer Miller opened the front passenger door where defendant was sitting and observed a "weapon in between the seat . . . and the passenger[-]side door, right where [Defendant's] right hand was." Officer Miller later explained:

> At that point in time is when I told him, let me see your hands, let me see your hands. I couldn't see his hands. I don't know what he's doing. He finally put his hands up where I could see them.
>
> At that point in time I opened this door. When I opened the door, this is the first thing I saw was that weapon laying right there, right beside him, right beside his right hand, where it was.

Additionally, the State admitted into evidence without objection a picture of the firearm as it was found in the vehicle. That image depicts a long rife lying on the floor of the vehicle between the passenger-side seat and door, with its handgrip facing up, precisely where Officer Miller testified Defendant's hand was lowered and could hold the firearm's handgrip. Although the firearm was not found on Defendant's person, when viewing this evidence in the light most favorable to the State, we conclude the evidence was sufficient to show Defendant had "personal custody" of the firearm and thus was sufficient to support the trial court's

instruction on the theory of actual possession of a firearm. *See McNeil*, 359 N.C. at 813, 617 S.E.2d at 279 (concluding evidence was "sufficient to support a jury finding of actual possession" when an officer observed the defendant "repeatedly go 'over the top of a chair with his arm' " while resisting arrest; that he again "observed [the] defendant's arm 'go' over the armchair" after he was handcuffed; and that the defendant later admitted 'the [twenty-two individually wrapped rocks of crack cocaine found in the armchair] was his").

Even presuming, *arguendo*, this evidence was insufficient to support an instruction on actual possession, Defendant could not establish prejudice—that is, a reasonable possibility that, had the court omitted the actual possession instruction, a different result would have been reached at trial. *See State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018) (citation omitted).

At trial, Defendant conceded the "constructive possession should go to the jury instructions" but objected to the instruction on actual possession. On appeal, although Defendant recites the showing required to support an instruction for constructive possession, he does not seriously dispute the sufficiency of evidence to support it, instead primarily arguing that "the evidence presented at trial did not support a theory of actual possession." To support his showing of prejudice, Defendant argues that instructing on both actual and constructive possession theories "likely created confusion on the part of the jury, which sent a note out asking to see the photograph that showed the firearm in the car." Defendant alleges that the jury's note to the trial court evidences the jury's confusion concerning the theories of possession. We disagree and conclude that the jury's note, standing alone, does not establish prejudice. *See Malachi*, ___ N.C. at ___, 821 S.E.2d at 422 (reasoning in part that the fact that the jury asked for further instructions concerning the possession issue did not tend to show prejudice, given the absence of any explanation for why the jury might have sought clarification of the meaning of possession).

Given the strong, undisputed, and credible evidence of Defendant's possession of a firearm based upon a constructive-firearm-possession theory, even if the trial court erred by also instructing on actual possession, Defendant has failed to satisfy his burden of demonstrating prejudice. *See id.* at ___, 821 S.E.2d at 421 ("[I]n the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely

that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." (footnote omitted)). Defendant's argument is overruled.

IV. Conclusion

We find no merit in Defendant's challenges to the trial court's evidentiary rulings or jury instructions.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES A. COX

No. COA18-692

Filed 5 March 2019

1. Robbery—with a dangerous weapon—felonious intent—good-faith claim to the money demanded

The State failed to present substantial evidence of conspiracy to commit robbery with a dangerous weapon where defendant and two others entered the home of another person (a go-between for drug purchases) to obtain money that they believed was their own property. Because the go-between kept defendant's and his alleged co-conspirators' money rather than purchasing drugs for them, they held a good-faith claim to the money and there was no evidence of felonious intent to deprive the go-between of her property.

2. Burglary and Unlawful Breaking or Entering—felonious—predicate felony not proven—elements sufficient for misdemeanor

Where the State failed to present sufficient evidence that defendant had the necessary felonious intent for conspiracy to commit robbery with a dangerous weapon, there was likewise insufficient evidence to convict defendant of felonious breaking and entering predicated on the felony of robbery with a dangerous weapon. The matter was remanded for entry of judgment on the lesser-included offense of misdemeanor breaking or entering.

Appeal by Defendant from Judgments entered 16 January 2018 by Judge William W. Bland in Onslow County Superior Court. Heard in the Court of Appeals 28 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepción, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James A. Cox (Defendant) appeals from his convictions for Conspiracy to Commit Armed Robbery with a Dangerous Weapon and Felonious Breaking or Entering.[1] The evidence presented at trial tends to show the following:

Sometime prior to the night of 8 August 2015, Defendant gave Richard Linn (Linn) $20.00 to purchase Percocet tablets or other drugs. Linn testified he regularly used Angela Leisure (Leisure) as a go-between to purchase drugs. On this occasion, Linn added his own money to Defendant's and gave Leisure approximately $50.00 or $60.00. Leisure admitted she never purchased the drugs and never returned the money to Linn.

Linn further testified on the evening of 8 August 2015, Defendant and his girlfriend, Ashley Jackson (Jackson), arrived at Linn's house and demanded he come outside. Defendant was standing outside with a gun in his hand and told Linn to "get in the car." Linn stated Defendant and Jackson wanted to go to Leisure's house "to talk to her about their money." After getting in the car, Linn directed Defendant to Leisure's house.

Leisure's boyfriend, Daniel McMinn (McMinn), testified he was standing outside of Leisure's home when Defendant, Jackson, and Linn arrived. Jackson asked McMinn where Leisure was. Jackson and Defendant entered the house and McMinn followed. After entering the home, Jackson attacked Leisure by pulling her hair, punching her, and forcing her to the ground. Leisure recalled Jackson saying, "give me my money" or "give me the money." McMinn testified he reached for his cell

1. Defendant was also convicted of Discharging a Weapon into an Occupied Property but raises no arguments on appeal regarding this offense.

phone to call the police, but he stopped when he saw Defendant display a handgun "in a threatening way."

After several minutes of fighting, Linn called Jackson off, saying: "I think she's had enough. Come on, let's go." Defendant, Jackson, and Linn left the house. Linn testified once outside Defendant turned and kicked a hole in the door. Defendant also fired a shot into Leisure's home, which struck a mirrored door inside the home. Defendant, Jackson, and Linn left Leisure's home without obtaining any money or personal property.

Based on these events, Defendant was arrested and charged with First-Degree Burglary, Conspiracy to Commit Robbery with a Dangerous Weapon, and Discharging a Weapon into an Occupied Property.[2] Following the State's presentation of evidence, Defendant moved to dismiss all charges. This Motion was denied.

Subsequently, Defendant presented evidence, including his own testimony. Defendant's evidence tended to show he went to Linn's house on 8 August 2015 to give Linn $20.00 to purchase pain relievers for Jackson. Later in the evening, Linn requested Defendant pick him up because Leisure had taken the money and would not answer his phone calls. Linn said he would talk to Leisure in person and get Defendant's money back. Defendant claimed no one, including himself, had a weapon on 8 August 2015 and that Jackson kicked in the door, not Defendant. At the close of all the evidence, Defendant renewed his Motion to Dismiss all charges, which the trial court denied.

After instructing the jury, the trial court provided the jury with written copies of its jury instructions. After deliberating for approximately two hours, the jury returned a note with two questions related to the Conspiracy charge: The first question stated, "Can we get clarification of 'While the defendant knows that the defendant is not entitled to take the property,' " which was part of the definition in the jury instructions on Conspiracy to Commit Robbery with a Dangerous Weapon. The jury's second question asked, "Is it still Robbery to take back one owns [sic] property?" After conferring with counsel, and without any objection by Defendant's trial counsel, the trial court declined to answer the jury's two questions directly. Instead, the trial court referred the jury back to its written copy of the jury instructions.

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2. Jackson was charged as a co-defendant with Conspiracy to Commit Robbery with a Dangerous Weapon, First-Degree Burglary, and Simple Assault, and their cases were joined for trial.

On 16 January 2018, the jury returned a verdict finding Defendant guilty of Felonious Breaking or Entering, Conspiracy to Commit Robbery with a Dangerous Weapon, and Discharging a Weapon into an Occupied Property. The trial court entered a consolidated judgment on the Conspiracy to Commit Robbery with a Dangerous Weapon and Discharging a Weapon into an Occupied Property charges, sentencing Defendant to a minimum of 60 months and a maximum of 84 months in the custody of the North Carolina Department of Adult Correction. On the Felonious Breaking or Entering charge, Defendant received a suspended sentence of 6 to 17 months and was placed on supervised probation for a term of 24 months. Defendant gave oral notice of appeal at trial. This Court has jurisdiction to hear Defendant's appeal under N.C. Gen. Stat. § 7A-27(b)(1) (2017) and N.C.R. App. P. 4(a)(1).

Issues

Defendant raises several issues including whether the trial court committed plain error in refusing to answer the jury's questions or whether his trial counsel committed ineffective assistance of counsel by failing to request further instructions in response to the jury's questions. However, the dispositive issues in this case, raised by Defendant, are whether the trial court: (1) erroneously denied Defendant's Motion to Dismiss the charge of Conspiracy to Commit Robbery with a Dangerous Weapon at the close of all the evidence; and (2) erroneously denied Defendant's Motion to Dismiss the charge of Felonious Breaking or Entering at the close of all the evidence.

Analysis

Defendant contends the trial court erred in denying his Motion to Dismiss the Conspiracy to Commit Robbery with a Dangerous Weapon and Felonious Breaking or Entering convictions based upon the sufficiency of the evidence. Defendant argues the State presented no evidence Defendant possessed the requisite felonious intent necessary for these two convictions. We agree.

I. Standard of Review

This Court has stated:

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to

> dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (citations and quotation marks omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

II. Conspiracy to Commit Robbery with a Dangerous Weapon

[1] "In order to prove a criminal conspiracy, the State must show an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way." *State v. Gray*, 56 N.C. App. 667, 672, 289 S.E.2d 894, 897 (1982) (citation omitted). In this case, the State had the burden to present substantial evidence tending to show that Defendant and Jackson agreed to commit each element of Robbery with a Dangerous Weapon against Leisure.

"For the offense of robbery with a dangerous weapon, the State must prove '(1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened.' " *State v. Pratt*, 161 N.C. App. 161, 163, 587 S.E.2d 437, 439 (2003) (quoting *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993)); *see also* N.C. Gen. Stat. § 14-87(a) (2017). The taking or attempted taking must be done with felonious intent. *State v. Norris*, 264 N.C. 470, 472, 141 S.E.2d 869, 871 (1965) (quoting *State v. Lawrence*, 262 N.C. 162, 163-68, 136 S.E.2d 595, 597-600 (1964)). Our Supreme Court has stated, "Felonious intent is an essential element of the crime of robbery with firearms and has been defined to be the intent to deprive the owner of *his goods* permanently and to appropriate them to the taker's own use." *State v. Brown*, 300 N.C. 41, 47, 265 S.E.2d 191, 196 (1980) (citations omitted).

Under existing North Carolina case law, a defendant can negate the element of felonious intent by showing he took or attempted to take the property under a bona fide claim of right or title to the property. *See State v. Spratt*, 265 N.C. 524, 144 S.E.2d 569 (1965). In *Spratt*, our Supreme Court stated, "A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a *bona fide claim of right or title to the property*, or for the personal protection

and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority." *Id.* at 526-27, 144 S.E.2d at 571 (emphasis added) (citations omitted). *Spratt*, in turn, relied on a line of cases including *State v. Lawrence*. In *Lawrence*, the defendant was charged with robbery after assaulting the victim because defendant claimed the victim "owed him something." 262 N.C. at 168, 136 S.E.2d at 600. In granting a new trial, the Supreme Court held the defendant was entitled to a jury instruction on felonious intent where the conflicting evidence could permit a finding the taking was without felonious intent. *Id.*; *see also* N.C.P.I.—Crim. 217.10 n.4 (June 2016) (pattern jury instruction for Common Law Robbery specifically providing: "In the event that a defendant relies on claim of right, the jury should be told that if the defendant honestly believed he was entitled to take the property, he cannot be guilty of robbery").[3]

Decisions from this Court, however, have questioned *Spratt* and rejected the notion that a defendant cannot be guilty of armed robbery where the defendant claims a good-faith belief that he had an ownership interest in the property taken.[4] *See State v. Oxner*, 37 N.C. App. 600, 604, 246 S.E.2d 546, 548 (1978) ("We renounce the notions that force be substituted for voluntary consent and violence be substituted for due process of law."), *judgment aff'd without precedential value*, 297 N.C. 44, 252 S.E.2d 705 (1979); *State v. Willis*, 127 N.C. App. 549, 552, 492 S.E.2d 43, 45 (1997). *Oxner* presented similar facts as the case at bar: a claim of money owed related to a drug deal and a charge of robbery with a firearm. 37 N.C. App. at 602-04, 246 S.E.2d at 547-48. However, on review, our Supreme Court divided equally, leaving this Court's opinion without precedential value. Moreover, *Oxner* differs from this case in that there: (A) the defendant denied taking any property at all; and

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3. We note the pattern jury instructions for Robbery with a Firearm, Attempted Robbery with a Firearm, and Robbery with a Dangerous Weapon Other than a Firearm do not include such express language specific to this claim of right defense. *Compare* N.C.P.I.—Crim. 217.10 (June 2016) (Common Law Robbery), *with* N.C.P.I.—Crim. 217.20 (June 2018) (Robbery with a Firearm), N.C.P.I.—Crim. 217.25 (May 2003) (Attempted Robbery with a Firearm), *and* N.C.P.I.—Crim. 217.30 (June 2018) (Robbery with a Dangerous Weapon – Other than a Firearm). However, the element of felonious intent is required for all of these offenses. *See Spratt*, 265 N.C. at 526, 144 S.E.2d at 571 (citation omitted).

4. A review of other jurisdictions reveals a split across the country on whether a bona fide claim of right defense precludes an armed robbery conviction. *See generally* Kristine Cordier Karnezis, Annotation, *Robbery, Attempted Robbery, or Assault to Commit Robbery, as Affected by Intent to Collect or Secure Debt or Claim*, 88 A.L.R.3d 1309 (1978 & Supp. 2018).

(B) the claim was vague and related to an unliquidated amount. *See id.* at 604, 246 S.E.2d at 548. Here, the claim was for specific amounts, there was no dispute Defendant—along with Linn and Jackson—intended to recoup their money, and even Leisure admitted she owed the money.

In *Willis*, the defendant contended the State was required to prove the victim actually owned the property taken in order for the offense to constitute armed robbery. 127 N.C. App. at 551-52, 492 S.E.2d at 44-45. This Court rejected this argument and held in the absence of any evidence showing the defendant had an ownership interest in the property, the bona fide claim of right, or "self-help," defense simply did not apply. *Id.* In reaching its decision, however, this Court did question the ongoing viability of *Spratt*. *Id.* at 552, 492 S.E.2d at 45. Nevertheless, to the extent *Willis* is construed as conflicting with the earlier Supreme Court opinions in *Lawrence* and *Spratt*, among others, we conclude we remain bound to follow and apply *Spratt*. *See Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (citations omitted).

Here, unlike in *Willis*, the evidence at trial demonstrates Defendant, along with Linn and Jackson, went to Leisure's home to retrieve the money they provided to Leisure for the purchase of drugs. The witnesses for both the State and defense agreed Defendant, Linn, and Jackson were attempting to collect monies owed to them. Defendant testified he gave Linn the money to purchase drugs from Leisure; Linn told Defendant that he would talk to Leisure and get Defendant's money back; and that he, Jackson, and Linn went to Leisure's house in an attempt to recover their money. Both Linn and Leisure, who testified for the State, agreed that Defendant and Jackson went to Leisure's house to obtain money they believed was their property. After a thorough review of the record, we conclude the State presented no evidence tending to show Defendant possessed the necessary intent to commit robbery. Rather, all of the evidence proffered at trial supports Defendant's claim that Defendant, Linn, and Jackson went to Leisure's house to retrieve their own money. Therefore, under *Spratt*, Defendant could not be guilty of Conspiracy to Commit Robbery with a Dangerous Weapon because he—and his alleged co-conspirators—held a good-faith claim of right to the money. *See Spratt*, 265 N.C. at 526-27, 144 S.E.2d at 571.

Because there was no evidence suggesting Defendant had an intent to take and convert property belonging to another, the trial court erred in denying Defendant's Motion to Dismiss the charge of Conspiracy to Commit Robbery with a Dangerous Weapon. Consequently, we reverse the Judgment on that charge.

III. Felonious Breaking or Entering

[2] "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) (citation omitted). Here, the trial court expressly instructed the jury that to convict Defendant of Felonious Breaking or Entering, it was required to find Defendant intended to commit Robbery with a Dangerous Weapon. As discussed above, the trial court erred in denying Defendant's Motion to Dismiss the charge of Conspiracy to Commit Robbery with a Dangerous Weapon because Defendant lacked the necessary felonious intent. Therefore, the trial court also erred in denying Defendant's Motion to Dismiss the charge of Felonious Breaking or Entering, which was expressly only predicated on the felony of Robbery with a Dangerous Weapon.

Nevertheless, the jury did find Defendant guilty of Felonious Breaking or Entering, including finding the State had proven all of the elements of that offense. "Misdemeanor breaking or entering, G.S. 14-54(b), is a lesser included offense of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building." *State v. O'Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985) (citations omitted). Misdemeanor Breaking or Entering does not require a finding of felonious intent. *See id.* As our holding above only negates the element of Defendant's felonious intent to commit Robbery with a Dangerous Weapon, the jury's verdict still supports finding Defendant guilty of Misdemeanor Breaking or Entering. We reverse and remand to the trial court to arrest judgment on the charge of Felonious Breaking or Entering and to enter judgment on Misdemeanor Breaking or Entering. *State v. Silas*, 168 N.C. App. 627, 635, 609 S.E.2d 400, 406 (2005) (citation omitted), *modified on other grounds and aff'd*, 360 N.C. 377, 627 S.E.2d 604 (2006).

Conclusion

Accordingly, we reverse the Defendant's conviction for Conspiracy to Commit Robbery with a Dangerous Weapon. Defendant did not challenge his conviction for Discharging a Weapon into an Occupied Property; however, we remand for resentencing because this offense was consolidated for judgment with Conspiracy to Commit Robbery with a Dangerous Weapon. Further, we reverse Defendant's conviction of Felonious Breaking or Entering and remand this matter for the trial

court to arrest judgment on Felonious Breaking or Entering and enter judgment against Defendant for Misdemeanor Breaking or Entering.

REVERSED IN PART AND REMANDED.

Chief Judge McGEE and Judge HUNTER concur.

STATE OF NORTH CAROLINA
v.
NACARRIAS T. JONES, DEFENDANT

No. COA18-176

Filed 5 March 2019

Search and Seizure—traffic stop—reasonable suspicion—frisk of defendant outside of vehicle—duration of stop

In a prosecution for multiple drug offenses, defendant's motion to suppress contraband was properly denied where the investigating officer had reasonable suspicion to initiate a traffic stop based on defendant's failure to wear a seatbelt, and the officer's lawful request that defendant exit the vehicle and submit to a weapons frisk did not prolong the stop beyond the time reasonably necessary to safely carry out the mission of the stop. The trial court's order was affirmed, even though the court based its denial on a different basis—that the officer had reasonable suspicion to extend the stop.

Appeal by defendant from judgment entered 23 October 2017 by Judge Imelda J. Pate in Sampson County Superior Court. Heard in the Court of Appeals 23 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Nick Benjamin, for the State.

Jeffrey William Gillette for defendant-appellant.

BERGER, Judge.

Nacarrias T. Jones ("Defendant") appeals the trial court's denial of his motion to suppress. Defendant argues his constitutional rights were violated when officers unnecessarily extended a traffic stop without reasonable suspicion. We disagree and affirm.

Factual and Procedural Background

On June 10, 2015, Defendant was a passenger in a rental car driven by Jelisa Simmons ("Simmons"). Deputies Ronie Robinson ("Deputy Robinson") and Dustin Irvin ("Deputy Irvin") with the Sampson County Sheriff's Department initiated a traffic stop of Simmons' vehicle because Defendant was not wearing a seatbelt. Deputy Irvin approached the passenger side of the vehicle and observed the passenger seat "leaned back very far" while Defendant was leaning forward with his head near his knees in "a very awkward position." Deputy Irvin also observed that Defendant's hands were around his waist and not visible to Deputy Irvin. Due to the way that Defendant was "bent forward," it appeared to Deputy Irvin that Defendant "was possibly hiding a gun." When Deputy Irvin introduced himself, Defendant glanced up at him, looked around the front area of the vehicle, but remained seated in the same awkward position. Deputy Irvin testified that, based upon his training and experience, Defendant's behavior was not typical.

When Deputy Irvin advised Defendant that the traffic stop was initiated because Defendant had not been wearing his seat belt, Defendant apologized. Deputy Irvin asked for Defendant's identification, but Defendant was unable to produce any document to verify his identity. However, Defendant stated that he was "not going to lie" about his identity. Deputy Irvin testified that, based upon his training and experience, use of the phrase "I'm not going to lie to you" or other similar phrases were signs of deception. Deputy Irvin asked Defendant to exit the vehicle due to Defendant's unusual behavior and because Defendant could not provide any identification.

During the suppression hearing, Deputy Irvin testified as follows:

> [Deputy Irvin:] I asked [Defendant] if he would step out of the vehicle.
>
> [The State:] And why did you do that?
>
> [Deputy Irvin:] Just based off of his behavior. First of all, I couldn't see his hands. He was leaned forward as if he was hiding something in his lap. And also—[Defendant] didn't have his identification. So for me to complete my action of investigating the seat belt violation, I would need to know who [Defendant] was, and for that, I would need his name, his date of birth, sometimes I would need an address, just depending on how common the name is. And to do that, I would need to run all of his information through our law enforcement database.

[The State:] And is that database something you have in your car?

[Deputy Irvin:] Yes. It is something we can pull up on our terminal inside of our patrol vehicle that's mounted inside the vehicle.

[The State:] And so it's mounted inside the vehicle?

[Deputy Irvin:] Yes.

[The State:] And is that going to pull up a photo?

[Deputy Irvin:] Yes. It will pull up any driver history, criminal history, and it will pull up photos of the individual.

[The State:] And is that part of why you would want him there, to look at his face, because the photo is going to be mounted in the car; is that right?

[Deputy Irvin:] Yes, that's correct.

. . . .

[The State:] . . . What would you have had to do if you didn't ask him out of the vehicle to go back with you to this database?

[Deputy Irvin:] Well, I would have, first of all, had to remember his name and date of birth and then where he was from, which I would have to get that information, walk back to my vehicle, and then if I was unable to locate his information in the database, I would have to return to the vehicle—to [Defendant's] vehicle to correct whatever information, you know, was wrong, and then return back to my patrol vehicle to again attempt to locate his information. . . .

[The State:] And now would that have taken you longer to walk back and forth?

[Deputy Irvin:] Yes, certainly.

[The State:] And would that be less safe for you?

[Deputy Irvin:] Yes. That would definitely be less safe because I would have to repeatedly approach the vehicle that we had pulled over, which when I initially approached the vehicle, I can see [Defendant], I can see the driver, and I know, you know, basically what's going on in the vehicle.

> But once I leave that vehicle to go back to my patrol vehicle, when I re-approach the suspect vehicle, I have no idea what's going on inside. They could have pulled weapons, they could have tried to hide narcotics. I have no idea once I have to re-approach.

When Defendant exited the vehicle, he turned and pressed the front of his body against the vehicle while he kept both hands around his waist. Deputy Irvin testified that "on numerous occasions," he had observed individuals involved in traffic stops get out of vehicles with their hands near their waistline who were later discovered to have had handguns concealed in their waistbands. Defendant denied having any weapons on him, and consented to a search of his person.

Defendant placed his left hand on top of the vehicle, but kept his right hand at his waistline. Because Defendant's pants were being worn below his waist, Deputy Irvin asked if he could pull Defendant's pants up. Defendant agreed and then placed his right hand on the vehicle. As Deputy Irvin was pulling up Defendant's pants, a large wad of paper towels fell out of Defendant's pants and onto the ground. Irvin asked what had fallen out, and Defendant stated, "Man, I already know," and placed his hands behind his back. Inside the paper towels, Deputy Irvin found a plastic bag which contained more than fifty-six grams of cocaine. Inside the vehicle, deputies seized a marijuana grinder, marijuana, marijuana "roaches," two cell phones, an empty plastic baggie, and two pills. Defendant claimed that he had found the bag of cocaine at the beach, along with the money, clothes, marijuana grinder, and marijuana. Defendant also stated that Simmons did not know anything about the contraband.

Defendant was arrested and charged with trafficking cocaine by possession, trafficking cocaine by transportation, possession with intent to sell and/or deliver cocaine, possession of drug paraphernalia, possession of marijuana, and possession of a Schedule IV controlled substance. He was subsequently indicted for trafficking cocaine by possession, trafficking cocaine by transportation, and possession with intent to sell and deliver cocaine.

On January 26, 2017, Defendant filed a motion to suppress in Sampson County Superior Court. In the January 31, 2017 order denying Defendant's motion to suppress, the trial court found that because Defendant had not provided Deputy Irvin with any form of identification, had been exhibiting evasive and nervous behavior while in the vehicle, and based on Deputy Irvin's training and experience,

reasonable suspicion had developed to support Deputy Irvin's extension of the traffic stop.

On October 23, 2017, Defendant entered an *Alford* plea of guilty to trafficking cocaine by possession, trafficking cocaine by transportation, possession with intent to sell or deliver, possession of marijuana, and possession of drug paraphernalia. Defendant was sentenced to an active term of thirty-five to fifty-one months in prison and ordered to pay a $50,000.00 fine. Defendant preserved his right to appeal the denial of his motion to suppress at the time he entered the guilty plea, and timely entered notice of appeal.

Defendant argues on appeal that the trial court erred when it denied his motion to suppress evidence that was obtained during the traffic stop. Specifically, Defendant contends Deputy Irvin and Deputy Robinson lacked reasonable suspicion to extend the traffic stop. We disagree.

Standard of Review

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

Analysis

> The Fourth Amendment protects individuals against unreasonable searches and seizures . . . and the North Carolina Constitution provides similar protection . . . . A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. . . . [A] traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot.

State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citations and quotation marks omitted). "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). "The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012)

(citations and quotation marks omitted). "Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (*purgandum*[1]). A traffic stop is a reasonable seizure under the Fourth Amendment when the police have reasonable suspicion "to believe that a traffic violation has occurred." *Styles*, 362 N.C. at 414-15, 665 S.E.2d at 440.

> The tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

Rodriguez v. United States, 575 U.S. ___, 191 L. Ed. 2d 492, 498 (2015) (*purgandum*).

Accordingly,

> [t]he duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose before that mission was completed. The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop. These inquiries include checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.
>
> In addition, an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. These precautions appear to include

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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.

> conducting criminal history checks . . . . Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop. But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop.

State v. Bullock, ___ N.C. ___, ___, 805 S.E.2d 671, 673-74 (2017) (*purgandum*), *cert. denied*, No. 18-924 (U.S. Feb. 25, 2019).

As a "precautionary measure" to "protect the officer's safety," a police officer may "as a matter of course" order the driver and passengers of a lawfully stopped car to exit his vehicle "during a stop for a traffic violation." *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) (citations and quotation marks omitted). Because the officer's "safety interest stems from the mission of the stop itself[,] . . . any amount of time that the request to exit the rental car added to the stop was simply time spent pursuing the mission of the stop." *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676 (citation and quotation marks omitted). Moreover, because "[t]raffic stops are especially fraught with danger to police officers," an officer may also lawfully frisk the defendant for weapons without "prolong[ing] a stop beyond the time reasonably required to complete the mission of the stop." *Id.* (*purgandum*). Because "traffic stops remain lawful only so long as unrelated inquires do not *measurably* extend the duration of the stop," a "frisk that lasts just a few seconds . . . d[oes] not extend the traffic stop's duration in a way that would require reasonable suspicion." *Id.* at ___, 805 S.E.2d at 676-77 (*purgandum*).

Here, the initiation of the traffic stop was justified by Deputy Irvin's observation that Defendant was not wearing his seatbelt as a passenger of a moving vehicle in violation of Section 20-135.2A(a). N.C. Gen. Stat. § 20-135.2A(a) (2017). Deputy Irvin's reasonable suspicion of Defendant's traffic violation permitted him to initiate the traffic stop.

From the moment the traffic stop was initiated, Deputy Irvin's conduct did not "prolong [the] stop beyond the time reasonably required to complete the mission of the stop." *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676 (*purgandum*). Defendant was unable to provide any identification, and Deputy Irvin attempted to more efficiently conduct the requisite database checks and "complete the mission of the stop" by requesting Defendant exit the vehicle. In addition, Deputy Irvin "could and did lawfully ask [D]efendant to exit the rental vehicle" and was permitted to

frisk Defendant for weapons. *Id.* During the lawful frisk, cocaine fell to the ground from Defendant's person. Because Deputy Irvin's conduct did not extend the traffic stop's duration in any way, an additional showing that Deputy Irvin had reasonable suspicion of another crime was unnecessary. Accordingly, we affirm the trial court's denial of Defendant's motion to suppress.

It is immaterial that the trial court denied Defendant's motion to suppress upon a finding that Deputy Irvin had reasonable suspicion to extend the traffic stop.

> A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence.

State v. Austin, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citation omitted).

Conclusion

The trial court properly denied Defendant's motion to suppress.

AFFIRMED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
TERANCE GERMAINE MALACHI, DEFENDANT

No. COA16-752-2

Filed 5 March 2019

Search and Seizure—anonymous tip—stop and frisk—reasonable suspicion—totality of the circumstances

In a prosecution for possession of a firearm by a felon, the trial court did not commit plain error by allowing evidence of a handgun officers removed from defendant's waistband during a stop and frisk, where the officers had reasonable suspicion to believe defendant illegally possessed a firearm and that he was armed and dangerous. Defendant's behavior—including "blading," or turning away to prevent the officers from seeing his weapon—and his failure to inform the officers he was lawfully armed as required by concealed carry statutes were sufficient to support the officers' stop and frisk.

Appeal by Defendant by writ of certiorari from judgment entered 28 January 2016 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2017, decided 25 January 2017, reversed by the Supreme Court of North Carolina 7 December 2018 and remanded to the Court of Appeals.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellant.

INMAN, Judge.

The trial court did not commit plain error by allowing evidence of a handgun a police officer removed from the waistband of a man in the course of stopping, seizing, and frisking him after forming a reasonable articulable suspicion that the suspect may have been engaged in unlawful conduct and was armed and dangerous.

Terance Germaine Malachi ("Defendant") appeals from his conviction for possession of a firearm by a felon following a jury trial and a related conviction for attaining habitual felon status. This is this Court's

second decision regarding Defendant's appeal, to resolve an issue not addressed in our initial decision.

Defendant argues that the trial court committed plain error by allowing the jury to hear evidence obtained as a result of an unconstitutional stop and seizure of Defendant. After careful review of the record and applicable law, we conclude that Defendant has failed to demonstrate plain error.

Factual and Procedural Background

An expanded summary of the factual and procedural background of this appeal can be found in our initial decision in *State v. Malachi*, ___ N.C. App. ___, 799 S.E.2d 645 (2017), *rev'd and remanded*, ___ N.C. ___, 821 S.E.2d 407 (2018). Below we summarize the facts and procedure pertinent to the single issue before us.

The evidence at trial tended to show the following:

Shortly after midnight on 14 August 2014, the Charlotte-Mecklenburg Police Department received a 911 call from an anonymous caller. The caller told the dispatcher that in the rear parking lot of a gas station located at 3416 Freedom Drive in Charlotte, North Carolina, an African American male wearing a red shirt and black pants had just placed a handgun in the waistband of his pants.

Officer Ethan Clark, in uniform and a marked car, first responded to the call. Officer Clark's arrival was followed almost immediately by Officer Jason Van Aken. Officer Clark saw about six to eight people standing in the parking lot, including a person who matched the description provided to the dispatcher and who was later identified as Defendant.

When Officer Clark got out of his car, Defendant looked directly at him, "bladed, turned his body away, [and] started to walk away." Officer Clark immediately approached Defendant and grabbed his arm. Officer Van Aken held Defendant's other arm and the two officers walked Defendant away from the crowd of people. Defendant was squirming. Officer Clark told Defendant to relax. Prior to this, neither officer spoke with Defendant.

Officer Clark placed Defendant in handcuffs and told him that he was not under arrest. Officer Van Aken then frisked Defendant and pulled a revolver from his right hip waistband. As the two officers seized the revolver, a third officer, Officer Kevin Hawkins, arrived. The officers then told Defendant he was under arrest and placed him in the back of Officer Clark's patrol vehicle.

Defendant was tried before a jury on charges of carrying a concealed weapon and possession of a firearm by a felon. Before evidence was presented, Defendant filed a motion to suppress all evidence of the revolver and argued that a police officer may not legally stop and frisk anyone based solely on an anonymous tip that simply described the person's location and description but that did not report any illegal conduct by the person. The trial court denied the motion. The State presented the challenged evidence at trial without objection by Defendant.

The jury returned a verdict of not guilty on the charge of carrying a concealed weapon and guilty of possession of a firearm by a felon. Defendant then pleaded guilty, pursuant to *N.C. v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), to attaining habitual felon status. The trial court sentenced Defendant in the mitigated range to 100 to 132 months of imprisonment.

Analysis

Defendant argues that the trial court committed plain error by allowing the jury to hear evidence of the revolver police removed from his waistband in the course of stopping and frisking him in violation of his Fourth Amendment rights. Defendant concedes that because, after the trial court denied his motion to suppress this evidence, his trial counsel did not object when the evidence was offered at trial, our review is limited to plain error analysis. Our Supreme Court has recently reiterated the standards applicable to plain error review:

> [T]o demonstrate that a trial court committed plain error, the defendant must show that a fundamental error occurred at trial. To show fundamental error, 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. Further, . . . because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.

State v. Maddux, ___ N.C. ___, ___, 819 S.E.2d 367, 371 (2018) (citations and quotation marks omitted) (second alteration in original). In applying this standard to the denial of a motion to suppress, "[o]ur review . . . is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are binding on appeal, and whether those factual findings in turn

support the judge's ultimate conclusions of law.' " *State v. Williams*, ___ N.C. App. ___, ___, 786 S.E.2d 419, 425 (2016) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Those conclusions of law are reviewable *de novo*. *Williams*, ___ N.C. App. at ___, 786 S.E.2d at 425.

We hold that the trial court did not err, much less commit plain error, in denying Defendant's motion to suppress. This case is fundamentally controlled by *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), in which the Supreme Court of the United States held a police officer did not violate the Fourth Amendment to the United States Constitution when he stopped an individual and frisked him for weapons without probable cause. 392 U.S. at 30-31, 20 L. Ed. 2d at 911. Under *Terry*, a stop-and-frisk of an individual passes constitutional muster if: (1) the stop, at its initiation, was premised on a reasonable suspicion that crime may have been afoot; and (2) the officer possessed a reasonable suspicion that the individual involved was armed and dangerous. *See*, *e.g.*, *State v. Johnson*, 246 N.C. App. 677, 686, 783 S.E.2d 753, 760 (2016) (noting that "[p]ursuant to *Terry*, [an officer's] frisk of [a] defendant may only be justified by [these] two independent criteria"). Thus, Officers Clark and Van Aken lawfully stopped and frisked Defendant if they possessed reasonable suspicion: (1) that Defendant may have been involved in criminal activity at the time of the stop; and (2) that Defendant was armed and dangerous.

To satisfy the first element, the officer's reasonable suspicion must be "supported by articulable facts that criminal activity '*may* be afoot.' " *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (emphasis added). Although "[t]he concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules[,]' " it is not without limitation and definition:

> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.' " The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.

Id. (citations omitted). Whether or not probable cause existed to execute the stop is determined "after considering the totality of circumstances

known to the officer." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015).

Binding precedent requires the conclusion that the anonymous tip was insufficient, by itself, to supply Officer Clark with reasonable suspicion to stop Defendant. Although he was able to identify Defendant based on the tip, it did not indicate any illegal activity sufficient to give rise to reasonable suspicion standing alone:

> [a]n accurate description of a subject's readily observable location and appearance [in an anonymous tip] is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Florida v. J.L., 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000). *In J.L.*, police received an anonymous tip that a young black male in a plaid shirt waiting at a bus stop was carrying a firearm. *Id.* at 268, 146 L. Ed. 2d at 258. Officers arrived at the scene, identified an individual matching that description, and, with "no reason to expect . . . illegal conduct" or any "threatening or unusual movements" on anyone's part, stopped the individual and frisked him, discovering a gun. *Id.* The defendant, a juvenile, was charged with possessing a firearm without a license and possessing a firearm while under the age of 18. *Id.* at 269, 146 L. Ed. 2d at 259. The Supreme Court held that this stop and frisk violated the Fourth Amendment, as the anonymous tip failed to reliably indicate illegal possession of a firearm such that it, standing alone, could provide reasonable suspicion to institute a *Terry* stop. *Id.* at 274, 146 L. Ed. 2d at 262.

But the officers' suspicion in this case was based on more than an anonymous tip. Unlike in *J.L.*, the record below and the trial court's findings disclose facts beyond the anonymous tip to support Officer Clark's reasonable suspicion that Defendant illegally possessed a firearm, including those facts specifically identified by the Supreme Court as lacking in that case. The unchallenged findings of fact made by the trial court and the uncontroverted evidence disclose that Officer Clark arrived on the scene in full uniform and a marked police car before making eye contact with Defendant. As Officer Clark was exiting his car, the Defendant "turned his body in such a way as to prevent the officer from observing a weapon." Officer Clark testified that he was trained

"on . . . some of the characteristics of armed suspects[,]" and that this kind of turn was known as "blading," as "[w]hen you have a gun on your hip you tend to blade it away from an individual. One of the indicators [of an armed person] is you turn and have your body between the other person and the firearm you're carrying." Defendant next began to move away. Officer Van Aken, who by then was on the scene, approached Defendant with Officer Clark; at no point prior to or during the approach did Defendant inform the officers that he was lawfully armed as required by our concealed carry statutes. *See* N.C. Gen. Stat. § 14-415.11(a) (2017) ("[W]henever the person is carrying a concealed handgun, [the person] shall disclose to any law enforcement officer that the person . . . is carrying a concealed handgun *when approached* or addressed by the officer[.]" (emphasis added)).[1]

Although we are unable to identify a prior North Carolina appellate decision holding reasonable suspicion existed under these particular facts, each individual fact present here has been cited to support a conclusion of reasonable suspicion as part of a totality of the circumstances analysis. *See, e.g.*, *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) ("[U]pon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight[.]"); *State v. Garcia*, 197 N.C. App. 522, 529, 677 S.E.2d 555, 559 (2009) ("Factors to determine whether reasonable suspicion existed include . . . unprovoked flight." (citation omitted)); *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) ("[A]n officer's experience and

1. Defendant argues that the trial court failed to make specific findings of fact that Defendant was aware that Officer Clark was a police officer, that he was aware Officer Clark was approaching him, or that he had time to speak with officers Clark and Van Aken before his seizure. However, the uncontroverted evidence of record shows that: (1) Defendant looked Officer Clark in the eyes; (2) Officer Clark was in full uniform and a marked vehicle; (3) Defendant "squared" to Officer Clark when he looked at him before blading his body; and (4) Defendant began to move away from Officer Clark as he was exiting the vehicle and approaching Defendant. There was no evidence introduced that Defendant was facing away from Officer Clark when he arrived, only that Defendant "bladed" by turning away, placing his body between Officer Clark and the firearm; Officer Clark testified that "when [he] exited [his] vehicle is when [Defendant] *turned and bladed* his body away." Thus, there is no evidence establishing that Clark approached Defendant from behind rather than from the side, or that Defendant walked away in the direct opposite direction from Officer Clark rather than a perpendicular one, such that Defendant would be unaware of his advance. Defendant declined to introduce any conflicting evidence as to what transpired, and "[i]n that event, the necessary findings are implied from the admission of the challenged evidence." *State v. Vick*, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995). As we must view this uncontroverted evidence in the light most favorable to the State, *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010), the trial court found those facts concerning the issues identified by Defendant, to the extent that any were necessary, by implication in admitting the evidence.

training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes." (citation omitted)); *State v. Sutton*, 232 N.C. App. 667, 681-82, 754 S.E.2d 464, 473 (2014) (holding that the defendant's "posturing [which] made it apparent that he was concealing something on his person" and subsequent failure to comply with Section 14-415.11(a) when approached, in addition to other facts in a totality of the circumstances analysis, gave rise to reasonable suspicion to conduct an investigatory stop). Given Defendant's "blading" after making eye contact with Officer Clark in his marked car and uniform, Defendant's movements away from Officer Clark as he was being approached, Officer Clark's training in identifying armed suspects, and Defendant's failure to comply with Section 14-415.11(a) when approached by the officers, we hold that the officers had reasonable suspicion under the totality of the circumstances to conduct an investigatory stop of Defendant in response to the tip identifying him as possessing a firearm at the gas station.

We now turn to whether the officers possessed reasonable suspicion that Defendant was armed and dangerous such that they were lawfully permitted to frisk him. We hold that such reasonable suspicion existed in accordance with North Carolina precedent and persuasive federal authority. In *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981), the North Carolina Supreme Court observed that "[i]f upon detaining [an] individual [pursuant to a lawful *Terry* stop], the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection." 303 N.C. at 559, 280 S.E.2d at 919 (citations omitted). This is certainly true where the officer has reasonable suspicion to believe the individual seized is unlawfully armed. *See Sutton*, 232 N.C. App. at 683-84, 754 S.E.2d at 474 (holding that facts giving rise to reasonable suspicion that the defendant was unlawfully carrying a firearm also supported a reasonable suspicion that the defendant was armed and dangerous).

The United States Court of Appeals for the Fourth Circuit has held, in an *en banc* decision, that an officer may lawfully conduct a frisk following a *Terry* stop if he "reasonably suspect[s] that the person is armed and therefore dangerous. . . . [T]he risk of danger is created simply because the person, who was forcibly stopped, is armed." *United States v. Robinson*, 846 F.3d 694, 700, *cert. denied*, 138 S. Ct. 379, 199 L. Ed. 2d 277 (2017) (underline in original). The Fourth Circuit also rejected the argument, raised by Defendant here, that a state's laws allowing for the public carrying of firearms might deprive the officer of reasonable suspicion:

> [T]he risk inherent in a forced stop of a person who is armed exists even when the firearm is legally possessed. The presumptive lawfulness of an individual's gun possession in a particular State does next to nothing to negate the reasonable concern an officer has for his own safety when forcing an encounter with an individual who is armed with a gun and whose propensities are unknown.

Id. at 701 (citing *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013)).

As set forth *supra*, Officers Clark and Van Aken had reasonable suspicion to believe that Defendant unlawfully possessed a firearm at the time they stopped him. This reasonable suspicion of unlawful possession, coupled with Defendant's struggling during the stop and his continued failure to inform the officers that he was armed as required by Section 14-415.11(a), convince us that the officers also possessed reasonable suspicion to frisk him as a potentially armed and dangerous individual. *Sutton*, 232 N.C. App. at 683-84, 754 S.E.2d at 474.

Conclusion

For the above reasons, we hold the trial court did not err, much less commit plain error, in denying Defendant's motion to suppress or in allowing the jury to hear evidence challenged in the motion to suppress.

NO PLAIN ERROR.

Judges ARROWOOD and HAMPSON concur.

STEWART v. SHIPLEY

[264 N.C. App. 241 (2019)]

TILLIE STEWART, PLAINTIFF
v.
JAMES R. SHIPLEY, DPM, INSTRIDE MT. AIRY FOOT AND ANKLE SPECIALISTS, PLLC D/B/A MT. AIRY FOOT & ANKLE CENTER, AND NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY, DEFENDANTS

No. COA18-745

Filed 5 March 2019

1. Appeal and Error—preservation of issues—specific grounds—adequacy of service

A medical malpractice plaintiff failed to preserve her argument that defendants should be estopped from asserting insufficiency of process as a defense. While plaintiff's trial counsel argued that defendants knew of the existence of the lawsuit because they filed motions for extension of time, trial counsel failed to further argue that these motions led plaintiff to rely to her detriment on the belief that defendants would not challenge the adequacy of service.

2. Process and Service—insufficiency—defense—estoppel

Principles of estoppel did not bar medical malpractice defendants from asserting that plaintiff failed to properly serve them with process. Defendants' motions for extension of time referred to "alleged service" and did not concede that the attempted service had been valid; further, there was a period of seven days between defendants' assertion of the defense of insufficiency of service of process and the last date on which plaintiff could have extended the summons.

Appeal by plaintiff from order entered 19 December 2016 by Judge Eric C. Morgan in Surry County Superior Court. Heard in the Court of Appeals 29 January 2019.

Pangia Law Group, by Amanda C. Dure and Joseph L. Anderson, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough, LLP, by G. Gray Wilson and Lorin J. Lapidus, for defendants-appellees.

DAVIS, Judge.

In this case, we consider the circumstances under which a defendant is estopped from asserting the defense of insufficiency of service of

process. Plaintiff Tillie Stewart appeals from the trial court's dismissal of her complaint against defendants Dr. James R. Shipley and Instride Mt. Airy Foot and Ankle Specialists, PLLC (collectively the "Shipley Defendants"). In her appeal, she argues that principles of estoppel serve to bar the Shipley Defendants from asserting that they were not properly served with process in this lawsuit. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

On 19 November 2012, Stewart began treatment for plantar fasciitis pain in her left foot with Dr. Shipley at Mt. Airy Foot and Ankle Center in Mount Airy, North Carolina. After three months of treatment, Dr. Shipley recommended that Stewart undergo surgery on her left foot to alleviate her pain. The operation took place on 19 February 2013 at Northern Hospital of Surry County ("Northern"). Although Stewart had consented to surgery only on her left foot, Dr. Shipley first operated on her right foot and then repeated the procedure on her left foot. As a result, Stewart subsequently experienced significant pain in both feet.

Stewart filed a complaint in Surry County Superior Court on 18 February 2016 alleging claims of medical malpractice and battery against Dr. Shipley, Instride Mt. Airy Foot and Ankle Specialists, PLLC ("Instride"), and Northern. Summonses for all of the defendants were issued that same day.

On 29 February 2016, counsel for Stewart sent an email to Courtney Witt, a claims specialist for the Shipley Defendants' insurer, containing the complaint and summonses as attachments. In the email, Stewart's counsel inquired whether the Shipley Defendants would "accept service or if [Witt could] forward this to [the Shipley Defendants'] attorney." Witt responded that same day, stating that Stewart would "have to serve the insured" as the insurance company would "not be accepting service."

The Shipley Defendants filed a motion for an extension of time in which to respond to Stewart's complaint on 9 March 2016, which stated that the complaint had been "allegedly served on or about February 19, 2016." On 10 March 2016, a private process server delivered a summons and complaint to the registered agent for Instride. Instride subsequently filed an amended motion for extension of time on 31 March 2016, which the trial court granted that same day. In this motion, Instride stated that Stewart's complaint was "allegedly served on or about March 10 2016." A private process server delivered a summons and complaint to Dr. Shipley on 7 April 2016.

On 10 May 2016, the Shipley Defendants filed an answer asserting a number of defenses, including lack of personal jurisdiction and insufficiency of service of process pursuant to Rules 12(b)(2) and (5) of the North Carolina Rules of Civil Procedure. The Shipley Defendants also submitted affidavits from Kevin McDonald, the president of Instride, and Dr. Shipley. In their respective affidavits, McDonald and Dr. Shipley each stated that they had been handed a copy of the complaint with no accompanying summons by persons who did not identify their status or position.

On 25 August 2016, the Shipley Defendants filed a motion to dismiss the claims against them for failure to state a claim upon which relief may be granted under Rule 12(b)(6), lack of personal jurisdiction based on Rule 12(b)(2), and insufficiency of service of process pursuant to Rule 12(b)(5). A hearing on the Shipley Defendants' motion was held before the Honorable Eric C. Morgan on 14 November 2016. On 19 December 2016, the trial court issued an order granting the motion to dismiss based on improper service. The court determined that Stewart "did not attempt to have [the Shipley Defendants] served by the sheriff, and that the clerk of Surry County has not appointed plaintiff's process servers and, consequently, plaintiff's attempted service by private process servers is invalid under Rule 4[.]" Stewart gave timely notice of appeal to this Court.[1]

Analysis

"We review *de novo* questions of law implicated by the denial of a motion to dismiss for insufficiency of service of process. The trial court's factual determinations are binding on this court if supported by competent evidence." *New Hanover Cty. Child Support Enf't ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (internal citations omitted).

At the outset, it is important to note that Stewart does not claim that the trial court erred in holding her attempted service of process on the Shipley Defendants was invalid. Nor could such an argument be properly made under these circumstances.

This Court has stated the following regarding the use of private process servers:

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1. This case is before us for a second time. In *Stewart v. Shipley*, 805 S.E.2d 545, 2017 N.C. App. LEXIS 859 (2017) (unpublished), we dismissed Stewart's initial appeal as interlocutory. *Id.* at *7. On 26 March 2018, Stewart voluntarily dismissed Northern as a defendant, thereby rendering the trial court's 19 December 2016 order a final judgment. Stewart then filed a new notice of appeal from which the current appeal arises.

> Service must generally be carried out by the sheriff of the county where service is to occur. While the clerk of the issuing court may appoint an alternative person to carry out service, that clerk is not required or authorized to appoint a private process server as long as the sheriff is not careless in executing process.

B. Kelley Enters., Inc. v. Vitacost.com, Inc., 211 N.C. App. 592, 598, 710 S.E.2d 334, 339 (2001) (citation, brackets, and quotation marks omitted). We have also made clear that a defendant's actual notice of a lawsuit's existence is not by itself sufficient to confer personal jurisdiction over the defendant absent proper service of process.

> While a defective service of process may give the defending party sufficient and actual notice of the proceedings, such actual notice does not give the court jurisdiction over the party. Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.

Thomas & Howard Co. v. Trimark Catastrophe Servs., Inc., 151 N.C. App. 88, 91, 564 S.E.2d 569, 572 (2002) (internal citations and quotation marks omitted).

Stewart does not contend that she attempted to have the Shipley Defendants served by the sheriff or that the Surry County Clerk of Court appointed the private process servers who attempted to serve them. Instead, she asserts that even though she failed to properly serve them, they should be estopped from asserting insufficiency of service of process as a defense because (1) they filed motions for extension of time that appeared to acknowledge the fact that they had been served; and (2) upon receiving the Shipley Defendants' answer, Stewart had only one week in which to obtain extensions on their summonses. Therefore, the only issue before us in the present appeal is whether the Shipley Defendants are estopped from asserting that they were never properly served with process.

[1] Initially, the Shipley Defendants argue that Stewart failed to properly preserve this argument for appeal because she did not raise the estoppel issue in the trial court. The North Carolina Rules of Appellate Procedure provide that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

Stewart admits that she did not specifically reference the estoppel doctrine before the trial court. However, she asserts that because "contentions regarding the Shipley Defendants' knowledge of the lawsuit and subsequent filings regarding service" are "[r]life in the pleadings and hearing transcript surrounding the motion to dismiss," her intent to make an argument grounded in estoppel was apparent. She specifically cites to the portion of the hearing transcript in which her counsel stated the following:

> On March 7, the Shipley Defendants filed a Motion for Extension of Time to respond to the Plaintiff's Complaint, stating that the Complaint was . . . "allegedly served on or about February 19, 2016."
>
> To my way of thinking, the fact that they filed a Motion for Extension of Time to respond to the Complaint is pretty darn good evidence that they knew they had been sued. You don't file a motion for an extension of time if you don't know you've been sued.

Based on our careful review of the record, we are unable to agree that Stewart actually made an estoppel argument in the trial court. While Stewart's counsel relied upon the Shipley Defendants' filing of motions for extension of time in arguing that they knew of the lawsuit's existence, her attorney did not go on to further argue that the language contained in these motions led Stewart to rely to her detriment on the belief that the Shipley Defendants would not be contesting the adequacy of service. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." (citations omitted)).

[2] However, even had Stewart properly preserved the issue for appeal, we conclude that her argument would still lack merit. In arguing that the Shipley Defendants are estopped, Stewart relies primarily upon our decision in *Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994). In *Storey*, the plaintiff brought an action against the defendant seeking compensation for services rendered. The defendant was not a resident of North Carolina and had appointed Thomas Wellman, an attorney, as his process agent in North Carolina. A deputy sheriff attempted to effect service by leaving a copy of the summons and complaint with Wellman's law partner at his office. *Id.* at 175, 441 S.E.2d at 603-604.

Wellman subsequently entered an appearance as counsel for the defendant and filed a motion requesting an extension of time in which

to respond to Storey's complaint, which was granted. *Id.* Two additional extensions of time were obtained through stipulation of counsel, amounting to a total delay of "54 days past the date when [Storey] could have procured endorsement of the original summons or issuance of an alias and pluries summons[.]" *Id.* at 175, 177, 441 S.E.2d at 604, 605. At the end of this extended response period, the defendant obtained new counsel, who filed a motion to dismiss based, in part, on insufficiency of service of process, lack of personal jurisdiction, and the expiration of the statute of limitations. The trial court granted the motion. *Id.* at 175-76, 441 S.E.2d at 604.

On appeal, the plaintiff argued "that she was lured into a false sense of security in that defendant's initial trial counsel . . . manifestly [led] Plaintiff's trial counsel to believe that there would be no need to continue further process[.]" *Id.* at 176, 441 S.E.2d at 604. This Court agreed.

> [The] plaintiff was deprived of any opportunity to cure any defects in the process or in the service of process, because defendant's counsel led plaintiff's counsel to believe it was unnecessary to continue further process. Defendant, absent the additional extension of time stipulated to by plaintiff's counsel, would have been subject to entry of default following the expiration of the second extension . . . . The defendant's conduct in securing extensions of time, through opposing counsel's professional courtesy, to 54 days past the date when plaintiff could have procured endorsement of the original summons or issuance of an alias and pluries summons, acts to estop defendant from asserting these defenses.

Id. at 177, 441 S.E.2d at 605.

We distinguished *Storey* in *Washington v. Cline*, 233 N.C. App. 412, 761 S.E.2d 650 (2013). In *Washington*, the plaintiffs brought suit against twelve defendants. The plaintiffs failed to properly serve nine of the twelve defendants, although each defendant received actual notice of the suit. The nine defendants received extensions of time to file a responsive pleading from the trial court and subsequently filed motions to dismiss based on the defense of insufficiency of service of process, which the trial court granted. *Id.* at 413-15, 761 S.E.2d at 652-53.

The plaintiffs appealed the dismissal of the nine defendants to this Court, arguing, in part, that they were estopped from raising the issue of insufficiency of service of process based on *Storey*. We rejected this argument, stating as follows:

> Here, although defendants did receive extensions of time from the trial court, they explicitly stated that the reason for the extensions was to "determine whether any Rule 12 or other defenses [were] appropriate." Defendants-appellees' . . . motion to dismiss for insufficient service of process w[as] entered pursuant to Rule 12(b)(5). Therefore, plaintiffs had notice that such motions could be filed. Furthermore, defendants-appellees in fact served plaintiffs with their answer containing the defenses . . . four days before the last day in which plaintiffs could have obtained extensions of the summonses. It is evident that plaintiffs had actual notice of the defenses . . . . Therefore, because defendants were not responsible for plaintiffs' failure to extend the life of the summonses, we find that *Storey* is inapposite and defendants are not estopped from asserting the defense of insufficient service of process.

Id. at 418, 761 S.E.2d at 654-55.

In the present case, we are of the view that Stewart has failed to demonstrate the applicability of the estoppel doctrine. First, while the Shipley Defendants did move for extensions of time, their original motion stated that the purpose of the extension was "to respond to plaintiff's complaint, which was *allegedly served* on or about February 19, 2016." (Emphasis added.) Similarly, Instride's amended motion recited that Stewart's complaint "was *allegedly served* on or about March 10, 2016." (Emphasis added.) Thus, the Shipley Defendants' motions did not actually concede that the attempted service had been valid, and they served to put Stewart on notice of a possible defect with regard to service of process.

Second, in *Storey* the defendant asserted insufficiency of service as a defense almost two months after the expiration of the plaintiff's deadline for extending the summons. Here, conversely, Stewart concedes that there was a period of seven days between the date she received the Shipley Defendants' answer expressly asserting the defense and the last date on which she could have extended the summonses.[2]

Thus, we are unable to agree with Stewart that the estoppel doctrine applies under these circumstances. Accordingly, even had she

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2. We note that the record reveals service efforts on behalf of Stewart continued even beyond the date of the second motion for extension of time. According to the affidavit of a private process server retained by Stewart, copies of the summons and complaint were delivered to Dr. Shipley on 7 April 2016.

properly preserved this argument for appeal, we would nevertheless be compelled to affirm the trial court's dismissal of her claims against the Shipley Defendants.

Conclusion

For the reasons stated above, we affirm the trial court's 19 December 2016 order.

AFFIRMED.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MARCH 2019)

COLUMBUS CTY. D.S.S. EX REL. MOORE v. NORTON No. 18-642	Columbus (10CVD152)	Affirmed
DEP'T OF TRANSP. v. BLOOMSBURY ESTATES, LLC No. 18-773	Wake (15CVS9786)	Dismissed
EISENBROWN v. TOWN OF LAKE LURE No. 17-934	Rutherford (16CVS197)	Reversed in Part, Affirmed in Part
IN RE A.G.B. No. 18-729	Gaston (17JT249-250)	Affirmed
IN RE H.N.H. No. 18-365	Mecklenburg (15JT21-22)	Affirmed in part; remanded in part
IN RE I.L. No. 18-762	Onslow (14JT70)	Affirmed
IN RE S.H-K.J.L. No. 18-772	Columbus (15JT74) (15JT75)	Affirmed
IN RE S.S.S. No. 18-514	Buncombe (17JT134) (17JT136)	Dismissed
IN RE V.O. No. 18-907	Mecklenburg (18SPC1336)	Vacated and Remanded
PAINTER v. CITY OF MT. HOLLY No. 18-197	Gaston (15CVS3367)	Reversed
STATE v. ALTMAN No. 18-544	Chowan (14CRS50355)	No Error in Part. Vacated in Part.
STATE v. BENNETT No. 18-606	Iredell (15CRS54923-28)	No prejudicial error
STATE v. BERRIER No. 18-453	Randolph (16CRS704810-11)	New Trial
STATE v. COOPER No. 18-637	Beaufort (11CRS50617)	Vacated

STATE v. GASKINS No. 18-970	Pitt (15CRS55376)	Affirmed in Part, Reversed in Part, for Further Proceedings
STATE v. GILBERT No. 18-614	Brunswick (13CRS3448-49)	NO PLAIN ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. GILLIAM No. 18-260	Alexander (13CRS50356) (13CRS50462) (15CRS50577) (16CRS102) (17CRS191) (17CRS192)	Affirmed
STATE v. GUEVARA No. 18-582	Alamance (15CRS50308)	No Error; Remanded for resentencing.
STATE v. KESLER No. 18-971	Pitt (14CRS3508)	Affirmed in Part, Reversed in Part, Remanded for further Proceedings
STATE v. MAIER No. 18-771	Guilford (14CRS90531-32) (14CRS91658) (14CRS92810)	No Error
STATE v. OGLESBY No. 18-277	Mecklenburg (14CRS247193-96)	No Error
STATE v. RINEHART No. 18-298	Caldwell (16CRS638-639)	No Error
STATE v. ROBINSON No. 18-343	Mecklenburg (15CRS244267-71)	Reverse and Vacate in Part.
STATE v. SEEMAN No. 18-969	Pitt (15CRS55923)	Affirmed in Part, Reversed in Part, Remanded for further Proceedings
STATE v. WAYCASTER No. 18-247	McDowell (15CRS51973) (16CRS119)	No error in part; vacated and remanded in part.
STATE v. WYNN No. 18-536	Dare (16CRS267) (16CRS50291) (17CRS10)	No Error

ADAMS v. LANGDON

[264 N.C. App. 251 (2019)]

CHRISTOPHER ADAMS, PLAINTIFF
v.
BRITTANY LANGDON, DEFENDANT
v.
CHERI MALONE, INTERVENOR

No. COA18-718

Filed 19 March 2019

1. Appeal and Error—notice of appeal—timeliness—dependent on proof of actual notice of court order

In a matter involving a grandparent's visitation rights, grandparent-intervenor's notice of appeal from an order dismissing a contempt proceeding against the custodial parent was deemed timely filed where grandparent-intervenor was not served with the court order and there was no argument that the notice of appeal was untimely or proof offered that grandparent-intervenor had actual notice of the order.

2. Child Visitation—grandparent's rights—survival after parent's rights terminated

A termination of parental rights order with regard to one parent did not extinguish previously granted visitation rights to a grandparent who had been allowed to intervene in a custody action between a child's parents. The grandparent-intervenor's visitation rights existed independently of the terminated parent's parental and custodial rights and could be enforced through contempt proceedings.

3. Child Visitation—grandparent's rights—dismissal of contempt motion—effect unclear

A trial court's form order dismissing a motion for contempt was remanded for clarification on whether the trial court intended to dismiss only the portion of a custody action pertaining to a parent whose parental rights had been terminated, or the entire custody action—including a grandparent-intervenor's visitation rights, which survived the termination action.

Appeal by Intervenor from Orders entered 26 April 2018 by Judge Mary H. Wells and 9 October 2017 by Judge Jim Love, Jr. in Johnston County District Court. Heard in the Court of Appeals 28 January 2019.

Mobley Law Office, P.A., by Marie H. Mobley, for plaintiff-appellee.

Spence, Berkau, & McLamb, P.A., by Robert A. Spence, Jr., for intervenor-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Cheri Malone (Intervenor) appeals from an Order to Dismiss filed on 9 October 2017 and a Custody/Visitation Order entered on 26 April 2018 concluding her grandparental visitation rights established in this child custody matter were terminated as a result of the termination of her daughter's parental rights in a separate action.

Christopher Adams (Plaintiff) and Brittany Langdon (Defendant) are the biological parents of a child born in 2007. When the child was approximately seven months old, Plaintiff filed a complaint seeking joint custody of the child. Defendant timely answered the complaint; however, neither party pursued a custody order until Plaintiff obtained an Ex Parte Temporary Custody Order on 13 October 2011, based on Defendant's alleged mental illness and substance abuse.

On 24 October 2011, Plaintiff and Defendant entered into a Memorandum of Judgment/Order establishing temporary custody pending a later permanent custody hearing. This Memorandum of Judgment/Order granted Plaintiff primary custody of the child and provided Defendant with supervised visitation. Defendant's visitation was to be supervised by Intervenor, who is Defendant's mother and thus the child's maternal grandmother.

Subsequently, on 11 January 2012, the trial court entered a Temporary Custody Order modifying the 24 October 2011 Memorandum of Judgment/Order. This Temporary Custody Order ceased Defendant's supervised visitation until completion of substance abuse testing and assessments.

On 10 February 2012, Intervenor filed a Motion to Intervene alleging she was the maternal grandmother of the child; she had a "close parental type relationship" with the child, given that the child had lived with her for several years; there was an ongoing custody dispute between the child's parents; and it was in the best interest of the child to allow her visitation rights. Plaintiff and Defendant consented to the intervention in a Memorandum of Judgment/Order on 1 March 2012, in which the parties also consented to allow Intervenor visitation with the child. Several weeks later, on 28 March 2012, the trial court entered a separate

order allowing the intervention. This 28 March 2012 Order concluded that Intervenor had standing to intervene as an interested party pursuant to Rule 24 of the North Carolina Rules of Civil Procedure and sections 50-13.2(b1) and 50-13.5(j) of our General Statutes.

By consent of the parties, the trial court entered a Permanent Custody Order on 26 April 2012. This Order provided Plaintiff sole custody of the child and Intervenor with visitation one weekend per month and one additional Saturday per month. Defendant was prohibited from any visitation with the child.

On 12 September 2012, Defendant filed a motion alleging she had completed a six-week drug program and seeking to modify the Permanent Custody Order to permit her to have supervised visitation. By consent of the parties, the trial court entered a Temporary Memorandum of Judgment/Order on 5 November 2012 giving Defendant visitation only under the supervision of Intervenor and leaving all other provisions of the 26 April 2012 Permanent Custody Order in full force.

The Record reflects the case was dormant for approximately five years when in a separate action, Plaintiff petitioned to have Defendant's parental rights terminated (TPR proceeding). While Intervenor was apparently present for the termination of parental rights hearing, she was not a party to the TPR proceeding. On 27 September 2017, the trial court in the TPR proceeding entered an order terminating Defendant's parental rights to the child.

With this backdrop, in the custody case before us, on 30 August 2017, Defendant filed a Motion and Notice of Hearing for Contempt alleging Plaintiff was in violation of the 5 November 2012 custody order by refusing to allow Defendant's supervised visitation and phone calls. The contempt hearing was set for 9 October 2017. On the day of the hearing, District Court Judge Jim Love, Jr. entered an Order to Dismiss (9 October 2017 Order to Dismiss). The 9 October 2017 Order to Dismiss was entered on an administrative form and makes no findings of fact nor conclusions of law. The 9 October 2017 Order to Dismiss appears to contain the following relevant provisions with marked boxes:

> 8. Pursuant to Rule 41(a) **[x]** this action **[x]** all outstanding motions is/are **VOLUNTARILY DISMISSED** **[x]** with prejudice
>
> . . . .

> 10. Show Cause is made permanent. **ALL OPEN ISSUES ARE INVOLUNTARILY DISMISSED [x] WITH PREJUDICE** . . . pursuant to Rule 41(b) for failure to appear and prosecute this action.
>
> . . . .
>
> 15. **Other** TPR granted against [Defendant].

The Record indicates Intervenor received no notice of these contempt proceedings and was not served with the 9 October 2017 Order to Dismiss.

On 1 November 2017, Intervenor filed a show cause motion for visitation. An Order to Show Cause for why Plaintiff should not be held in contempt for violating the 26 April 2012 Order issued the same day. At the 20 November 2017 hearing, Plaintiff and Intervenor indicated there was a disagreement on a preliminary legal issue: whether the termination of Defendant's parental rights also terminated Intervenor's visitation rights.

On 26 April 2018, District Court Judge Mary H. Wells entered a Custody/Visitation Order (26 April 2018 Custody/Visitation Order). The trial court ruled "grandparent visitation arises from the litigated custody action of the parent, and accordingly, a grandparent's rights to the care, custody and control of the child are not constitutionally protected except through the parent's constitutional protection." The trial court further concluded "the custody action does not survive the termination of [Defendant's] parental rights, therefore, the grandparent rights of [Intervenor] do not survive [Defendant's] parental rights being [terminated and] that [Intervenor's] grandparent visitation rights are terminated along with the custodial and parental rights of her daughter [Defendant]." The trial court thus concluded Plaintiff was not in violation of the prior custody order since this custody action did not survive the termination of Defendant's parental rights.

On 3 May 2018, Intervenor timely filed Notice of Appeal from the 26 April 2018 Custody/Visitation Order. On 18 May 2018, Intervenor filed a Notice of Appeal from the 9 October 2017 Order to Dismiss. In her 18 May 2018 Notice of Appeal, Intervenor alleged she had no notice of the 9 October 2017 Order to Dismiss until Intervenor's counsel located it in the file in the clerk's office on 3 May 2018. Intervenor further noted to the extent the 9 October 2017 Order to Dismiss purported to dismiss the entire custody action with prejudice, it served as an adverse ruling against her.

Appellate Jurisdiction

[1] The trial court's 9 October 2017 Order to Dismiss and 26 April 2018 Custody/Visitation Order are each final orders resolving the then-pending issues before the trial court. Thus, this Court has appellate jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

Intervenor's Notice of Appeal from the 26 April 2018 Custody/Visitation Order was timely filed within 30 days of entry of that Order. The timeliness of Intervenor's 18 May 2018 Notice of Appeal from the 9 October 2017 Order to Dismiss, however, requires further analysis.

According to Intervenor's Notice of Appeal from the 9 October 2017 Order to Dismiss, this Order was never served on Intervenor, and Intervenor first learned of the Order on 3 May 2018 when counsel for Intervenor found the Order in the court file. Upon learning of this Order, Intervenor promptly filed Notice of Appeal.

Our Court has recently stated: "[W]here . . . there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, *appellee* must show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal." *Brown v. Swarn*, ___ N.C. App. ___, ___, 810 S.E.2d 237, 240 (2018) (emphasis added). Under *Brown*, unless the appellee argues that the appeal is untimely, and offers proof of actual notice, we may not dismiss. Appellee-Plaintiff has not argued Intervenor's appeal is untimely or offered proof of Intervenor's actual notice of the 9 October 2017 Order to Dismiss; therefore, Intervenor's Notice of Appeal from that Order is deemed timely filed. *See id.*

Issue

The dispositive issue on appeal is whether the visitation rights of Intervenor, as established in the 26 April 2012 Custody Order, were terminated when the parental rights of her daughter, Defendant, were terminated in a separate termination of parental rights action brought by the child's father to which Intervenor was not a party.

Analysis

I. Standard of Review

Both the 9 October 2017 Order to Dismiss and the 26 April 2018 Custody/Visitation Order were entered in the context of civil contempt proceedings. "When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence

to support the trial court's findings and whether the findings support the conclusions [of law]." *Shumaker v. Shumaker*, 137 N.C. App. 72, 77, 527 S.E.2d 55, 58 (2000) (citation omitted). "The trial court's conclusions of law drawn from the findings of fact [in civil contempt proceedings] are reviewable *de novo*." *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009) (citation and quotation marks omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

II. Grandparent Visitation

A. The 26 April 2018 Custody/Visitation Order

[2] In the 26 April 2018 Custody/Visitation Order, the trial court concluded as a matter of law that Intervenor's grandparental visitation rights, established in the prior custody order, did not survive the termination of Defendant's parental rights, reasoning the custody action did not survive the termination of Defendant's parental rights.

At common law, grandparents had no independent right to seek visitation with their own grandchildren. *Montgomery v. Montgomery*, 136 N.C. App. 435, 436, 524 S.E.2d 360, 361 (2000) (citations omitted). North Carolina, however, by statute, grants grandparents the ability to seek court-ordered visitation with their grandchildren in several defined circumstances:

> First, N.C.G.S. § 50-13.2(b1) states that "[a]n *order for custody of a minor child* may provide visitation rights for any grandparent of the child as the court in its discretion deems appropriate".
>
> Second, N.C.G.S. § 50-13.2A, entitles a grandparent to seek visitation when the child is "*adopted by a stepparent or a relative of the child* where a substantial relationship exists between the grandparent and the child."
>
> Third, N.C.G.S. § 50-13.5(j) entitles a grandparent to seek visitation "[i]n any action in which the *custody of a minor child has been determined*, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7".
>
> Finally, N.C.G.S. § 50-13.1(a) entitles a grandparent to "institute an action or proceeding for custody" of their

> grandchild. However, . . . grandparents are not entitled to seek visitation under N.C.G.S. § 50-13.1(a) when there is no ongoing custody proceeding and the grandchild's family is intact.

Id. at 436-37, 524 S.E.2d at 362 (alteration in original) (citations omitted).

In this case, prior to the termination of Defendant's parental rights, Intervenor sought to intervene in the custody dispute under N.C. Gen. Stat. § 50-13.2(b1) and N.C. Gen. Stat. § 50-13.5(j), alleging an ongoing custody dispute between Plaintiff and Defendant. The trial court granted the Motion to Intervene on 28 March 2012. The Permanent Custody Order establishing Intervenor's grandparental visitation rights was entered on 26 April 2012. Defendant's parental rights were terminated on 27 September 2017. On appeal, Plaintiff contends the termination of Defendant's parental rights necessarily abrogated Intervenor's court-ordered visitation rights. We disagree.

As a general rule, grandparents are only granted standing to intervene in a case seeking visitation under N.C. Gen. Stat. § 50-13.2(b1) "when custody of the minor children is an ongoing issue." *Smith v. Barbour*, 195 N.C. App. 244, 251, 671 S.E.2d 578, 584 (2009). This requires the custody of a child being "in issue" or "being litigated." *Id.* (citation and quotation marks omitted). Thus, for example, this Court has recognized where one parent dies in the midst of a custody action, but before the grandparent seeks to intervene, there was no ongoing custody action in which the grandparent could intervene, nor could the grandparent initiate a separate action. *McDuffie v. Mitchell*, 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002). Likewise, this Court has held grandparents could not *initiate* an action for visitation where the child was living with one parent after the other parent's parental rights had been terminated because there was no ongoing custody dispute. *Fisher v. Gaydon*, 124 N.C. App. 442, 445, 477 S.E.2d 251, 253 (1996).

However, "once grandparents have become parties to a custody proceeding—whether as formal parties or as *de facto* parties—then the court has the ability to award or modify visitation even if no ongoing custody dispute exists between the parents at the time." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 122, 674 S.E.2d 775, 778 (2009) (citation omitted).[1] This is because once a grandparent intervenes in a case,

1. In this context, "*de facto* parties" refers to grandparents who had not formally intervened as parties at the time the custody order was entered, but who were granted visitation rights by the trial court and were thus functionally made parties to the custody order.

they are "as much a party to the action as the original parties are and [have] rights equally as broad. . . . Once an intervenor becomes a party, he should be *a party for all purposes*." *Id.* at 124, 674 S.E.2d at 779 (citations and quotation marks omitted). Thus, there, the trial court retained jurisdiction over a pending grandparental visitation claim even where the parents resolved their own custody claims via consent order. *Id.*

Consequently, we conclude, here, where Intervenor had not only intervened in the case but also obtained visitation rights via a permanent custody order, the termination of Defendant's parental rights did not extinguish Intervenor's court-ordered visitation rights.

We find support for our conclusion in this Court's analogous decision in *Sloan v. Sloan*. 164 N.C. App. 190, 595 S.E.2d 228 (2004). In *Sloan*, the original custody order granted the paternal grandparents telephonic visitation rights with the minor child. *Id.* at 192, 595 S.E.2d at 230. The paternal grandparents had not been made parties to the action. *Id.* After the unexpected death of the father, the paternal grandparents filed a motion to intervene, along with motions to modify the original custody order and to hold the mother in contempt for failing to allow their telephonic visitation. *Id.* The mother argued that because of the father's death, there was no ongoing custody dispute, the child was living in an intact family, and the trial court lost jurisdiction over child custody upon the father's death. *Id.* at 193-94, 595 S.E.2d at 231. This Court held because the original custody order between the parties already granted the paternal grandparents visitation rights, the trial court did not err in retaining jurisdiction over child custody and allowing the paternal grandparents to formally intervene in the case for purposes of enforcement and modification of the visitation provisions of the original custody order.[2] *Id.* at 194-97, 595 S.E.2d at 231-32.

We see no distinction between the death of one parent, as in *Sloan*, and the termination of one parent's parental rights, as in the case *sub judice*. *Cf. Stann v. Levine*, 180 N.C. App. 1, 11 n.9, 636 S.E.2d 214, 220 n.9 (2006) (describing termination of parental rights as "tantamount to a civil death penalty" (citation and quotation marks omitted)). Thus, where Intervenor was a party to this child custody action and was awarded visitation with her grandchild by a court order, those visitation rights existed independently of Defendant's parental and custodial

2. The *Sloan* Court acknowledged the result would have been different had this been the first time grandparent visitation had been raised as an issue. *Id.* at 194, 595 S.E.2d at 231.

rights. Therefore, with respect to Intervenor's visitation rights, the custody action survived, and those court-ordered visitation rights survived the termination of Defendant's parental rights.

Consequently, the trial court erred in concluding Intervenor's visitation rights under the prior custody order did not survive termination of Defendant's parental rights. Therefore, Intervenor could seek to enforce the prior custody order through contempt proceedings. Accordingly, we reverse the trial court's 26 April 2018 Custody/Visitation Order and remand this matter for further proceedings on the Order to Show Cause issued upon Intervenor's Motion to Show Cause.

B. The 9 October 2017 Order to Dismiss

[3] Intervenor also appeals from the 9 October 2017 Order to Dismiss to the extent it purported to dismiss the entire custody action with prejudice, including as to Intervenor and her grandparental visitation rights. To the extent this was the trial court's intent, for the reasons stated above, we agree this was error.

Plaintiff, however, contends the 9 October 2017 Order to Dismiss was merely intended to dispose of Defendant's own contempt motion following the termination of Defendant's parental rights and was not intended as a dismissal of the entire action. While we agree Plaintiff's interpretation of the 9 October 2017 Order to Dismiss is most likely the correct reading of the trial court's intent, it is not clearly apparent from the trial court's Order.

The trial court's form order reflects both "this action" and "all outstanding motions" are voluntarily dismissed with prejudice. It also reflects that "all open issues" are involuntarily dismissed with prejudice. The form further indicates the trial court considered the termination of Defendant's parental rights as a basis for its order. In short, we are unable to undertake effective appellate review of this order. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) ("Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated."). Therefore, we remand the 9 October 2017 Order to Dismiss to the trial court for clarification of its Order.

Conclusion

Accordingly, we reverse the 26 April 2018 Custody/Visitation Order and remand for further proceedings on the Order to Show Cause issued upon Intervenor's Motion to Show Cause. We reverse the 9 October 2017

Order to Dismiss and remand the matter to the trial court for clarification of its rationale.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge HUNTER concur.

AESTHETIC FACIAL & OCULAR PLASTIC SURGERY CENTER, P.A., PLAINTIFF
v.
RENZO A. ZALDIVAR AND OCULOFACIAL PLASTIC SURGERY CONSULTANTS, P.A., SURGICAL, LLC, DEFENDANTS

No. COA18-431

Filed 19 March 2019

1. Employer and Employee—covenants not to compete—highly specialized physician—public policy

A non-compete employment agreement involving two highly specialized physicians (oculofacial plastic surgeons) violated public policy and was unenforceable where very few physicians practiced the specialty in the area covered by the covenant (central and eastern North Carolina), thus raising a substantial question of potential harm to the public health.

2. Employer and Employee—covenants not to compete—buy-out provisions—highly specialized physician—public policy

A buy-out provision of an employment agreement involving two highly specialized physicians (oculofacial plastic surgeons)—which provided that the employee physician could be released from a non-compete covenant by paying 150% of his salary at termination—was unenforceable where the non-compete covenant violated public policy. Like the non-compete covenant, the buy-out provision had the potential to harm the public health by creating a risk of financial penalty for practicing in the restricted area.

3. Employer and Employee—non-solicitation covenants—highly specialized physician—overbroad—public policy

A non-solicitation covenant involving two highly specialized physicians (oculofacial plastic surgeons) was overbroad and violated public policy where it prohibited the employee physician from soliciting business from members of any patient's household and

from accepting referrals from medical professionals or hospitals with whom his former employer had a relationship.

4. Unfair Trade Practices—learned profession exemption—physician—practice of medicine

A claim of unfair and deceptive trade practices against a physician for "the solicitation of patients and the practice of medicine and surgery in North Carolina in violation of [an employment agreement between the employer and the physician]" was barred by the learned profession exemption.

5. Damages and Remedies—punitive—no compensatory damages

Where restrictive covenants in an employment agreement were unenforceable, defendants had no liability for compensatory damages, and so there was no basis for punitive damages.

Appeal by plaintiff from order entered 16 December 2015 by Judge G. Bryan Collins, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 16 October 2018.

The Law Offices of Michele A. Ledo, PLLC, by Michele A. Ledo; and Law Office of Samuel A. Forehand, P.A., by Samuel A. Forehand, for plaintiff-appellant.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew, John R. Taylor, and Robert E. Zaytoun, for defendants-appellees.

STROUD, Judge.

This case arises from plaintiff's claim to enforce restrictive covenants in an employment agreement involving two highly specialized physicians. After two years, Dr. Renzo Zaldivar left Aesthetic Facial and Ocular Plastic Surgery Center, P.A., an ocular and facial plastic surgery practice started by Dr. Frank Christensen, and started his own practice. Dr. Zaldivar's employment agreement with Dr. Christensen's practice included a covenant not to compete in certain geographical areas in North Carolina, and a covenant not to solicit former patients or referrals from individuals or businesses with a referring relationship to plaintiff. After carefully reviewing the covenants, we find that they are unenforceable because they violate public policy and affirm the trial court's grant of summary judgment for defendants.

I. Background

Dr. Frank Christensen is a board-certified physician practicing ophthalmology, with specialized "surgical training in ocular and plastic surgery." He has been in practice for about 30 years, and, because of his highly specialized practice, he sees patients "based upon referrals from optometrists and ophthalmologists throughout the eastern half of North Carolina." For most of his years in practice, Dr. Christensen was the only physician working for his practice, Aesthetic Facial & Ocular Plastic Surgery Center, P.A. ("plaintiff"). Plaintiff has an office in Raleigh, but Dr. Christensen saw and treated patients in office spaces rented from other physicians or in hospitals in Central and Eastern North Carolina.

In 2008, Dr. Christensen "actively recruited an additional surgeon to supplement the practice specifically seeking a surgeon trained in both ophthalmic and plastic surgery." "After an extensive recruiting process," he offered to employ defendant, Dr. Renzo Zaldivar. Dr. Zaldivar completed his ophthalmology training and a fellowship with the Mayo Clinic and University of Minnesota, and Dr. Christensen offered Dr. Zaldivar employment with plaintiff in a letter dated 26 November 2008 ("the Agreement"). This Employment Agreement contained provisions covering salary, benefits, and Dr. Zaldivar's obligations to plaintiff. The Agreement also contained non-compete and non-solicitation covenants. Dr. Zaldivar accepted Dr. Christensen's offer and was employed by plaintiff starting in July of 2009. The Agreement stated Dr. Zaldivar's employment was "at will" but anticipated "continuing year to year thereafter until terminated as provided herein." In June of 2011, Dr. Zaldivar gave notice of his resignation to Dr. Christensen and formed his own practice, defendant Oculofacial Plastic Surgery Consultants, P.A., Surgical, LLC. Dr. Zaldivar immediately began practicing in the same geographical region as plaintiff.

On 24 September 2014, plaintiff filed a complaint against Dr. Zaldivar and his practice ("defendants") alleging claims of breach of the covenants in the employment agreement, tortious interference with contractual relations, civil conspiracy, and unfair and deceptive trade practices. Defendants answered, denying the material allegations of the complaint and alleging that the non-compete covenant and non-solicitation covenants of the Agreement were unenforceable for various reasons. Defendants counterclaimed for breach of contract, fraud, negligent misrepresentation, unjust enrichment, and unfair and deceptive trade practices. After discovery and depositions, defendants filed a motion for summary judgment. After a hearing on the motion, the trial

court entered an order granting defendants' motion. On 12 December 2017, defendants voluntarily dismissed all counterclaims, and plaintiff timely appealed.

II. Standard of Review

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

III. Restrictive Covenants

Plaintiff argues that the trial court erred in granting summary judgment because there are genuine issues of material fact related to the enforceability of the non-compete covenant and non-solicitation covenant in the Agreement and that the covenants do not not violate public policy. Defendants contend that enforcement of the covenants would create a "substantial question of potential harm to the public health" because Dr. Zaldivar is one of very few specialists in North Carolina who practice his particular subspecialty of ocluofacial plastic surgery.

"[I]n North Carolina, restrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy." *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988). There is no dispute that the parties entered a written employment contract based on valuable consideration; their dispute is based upon the territory and the public policy considerations of the restrictions. Defendants contend that the territorial restrictions of the covenants are unreasonable, and for purposes of addressing the public policy issue, we express no opinion on the reasonableness of the territory. For purposes of this argument, we will view the Agreement in the light most favorable to the plaintiff and assume the restrictions cover

the full territory alleged by plaintiff. Dr. Christensen had arrangements with other physicians or hospitals to provide services in Chapel Hill, Durham, Fayetteville, Greensboro, Greenville, Pinehurst, Raleigh, Rocky Mount, Supply, Wake Forest, Wilmington, and Wilson. The Agreement provided that the covenants covered a 15-mile radius around each of plaintiff's practice locations.

a. Covenant not to Compete

[1] North Carolina courts have considered several cases involving non-compete agreements involving physicians, and depending upon the specialization of the physician and the territory of the restriction, several cases have recognized the potential for harm to the public health from denial of needed medical care to the public:

> If ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interests outweigh the contract interests of the covenantee, and the court will refuse to enforce the covenant. But if ordering the covenantor to honor his agreement will merely inconvenience the public without causing substantial harm, then the covenantee is entitled to have his contract enforced.

Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 27-28, 373 S.E.2d 449, 453 (1988) (citations omitted), *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1989).

> This Court considers the following factors in determining the risk of substantial harm to the public: the shortage of specialists in the field in the restricted area, the impact of establishing a monopoly in the area, including the impact on fees in the future and the availability of a doctor at all times for emergencies, and the public interest in having a choice in the selection of a physician.

Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 599-600, 632 S.E.2d 563, 572 (2006) (quotation marks and ellipsis omitted).

Here, both Dr. Zaldivar and Dr. Christensen practice a sub-specialty of oculo-facial surgery. There is no factual dispute there are very few physicians practicing this subspecialty in the territory covered by the restrictions, or even in the entire state of North Carolina.

If a particular type of medical care is readily available in the restricted territory, a covenant which restricts a medical professional from providing care may not offend public policy. For example, in *Jeffrey R. Kennedy, D.D.S., P.A. v. Kennedy*, this Court addressed a general dentist who signed a restrictive covenant not to compete within fifteen miles of the practice in Chapel Hill for three years following his departure from the practice. 160 N.C. App. 1, 4, 584 S.E.2d 328, 330 (2003). The defendant dentist began practicing dentistry in violation of the covenant, and the plaintiff dental practice filed a complaint seeking a preliminary injunction, which the trial court denied. *Id.* at 5, 584 S.E.2d at 331. This Court reversed the trial court and concluded the covenant was enforceable because "the covenant at issue does not cause substantial harm to the public health and, at most, merely inconveniences dental patients." *Id.* at 11, 584 S.E.2d at 335. The evidence in that case showed that many dentists were available in the restricted area, and the defendant dentist did not practice any sort of specialized dental care not provided by most general dentists. *Id.* This Court stated that "[p]rior cases concluding that such restrictions harm the public health involve circumstances wherein the health care provider is the sole such provider in the area, or is one of few specialists in a particular area." *Id.*

This Court addressed a non-compete agreement involving a specialized physician in an area where few similar specialists were available in *Iredell Digestive Disease Clinic v. Petrozza*. 92 N.C. App. 21, 373 S.E.2d 449. In *Iredell Digestive Disease Clinic*, the defendant specialized in gastroenterology and internal medicine. 92 N.C. App. at 22, 373 S.E.2d at 450. Defendant signed a covenant not to compete for three years within twenty miles of Statesville or five miles of any hospital or office serviced by plaintiff. *Id.* at 23, 373 S.E.2d at 450-51. Defendant submitted affidavits from 41 physicians in Statesville which stated that "one gastroenterologist would not be able to meet the community's demand for such services; that losing defendant Petrozza's services would create an excessive workload on plaintiff; and would 'likely result in undesirable and possible critical delays in patient care and treatment.' " *Id.* at 28, 373 S.E.2d at 453. Plaintiff submitted affidavits from 14 physicians who stated "that there are presently four surgeons in Statesville who can perform certain semi-surgical procedures performed by gastroenterologists; and that in severe cases patients can be transferred by helicopter from the hospital in Statesville to Baptist Hospital in Winston-Salem." *Id.* at 28, 373 S.E.2d at 453-54. The trial court acknowledged that "there is conflict between plaintiff's and defendant's affidavits as to the precise impact Dr. Petrozza's leaving would have on the community. However, we believe after reviewing the affidavits *de novo*, that the trial court was

correct in finding that the public health and welfare would be harmed if there were only one gastroenterologist in Statesville." *Id.* at 29, 373 S.E.2d at 454.

Similarly, in *Statesville Medical Group v. Dickey*, defendant specialized in endocrinology and signed an employment contract that prohibited him from competing with plaintiff for two years in Iredell County. 106 N.C. App. 669, 670-71, 418 S.E.2d 256, 257 (1992). The trial court granted a preliminary injunction preventing the defendant from practicing in the restricted area under the covenant. *Id.* at 671, 418 S.E.2d at 257. On appeal, this Court reversed the trial court and found that the covenant posed a risk of substantial harm to the public due to

> the shortage of specialists in the field in the restricted area, the impact of plaintiff establishing a monopoly of endocrinology practice in the area, including the impact on fees in the future and the availability of a doctor at all times for emergencies, and the public interest in having a choice in the selection of a physician.

Id. at 673, 418 S.E.2d at 259.

In *Nalle Clinic Co. v. Parker*, defendant specialized in pediatrics and pediatric endocrinology. 101 N.C. App. 341, 342, 399 S.E.2d 363, 364 (1991). Defendant signed a contract with plaintiff that prevented defendant from practicing in Mecklenburg County for two years following his employment with plaintiff. *Id.* After defendant resigned from employment with plaintiff, plaintiff sought a preliminary injunction which the trial court granted. *Id.* at 342-43, 399 S.E.2d at 365. Under the specific facts of the case, including the defendant's specialization and the lack of other pediatric endocrinologists in the geographic area, this Court reversed the trial court because "enforcement of the covenant not to compete would create a substantial question of potential harm to the public health." *Id.* at 345, 399 S.E.2d at 366 (quotation marks omitted).

Here, the covenant not to compete is titled "Restrictive Covenant" in the employment agreement. The covenant provides that for a period of two years after his employment with plaintiff ends, defendant

> will not render any ophthalmology and/or oculo-facial plastic and reconstructive surgery services on behalf of yourself, any business, practice or entity within a fifteen (15) mile radius of any office, satellite or other place of business used by the Practice at the time your employment commences, or within a fifteen (15) mile radius of any

> future office, satellite or other place of business used by the Practice at the time your employment ends (or within one (1) year prior to the time your employment ends). This promise specifically includes your not practicing ophthalmology and/or oculo-facial plastic and reconstructive surgery services or any of their disciplines at any hospital, surgery center or laser center at which you or the Practice's other physicians had active staff privileges at the time your employment ends (or within one (1) year prior to the time your employment ends).

Dr. Zaldivar resigned in September 2011, and plaintiff did not pursue an injunction to stop Dr. Zaldivar from competing in the restricted area; plaintiff waited until September 2014 to file a complaint. To support their motion for summary judgment, defendants submitted affidavits from eight physicians practicing ophthalmology in North Carolina; six are specialists in oculofacial plastic surgery. These physicians described the medical necessity of Dr. Zaldivar's services and the potential impact on public health from enforcing the restrictive covenants:

> Dr. Zaldivar is a much needed member of the North Carolina medical community. Should Dr. Zaldivar not be permitted to practice in the alleged "restricted area" of the "non-compete covenant" that is involved in this dispute, this could potentially cause harmful delay in delivery of specialized medical care in the emergency setting . . . . Removing Dr. Zaldivar from practice in this broad and highly populated geographic area would cause an increased burden on the limited number of oculofacial plastic specialists practicing from Greensboro to the North Carolina Coast.

In addition, the eight physicians noted the limited number of oculofacial plastic surgeons in the area:

> There are currently a limited number of oculofacial plastic surgeons practicing in the North Carolina from Greensboro to the East Coast. These subspecialty eye surgeons handle emergencies and time-sensitive face and eye surgeries for a population of millions of people in this geographic area, including children seen in emergency rooms for acute or trauma injuries to the eyes and face.

The physicians also noted that Dr. Zalidivar provides several highly specialized surgical procedures not provided by other physicians in the area:

> Dr. Zaldivar provides patients with access to highly specialized medical procedures and orbital surgeries, including but not limited to optic nerve sheath fenestrations, which are currently only available in Eastern North Carolina through Dr. Zaldivar's practice. This procedure is usually necessitated in an emergency situation where pressure on the optic nerve can cause permanent vision loss without prompt surgical intervention.

Where defendants have presented evidence supporting a summary judgment motion, plaintiff cannot rely on its complaint but must produce evidence to create a genuine issue of material fact. *See* N.C. Gen. Stat. §1A-1, Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). However, we "view the presented evidence in a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

In response to defendants' motion for summary judgment, plaintiff submitted affidavits of Dr. Christensen and two other employees of plaintiff. In his deposition, Dr. Christensen acknowledged that both he and Dr. Zaldivar are in a very highly specialized area of practice. When Dr. Zaldivar joined plaintiff, Dr. Christensen sent out a letter to his referral sources describing his unique qualifications and extensive training:

> I believe you will be impressed with my new associate Dr. Renzo Zaldivar. He is a very talented surgeon with the highest of training credentials and excellent personal demeanor. Dr. Zaldivar has completed a formal, two-year fellowship in oculoplastics at the Mayo Clinic which is one of thirty recognized by the American Society of Ophthalmic Plastic and Reconstructive Surgery (ASOPRS). . . . *We will be the only fellowship trained oculoplastic and orbital specialists that have both completed a fellowship approved by the American Society of Ophthalmic Plastic and Reconstructive Surgeons and are also members of this society who treat patients in Raleigh and Cary* (Dr. Zaldivar will be admitted to ASOPRS society October, 2009).
>
> . . . .

> I am very excited to have an associate with his excellent credentials. Although results cannot be guaranteed I believe that the first responsibility as a surgeon is to obtain the best and most advanced training available through education and then to apply this knowledge.

(Emphasis added.)

Based upon the entire forecast of evidence, viewed in the light most favorable to plaintiff, there is no genuine issue of material fact as to Dr. Zaldivar's specialized qualifications and the very limited number of physicians in the territory covered by the covenant—or even in North Carolina—who can provide oculofacial plastic surgery and particularly optic nerve sheath fenestrations. Plaintiff seeks to minimize the importance of the optic nerve sheath fenestration surgery, arguing it is "so rare you don't see many of them," but plaintiff does not dispute that when a patient needs optic nerve sheath fenestration surgery, the patient may go blind if the procedure is not performed promptly. And even if very few patients need this procedure, one person losing his or her sight because of the lack of a specialist to perform the surgery is one too many.

There is no genuine issue of material fact regarding the nature of Dr. Zaldivar's practice or the very limited availability of other physicians practicing in the relevant area of North Carolina. We conclude that restricting Dr. Zaldivar's ability to practice in the most populated areas of North Carolina when there are very few oculofacial plastic surgeons, and even fewer who perform some of the specialized procedures he is trained to provide, raises a "substantial question of potential harm to the public health." *Iredell Digestive Disease Clinic*, 92 N.C. App. at 27, 373 S.E.2d at 453. Accordingly, the covenant violates public policy and will not be enforced.

b. Buy-Out Provision

[2] Plaintiff contends that even if enforcement of the Agreement by enjoining Dr. Zaldivar from practicing would pose a risk to public health, this risk is not present here because he did not seek to enjoin Dr. Zaldivar from practicing his specialty after leaving plaintiff's practice. Plaintiff waited until after the expiration of the two year covenant to file its claim against defendants and seeks damages under the buy-out provision of the Agreement. This provision provides that

> the Practice agrees to release you from the restrictive covenant of this Paragraph 11 (but not the non-solicitation provisions of Paragraph 12) if you purchase and actually

> pay for a release from the restrictive covenant from the Practice. Your purchase of a release from the restrictive covenant and your actual payment for such release prior to your practicing in the restricted areas after your employment ends will permit you to practice in the restricted areas described above after termination of your employment. You hereby agree that reasonable compensation to the Practice for such a release from the restrictive covenant is an amount equal to one hundred fifty percent (150%) of your annual base salary in effect immediately prior to the termination of your employment with the Practice. Thus, should you elect to practice in the restricted areas after your employment ends, you agree to pay and the Practice agrees to accept such amount to provide you a release from the restrictive covenant to which you have agreed in this Paragraph 11.

Plaintiff argues that the buy-out provision is enforceable because it does not prevent Dr. Zaldivar from providing medical care; it only requires him to pay Plaintiff to be released from the non-compete provisions of the Agreement (but not the non-solicitation provision, which we will address below). Plaintiff contends that "[t]his Court has held that there is no potential harm to public health where a physician can pay his former employer to practice in a restricted area, whether the payment provision is cast as a liquidated damages provision or a forfeiture provision." We disagree with plaintiff's characterization of this Court's prior holdings.

Plaintiff argues this Court approved damages in lieu of enforcement of a non-compete agreement in *Eastern Carolina Internal Medicine, P.A. v. Faidas*. 149 N.C. App. 940, 564 S.E.2d 53, *aff'd*, 356 N.C. 607, 572 S.E.2d 780 (2002). But *Faidas* did not address a covenant not to compete; this Court held "that the 'Cost Sharing' provision is not a covenant not to compete and we do not subject it to the strict scrutiny as to reasonableness and public policy required with a covenant not to compete." *Id.* at 945, 564 S.E.2d at 56. Relying on *Faidas*, this Court in *Calhoun v. WHA Medical Clinic, PLLC*, considered a non-compete clause and a damages clause dealing with cardiologists and found that "[t]he trial court made findings . . . that establish that there is no potential harm to public health given that the physicians were able to pay the liquidated damages and had no plans to leave the area." 178 N.C. App. at 600, 632 S.E.2d at 573. At trial, the cardiologists subject to the covenant testified "that they had no plans to leave the area and, if the covenant not to

compete was determined to be enforceable, they were prepared to take all necessary steps to ensure continued presence in the medical community and continued treatment of patients, even if that meant paying the liquidated damages agreed to in their contracts with WHA." *Id.* at 593, 632 S.E.2d at 569. They also posted a letter of credit with the clerk of superior court further demonstrating their ability to pay the liquidated damages. *Id.* Further, the amount of the liquidated damages in *Calhoun* was at a minimum equal to a payout that each doctor had the option to receive or forgo and not be subject to the restrictive covenant. *Id.* at 590, 632 S.E.2d at 567.

Neither *Calhoun* nor *Faidas* stand for the proposition that a damages clause in a restrictive covenant makes a covenant in violation of public policy based upon a risk to public health enforceable through payment of damages instead of enjoining the physician from practicing. The provisions of the Agreement regarding damages in *Calhoun* and the unique facts of that case distinguish it from this case. *See id.* at 600, 632 S.E.2d at 573. *Faidas* did not deal with a covenant not to compete. 149 N.C. App. at 945, 564 S.E.2d at 56. The evidence does not demonstrate that Dr. Zaldivar had the ability to pay the liquidated damages, nor did he post a letter of credit with the clerk of superior court to secure the damages. Both the restrictive covenant *and* the liquidated damages provision must be reasonable and not violate public policy. *See Calhoun*, 178 N.C. App. at 599, 632 S.E.2d at 572 ("[T]he agreement . . . contains an unequivocal non-compete clause, and . . . contains a damages provision in the event the Physician desires to practice in violation of the non-compete clause. Accordingly, under established case law, the provisions are strictly scrutinized as to reasonableness and public policy." (brackets, quotation marks, and emphasis omitted)).

We recognize that we have the benefit of hindsight, since plaintiff waited until after the two-year term of the restrictions to bring this lawsuit and Dr. Zaldivar continued to practice in the restricted area, so any potential harm to public health from limitation of his practice did not happen. But the timing of plaintiff's lawsuit and the damages provision cannot obviate the public policy considerations of this covenant. If we allowed enforcement of this type of damages provision in lieu of enforcement of an injunction restricting a physician's practice, physicians in Dr. Zaldivar's position may opt not to continue practicing in the restricted area because of the risk of the financial penalty. The practical effect on public health is then the same as enjoining the physician's practice: the public would be denied crucial medical care because of the financial penalty imposed by a physician's non-compete agreement. Since there

is a risk of substantial harm to the public based on these facts, there is strong public policy in favor of not enforcing the non-compete provisions by an award of damages.

c. Non-Solicitation Covenant

[3] Plaintiffs argue that the non-solicitation covenant is enforceable because "the non-solicit provision is reasonably limited to health care providers and patients with whom Christensen Plastics had already established a relationship (or those patients' family members)." The non-solicitation covenant provides:

> Recognizing that your duty to the Practice as your employer extends beyond your employment, you agree that both during your employment and thereafter, if your employment ends (regardless of the reason or manner of termination) and whether or not you practice within the restricted area as described above, that you will not directly or indirectly: (i) solicit for treatment any former or existing patient (or member of any patient's household) of the Practice; (ii) induce or attempt to influence any employee, contractor or patient of the Practice to alter his or her relationship with the Practice in any way; (iii) induce or attempt to influence any hospital, other health care facility, any physician, any optometrist, any optician, or any other professional with a referring relationship with the Practice, including any managed care payor, to alter that relationship in anyway; or (iv) solicit any patient service contractual arrangement of the Practice. This restriction shall apply during the term of your employment and for a period of two (2) years immediately following the end of your employment. In the event of your breach thereof, the two (2) year time limitation expressed above shall be from the date of your last violation.

"To be valid, the restrictions must be no wider in scope than is necessary to protect the business of the employer." *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 656, 670 S.E.2d 321, 327 (2009) (quotation marks omitted). "In North Carolina, the protection of customer relations against misappropriation by a departing employee is well recognized as a legitimate interest of an employer." *Id.* (quotation marks and brackets omitted). A restrictive covenant may "be directed at protecting a legitimate business interest. But . . . where the Agreement reaches not only clients, but potential clients, and extends to areas where Plaintiff had no connections or personal knowledge of customers, the Agreement

is unreasonable." *Hejl v. Hood, Hargett & Assocs.*, 196 N.C. App. 299, 307, 674 S.E.2d 425, 430 (2009).

In his deposition, when Dr. Christensen was asked for the name of a physician whom Dr. Zaldivar solicited in violation of this covenant, he responded:

> I'll give you one doctor. That's the question. Kathy Hecker. He called Kathy Hecker up and says, I would like you to stop sending to Frank and send to me.

But in direct response to this testimony, Dr. Kathryn Hecker swore to the following in an affidavit:

> 2. I have been advised that Dr. Frank Christensen, the owner of Aesthetic Facial & Ocular Plastic Surgery Center, PA, gave sworn deposition testimony about me in his legal proceedings against Dr. Renzo Zaldivar. I have read the portions of Dr. Christensen's depositions where he discusses me, which are attached to affidavit as **Exhibit A**, and Dr. Christensen's testimony about me is false. Specifically, Dr. Christensen's testimony that Dr. Zaldivar solicited business from me is not true. Contrary to Dr. Christensen's testimony, Dr. Zaldivar never called me and asked that I stop referring patients to Dr. Christensen and instead refer patients to Dr. Zaldivar. Also, I never told Dr. Christensen that Dr. Zaldivar solicited me in this way.

This testimony and affidavit could present a genuine issue of material fact, since Dr. Hecker denies that Dr. Zaldivar solicited her, and Dr. Christensen says he did. Viewed in the light most favorable to plaintiff, this evidence in addition to the affidavits of plaintiff's employees could show a violation of the non-solicitation agreement as to Dr. Hecker, but even if Plaintiff has forecast one potential violation of the non-solicitation covenant, the Agreement still is unenforceable because it is overbroad and in contravention of public policy. The non-solicitation provision is not limited to existing patients or Dr. Zaldivar's professional contacts made during his employment with plaintiff. Instead, it covers "any former or existing patient (*or member of any patient's household*) of the Practice[.]" (Emphasis added.) This restriction would apply not just to existing patients, but also to "any member of the patient's household"—a future or potential patient with whom Dr. Christensen had no relationship—and is therefore unreasonable. *See Hejl*, 196 N.C. App. at 307, 674 S.E.2d at 430.

Because of the highly specialized nature of both Dr. Zaldivar's and Dr. Christensen's practices, they see patients almost exclusively based upon referrals from other physicians. The remaining prohibitions of the non-solicitation provisions also impair Dr. Zaldivar's ability to see future or potential patients because it penalizes Dr. Zaldivar for accepting referrals from other medical professionals or hospitals with whom Dr. Christensen had a relationship. These limitations on Dr. Zaldivar prevent him from

> (ii) induc[ing] or attempt[ing] to influence any employee, contractor or patient of the Practice to alter his or her relationship with the Practice in any way; (iii) induc[ing] or attempt[ing] to influence any hospital, other health care facility, any physician, any optometrist, any optician, or any other professional with a referring relationship with the Practice, including any managed care payor, to alter that relationship in anyway; or (iv) solicit[ing] any patient service contractual arrangement of the Practice.

For example, if a patient suffered an eye injury and presented to the emergency department of a hospital where Dr. Christensen had practiced, and the hospital contacted Dr. Zaldivar to care for the patient, instead of Dr. Christensen, Dr. Zaldivar may be in violation of the non-solicitation provision simply because he let the hospital know that he was available to care for patients at the hospital and agreed to care for the patient—even if Dr. Christensen was *not available* at that moment to care for the patient in the emergency department. This limitation on referrals from other medical professionals to a highly specialized physician, where very few such physicians are available, would have the same detrimental effect upon availability of medical care as the non-compete agreement, and it is therefore unenforceable.

IV. Breach of Contract

Plaintiff argues "[w]here the Referral Source Covenants of the parties' contract are valid and enforceable, the trial court erred in summarily dismissing Christensen Plastics' breach of contract claims." However, the breach of contract claim is contingent on the validity of the unenforceable covenants discussed above. This argument is overruled.

V. Learned Profession Exemption

[4] Plaintiff argues that "the trial court erred in holding that the 'learned profession' exemption bars its unfair and deceptive trade practices claim

where this claim does not involve the provision of medical services." (Capitalization removed.) Plaintiff's complaint alleged in relevant part:

> 41. Oculofacial P.A. employed Zaldivar for the express purpose of committing acts in breach of his agreement with Plaintiff when Oculofacial P.A. and Zaldivar knew of the agreement and knew or should have known that the acts violated the agreement.
>
> 42. Oculofacial P.A. and Zaldivar engaged in the solicitation of patients and in the practice of medicine and surgery in North Carolina in violation of the agreement between Plaintiff and Zaldivar.

"To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (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 or to his business." *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). "[C]ommerce includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b) (2017) (quotation marks omitted). "To determine whether the learned profession exclusion applies, a two-part inquiry must be conducted: first, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589, 768 S.E.2d 119, 123 (2014) (brackets and quotation marks omitted).

"There is no dispute that doctors . . . are members of a learned profession." *Hamlet H.M.A., LLC v. Hernandez*, ___ N.C. App. ___, ___, 821 S.E.2d 600, 606 (2018). Here, the conduct as alleged by plaintiff's complaint is "the solicitation of patients and *the practice of medicine and surgery* in North Carolina in violation of the agreement between Plaintiff and Zaldivar." (Emphasis added.) The Agreement places a limitation on defendant's ability to provide medical care and therefore arises from "a rendering of professional services." *Wheeless*, 237 N.C. App. at 589, 768 S.E.2d at 123. The trial court did not err in determining this claim falls under the learned profession exemption, and this argument is overruled.

VI. Derivative Claims

Plaintiff next argues that "the Referral Source Covenants are valid and enforceable. As such, they can properly serve as the basis for a

tortious interference claim against Zaldivar Plastics." As the restrictive covenants are not enforceable, there is also no basis for plaintiff's tortious interference claim. This argument is overruled.

VII. Punitive Damages

[5] Plaintiff finally argues, "the trial court . . . erred in holding that Christensen Plastics' punitive damages claim fails." Because we have held that the covenants are unenforceable, defendants have no liability for compensatory damages, and thus there is no basis for awarding punitive damages. N.C. Gen. Stat. § 1D-15(a) (2017) ("Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages . . . ."); *see Pittmann v. Hyatt Coin & Gun, Inc.*, 224 N.C. App. 326, 330, 735 S.E.2d 856, 859 (2012) ("[A] claim of punitive damages is dependent upon a successful claim for compensatory damages . . . ."). This argument is overruled.

VIII. Conclusion

For the foregoing reasons, we affirm the trial court's grant of summary judgment for defendants.

AFFIRMED.

Judges BRYANT and DAVIS concur.

ASSOCIATE BEHAVIORAL SERVICES, INC. AND GREGORY MOORE, PLAINTIFFS
v.
SHIRLEY SMITH, JEANETTE SMITH, AND LIFE CHANGING BEHAVIORAL HEALTH SERVICES, LLC, DEFENDANTS

No. COA18-463

Filed 19 March 2019

1. Appeal and Error—time for filing notice of appeal—tolling—motion for reconsideration

A defendant in a complex business case lost the right to appeal an attorney fees order that was issued with the final judgment by failing to appeal the order within 30 days. A Rule 60(b) motion for reconsideration did not toll the time for filing a notice of appeal.

2. Civil Procedure—Rule 60(b) motion for reconsideration—new legal theory

The trial court did not abuse its discretion in denying a Rule 60(b) motion for reconsideration of an attorney fees order where the motion was based on an entirely new legal theory not argued in the original motion for attorney fees.

Appeal by defendant from order entered 4 December 2017 by Judge John R. Jolly, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 28 November 2018.

Hutchens Law Firm LLP, by Davis W. Puryear and H. Terry Hutchens, for plaintiff-appellee Associate Behavioral Services, Inc.

Robert R. Underwood, II, for plaintiff-appellee Gregory Moore.

The Charleston Group, by Jose A. Coker and R. Jonathan Charleston, for defendant-appellant Shirley Smith.

DAVIS, Judge.

In this case, we consider whether the trial court erred by denying a defendant's motion for reconsideration of the court's prior order declining to award her attorneys' fees. Because the motion for reconsideration did not assert any of the grounds upon which relief may be granted under Rule 60(b) of the North Carolina Rules of Civil Procedure and instead requested reconsideration based on an entirely new legal theory, we affirm.

Factual and Procedural Background

In 2003, defendant Shirley Smith and Gregory Moore founded Associate Behavioral Services, Inc. ("ABS"), a company that provided home care services to mentally ill and developmentally disabled persons in North Carolina. Moore and Smith each owned fifty percent of ABS's shares. The relationship between Moore and Smith ultimately soured after frequent disagreements as to the management of ABS.

The decline of this relationship culminated on 22 October 2009, when Moore and ABS filed a complaint in Robeson County Superior Court against Smith, her sister Jeanette Smith, and Life Changing Behavioral Services, LLC ("LCBS"), a business the two sisters had formed together. The complaint contained a number of claims for relief, including conversion, diversion of corporate opportunities, unfair and deceptive trade practices, fraud, tortious interference with contract, and civil conspiracy. On 7 December 2009, Smith filed a motion to dismiss and an answer containing counterclaims for fraud, conversion, diversion of corporate opportunities, unfair and deceptive trade practices, breach of fiduciary duty, unjust enrichment, and gross mismanagement. Smith's answer also included a request for dissolution of ABS, receivership, and an accounting.

A hearing on Smith's motion for the appointment of a receiver was held before the Honorable Robert F. Floyd on 8 December 2009. On 2 February 2010, the trial court entered an order granting the motion and appointing a receiver. The case was subsequently designated a mandatory complex business case on 23 February 2010 and transferred to the North Carolina Business Court two days later.

On 8 July 2011, the trial court entered an order dismissing all claims against Jeanette Smith and LCBS. Based on its determination that neither Moore nor Smith had standing to assert claims or counterclaims on behalf of ABS, the trial court entered an order dismissing these claims on 11 August 2011. The order further provided that "[t]he [c]laims against Smith and the [c]ounterclaims against Moore asserted in this matter shall remain in place, but may be prosecuted only by and on behalf of ABS, acting through the Receiver."

On 16 January 2013, Moore filed a motion to remove the receiver and dissolve the receivership. In addition, he made a separate motion to (1) allow him to pursue derivative claims on behalf of ABS; (2) permit him to pursue his individual claims against Smith; and (3) reinstate the claims against Jeanette Smith and LCBS. Smith filed a response to Moore's motions on 5 February 2013 in which she requested an award of

attorneys' fees pursuant to Rule 11 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 6-21.5.

On 18 July 2016, the trial court issued an order (the "Dismissal Order") that (1) dismissed all of the parties' remaining claims and counterclaims; (2) directed that the receiver liquidate and dissolve ABS; and (3) ordered that once the liquidation and dissolution had occurred the receiver would be discharged and the receivership dissolved.

On that same date, the court also entered a separate order (the "Attorneys' Fees Order") denying Smith's motion for attorneys' fees. The court ruled that although Moore had engaged in misconduct that materially delayed the action and caused harm to ABS, the conduct was "not related to any pleading, motion, or other court paper" and thus Rule 11 was "not the vehicle for imposing sanctions."

On 23 August 2016, Smith filed a motion for reconsideration as to the Attorneys' Fees Order, which stated, in relevant part, as follows:

> 3. The Court in denying Smith's motion for attorney's fees stated that "[g]iven the nature of the complained of conduct, however, it appears Rule 11 is not the vehicle for imposing sanctions based on that misconduct." . . .
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> 4. Based on the above, Smith now respectfully moves the Court, pursuant to N.C.G.S. § 55-7-46(2), to permit the payment of reasonable attorneys' fees to Smith due to the harm caused by Moore's unreasonable conduct in delaying and obstructing the prosecution of this action which he initiated, individually and on behalf of ABS.

The trial court entered an order (the "Reconsideration Order") on 4 December 2017 denying Smith's motion. On 3 January 2018, Smith filed a notice of appeal with this Court.

Analysis

In her notice of appeal, Smith stated her intent to appeal both the Attorneys' Fees Order and the Reconsideration Order. We address each in turn.

I. Attorneys' Fees Order

[1] Rule 3 of the North Carolina Rules of Appellate Procedure requires that parties to a civil action file and serve a notice of appeal within thirty days after entry of a final judgment. *Rosenstadt v. Queens Towers Homeowners' Ass'n*, 177 N.C. App. 273, 276-77, 628 S.E.2d 431, 433 (2006). "A final judgment is one which disposes of the cause as to all the

parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citation omitted).

Here, as Smith concedes, the two 18 July 2016 orders collectively constituted a final judgment because they disposed of all of the parties' claims and counterclaims, ordered dissolution of ABS, and denied Smith's motion for attorneys' fees. Nevertheless, she did not file her notice of appeal of the Attorneys' Fees Order until well after thirty days had elapsed from the date of the order.

It is well established that "[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal." *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008). Thus, if a party files a motion for reconsideration under Rule 60(b) but fails to appeal the underlying order within thirty days, the appeal is untimely as to that order. *Sea Ranch II Owners Ass'n, Inc. v. Sea Ranch II, Inc.*, 180 N.C. App. 226, 228-29, 636 S.E.2d 332, 333-34 (2006). Therefore, because Smith failed to give notice of appeal within thirty days of the entry of the Attorneys' Fees Order, her right to appeal that order was lost.

II. Reconsideration Order

[2] Unlike Smith's appeal of the Attorneys' Fees Order, her appeal of the Reconsideration Order is properly before us given that she filed her notice of appeal within thirty days of that order. Although her motion for reconsideration did not cite a specific Rule of Civil Procedure, it is well established that Rule 60(b) governs motions for reconsideration in this context. *See, e.g.*, *Henderson v. Wachovia Bank of N.C.*, 145 N.C. App. 621, 626-28, 551 S.E.2d 464, 468-70 (applying Rule 60(b) to defendant's motion for relief from entry of default judgment), *disc. review denied*, 354 N.C. 572, 558 S.E.2d 869 (2001). "[R]elief under Rule 60(b) is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion." *Harrington v. Harrington*, 38 N.C. App. 610, 612, 248 S.E.2d 460, 461 (1978) (citation omitted).

Rule 60(b) provides, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
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> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) Fraud . . . misrepresentation, or other misconduct of an adverse party;
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> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. R. Civ. P. 60(b). "It is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments." *Catawba Valley Bank v. Porter*, 188 N.C. App. 326, 329, 655 S.E.2d 473, 475 (2008) (citation and quotation marks omitted).

Here, although Smith's original motion for attorneys' fees was based upon Rule 11, her motion for reconsideration was premised on an entirely new legal basis — N.C. Gen. Stat. § 55-7-46(2). As a result, her motion did not fall within any of the enumerated grounds for relief under Rule 60(b).[1] Smith has failed to cite any legal authority for the proposition that Rule 60(b) permits a litigant to "swap horses" in a motion for reconsideration by seeking relief under a new legal theory. Nor has our own research disclosed any support for such an argument. Indeed, our caselaw suggests that the contrary is true. *See Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981) (holding that trial court erred in granting defendant's motion for relief from prior order awarding attorneys' fees to opposing party by modifying that order pursuant to Rule 60(b) "so as to apply a different principle or rule of law to the portion of the prior judgment awarding attorney's fees"). Therefore, we conclude that the trial court did not err in denying Smith's motion for reconsideration.

Conclusion

For the reasons stated above, we affirm the trial court's 4 December 2017 order.

AFFIRMED.

Judges HUNTER, JR. and BERGER concur.

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1. Indeed, Smith's brief does not argue as to the applicability of any specific provision of Rule 60(b).

BDM INVESTMENTS, PLAINTIFF

v.

LENHIL, INC., LENNON HILLS, L.L.C., JUDITH HOLLINGSWORTH, IN HER OFFICIAL CAPACITY AS EXECUTRIX OF THE ESTATE OF GLENN HOLLINGSWORTH; EDWIN L. BURNETT, III; VIABLE CORP.; GARY LAWRENCE; KEITH MYERS; MEYERS APPRAISAL SERVICES, L.L.C.; AND DANIEL HILLA, III, DEFENDANTS

No. COA18-533

Filed 19 March 2019

1. Statutes of Limitation and Repose—alleged loss—not reasonably discoverable within two years—nondisclosure of conflicts of interest

A legal malpractice claim was not saved by the four-year statute of repose (N.C.G.S. § 1-15(c)) where plaintiff failed to show that its alleged loss—due to its closing attorney's nondisclosure of facts implicating conflicts of interest—was not reasonably discoverable within two years of the attorney's last date of representation (the real estate closing date).

2. Fraud—constructive—pleading—requirement of particularity—conclusory statements

The trial court properly dismissed constructive fraud claims against an attorney for his actions in a real estate transaction where the complaint failed to meet the requirement of particularity, instead presenting conclusory statements—for example, that the presumption of constructive fraud existed because the attorney's wife received a commission from the transaction.

3. Fraud—negligent misrepresentation—attorney—real estate transaction—deed of trust—no effect on title

The trial court properly dismissed negligent misrepresentation claims against an attorney for his alleged misrepresentations or omissions during the course of a real estate transaction where the attorney's nondisclosure of facts—related to a deed of trust on a real estate development in which plaintiff was purchasing lots—did not affect plaintiff's title to the lots.

4. Conspiracy—civil—forecast of evidence—suspicion and conjecture

The trial court properly dismissed plaintiff's civil conspiracy claim alleging that an attorney had enticed plaintiff into an ill-advised real estate purchase where plaintiff offered nothing to dispute the

attorney's statement that he had no knowledge of a secret payment to another person for inducing plaintiff into the transaction, and plaintiff offered nothing else in support of its claim other than suspicion and conjecture.

5. Fiduciary Relationship—aiding and abetting breach of—existence of cause of action

The trial court properly dismissed claims for aiding and abetting breach of fiduciary duty where the N.C. Supreme Court had not recognized such a cause of action.

6. Appeal and Error—waiver—multiple defendants—failure to assign claim to particular defendant

A claim of equitable estoppel against a defendant was waived where plaintiff's complaint did not name that specific defendant in its list of defendants to which the claim applied.

7. Employer and Employee—vicarious liability—employee's actions not overseen by employer—real estate transaction

Plaintiff failed to state a claim where plaintiff alleged that defendant supervising realtor and real estate company (Evans/Homeplace) were vicariously liable for the actions of plaintiff's realtor, yet plaintiff also alleged that the realtor kept his actions secret from Evans/Homeplace and that Evans/Homeplace did not oversee anything the realtor was doing in the transaction at issue. The realtor's actions were outside the legitimate scope of his employment.

8. Employer and Employee—respondeat superior—derivative claims—precluded by dismissal with prejudice as to employee

Derivative claims against a deceased employee's employer based on respondeat superior were barred where plaintiff settled with the deceased employee's estate and filed a notice of dismissal with prejudice, which precluded further action against the employer as to derivative liability.

9. Fraud—negligent misrepresentation—sufficiency of complaint—specificity of allegations

The trial court properly dismissed a negligent misrepresentation claim where plaintiff's complaint (1) lacked any specific allegations that defendant real estate development company negligently supplied information with respect to the transaction at issue and (2) also lacked any showing that plaintiff justifiably relied on any such negligently prepared or omitted information.

10. Unfair Trade Practices—sufficiency of complaint—specificity

The trial court properly dismissed unfair and deceptive trade practices claims arising from a real estate transaction where the complaint failed to plead specifically what statement or misrepresentation defendants made, how plaintiff relied to its detriment on such statement or misrepresentation, or how such statement or misrepresentation proximately caused an injury to plaintiff.

11. Conspiracy—civil—specificity of allegations—suspicion or conjecture

The trial court properly granted summary judgment against plaintiff on its claim for civil conspiracy where the complaint failed to allege any specific overt act in furtherance of a conspiracy or a common agreement to defraud plaintiff or accomplish any unlawful purpose in the real estate transaction at issue—instead alleging only suspicion or conjecture.

12. Damages and Remedies—punitive—underlying claims dismissed

The trial court properly dismissed constructive fraud claims arising from a real estate transaction where the complaint failed to allege the time, place, and content of the alleged fraudulent representations. As a result, the trial court also properly denied punitive damages for the fraud claims.

13. Conspiracy—civil—dual agency relationship—summary judgment

The trial court properly denied plaintiff's motion for summary judgment on its claims for civil conspiracy against certain defendants arising from a real estate transaction where there were genuine issues of material fact. Plaintiff failed to prove whether defendant-realtor served as plaintiff's agent in the transaction and whether he also served as other parties' agent in the transaction.

Appeal by Plaintiff-Appellant from Orders entered 18 January 2012, 20 March 2014, 21 July 2014, and 16 November 2017 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Brunswick County. Heard in the Court of Appeals 14 November 2018.

King Law Firm, by Kenneth W. King, Jr., plaintiff-appellant.

The Law Offices of Oliver & Cheek, LLC, by George M. Oliver & Ciara L. Rogers, for Edwin L. Burnett, III, Daniel Hilla, Lenhil, Inc., Lennon Hills, L.L.C., and Viable Corp., defendants-appellees.

Cranfill Sumner & Hartzog, LLP, by Carl Newman and Richard T. Boyette, for Gary Lawrence, defendant-appellee.

Ennis, Baynard, Morton, Medlin & Brown, P.A., by Maynard M. Brown and B. Danforth Morton, for Martin J. Evans and Homeplace Realty Associates, Inc., defendants-appellees.

HUNTER, JR., ROBERT N., Judge.

Plaintiff-Appellant appeals from Orders entered 18 January 2012, 20 March 2014, 21 July 2014, and 16 November 2017 in which Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Brunswick County, granted Defendants' motions to dismiss and motions for summary judgment and dismissed the case. We affirm.

I. Factual Background and Procedural History

A. Factual Background

The Record shows the following facts. Plaintiff-Appellant BDM Investments Inc. ("Plaintiff" or "BDM") is a general partnership, engaged exclusively in purchasing and holding real estate. Plaintiff's managing partner, Kenneth W. King, Jr. ("King"), and its two other partners, Leah L. King and Richard A. Mu, are licensed attorneys.[1] Plaintiffs purchased undeveloped land on 1 March 2007 and subsequently lost their investment and projected profits.

Since the early 1990s, Glenn Hollingsworth ("Hollingsworth") served as King's personal and business financial agent and advisor, preparing King's tax returns and "occupy[ing] a position of close personal trust" with King. In 2001, Hollingsworth also began providing personal and business financial advice to Leah King.

In or around 2004, Hollingsworth informed King he had sold his accounting business and acquired a provisional real estate license.

1. In the initial and two amended Complaints, and in all related filings up to and including the trial court's 18 January 2012 order, "Plaintiffs" or "plaintiffs" included BDM Investments, Kenneth W. King, Jr., Leah L. King, and Richard A. Mu. The trial court also referred to the Kings and Mu as "Individual Plaintiffs." The trial court's 18 January 2012 order granted Defendants' motion to dismiss Individual Plaintiffs, explaining they lacked standing to pursue individual claims because they failed to allege an injury separate and distinct from that suffered by BDM. The issue of standing of individual plaintiffs is not on appeal. Subsequently, BDM remains as the sole plaintiff. We refer to BDM as "Plaintiff," but may reference "plaintiffs" when explaining or quoting historical facts and procedure.

Hollingsworth's provisional real estate license required supervision by Martin J. Evans/Homeplace Realty Associates, Inc. ("Evans/Homplace").[2] At the same time, Hollingsworth intended to continue serving certain clients by including them in favorable investment opportunities. Based on their relationship of trust and confidence, King "believed that [Hollingsworth] would be acting in King's best interests in all respects related to matters of a personal and business financial nature."

In 2006, Hollingsworth contacted King regarding an " 'unbelievable opportunity' " to invest in land in the Lennon Hills subdivision in Brunswick County. Defendants Lenhil, Inc. and Lennon Hills L.L.C. developed and sold the Lennon Hills Lots. Hollingsworth told King that plaintiffs could buy ten undeveloped lots in the subdivision for $850,000 with a ten percent down payment. After plaintiffs held the lots for one year, during which time the developer would pay the interest on the loan for the land, they could then sell the lots back to the developer for a profit. Hollingsworth further represented that it was such a favorable investment, he had purchased lots in the subdivision. Hollingsworth "offered to take all necessary actions to complete BDM's investment."

Based on Hollingsworth's representations about the "particularly choice lots[,]" plaintiffs decided to purchase ten lots from the developer (the "Lennon Hills transaction"). On 5 December 2006, Plaintiff BDM signed a contract to purchase the lots for $850,000 and deposited $30,000 earnest money with closing attorney, Gary Lawrence ("Lawrence"), who was serving as an "impartial 'escrow agent' for the parties" to the transaction. At the time BDM signed the contract, the Lennon Hills plat map had not yet been recorded with the Brunswick County Register of Deeds.

During the Lennon Hill transaction, Hollingsworth assisted plaintiffs with securing financing, first through Cooperative Bank, and when that failed, through Wachovia Bank and Trust Company, Inc. Hollingsworth was also working with Defendant Edwin L. Burnett, III ("Burnett") and Defendant Daniel Hilla III ("Hilla"), shareholders of Lenhil Inc. and Lennon Hills, L.L.C. Hollingsworth had been preparing Burnett's tax returns, among other services, for over 20 years. Additionally, Hollingsworth was a W-2 employee of Viable Corp. ("Viable"), a North

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2. Plaintiff-Appellants' Second Amended Complaint identifies as defendants "Exit Realty 1st, LLC, Exit Realty & Associates, Inc., Exit Realty Seaside, L.L.C., and Homeplace Realty Associates, Inc. (collectively referred to as "Exit Realty[.]") It also refers to "defendant J. Martin Evans" as the "qualifying broker employed with, and acting for, the Exit Realty defendants[.]" Listed as defendants in the case, however, are Martin J. Evans and Homeplace Realty Associates, Inc., to which we refer collectively as "Evans/Homeplace."

Carolina corporation of which Burnett is the sole shareholder. Viable paid Hollingsworth approximately $3000 per month for his services. According to Plaintiff, Burnett, a licensed real estate agent, "appointed himself BDM's agent in the transaction and arranged for his half of the commission [$42,500] to be paid through Viable" to Hollingsworth Further, Burnett "as BDM's agent arranged for [Lawrence] to represent BDM."

Lawrence drafted the restrictive covenants for Lennon Hills and the custom Homesite Purchase Agreement for signing. Plaintiffs did not know about Lawrence's prior work for Lennon Hills, but claimed Burnett, "BDM's agent in the transaction, was aware of this relationship."

The contract for the Lennon Hills transaction, which was attached to each of plaintiffs' complaints: listed the closing date for plaintiffs' purchase as 6 February 2007; listed Lawrence as the escrow agent for the transaction; included no promise by the developer to repurchase the lots; and listed Lenhil, Inc. as seller. King gave the earnest money check to Hollingsworth at "First Citizens [Bank] in Porters Neck[.]" In discussing a closing date with Hollingsworth, King indicated that his schedule would delay him coming to Brunswick County; Hollingsworth subsequently agreed to pick up the documents and meet to sign them.

Lawrence acted as the closing agent on the Lennon Hills transaction, preparing all the documents for the closing on behalf of plaintiffs, pursuant to the contract and the instructions of the lender. He "treated [the closing] as a 'mail away' closing . . . [a] common practice in Brunswick County for real estate transactions . . . ."

King's deposition indicates he was aware at the date of closing that Lawrence was the closing attorney. King also stated he did no due diligence investigation as to the viability of the developer, made no effort to contact Lawrence as to the developer or any loans needing to be paid off in connection to the closing, nor spoke to any attorneys of his choosing about the transaction.

On 23 February 2007, King received "a good faith estimate and a proposed HUD," which Lawrence had faxed to Lumina Mortgage broker Nick Frank, who then faxed the statement to King's bookkeeper. The good faith estimate, which was not prepared by Lawrence,[3] reflected the $850,000 purchase price for the ten lots, and listed a ten percent commission, split in two equal parts: $42,500 to Viable Corp., and $42,500 to Lawrence Sales & Marketing.

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3. King's testimony did not reflect who did prepare the HUD, only that he did not "believe" it was prepared by Lawrence.

Lawrence Sales & Marketing is operated by Pam Lawrence, a real estate agent who is also Gary Lawrence's wife. Pam Lawrence and Burnett previously worked together in marketing and developing the Lennon Hills subdivision and other real estate ventures. During the development of Lennon Hills, Pam Lawrence asked Gary Lawrence to draft a form contract for sales, restrictive covenants, and bylaws for the future homeowners' association. Lawrence did so. Plaintiff asserts it did not know of Pam and Gary Lawrence's relationship.

In his deposition, Lawrence explained that in performing the title search in order to close the loan, he found a prior mortgage from BB&T Bank to Lennon Hills, L.L.C. as well as a deed of trust on the entire development from Lennon Hills, L.L.C. to Lenhil Inc., which Lawrence knew were essentially duplicate entities. Lawrence asked Alton Lennon, Lennon Hills' attorney, to release all ten lots that Plaintiff was purchasing from the deed of trust; Lennon agreed to do so. Lawrence further stated Burnett, "apparently" as Plaintiff's agent, was aware of the Lawrence's marriage, the covenants for the development, and the homeowners' association bylaws.

The Lennon Hills transaction closed on 1 March 2007, when King met Hollingsworth in a parking lot and signed documents closing Plaintiff's purchase of the ten lots. King knew Lawrence was the closing attorney but had had no communications with Lawrence at that time. Lawrence did not attend the parking lot closing.

The closing documents included a Wachovia Bank closing statement and a final HUD settlement statement, prepared by Lawrence as the settlement agent, and signed by King. King also affirmed during his deposition that he "had seen a draft HUD a week or so earlier that indicated [Lawrence] was the closing attorney[.]" The statement, which was included as an exhibit to plaintiffs' complaints, lists a $42,500 commission payment each to Lawrence Sales & Marketing and Viable. Hollingsworth's commission was concealed in the sales commission paid to other defendants.

As to the transaction, King admitted "BDM never reduced any binding repurchase agreement with the developers to writing," nor did plaintiffs perform any "due diligence investigation into the lot purchase" or "visit or look at the property before signing the homesite purchase agreement or closing the transaction." No documents included the promise by the seller to pay the first year's interest on the loan or to buy back the lots at a profit. King also admitted he "didn't pay any particular attention" to the entities receiving commission, nor did he raise

questions with Hollingsworth about the commission for the transaction. At the closing, King gave Hollingsworth a check for $63,526.48 covering the remaining balance of the ten percent down payment and additional closing costs.

On 7 March 2007, Viable Corp. paid $42,500 to Hollingsworth; this payment was not disclosed to Lawrence. Hollingsworth did not disclose the transaction to Evans/Homeplace, and upon questioning by Evans, he "denied receiving the $42,500 commission."

By letter of 30 March 2007, Lawrence "sent correspondence to plaintiffs enclosing a General Warranty Deed." The mailing included deeds for the ten lots in the Lennon Hills subdivision. Lawrence performed no further representation, nor did he and King communicate directly until this litigation began.

B. Procedural History

On 28 February 2011, plaintiffs filed the original complaint and issuance of summons against 29 defendants. The complaint included 19 causes of action and a separately pled claim for punitive damages against all defendants. On 16 March 2011, plaintiffs filed the First Amended Complaint against 29 defendants, with 19 causes of action and a claim for punitive damages against all defendants. On 8 April 2011, the North Carolina Supreme Court designated the case a Complex Business Case, and assigned the case on 14 April 2011 to the Honorable James L. Gale, Special Superior Court Judge for Complex Business Cases.

Between April and November of 2011, defendants filed answers to the complaints, motions to strike, and numerous motions to dismiss.

On 18 January 2012, the trial court dismissed by order the following claims pursuant to motions to dismiss under N.C. Gen. Stat. § 1A-12(b)(6): Legal Malpractice and Breach of Fiduciary Duty against Lawrence; Negligent Misrepresentation and Unfair and Deceptive Trade Practices against Lennon Hills Defendants;[4] and all claims against Evans/Homeplace Realty.

Claims not dismissed were subject to discovery. After discovery concluded, the trial court heard oral arguments on 17 December 2013. On 20 March 2014, the trial court issued an order and opinion on six

4. We refer to these appellees collectively as the "Lennon Hills Defendants," which includes Edwin L. Burnett, III ("Burnett"), Viable Corp., and Daniel Hilla ("Hilla"). These parties have also been referred to as Lenhil, Inc. or Lenhill and Lennon Hills, L.L.C.

motions:[5] (1) Plaintiff's motion for summary judgment against Lennon Hills Defendants, which the court denied; (2) Plaintiff's motion for summary judgment against the Estate of Hollingsworth, which the court denied; (3) Defendant Judith Hollingsworth's, as Executrix of the Estate of Hollingsworth, motion for summary judgment on all claims, which the court granted in part and denied in part; (4) Lennon Hills Defendants' motion for summary judgment, which the court granted in part and denied in part; (5) Defendant Lawrence's motion for summary judgment, which the court granted; and (6) Plaintiff's motion to amend complaint and to rescind and/or amend pursuant to Rules 15 and 54(b), which the court granted in part and denied in part.

On 27 May 2014, the Lennon Hills Defendants filed a motion for summary judgment as to Plaintiff's claim for piercing the corporate veil. The trial court issued an order and opinion on 21 July 2014 explaining that after the 20 March 2014 order, the parties disagreed as to whether Plaintiff's claim for piercing the corporate veil survived that order. The court determined the claim remained and allowed the Lennon Hills Defendants to file a motion as to the claim. The court granted the motion as to Plaintiff's claim for piercing the corporate veil and dismissed the claim with prejudice, leaving no other claims against Defendants Burnett or Hilla.

On 17 October 2017, Plaintiff filed a Notice of Dismissal with Prejudice, dismissing its claims against Judith Hollingsworth individually and as Executrix of the Estate of Glenn Hollingsworth.

In an Opinion and Final Order filed 16 November 2017, the trial court dismissed Plaintiff's action by denying its motions for summary judgment as to all defendants, granting the defendants' cross-motions, and resolving all claims in the action. Accordingly, the court dismissed the following claims pursuant to defendants' motions for summary judgment: Constructive Fraud and Negligent Misrepresentation against Lawrence; Civil Conspiracy against all defendants; Aiding and Abetting Breach of Fiduciary Duty against all defendants; and Punitive Damages.

On 12 December 2017, Plaintiff filed a Notice of Appeal as to Judge Gale's 18 January 2012, 20 March 2014, 21 July 2014 interlocutory orders and 16 November 2017 Final Order and Opinion dismissing all remaining defendants.

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5. Though we itemize here the motions relevant to the trial court's order, not all are part of the issues on appeal.

II. Jurisdiction

Judge Gale's orders of 18 January 2012, 20 March 2014, and 21 July 2014 were interlocutory; his Opinion and Final Order of 16 November 2017 is a final judgment. The North Carolina Supreme Court designated this a Complex Business Case on 8 April 2011. Because the designation was prior to 1 October 2014, this Court reviews the appeal pursuant to N.C. Gen. Stat. § 7A-27(b).

III. Standards of Review

A. Motion to Dismiss

"On appeal of a [Rule] 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted). This Court views the allegations in the complaint in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994); N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). This Court considers "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[.] *Harris v. NCNB Nat. Bank of North Carolina*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Under North Carolina's notice pleading requirements, "[a] complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of [a plaintiff's] claim so as to enable [them] to answer and prepare for trial." *McAllister v. Ha*, 347 N.C. 638, 641, 496 S.E.2d 577, 580 (1998) (citation omitted).

While this Court takes factual allegations in the complaint as true, *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citation omitted), we are not required to "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health and Human Svcs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005). In North Carolina, dismissal pursuant to Rule 12(b)(6) is appropriate when one of three conditions is satisfied:

> (1) when on its face the complaint reveals no law that supports plaintiff's claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good

claim; and (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Johnson v. Bollinger, 86 N.C. App. 1, 3, 356 S.E.2d 378, 380 (1987).

"A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred." *Reunion Land Co. v. Village of Marvin*, 129 N.C. App. 249, 250, 497 S.E.2d 446, 447 (1998) (citation omitted). "Whether a statute of repose has run is a question of law." *Glens of Ironduff Prop. Owners Ass'n v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447 (2012) (citation omitted). It is well settled that "[q]uestions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *In re Summons of Ernst & Young*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted).

B. Summary Judgment

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, this Court reviews *de novo* a claim for a motion for summary judgment. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). Such review requires a two-part analysis of whether: the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that no genuine issue as to any material fact exists, and that the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c); *Andresen v. Progress Energy, Inc.*, 204 N.C. App. 182, 184, 696 S.E.2d 159, 160-61 (2010). The moving party must demonstrate the absence of a triable issue: "(1) by showing that an essential element of the opposing party's claim is nonexistent; or (2) [by] demonstrating that the opposing party cannot produce evidence sufficient to support an essential element of the claim or overcome an affirmative defense which would work to bar [its] claim." *Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 89, 464 S.E.2d 299, 300 (1995) (citing *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)).

If the moving party is able to meet this burden, the non-moving party "must 'produce a forecast of evidence demonstrating that the [non-moving party] will be able to make out at least a prima facie case at trial.' " *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342 (quoting *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). This forecast "may not rest upon the mere allegations or denials of [a] pleading," N.C. R. Civ. P. 56(e), nor may it rest upon unsworn affidavits or other inadmissible materials, *see Rankin*, 210 N.C. App. at 218-22, 706 S.E.2d at 314-16 (affirming summary judgment

where only inadmissible, unauthenticated documents and no affidavits or sworn testimony were submitted in response to summary judgment motion).

IV. Analysis

A. Claims against Lawrence

1. Malpractice

[1] On appeal, Plaintiff assigns error to the trial court for dismissing the legal malpractice claim against Lawrence because Plaintiff filed its claim within the four-year statute of repose. In response, Lawrence argues the court correctly dismissed Plaintiff's "untimely" malpractice claim because Plaintiff is not entitled to the protection of the longer statute of repose.

This appeal presents the question of whether a claim for professional malpractice against an attorney for alleged malpractice is allowable under the four-year statute of repose contained in North Carolina's professional malpractice statute of limitations when the claim is filed more than three years but within four years after the attorney's alleged malpractice. See N.C. Gen. Stat. § 1-15(c) (2017). Section 1-15(c) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of occurrence of the last act of the defendant giving rise to the cause of action: Provided whenever there is . . . economic or monetary loss . . . which originates under circumstances making the . . . loss . . . apparent to the claimant at the time of its origin, and the . . . loss . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

Id. The accrual of professional malpractice claims is delayed, then, until the last act of the representation at issue, at which time the statute of limitations begins to run. *Id.* Thus, in order to benefit from the four-year

statute of repose under N.C. Gen. Stat. § 1-15(c), a plaintiff must show (1) an economic or monetary loss caused by the alleged malpractice, (2) which was not reasonably discoverable for at least two years after that date, and (3) commencing of its suit within one year of discovery. *Bolton v. Crone*, 162 N.C. App. 171, 173, 589 S.E.2d 915, 916 (2004).

A defense under a statute of limitations or a statute of repose may be raised under a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Hargett*, 337 N.C. at 653, 447 S.E.2d at 786. "Unlike statutes of limitations, which run from the time a cause of action accrues, 'statutes of repose . . . create time limitations which are not measured from the date of injury . . . [but] often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant.' " *Id.* at 654, 447 S.E.2d at 787 (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985)). If the time period in which a claim based on professional malpractice is not met, the plaintiff has no cause of action. *Id.* at 655, 447 S.E.2d at 787.

Here, the parties agree the last act in Lawrence's representation of Plaintiff was at the closing on 1 March 2007. Plaintiff filed suit on 28 February 2011, which was one day shy of four years from Lawrence's last date of representation. The question, then, is whether Plaintiff's claim is time barred by the statute of limitations or allowed pursuant to the statute of repose. Plaintiff's malpractice claim—whereby Plaintiff argues on appeal "Lawrence's entire representation . . . was fraught with unethical conduct"—is largely centered on a failure to disclose facts that were in the closing documents and the contract. Plaintiff signed the contract of sale prior to Lawrence's representation in the transaction. At the trial court, Plaintiff alleged Lawrence improperly served as escrow agent and closing attorney, but Plaintiff knew these facts prior to closing. During its 30(b)(6) deposition, Plaintiff admitted that the allegations that it did not know Lawrence was the escrow agent or its closing attorney until after the closing were false [King I Dep. 52:18-19, 53:2-17]; Plaintiff did not, however, withdraw those allegations. Plaintiff's complaint further alleged "Lawrence never disclosed to [Plaintiff] that he was disbursing $42,500.00 of the purchase price to . . . Viable, yet the complaint also alleged that the settlement statement Lawrence prepared "identified [a] commission payment . . . to Viable . . . in the amount of $42,500.00." Thus, at the latest, Plaintiff knew that Lawrence was acting as its closing attorney when it received the preliminary closing statement on 23 February 2007, which included the ten percent commission, split in two equal parts: $42,500 to Viable Corp., and $42,500 to Lawrence Sales and Marketing.

In Plaintiff's three complaints, it alleges only that it did not discover its loss in its real estate investment until "long after the purchase was complete." On appeal, Plaintiff argues this was a "non-apparent injury" that was discovered "*long after* the purchase was complete[,]" and thus argues Plaintiff "was not injured *until King discovered* the misrepresentations and omissions made by Lawrence and other parties involved[,]" as set forth in the pleadings. (Emphasis added.) Plaintiff argues, further, it was the "deceptive nature" of Lawrence's acts that prevented King from discovering "underlying facts until *much later* and BDM filed suit within one year of that discovery." (Emphasis added.) Plaintiff did not identify its economic or monetary loss or explain why any alleged injury was not reasonably discoverable, nor did it provide a specific date of injury by which the court could measure the time frame in which the suit had to be commenced. *See Bolton*, 162 N.C. App. at 173, 589 S.E.2d at 916. In its brief, Plaintiff concedes it did not plead a date of discovery. Such vague arguments fail to meet the necessary elements set forth by N.C. Gen. Stat. § 1-15(c).

Both the contract and the settlement statement lead to legal conclusions that the statute of limitations as well as the statute of repose do not save Plaintiff's claims against Lawrence for malpractice. The four-year statute of repose would not save Plaintiff's claim because Plaintiff failed to show that its alleged loss due to Lawrence's nondisclosure was one which should not have reasonably been discovered within two years of the closing. Later discovery of additional facts or greater damages does not delay accrual. The three-year statute of limitations had run from the time Plaintiff must have known that Lawrence was both closing and attorney escrow agent. Plaintiff's own allegations show that it should have reasonably discovered Lawrence's complained of actions no later than 1 March 2007.

Moreover, Lawrence filed a motion to dismiss all claims against him, arguing the statute of limitations as a defense because the claims "accrued no later than March 1, 2007[.]" Plaintiff's response to Lawrence's motion to dismiss neither raised the statute of repose nor argued why it applied. North Carolina law is well-settled that arguments "not raised at the trial level will not be entertained for the first time on appeal." *Bennett v. Hospice & Palliative Care Center of Alamance-Caswell*, 246 N.C. App. 191, 195, 783 S.E.2d 260, 263 n.1 (2016) (citing *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001)).

For these reasons, we affirm the trial court's dismissal of the legal malpractice claims against Lawrence.

2. Breach of Fiduciary Duty

Plaintiff next argues Lawrence breached his fiduciary duty to Plaintiff. In its complaint, Plaintiff alleged Lawrence "failed to act in good faith and with due regard to the interests of plaintiffs in keeping with his fiduciary duty" and alleged fraud and civil conspiracy, among other things, the "direct and proximate" of which caused injury that "induced" plaintiffs to purchase the lots. In its brief, Plaintiff argues Lawrence breached his fiduciary duty by "fail[ing] to disclose his marriage to Pam Lawrence" and Lawrence's "multiple conflicts of interest" resulting in "an ethical breach of the duty of loyalty" particularly arising from Lawrence's "long standing professional relationship" with the Lennon Hill Defendants.

Breach of fiduciary claims are subject to the statute of limitations found in N.C. Gen. Stat. § 1-52 (2017).

> The appropriate statute of limitations depends upon the theory of the wrong or the nature of the injury. Because claims arising out of the performance or failure to perform professional services based on negligence or breach of contract are in the nature of "malpractice" claims, they are governed by N.C. Gen. Stat. § 1-15(c). Fraud by an attorney, however, is not within the scope of "professional services" as that term is used in N.C. Gen. Stat. § 1-15(c), and thus cannot be "malpractice" within the meaning of that statute. If the claim is for fraud, which includes a deliberate breach of fiduciary obligation, the courts have generally applied the jurisdiction's fraud statute of limitations.

Sharp v. Teague, 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994) (citations and some internal quotation marks omitted).

Plaintiff's complaint put forth essentially the same facts for claims of negligence and for breach of fiduciary duty. In its brief, Plaintiff argues, and we agree, that the three year statute of limitations against Lawrence should apply to its "[a]llegations of a breach of fiduciary duty that do not rise to the level of constructive fraud." Plaintiff's claims for breach of fiduciary duty overlap its claims for legal malpractice; accordingly, for the same reasons the legal malpractice claims should be dismissed as time barred, so too should the claims for breach of fiduciary duty be dismissed.

We therefore affirm the trial court's dismissal of Plaintiff's claim for breach of fiduciary duty against Lawrence.

3. Constructive Fraud

[2] In its brief, Plaintiff states in its breach of fiduciary duty argument, "certain breaches of fiduciary duty based on fraud, such as [Lawrence's] failure to disclose his wife's commission and past work for Lennon Hills defendants, do not merge with the general claim of legal malpractice." In a separate argument, Plaintiff subsequently challenges the trial court's 20 March 2014 summary judgment order dismissing the constructive fraud claims against Lawrence. In its 18 January 2012 order, pursuant to motions to dismiss, the trial court dismissed all constructive fraud claims except against Hollingsworth. In its 20 March 2014 order, the trial court determined the following claims would not survive summary judgment: Plaintiff's "direct" claims of fraud; fraud in the inducement; and negligent misrepresentation against Lawrence for failing to disclose his relationship with Lawrence Sales & Marketing, the prior legal work he performed for the Lennon Hills Defendants, and a deed of trust that did not affect BDM's title to the lots.

Plaintiff argues in its brief, "the claim [for constructive fraud] should not have been dismissed pursuant to summary judgment." Plaintiff's appellate argument, therefore, references a grant of summary judgment on different claims not addressed in its brief. Assuming without deciding Plaintiff properly raised constructive fraud on appeal,[6] the arguments center on Lawrence's fiduciary duty to Plaintiff in the Lennon Hills transaction, and Lawrence's failure to "disclose material facts that would have kept BDM from completing the land purchase, including but not limited to, the commission paid to Lawrence's wife, a possible benefit to Lawrence."

"Although the showing necessary to establish the existence of a breach of fiduciary duty and constructive fraud involves overlapping elements, the two claims are separate under North Carolina law." *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 502, 764 S.E.2d 203, 219 (2014) (citation omitted). To recover for constructive fraud, a plaintiff must establish the existence of circumstances:

> (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust[.] Further, an

6. "A claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations[.]" *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000).

> essential element of constructive fraud is that defendants sought to benefit themselves in the transaction. The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself. In order to satisfy this requirement, Plaintiff's evidence must prove defendants sought to benefit themselves or to take advantage of the confidential relationship.

Id., 764 S.E.2d at 219-20 (citations and internal quotations omitted) (alterations in *Trillium*); *see also Collier v. Bryant*, 216 N.C. App. 419, 432, 719 S.E.2d 70, 81 (2011) (explaining the presumption of constructive fraud if a superior party "obtains a possible benefit" and the burden shifting to defendant to prove he acted in an "open, fair and honest manner" so that no breach of fiduciary duty occurred). As to claims based in fraud, this Court has stated:

> Material facts and circumstances constituting fraud must be [pled] in a complaint with particularity. Mere generalities and conclusory allegations of fraud will not suffice. This is so for both fraud and constructive fraud. Constructive fraud rests upon the presumption arising from a breach of a fiduciary obligation.

Id. at 597, 439 S.E.2d at 796 (citations and internal quotation marks omitted).

Plaintiff argued the presumption of constructive fraud existed, since Lawrence's wife received a commission, which was a possible benefit to Lawrence. Facts support, however, Lawrence's fair handling of the transaction. The contract for the sale of the transaction was signed prior to Lawrence's involvement as an escrow agent. The deed of trust did not encumber Plaintiff's lots, and thus Lawrence was not obligated to disclose it. Plaintiff received clear title to its lots and notice of who received commissions, including Lawrence Sales & Marketing. Plaintiff did not contest the accuracy of the settlement statement. Lawrence completed the closing and disbursed funds appropriately as the escrow agent.

Here, the complaint does not meet the requirement of particularity with regard to fraud or constructive fraud and instead presents conclusory statements. Such claims merely repeat the reasons stated for the legal malpractice and breach of fiduciary duty claims. Because Plaintiff has offered no reason to reverse the dismissal of its constructive fraud claim, we affirm the trial court.

4. Negligent Misrepresentation

[3] Next, Plaintiff argues the trial court erred in dismissing the negligent misrepresentation claims against Lawrence. Plaintiff argues further:

> BDM justifiably relied on several misrepresentations and/or omissions negligently made by Lawrence, including but not limited to . . . [h]is past work for Lennon Hills defendants . . . [h]is marriage to Pam Lawrence of Lawrence Sales & Marketing . . . [t]he 15 million Deed of Trust on the Property . . . [and] [t]he payment of $42,500 to Lawrence Sales & Marketing and to Viable, knowing Viable would "do something with the money."

"[N]egligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). Reliance is not justifiable for purposes of negligent misrepresentation if a plaintiff failed to make reasonable inquiry, had the opportunity to investigate, and could "have learned the true facts through reasonable diligence[,]" *Rountree v. Chowan County*, 796 S.E.2d 827, 832 (2-17) (2017).

Plaintiff argues Lawrence acknowledged "key omissions of fact that should have been disclosed to BDM, but improperly placing the impetus on BDM . . . to discover these matters." While Plaintiff raised the issue of justifiable reliance on multiple issues, as stated *supra*, Plaintiff argues in its brief only the deed of trust. King testified that had he known about the encumbrance on the lots from the deed of trust, he would not have consummated the transaction.

When questioned at his deposition whether he would have told plaintiffs about the $15 million deed of trust, Lawrence explained, "Not unless they had asked because I don't think that it made any difference." Lawrence was not involved in the Lennon Hills transaction until after the sales contract between Plaintiff and Lenhil, Inc. was fully executed. The trial court found Lawrence's "failure to disclose those facts [*i.e.*, his past legal work for the Lennon Hills Defendants, his wife's ownership of Lawrence Sales & Marketing, and the deed of trust] after the purchase contract was binding . . . did not cause BDM to purchase the lots." Lawrence secured a release of the deed of trust after closing; Plaintiff received clear title to the lots. Plaintiff has raised no genuine issue of material fact to the contrary, and we therefore affirm the trial court's grant of summary judgment on Plaintiff's negligent misrepresentation claim.

5. Civil Conspiracy

[4] Plaintiff claims in its brief on appeal that "this case has, at its heart, an elaborate conspiracy of intentional obfuscation and unethical behavior." Citing to pattern jury instructions and to a federal District Court case finding a civil conspiracy claim sufficient to overcome a motion to dismiss, Plaintiff asks this Court to find its civil conspiracy claim was "improperly dismissed" at summary judgment. *See Bear Hollow LLC v. Moberk, LLC*, 2006 WL 1642126 (W.D.N.C. 5 June 2006). Lawrence argues Plaintiff's civil conspiracy claim must fail, where Plaintiff "put forward no evidence to support a civil conspiracy claim" against him, and that "mere suspicion or conjecture" is not enough for submission to a jury.

In North Carolina, in order to state a claim for civil conspiracy, a complaint must allege "(1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy." *State ex. rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 115 (2008) (citing *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951)). "If a party makes this showing, all of the conspirators are jointly and severally liable for the act of any one of them done in furtherance of the agreement." *Dalton v. Camp*, 138 N.C. App. 201, 213, 531 S.E.2d 258, 267 (2000), *rev'd in part on other grounds*, 353 N.C. 657 (2001) (citing *Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987)).

Civil conspiracy is a dependent claim. *Toomer v. Garrett*, 155 N.C. App. 462, 483, 574 S.E.2d 76, 92 (2002). "Only where there is an underlying claim for unlawful conduct can a plaintiff state a claim for civil conspiracy by also alleging the agreement of two or more parties to carry out the conduct and injury resulting from that agreement." *Id.*, 574 S.E.2d at 92. In order to maintain a civil conspiracy claim, the underlying unlawful conduct need not be separately stated; this Court reviews all sections of a complaint as to allegations to support such a claim. *See Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987) (explaining that recovery for a claim arising out of civil conspiracy "must be on the basis of sufficiently alleged wrongful overt acts"). "A party may prove an action for civil conspiracy by circumstantial evidence; however, sufficient evidence of the agreement must exist 'to create more than a suspicion or conjecture in order to justify submission of the issue to a jury.' " *Dalton*, 138 N.C. App. at 214, 531 S.E.2d at 267 (citing *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981)).

Here, in support of its civil conspiracy claim, Plaintiff sets forth in its complaint numerous allegations against "[a]ll Defendants." Collectively,

Plaintiff claims "[t]hrough their actions, misrepresentations and concealment of material facts and conflicts of interest and improper relationships . . . defendants conspired and/or entered into an agreement to improperly entice plaintiffs into purchasing and financing 10 lots in the Lennon Hills subdivision."

Our review of Plaintiff's allegations reveals that Plaintiff has failed to allege any specific overt act in furtherance of the alleged conspiracy or a common agreement and objective between Lawrence and Plaintiff. Moreover, Plaintiff voluntarily dismissed with prejudice all claims against Judith T. Hollingsworth, individually and as Executrix of the Estate of Glenn Hollingsworth. Thus, claims against Hollingsworth no longer exist as the central figure in the alleged conspiracy.

King, in his deposition, alleged Lawrence knew Hollingsworth was secretly being paid to lead Plaintiff into the transaction. In its appellate brief, Plaintiff suggests there was evidence Lawrence knew about the payment from Viable to Hollingsworth, citing to Lawrence's deposition testimony that Lawrence knew "Viable would 'do something with the money' ". Greater context of the quoted testimony reveals Lawrence had no knowledge of Viable's payment to Hollingsworth until after this lawsuit was filed. Lawrence testified in his deposition:

> [I] had no knowledge of who Glenn Hollingsworth was. I had no knowledge that he was a realtor . . . . I had no reason to suspect that he was being paid any sum of money. I paid at closing the two real estate agents I knew were involved . . . I paid $42,500 to Ed Burnett through his company, Viable. I have no idea what he did with that money.

Lawrence further testified:

> We were aware there were two agents involved and that they were splitting the commission. That is who we paid. We had no reason to believe that anybody else was going to get it. Now, I did have reason to believe Viable would do something with the money but I had no idea what . . . . I didn't know what Viable was going to do with its money. And I certainly had no idea that Glenn Hollingsworth was going to get any portion of it.

Plaintiff offers nothing to dispute that Lawrence had no knowledge of a secret payment. Other allegations regarding related "misrepresentations, conflicts of interest, hidden shared interest, conspiracies, banking violations, [and] appraisal violations" are likewise unsupported by

anything more than suspicion or conjecture. Plaintiff's argument on appeal likewise mirrors the conclusory allegations set out in his complaint and fails to cite any specific facts in support of his claim for civil conspiracy.

We conclude, therefore, Plaintiff has not forecast enough evidence to present a genuine question of material fact as to conspiracy. Accordingly, the trial court properly entered summary judgment for Lawrence.

6. Aiding and Abetting Breach of Fiduciary Duty

[5] Plaintiff next claims the trial court erred in dismissing its aiding and abetting breach of fiduciary duty claims against Lawrence and the Lennon Hills Defendants. To suggest Lawrence aided and abetted Hollingsworth in his breach, Plaintiff cites to Lawrence's deposition, in which he stated he knew Viable would "do something" with the money.

As Plaintiff acknowledges in its brief, the North Carolina Supreme Court has not recognized a cause of action for aiding and abetting breach of fiduciary duty, nor do we recognize it here. *See Ehrenhaus v. Baker*, 216 N.C. App. 59, 89, 717 S.E.2d 9, 29 (2011) (stating "it is unclear whether such a cause of action exists in North Carolina," and "elect[ing] not to delve into whether such claim exists" in the context of a class action merger), *appeal dismissed and rev. denied by Ehrenhaus v. Baker*, 366 N.C. 420, 735 S.E.2d 332 (2012); *but see Blow v. Shaughnessy*, 88 N.C. App. 484, 490, 364 S.E.2d 444, 447 (1988) (using a federal law to recognize a state cause of action for aiding and abetting a breach of fiduciary duty in the context of securities law violations), *abrogated by Bottom v. Bailey*, 238 N.C. App. 202, 211, 767 S.E.2d 883, 889 (2014). We therefore affirm the trial court's grant of summary judgment as to Plaintiff's claim for aiding and abetting breach of fiduciary duty.

7. Equitable Estoppel

[6] As an "alternative" to its other arguments, Plaintiff argues on appeal that "all defendants should be equitably estopped from asserting defenses against the foregoing claims including but not limited to the statute of limitations." Plaintiff asserts in its brief that "through pleadings and discovery" it showed "defendants repeatedly and knowingly made false representations and concealed material facts related to the Lennon Hills transaction" in order to lead Plaintiff into the sale.

While Plaintiff's brief uses the terminology "all defendants," plaintiffs' complaint did not include Lawrence in the specific listing of defendants pertaining to the Equitable Estoppel claim. To any extent Plaintiff

attempts to raise equitable estoppel against Lawrence on appeal, it is waived.

8. Punitive Damages

Plaintiff claims on appeal it is "entitled to punitive damages in addition to rescission of the contract" for the Lennon Hills transaction. Plaintiff asserts it is entitled to "punish defendants" with such damages "based on defendants' constructive fraud and negligent misrepresentations." Thus, on appeal, Plaintiff does not mention any individual defendant when discussing punitive damages, including Lawrence.

Because no claims remained against Lawrence, the trial court granted summary judgment on Plaintiff's claim for punitive damages against Lawrence. By affirming the trial court as to all previously considered claims against Lawrence, we likewise affirm the trial court's grant of summary judgment as to this claim.

For the above reasons, we affirm the trial court's orders as to Defendant Gary Lawrence.

B. Claims against Evans/Homeplace

Plaintiff next assigns error to the trial court for "dismissing all claims" against Evans/Homeplace. Other than a mere reference to "all claims," Plaintiff argues on appeal, more specifically, pursuant to vicarious liability, *respondeat superior*, and negligent supervision claiming Evans/Homeplace "should be held liable for Hollingsworth's acts with respect to the Lennon Hills transaction."

Plaintiff's argument does not include that the trial court erred in its ruling pertaining to the statute of limitations. The trial court's order of 18 January 2012 discussed the statute of limitations as it pertained to other defendants, but did not specifically discuss whether plaintiffs' claims against Evans/Homeplace were time barred. As to the order, Evans/Homeplace had already been dismissed, prior to the court's discussion of the statute of limitations. For the same reason the trial court dismissed other defendants based on the statute of limitations, however, most of plaintiffs' claims against Evans/Homeplace were time barred. Further, the trial court's order noted plaintiffs' concession at oral argument and in the motion brief that claims for negligence, gross negligence, conversion, breach of contract, and the implied duty of good faith and fair dealing were time barred. *See* N.C. Gen. Stat. § 1-52(9) and (16) (2017.)

Plaintiff also alleged joint venture and civil conspiracy against Evans/Homeplace. Under these claims, which are not separate causes of action, the conduct of one member of the joint venture or conspiracy is imposed upon another member of the joint venture or conspiracy. *See e.g.*, *Sellers v. Morton*, 191 N.C. App. 75, 83, 661 S.E.2d 915, 922; *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 10-11, 161 S.E.2d 453, 461 (1968). Thus, the statute of limitations for the underlying claims govern the claims for the joint venture or conspiracy. Other than the Chapter 75 claim, joint venture and civil conspiracy claims are also barred by the three-year statute of limitations. Accordingly, actions giving rise to Plaintiff's claims for negligence occurred during or before the parking lot closing on 1 March 2007 and are time barred.

1. Vicarious Liability

[7] Even if Plaintiff's negligence claims were not time barred by the statute of limitations, Plaintiff's argument that Evans/Homeplace is vicariously liable for Hollingsworth's actions fails. The doctrine of *respondeat superior* imposes liability on an employer for damages caused by the negligent acts of an employee. *Estes v. Comstock Homebuilding Cos., Inc.*, 195 N.C. App. 536, 540, 673 S.E.2d 399, 402, *disc. review denied*, 363 N.C. 373, 678 S.E.2d 238 (2009). Conversely, liability is not imposed on an employer when an employee "engaged in some private matter of his own or outside the legitimate scope of his employment[.]" *Van Landingham v. Singer Sewing Machine Co.*, 207 N.C. 355, 357, 177 S.E. 126, 127 (1934). "It is only when the relation of master and servant between the wrongdoer and his employer exists at the time and in respect to the very transaction out of which the injury arose that liability therefor attaches to the employer." *Tomlinson v. Sharpe*, 226 N.C. 177, 179, 37 S.E.2d 498, 500 (1946). Generally, "a principal will be liable for its agent's wrongful acts under the doctrine of *respondeat superior* when the agent's act (1) is expressly authorized by the principal; (2) is committed within the scope of the agent's employment and in furtherance of the principal's business; or (3) is ratified by the principal." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004) (citing *B. B. Walker Co. v. Burns Int'l Sec. Servs., Inc.*, 108 N.C. App. 562, 565, 424 S.E.2d 172, 174, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993)).

In *White v. Consolidated Planning, Inc.*, this Court set forth the following key points for assessing vicarious liability:

> (1) "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting

> within his authority, to commit fraud upon third persons is subject to liability to such third persons for fraud[;]" and (2) the critical question[s] [are] whether the tort was committed in the course of activities that the employee was authorized to perform[;] [whether] the [fraud] occurred as part of the very tasks that the employer had given the employee authority to perform[;] and [whether] [the defendant] had selected and employed [the employee] specifically to perform the functions that he exploited to accomplish his fraud and theft.

166 N.C. App. 283, 298-99, 603 S.E.2d 147, 158-59 (2004) (citation omitted).

Plaintiff contends it pled sufficient facts to support its claim. In its Second Amended Complaint, Plaintiff asserted Hollingsworth was "under the direct supervision and control" of Evans/Homeplace, and as such, Evans/Homeplace was required "to supervise, oversee, and control Defendant Hollingsworth in all matters relating to real estate dealings." Plaintiff also asserted Evans/Homeplace was "liable for defendants [sic] Hollingsworth's misrepresentations pursuant to the doctrine of respondeat superior given that all of those misrepresentations were made by Hollingsworth when he was acting under the direct supervision and control of the Exit defendants and for the benefit of Exit," and further, that Exit defendants benefited from and "ratified" Hollingsworth's actions. In its brief, Plaintiff asserts that by Evans/Homeplace training and sending forth Hollingsworth as an agent, this "enabled" Hollingsworth's misdeeds, and further, that Evans/Homeplace "ratified" Hollingsworth's acts by accepting the listings of 200 Lennon Hills properties.

Evans/Homeplace contends it cannot be held vicariously liable for the intentional conduct of Hollingsworth, and further, that they "were strangers to the events from which BDM's claims arise." In North Carolina, intentional torts are "rarely" considered to be in the scope of an employee's employment. *White* at 296, 603 S.E.2d at 157 (citation omitted). "Nevertheless, 'rarely' does not mean 'never.' " *Id.*, 603 S.E.2d at 157 (citing *Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001)).

Effectively refuting its own contentions, Plaintiffs' Second Amended Complaint asserts that King had a "close fiduciary relationship" with Hollingsworth, King and Hollingsworth "regularly discussed . . . both personal and business financial matters," and Hollingsworth told King that he "would still be serving his clients' financial interests by including select clients in favorable investment opportunities." The Lennon

Hills purchase was presented as an "extremely favorable investment" opportunity. King asserted he "reli[ed] on the fiduciary relationship" in Hollingsworth's selection of the lots, and plaintiffs "believed that Hollingsworth would be acting in plaintiffs' best financial interest" in selecting the lots. The past agency relationship was based in financial advice.

Plaintiffs' Second Amended Complaint goes on to state "Hollingsworth misrepresented to plaintiffs, by his silence, that Viable corporation was a realtor that had performed actual real estate sales services entitling it to a split of the sales commission when . . . Viable was in reality a mere straw man for Hollingsworth who was actually receiving a hidden commission[.]" Alternatively, plaintiffs' complaint asserts "Viable was in reality a front name used by" the Lennon Hills Defendants to obtain "funds necessary to pay the first year's interest on the Wachovia loan[.]" Plaintiffs' complaint further assert "Hollingsworth misrepresented to plaintiffs that the Exit Realty defendants were monitoring his activities, and that Hollingsworth was doing all that was required of him as a realtor-sponsored holder of a new real estate license, when in truth the Exit Realty defendants, including defendant J. Martin Evans, were *not overseeing anything* Hollingsworth was doing, including the transaction involving plaintiffs[.]" (Emphasis added.) Plaintiffs assert "Hollingsworth misrepresented to plaintiffs, by his silence, the truth of his *failure to inform* the Exit Realty defendants—Hollingsworth's alleged sponsor and overseer—of the $42,500 commission Hollingsworth earned on the sale of the lots to plaintiffs[.]" (Emphasis added.)

As to a conspiracy, plaintiffs complaint explains that various parties conspired with each other to conceal material facts, conflicts of interest, and improper relationships pertaining to the purchase of the Lennon Hills property. To effect the conspiracy, "all defendants agreed that Hollingsworth would refrain from telling his realty sponsor [Evans/Homeplace] about the sale of the lots to the plaintiffs so that Hollingsworth's 'financial advisor' status could be maintained in the eyes of the plaintiffs and further that the defendants could receive as much money as possible in fees and commissions." In its brief, Plaintiff argues Burnett, a real estate agent, "appointed himself BDM's agent in the transaction and arranged for his half of the commission to be paid through Viable in order to conceal the payment to Hollingsworth."

Plaintiff's allegations regarding this secretive behavior directly counter any allegations that Evans/Homeplace knew or had reason to know of Hollingsworth's misdeeds. Evans/Homeplace's testimony also supports the notion it was unaware of Hollingsworth's involvement

in or payment for the transaction at issue. Hollingsworth concealed from Evans/Homeplace his business relationship with Plaintiff. Because Evans/Homeplace was unaware, there was no "relation of master and servant" between Evans/Homeplace and Hollingsworth. *See Tomlinson*, 226 N.C. at 179, 37 S.E.2d at 500. As to this transaction, Plaintiff alleged insufficient facts to support that Evans/Homeplace "expressly authorized" Hollingsworth's actions, that his actions were in the "scope" of his employment, or that Evans/Homeplace "ratified" Hollingsworth's actions. *See White*, 166 N.C. App. at 296, 603 S.E.2d at 157. Plaintiff's allegations support, instead, that Hollingsworth was "engaged in some private matter of his own," and his actions were clearly "outside the legitimate scope of his employment." *See Van Landingham*, 207 N.C. at 357, 177 S.E. at 127. In sum, Plaintiff failed to state a claim upon which relief may be granted.

2. Plaintiff's Derivative Claims, *Respondeat Superior*

[8] In North Carolina

> A dismissal taken with prejudice indicates a disposition on the merits which preclude litigation to the same extent as if the action had been prosecuted to a final adjudication. It is well settled in this State that a voluntary dismissal with prejudice is a final judgment on the merits. It is further well settled law that dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective not only on the immediate parties but also on their privies.

Barnes v. McGee, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974) (quotations and citations omitted).

Here, Plaintiff settled with Hollingsworth through his estate. Plaintiff provided the Notice of Dismissal with Prejudice on 17 October 2017. Under North Carolina law, such dismissal is a judgment on the merits as to the alleged employee, which precludes further action against the employer as to derivative liability. *See Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 681, 522 S.E.2d 789, 794 (1999) (affirming summary judgment to employer hospital where employee physician was voluntarily dismissed with prejudice); *Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996) (finding claims against principal must fail where claims against agent failed). Plaintiff's dismissal of Hollingsworth with prejudice operates as an adjudication on the merits in favor of Evans/Homeplace. *See Barnes*, 21 N.C. App. at 289, 204 S.E.2d at 205. Accordingly, Plaintiff's derivative claims against

Evans/Homeplace on the basis of *respondeat superior* are barred. *See id.*, 204 S.E.2d at 205.

3. Evans/Homeplace, *Res Judicata* Claims

Evans/Homeplace asserts the right as an appellee to present issues on appeal to provide an alternative basis supporting the trial court's judgment. N.C.R. App. P. 28(c). Evans/Homeplace argues that even if the trial court erred in its order of 18 January 2012, Plaintiff's dismissal of the Estate of Hollingsworth on 17 October 2017 "operates as an adjudication on the merits of potential claims against Hollingsworth[,]" and thus Plaintiff's "claims against Evans/Homeplace on the basis of *respondeat superior* are barred by *res judicata*."

Because we affirm the trial court, we need not address Evans/Homeplace's *res judicata* claims. For the above reasons, we affirm the trial court's dismissal of all claims against Evans/Homeplace.

C. Claims against Lennon Hill Defendants

1. Negligent Misrepresentation

[9] Plaintiff assigns error to the trial court for dismissing the negligent misrepresentation claim against the Lennon Hills Defendants. Plaintiff asserts the Lennon Hills Defendants, "through their manipulation and concealment of material facts committed negligent misrepresentation in breach of the fiduciary duty of good faith and fair dealing implicit in their contractual relationship" for the transaction of the sale of the lots. This argument is without support in the record.

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988).

To support its claims, Plaintiff refers in its brief to five paragraphs in the Second Amended Complaint. Nothing in the pleadings reflect that the Lennon Hills Defendants negligently prepared information for Plaintiff. The first referenced section in the complaint states: "The defendants reasonably calculated that the misrepresentations and concealed material facts would deceive plaintiffs and defendants desired and expected that plaintiffs would reasonably rely on the misrepresentations and undisclosed material facts." The sections continue, "defendants recklessly made misrepresentations," "recklessly concealed material facts and conflicts of interest and improper relationships," and that "plaintiffs

justifiably relied upon and acted upon" such misrepresentations and undisclosed facts. Plaintiffs complained had they known the truth, they would not have purchased the lots; plaintiffs further claimed damages as to the "numerous fraudulent misrepresentations" that caused their injury. Lacking from the complaint is any specific information that defendants, particularly the Lennon Hills Defendants, negligently supplied information with respect to the transaction. Plaintiff's brief is likewise filled with generalities and conclusory statements. It states Burnett and Hilla "withheld and manipulated material facts"; Viable, "as BDM's agent, breached its separate fiduciary duty in perpetrating the same negligent misrepresentations"; and Lennon Hills Defendants "failed to disclose" the commission payment and that they had a long-standing relationship with Hollingsworth. Plaintiff also fails to show it justifiably relied on any such negligently prepared or omitted information. *See Raritan River Steel Co.*, 322 N.C. at 206, 367 S.E.2d at 612.

Plaintiff has not sufficiently pled a claim for negligent misrepresentation, and we thus affirm the trial court's dismissal of the claim.

2. Unfair and Deceptive Trade Practices

[10] Plaintiff next assigns error to the trial court for dismissing the unfair and deceptive trade practices claims against the Lennon Hills Defendants. Plaintiff claims that Burnett/Viable's failure to "disclose their dual agency as agent and seller and thereafter obtain[ing] BDM's consent to [the] relationship" was "per se unfair and deceptive."

A claim for Unfair and Deceptive Trade Practices requires a plaintiff to allege: "(1) an unfair and deceptive act or practice; (2) in or affecting commerce; and (3) which proximately causes actual injury[.]." *Poor v. Hill*, 138 N.C. App. 19, 27, 530 S.E.2d 838, 844 (2000). When an allegation of unfair and deceptive trade practices is based on alleged misrepresentation, a plaintiff must show actual reliance on the alleged misrepresentation. *Id.*, 530 S.E.2d at 844. To prevail under Chapter 75, a plaintiff must show that he detrimentally relied upon a statement or misrepresentation, and that he suffered actual injury as a proximate result. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1999), *cert. denied*, 99 N.C. 587, 402 S.E.2d 824 (1991).

For its argument, Plaintiff relies on North Carolina Real Estate Commission regulation Chapter 93A-6(a)(1), which allows the Commission to take action against a broker for "making any willful or negligent misrepresentation or any willful or negligent omission of material fact." Citing to two paragraphs in its Second Amended Complaint, Plaintiff asserts it "[pled] facts sufficient" to make its claim against the Lennon Hills

Defendants. The cause of action as stated in the complaint was against "[A]ll Defendants Except for Gary Lawrence." The first referenced paragraph states "All of the actions of the defendants relating to misrepresenting and failing to disclose material facts and conflicts of interest as set forth . . . constitute unfair and deceptive trade practices[.]" The second referenced paragraph states, "The plaintiffs have been, and will continue to be, directly and indirectly injured and damaged as a result of defendants' unfair trade practices that have harmed plaintiffs." The paragraph goes on to claim such practices were the proximate cause of plaintiffs' decision to purchase the lots. Lacking from the complaint is the pleading specificity required as to what statement or misrepresentation the Lennon Hills Defendants made, how Plaintiff relied to its detriment on such statement or misrepresentation, or how such statement or misrepresentation proximately caused an injury to Plaintiff. *See Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1999), *cert. denied*, 99 N.C. 587, 402 S.E.2d 824 (1991).

Based on the above, we affirm the trial court's dismissal of Plaintiff's unfair and deceptive trade practices claim against the Lennon Hills Defendants.

3. Civil Conspiracy

[11] We reference the Plaintiff's allegations against "[a]ll Defendants" and law set forth *supra* regarding claims for civil conspiracy. Our review of Plaintiff's allegations reveals that Plaintiff has failed to allege any specific overt act in furtherance of the alleged conspiracy or common agreement and objective between the Lennon Hills Defendants and the other defendants. As discussed, by dismissing Hollingsworth's Estate and its representative, claims against the central figure no longer exist.

On appeal Plaintiff asserts Burnett and Viable Corp. created an agency relationship with Plaintiff by acting as Plaintiff's agent for the closing. Plaintiff alleges the Lennon Hills Defendants entered into an agreement with the specific purpose of "negligently misrepresent[ing] certain facts regarding the sale of Lennon Hills [property], as well as engaging in unfair and deceptive trade practices." Plaintiff also alleges Burnett and Lawrence falsified the HUD statement showing the sale of the Lennon Hills property, and that the Lennon Hills Defendants concealed the nature of Hollingsworth's involvement in the Lennon Hills sales transactions.

Acting as an agent for and effectuating a land deal closing is not unlawful. Nothing in the record supports that Burnett and Viable's working together was part of a master plan. Plaintiff has not provided any

evidence beyond a suspicion or conjecture, *see Dalton*, 138 N.C. App. at 214, 531 S.E.2d at 267, that the Lennon Hills Defendants entered into an agreement to defraud Plaintiff or to accomplish any unlawful purpose or lawful purpose by unlawful means. *See Toomer*, 155 N.C. App. at 483, 574 S.E.2d at 92 (2002). We thus affirm the trial court's grant of summary judgment on this claim.

4. Aiding and Abetting Breach of Fiduciary Duty

For reasons set forth *supra*, we do not recognize here a claim for aiding and abetting breach of fiduciary duty. We thus affirm the trial court's grant of summary judgment on this claim.

5. Punitive Damages

[12] Plaintiff asserted a punitive damages claim against Hollingsworth and the Lennon Hills Defendants for constructive fraud, among other things. As discussed *supra*, a claim for punitive damages is not an independent claim; rather, punitive damages must only be awarded if a defendant is liable for compensatory damages related to fraud, malice, or willful or wanton conduct. *See* N.C. Gen. Stat. § 1D-15(a) (2017).

Claims for fraud are "subject to more exacting pleading requirements than are generally demanded by our liberal rules of notice pleading." *Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc.*, 91 N.C. App. 539, 542, 372 S.E.2d 901, 903 (1988). Further, such claims require time, place, and content of conversation. *Id.*, 372 S.E.2d at 903.

In its February 2012 order, the trial court found Plaintiff failed to allege in its Second Amended Complaint the "time, place and content of the [alleged] fraudulent representations [Plaintiff] claimed were made by [the Lennon Hills Defendants]." The trial court found the Second Amended Complaint deficient because it did not include specific references to the time, place, and content of the alleged fraudulent representations made by the Lennon Hills Defendants. Without showing there was information exchanged between Plaintiff and the Lennon Hills Defendants, and without showing how Plaintiff justifiably relied on such information, there is no showing of fraud. Plaintiff also did not assert allegations of malice, or willful or wanton conduct. *See* N.C. Gen. Stat. § 1D-15(a).

Like the trial court, we see nothing in the record to indicate Plaintiff produced evidence from which a reasonable jury could conclude that clear and convincing evidence exists that an officer, director, or manager of Viable, Lenhil, Inc, or Lennon Hills, L.L.C. participated in or condoned

any of the potentially fraudulent, malicious, or willful and wanton conduct of Hollingsworth. We affirm the trial court's dismissal of any and all claims against the Lennon Hills Defendants for constructive fraud and denial of punitive damages.

6. Equitable Estoppel

Plaintiff on appeal suggests that "*all* defendants should be equitably estopped." Plaintiff, however, provides no specific references to the record supporting its assertions that the Lennon Hills Defendants concealed material facts or made false representations. Plaintiff also provides no support for alleging it had no means of knowledge of certain facts. The public record, discussed *supra*, provided most of the facts that were allegedly uncovered after the close of the Lennon Hills sale.

We therefore affirm the trial court's dismissal of the equitable estoppel claims against the Lennon Hills Defendants.

7. Plaintiff's Motion for Summary Judgment

[13] Plaintiff also assesses error to the trial court for denying its motion for summary judgment with respect to the claims of civil conspiracy and aiding and abetting breach of fiduciary duty against the Lennon Hills Defendants. In support of its claim, Plaintiff asserts on appeal: (1) "Burnett and Hollingsworth entered a secret agreement that Hollingsworth would be paid half of the commission on the Lennon Hills . . . transaction[]" ' (2) Hollingsworth held a real estate license at the time of the transaction; (3) "Burnett appointed himself/Viable as BDM's agent for purposes of the transaction"; (4) the HUD statement "violated Chapter 93A disclosure requirements"; and (5) Plaintiff "would not have entered the Lennon Hills transaction had they been aware of the agreement between Burnett and Hollingsworth."

In its March 2014 order, the trial court concluded there are genuine issues of material fact as to these claims because Plaintiff failed to prove Hollingsworth served as Plaintiff's agent in the transaction and whether he served as Viable, Lenhil, or Lennon Hills, L.L.C.'s agent in the transaction. This was grounded in the fact that the dual agency relationship was central to Plaintiff's case.

While Burnett told Hollingsworth he would "take care" of him if Hollingsworth brought buyers for the development, nothing in the record establishes employment of Hollingsworth, or that Hollingsworth was an agent of Burnett, Viable Corp., or any other defendant. Lacking an agency relationship between Hollingsworth and other defendants, there is no conspiracy. As addressed *supra*, there is no recognized

claim for aiding and abetting breach of fiduciary duty under North Carolina law.

We thus affirm the trial court's denial of Plaintiff's motion for summary judgment on the claims of civil conspiracy and aiding and abetting breach of fiduciary duty.

V. Conclusion

For the foregoing reasons, we affirm the trial court's orders as to Lawrence, Evans/Homeplace, and the Lennon Hills Defendants.

AFFIRMED.

Judges DAVIS and BERGER concur.

THE ESTATE OF ROBERT EUGENE TIPTON, JR., BY AND THROUGH HIS ANCILLARY ADMINISTRATOR, DEBORAH DUNKLIN TIPTON AND DEBORAH DUNKLIN TIPTON, INDIVIDUALLY, PLAINTIFF

v.

DELTA SIGMA PHI FRATERNITY, INC., MICHAEL QUBEIN, INDIVIDUALLY AND AS AN AGENT FOR DELTA SIGMA PHI FRATERNITY, MARSHALL JEFFERSON, INDIVIDUALLY AND AS AN AGENT FOR DELTA SIGMA PHI FRATERNITY, HIGH POINT UNIVERSITY, NIDO QUBEIN, INDIVIDUALLY AND AS PRESIDENT OF HIGH POINT UNIVERSITY, DEFENDANTS

No. COA18-581

Filed 19 March 2019

Wrongful Death—hazing—negligence by fraternity—proximate cause of death—no genuine issue of material fact

In a wrongful death action filed after a university student died from a head injury while pledging a fraternity, the trial court properly granted summary judgment to defendant fraternity because there was no genuine issue of material fact that the fraternity's negligence proximately caused the student's death. Although there was evidence that members of the fraternity previously hazed the student, the evidence did not establish either the specific cause of his head injury or any link between the head trauma and any of the fraternity members' actions, rendering the theory that hazing caused the student's death mere speculation. One fraternity member's actions in deleting messages and photographs from the decedent's cell phone

and computer did not create an inference of spoliation where defendant fraternity had no knowledge of that conduct.

Appeal by defendants from order entered 29 December 2017 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 29 January 2019.

Donald H. Beskind, P.A., by Donald H. Beskind, and Thomas, Ferguson & Mullins, LLP, by Jay H. Ferguson, for plaintiffs-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Clint S. Morse, and Cokinos Young, by Jennifer A. Riso, for defendant-appellee Delta Sigma Phi Fraternity, Inc.

DAVIS, Judge.

Robert Eugene Tipton, Jr., a student at High Point University ("HPU") and a pledge of the local chapter of the Delta Sigma Phi fraternity, died on 26 March 2012. At the time of his death, he was an overnight guest at the apartment of another member of the fraternity, Marshall Jefferson. Tipton's estate subsequently brought a lawsuit (the "Wrongful Death Action") against various individuals and entities, including Delta Sigma Phi Fraternity, Inc. (the "Fraternity"), in connection with Tipton's death. In its complaint, Tipton's estate alleged that his death occurred as a result of hazing and that the Fraternity had breached the duty of care it owed to prospective members of local chapters such as Tipton to protect them from the harms associated with hazing-related activities. The trial court granted summary judgment in favor of the Fraternity. Because we conclude that Plaintiff has failed to offer sufficient evidence — as opposed to mere conjecture — from which a reasonable factfinder could determine that Tipton's death was proximately caused by hazing, we affirm.

Factual and Procedural Background

The Fraternity was founded in 1899 and is headquartered in Indianapolis, Indiana. It extends charters to groups of undergraduate students at colleges and universities throughout the country. In doing so, the Fraternity "permits the local chapter to affiliate with and use its name, and provides the chapter with access to educational resources and leadership opportunities." The Fraternity currently has 110 active chapters at colleges and universities with a total of approximately 6,000

undergraduate members. At all times relevant to this litigation, a chartered chapter (the "HPU Chapter") of the Fraternity existed at HPU.

The Fraternity's Constitution and Bylaws provide it with the power to suspend or revoke a local chapter's charter. With regard to the role of the Fraternity in the operations of local chapters, its Constitution states, in pertinent part, as follows:

> Neither the national Fraternity nor its officers has control of or responsibility for the day-to-day operations of its individual members, chapters, colonies or the separate alumni organizations. However, should it come to the attention of any officer of the national Fraternity that any policies or practices of an undergraduate chapter or colony . . . or any individual member are in violation of this Constitution, its Bylaws, or the stated policies of this Fraternity, then such actions as may be appropriate may be taken[.]

A separate document entitled "The Fraternity Manual" that was distributed by the Fraternity to local chapters expressly prohibited hazing.

> No chapter shall conduct hazing activities. Hazing activities are defined as any act or attempt to embarrass, humiliate, intimidate, ridicule, shame or endanger physically or mentally any person, or to compel physical activity or do physical or emotional harm to any person, or to require consumption or ingestion of liquids, food, or other materials.

During the spring of 2009, an allegation of hazing was made by a pledge of the HPU chapter named Hugo Hormazabal to HPU administrators and the national headquarters of the Fraternity. Following Hormazabal's complaint, the executive director of the Fraternity sent the HPU Chapter a letter on 7 April 2009 stating that the Fraternity had "temporarily suspended" the HPU Chapter due to "allegations that members of the new member class are being hazed." The letter further stated that the Fraternity would conduct "[a]n investigation into the activities surrounding the chapter's new member education program."

As a part of this investigation, a Fraternity representative traveled to HPU and interviewed Hormazabal. During his interview, Hormazabal described the hazing that had occurred as part of his pledging process:

> During one hazing incident, the Delta Sig members made me and the other pledges stand around a kiddie pool lined with a garbage bag in the basement of the fraternity house.

> The Delta Sig members then ordered us to drink warm corn whisky until we vomited so much we filled the kiddie pool with our vomit.
>
> During another hazing incident at the fraternity house, Delta Sig members put a hood over my head, told me, "This will break you down and build you back up," and then hit me all over my body.
>
> As a result of this incident, I suffered an injury to my right shin, which in retrospect I believe may have been fractured by the blows I received from the Delta Sig members. The injury still causes me pain to this day.

On 17 April 2009, Gail Tuttle, the Vice President for Student Life at HPU, sent a letter to the Chapter outlining a lengthy list of sanctions that "[HPU] and [the Fraternity] have jointly levied against [the HPU Chapter] as a result of hazing incidents that occurred in the Spring 2009." The letter further provided that "[i]f all of the above stipulations are not met at the end of the 2009-2010 academic year, the chapter will lose the privilege of its chapter house for the 2010-2011 academic year."

During the 2011-2012 academic school year, Robert Tipton was enrolled as a student at HPU. In the spring of 2012, he accepted a bid from the HPU Chapter to begin the pledging process to become an initiated member. A student named Michael Qubein who was an initiated member of the HPU Chapter and served as the "pledge educator" was charged with overseeing the pledging process for Tipton's pledge class. Jefferson was also an initiated member of the HPU Chapter during the time period in which Tipton was pledging. Jefferson and Tipton had become close friends during the year before Tipton made his decision to pledge the fraternity.

During the pledging period, Tipton sent messages via text and Facebook to various friends describing his pledging experience. In one such text, he wrote that he was "getting hazed bad now and need Xanax. I didn't even sleep last night and was shaking." With regard to an upcoming HPU Chapter event, Tipton sent a Facebook message to a fellow pledge reassuring him that "they're just going to yell at us a bunch and maybe make us work out or eat something nasty. [T]hey can't kill us[.]"

George Reece, a fellow member of Tipton's pledge class, stated in his deposition testimony that on one occasion he was "hit with a paddle on the butt three times" by Qubein as part of the pledging process. He

also testified that on another occasion he and other pledge class members were forced to perform physically demanding exercises for prolonged periods at Qubein's house as a part of "Hell Week" — the final week before the conclusion of the pledging period. Reece stated that he became so exhausted from the intense exercise that he vomited. He further testified that although pledge class members were required at various times to clean the residences of certain members of the HPU Chapter, he was unaware of any pledges being forced to clean Jefferson's apartment.

On 25 March 2012, Jefferson invited Tipton over to his apartment to "hang out" and have "brother-on-brother time" because he knew Tipton "was having a tough time balancing school and fraternity and . . . life in general[.]" Tipton arrived at Jefferson's apartment that night around midnight. Jefferson did not observe any head wounds or facial injuries on Tipton upon his arrival.

According to Jefferson's deposition testimony, he and Tipton "did some drugs" and shared a bottle of wine during the early morning hours of 26 March 2012. Jefferson testified that they split one pill of Oxymorphone between them and each took one Klonopin.

That same night, two female friends visited Jefferson and Tipton at the apartment before subsequently departing. At some point during the pre-dawn hours of 26 March 2012, Tipton sent the following text to the other members of his pledge class:

> Dear bros, as of recent events I feel like a lot of u [sic] are mad at me for one reason or another[.] I'm very sry [sic] for losing yal [sic] respect so I would really appreciate [i]t if I could meet up w[ith] each one of u [sic] individually to talk about how I could do my job as [pledge class president] better, thanks bros just let me know when ever [sic] we can talk[.]

Jefferson testified that he and Tipton went to bed at approximately 4:00 a.m. and that Tipton slept "on the makeshift bed that [Jefferson] made him on the floor." Jefferson stated that when he left the apartment to go to class at approximately 9:00 a.m. Tipton was "[s]noring loud as a bulldozer" while lying on his back. When Jefferson returned to his apartment later that morning, he saw that Tipton was "[p]ale, discolored," and nonresponsive with vomit visible around his mouth and head area. Jefferson called 911, and Tipton was transported to High Point Regional Hospital by EMS where he was pronounced dead at 11:09 a.m.

An autopsy was performed by the Office of the Chief Medical Examiner (the "OCME"). The autopsy noted that Tipton had "contusions on the right head, left face, anterior neck, left anterior abdomen, and abrasions on the bilateral knees" as well as bruising on his buttocks. The OCME determined Tipton's cause of death to be oxymorphone poisoning and stated that Tipton's physical injuries were "superficial or mild in nature and did not contribute to death." Jefferson was unable to offer any explanation in his deposition testimony for the origin of the injuries to Tipton's head and face. The autopsy did not indicate the presence of alcohol in Tipton's body.

Cyril Wecht, a forensic pathologist hired by Tipton's family, reached a different determination based upon his analysis of the autopsy report. Wecht concluded that Tipton died from "aspiration of gastrointestinal contents, most likely precipitated by blunt force trauma of his head that produced a concussion." In his report, Wecht also noted that "the levels of drugs set forth in the toxicology report were not . . . high enough to be considered lethal or even significantly toxic."

On 26 March 2012, after learning of Tipton's death Qubein went to Jefferson's apartment and took possession of Tipton's cell phone. He proceeded to delete various texts and photographs from the phone. He later testified that the messages and images he deleted concerned activity that "the school would consider to be hazing" and that he did so in order "to protect the fraternity." The messages and photographs deleted by Qubein were never recovered. In addition, following Tipton's memorial service at his home in Memphis, Tennessee, Qubein entered Tipton's bedroom without permission and deleted from his computer "[w]hatever came up that [he] thought needed to be deleted."

Deborah Dunklin Tipton, individually and in her capacity as the administrator of Tipton's estate ("Plaintiff"), filed the Wrongful Death Action in Guilford County Superior Court on 13 March 2015. With regard to the Fraternity, the complaint asserted claims against it based on several different legal theories but all premised on the proposition that the Fraternity had failed to take appropriate action to prevent hazing at the HPU Chapter. On 19 May 2016, the trial court dismissed the claims asserted against the Fraternity for fraud, constructive fraud, and negligent misrepresentation. The Fraternity subsequently filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure and an amended motion on 22 May 2017 as to the remaining claims asserted against it.

The Fraternity's motion was heard on 18 September 2017 before the Honorable Michael D. Duncan. On 6 October 2017, the trial court entered an order granting summary judgment in favor of the Fraternity. Plaintiff filed a motion to amend the summary judgment order to include language certifying the order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The trial court granted the motion and entered an amended summary judgment order on 29 December 2017. On 26 January 2018, Plaintiff filed a notice of appeal to this Court.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must determine whether we have appellate jurisdiction to hear this appeal. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) ("[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." (citation, quotation marks, and brackets omitted)). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

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

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

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted). Rule 54(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that "[w]hen more than one claim for relief is presented in an action . . . the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." N.C. R. Civ. P. 54(b).

In the present case, the trial court's amended summary judgment order entered on 29 December 2017 was not a final judgment because it did not dispose of all of the claims asserted by Plaintiff against the remaining defendants. However, in the amended order, the trial court certified its ruling for immediate appeal pursuant to Rule 54(b). Therefore, we are satisfied that this appeal is properly before us. *See Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 364, 533 S.E.2d 827, 831, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000) (appellate jurisdiction existed where "trial court certified that there is no just reason for delaying the appeal pursuant to Rule 54(b)").

II. Entry of Summary Judgment

Plaintiff asserts that the trial court erred in granting summary judgment in favor of the Fraternity because (1) the Fraternity assumed a duty of care toward Tipton and the other pledges of the HPU Chapter by actively engaging in a course of conduct designed to recruit new members; (2) it breached that duty by failing to exercise reasonable care to ensure that no hazing occurred during the pledging process of the HPU Chapter; and (3) this breach was a proximate cause of Tipton's death.

The Fraternity, conversely, contends that it did not owe Tipton a duty of care because it lacks control over the day-to-day actions of its local chapters and their members. In addition, the Fraternity argues that Plaintiff has failed to offer evidence that any negligent conduct on its part was a proximate cause of Tipton's death.

After a careful review of the record and applicable law, we conclude that the entry of summary judgment was proper. Even assuming, without deciding, that such a duty of care on the part of the Fraternity existed, Plaintiff has failed to establish the existence of a genuine issue of material fact with regard to the question of whether Tipton's death was proximately caused by the Fraternity's negligence.

"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. Brewe*r, __ 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 161 (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).

Our Supreme Court has held that actionable negligence is the "failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992) (citation omitted). "Proximate cause is defined as a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred." *Young By and Through Young v. Fun Servs.—Carolina, Inc.*, 122 N.C. App. 157, 159, 468 S.E.2d 260, 262 (citation and quotation marks omitted), *disc. review denied*, 344 N.C. 444, 476 S.E.2d 134 (1996).

As a general proposition, "[s]ummary judgment is seldom appropriate in a negligence action. A trial court should only grant such a motion where the plaintiff's forecast of evidence fails to support an essential element of the claim." *Hamby v. Thurman Timber Co., LLC*, __ N.C. App. __, __, 818 S.E.2d 318, 323 (2018) (citation and quotation marks omitted). Nevertheless, "[n]egligence is not presumed from the mere fact of injury." *Jackson v. Neill McKay Gin Co.*, 255 N.C. 194, 196, 120 S.E.2d 540, 542 (1961). Instead, it is well established that "a plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon

failure to do so, summary judgment is proper." *Hamby*, __ N.C. App. at __, 818 S.E.2d at 323 (citation, quotation marks, and brackets omitted).

On a number of occasions, this Court has upheld the dismissal of negligence claims as a matter of law at the summary judgment or directed verdict stage based on a lack of evidence that the defendant's conduct had proximately caused the plaintiff's injury. For example, in *Gibson v. Ussery*, 196 N.C. App. 140, 675 S.E.2d 666 (2009), the plaintiff brought a negligence action after falling down an unfinished stairway on the defendants' property. *Id.* at 141, 675 S.E.2d at 667. At trial, evidence was presented that the plaintiff "did not appear to trip on anything." *Id.* at 144, 675 S.E.2d at 668. In addition, the plaintiff "was one of several to descend the staircase, but the only one to fall" and "none of the witnesses noticed any problems with the condition of the staircase as they descended." *Id.* Although a witness testified that one of the stairs wobbled under her foot after she went back to inspect the staircase following the plaintiff's fall, "there was no testimony about which stair [the plaintiff] fell on and no testimony that anyone observed what caused her to fall." *Id.* The trial court granted the defendants' motion for directed verdict, and the plaintiff appealed. *Id.* at 142, 675 S.E.2d at 667.

This Court affirmed the trial court's entry of a directed verdict, concluding as follows:

> In evaluating the record, we look for evidence that takes the element of proximate cause out of the realm of suspicion. All of the testimony . . . provides no more than mere speculation that defendants' alleged negligence was the proximate cause of Cynthia's fall and the injuries that may have resulted from it. Doubtless Cynthia was injured in some manner as a result of her fall, but there is insufficient evidence to support a reasonable inference that the injury was the result of defendants' negligence.

Id. at 144, 675 S.E.2d 668-69.

Elm St. Gallery, Inc. v. Williams, 191 N.C. App. 760, 663 S.E.2d 874, *disc. review denied*, 362 N.C. 680, 670 S.E.2d 231 (2008), involved a building fire of unknown origin. *Id.* at 766, 663 S.E.2d at 878. In that case, the plaintiffs filed a lawsuit alleging that the owners of an adjoining building had "negligently maintained their building in such a condition that caused or contributed to the start and spread of the fire." *Id.* at 762, 663 S.E.2d at 875. Although the fire inspector's investigation revealed "three generations of electrical wiring design within the building[,]" the inspector "did not find any prevalent indications of an electrical cause of

the fire. However, with the extent of fire damage he could not determine that this fire was not electrical in nature." *Id.* at 766, 663 S.E.2d at 878 (quotation marks and brackets omitted). The fire inspector ultimately listed the cause of the fire as "undetermined." *Id.* The trial court granted the defendants' motion for summary judgment. *Id.* at 762, 663 S.E.2d at 878.

In affirming the trial court's ruling, this Court stated the following with regard to the issue of proximate cause:

> [P]roof of the burning alone is not sufficient to establish liability, for if nothing more appears, the presumption is that the fire was the result of accident or some providential cause. There can be no liability without satisfactory proof, by either direct or circumstantial evidence, not only of the burning of the property in question but that it was the proximate result of negligence and did not result from natural or accidental causes.

Id. at 764-65, 663 S.E.2d at 877 (citation omitted). We determined that the plaintiff's "assertion that the evidence points to an electrical fire . . . is a mere conjecture, surmise and speculation as to the cause of the fire" given the fire inspector's inability to determine the fire's origin. *Id.* at 766, 663 S.E.2d at 878 (citation, quotation marks, and brackets omitted).

Similarly, in *Young* the trial court granted summary judgment for the defendant where the plaintiff's evidence concerning proximate causation failed to raise a factual dispute requiring resolution by a jury. *Young*, 122 N.C. App. at 161, 468 S.E.2d at 263. In that case, the plaintiff — a 12 year-old child — was injured while jumping in a "moonwalk" operated by the defendant. *Id.* at 158, 468 S.E.2d at 261. Prior to the child's injury, the plaintiff's mother observed the moonwalk "slid[e] across the floor to the point that [the defendant's employee] had to move the moonwalk back to its original position." *Id.* The plaintiff filed a lawsuit alleging that the defendant had negligently failed to secure the moonwalk. *Id.*

This Court affirmed the trial court's grant of summary judgment for the defendant, noting that the plaintiff's mother "stated that she had no personal knowledge of how [plaintiff's] accident occurred, since she did not witness the accident." *Id.* at 161, 468 S.E.2d at 263. We concluded as follows:

> Nothing in the record demonstrates that the moonwalk shifted immediately before Kevin's accident. Nothing in the record allows the inference that a shifting of the

> moonwalk caused Kevin's accident. The mere fact that the moonwalk shifted earlier in the day, without more, is not enough to satisfy our Supreme Court's definition of proximate cause[.]

Id.

While *Gibson*, *Elm St. Gallery, Inc.*, and *Young* are all factually dissimilar to the present case, they are nevertheless instructive in providing examples of negligence-based claims that failed as a matter of law due to the plaintiffs' inability to raise a genuine issue of material fact on the element of proximate cause. Moreover, they aptly demonstrate that proximate cause cannot be established through mere conjecture.

Here, no evidence was presented concerning the manner in which Tipton sustained the head trauma that — according to Plaintiff's expert witness — was the cause of his death. Nor was there any evidence specifically linking Jefferson or his apartment with hazing activity. Although Reece testified in his deposition that hazing took place at the homes of Qubein and other members of the fraternity, he was unable to recall any hazing at Jefferson's residence.

Without evidence providing *some* actual link between actions taken by Jefferson (or other members of the HPU Chapter) and Tipton's head trauma, testimony merely showing that members of the HPU Chapter had previously hazed Tipton (along with his fellow pledges) during the pledging period in ways that would not logically cause injury to his head is simply not sufficient to meet Plaintiff's burden at the summary judgment stage.[1] Rather, such testimony fails to rise above the level of "mere speculation" that hazing was the cause of Tipton's death. *Gibson*, 196 N.C. App. at 144, 675 S.E.2d at 669. Thus, we are satisfied that the trial court did not err in granting the Fraternity's motion for summary judgment. *See Young*, 122 N.C. App. at 161, 468 S.E.2d at 263 (entry of summary judgment for defendant was proper where "an essential element of plaintiffs' claim was lacking — proximate cause").

In arguing that a genuine issue of material fact exists as to whether Tipton's head injuries were the result of hazing, Plaintiff directs our attention to several pieces of evidence, including (1) the existence of

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1. We note that none of the evidence suggests that Tipton or his fellow pledges were ever beaten on the head during the pledging period. To the contrary, the only evidence that exists in the record of hazing in the form of physical abuse against Tipton's pledge class is testimony that Tipton and his fellow pledges were each struck three times on the buttocks with a wooden paddle during "Hell Week."

bruises on Tipton's knees and buttocks that Plaintiff contends are consistent with him having been paddled while in a kneeling position; (2) the apology text message sent by Tipton to the other members of his pledge class during the early morning hours of 26 March 2012; and (3) the fact that hazing had previously occurred in the homes of Qubein and various other HPU Chapter members in the form of pledges being required to perform physical exercises and clean the residences.

Taken together, however, this evidence still does not shed any light on the specific cause of Tipton's head trauma. With regard to the bruising present on Tipton's knees and buttocks, even if these bruises resulted from him being paddled on those areas of his body at some point during the pledging process, the occurrence of such paddling would provide no explanation for the presence of his head wounds on the night of his death. Nor does the fact that Tipton sent a text apologizing to the other pledges for perceived mistakes on his part support the inference that he was hazed that night while in Jefferson's apartment.

In addition, the fact that pledges had on occasion been required to perform strenuous exercises and clean the residences of various members of the HPU Chapter does not — without more — allow for a rational inference that pledges such as Tipton were subjected to physical abuse on such occasions or that any form of hazing occurred in Jefferson's apartment on the night of Tipton's death. Moreover, it is undisputed that on the night of Tipton's death no fraternity-related activities were scheduled. In short, Plaintiff has failed to offer any evidence (1) as to the manner in which Tipton suffered trauma to his head; or (2) supporting the proposition that his head injury resulted from hazing-related activities.

Finally, Plaintiff argues that the doctrine of spoliation applies with regard to Qubein's actions in deleting messages and photographs from Tipton's cell phone and computer after his death. This Court has held that "when the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187-88, 527 S.E.2d 712, 718 (citation and brackets omitted), *disc. review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000).

We are unable to agree with Plaintiff that the spoliation doctrine applies as against the Fraternity on these facts. Although Qubein stated that he deleted items from Tipton's phone and computer to "protect the fraternity," he further explained that he deleted evidence of activity that

"the school would consider to be hazing." Nowhere in Qubein's testimony did he contend that he was acting on behalf of — or for the benefit of — the *national* fraternity. Indeed, the Fraternity submitted an affidavit stating that "[a]s a policy, [the Fraternity] does not provide the authority or consent to any of its chapters or its members to act on its behalf." Nor has Plaintiff cited any evidence in the record to the contrary as to this issue.

Thus, Plaintiff has failed to offer any evidence that Qubein's conduct was intended to protect anyone other than the HPU Chapter or that his actions were undertaken at the direction of the Fraternity. It is axiomatic that an inference of spoliation cannot exist against a defendant who had no knowledge that the person who destroyed evidence was engaging in such conduct and where no relationship actually existed between that person and the defendant. *See generally Panos v. Timco Engine Ctr., Inc.*, 197 N.C. App. 510, 521, 677 S.E.2d 868, 876 (2009) ("[S]poliation of evidence permits an inference that the destroyed evidence was unfavorable *to the party that destroyed it*[.]" (emphasis added)). Thus, while an adverse inference might exist against Qubein, it would not extend to the Fraternity.

* * *

In the final analysis, even taking all of the reasonable inferences from the evidence in the light most favorable to Plaintiff, vital links in the causation chain remain absent in terms of connecting the alleged negligence of the Fraternity to Tipton's death. We wish to emphasize, however, that in no way should our holding in this case be read as a retreat from the well-established principle that the issue of proximate causation is ordinarily left for the jury to decide, and that "[i]t is only in exceptional cases, in which reasonable minds cannot differ . . . that a court should decide proximate cause as a matter of law." *Holt v. N.C. Dep't of Transp.*, 245 N.C. App. 167, 180, 781 S.E.2d 697, 706 (citation and quotation marks omitted), *aff'd per curiam*, 369 N.C. 57, 791 S.E.2d 458 (2016). We are satisfied that the present appeal represents just such an exceptional case. Accordingly, we affirm the trial court's order granting summary judgment in favor of the Fraternity. *See Gibson*, 196 N.C. App. at 146, 675 S.E.2d at 670 (summary judgment was appropriate in negligence action where "there is no evidence beyond mere conjecture and speculation that defendants' negligence was the proximate cause of [the plaintiff's] fall and her injuries").

Conclusion

For the reasons stated above, we affirm the trial court's 29 December 2017 order.

AFFIRMED.

Judges BRYANT and INMAN concur.

FEEASSCO, LLC, AND JW COMPANY, LLC, PLAINTIFF
v.
THE STEEL NETWORK, INC., DEFENDANT

No. COA18-739

Filed 19 March 2019

1. Appeal and Error—interlocutory order—discovery and sanctions orders—affecting a substantial right

Defendant's appeal from two interlocutory orders—one compelling discovery and one imposing sanctions—affected a substantial right where the trial court struck defendant's answer and entered judgment for plaintiffs as to liability in a contract dispute concerning commissions.

2. Appeal and Error—interlocutory order—order denying motion to compel discovery—information essential to proof of claim

Defendant's appeal from an interlocutory order denying his motion to compel discovery was dismissed where the information sought was not highly material to a determination of the critical question to be resolved in a contract dispute involving commissions. Any inability or refusal by plaintiff to provide the requested calculation of damages would not have precluded defendant from defending against plaintiff's claims because defendant already possessed the information needed to make such calculations and it was in as good or better position than plaintiff to do so. Where defendant neither addressed the interlocutory nature of the denial of his motion for sanctions nor argued why appellate review was appropriate, the appeal from that order was dismissed.

3. Discovery—request for production—alternative manner—submission to electronic audit

In a contract dispute involving commissions, the trial court properly exercised its discretion in discovery matters by ordering defendant to allow an electronic systems inspection as an alternative means of complying with plaintiff's request for production.

4. Discovery—violations—sanctions—abuse of discretion analysis

In a contract dispute involving commissions, the trial court did not abuse its discretion by imposing sanctions on defendant where its unchallenged findings of fact amply supported its conclusion that defendant committed numerous discovery violations and that sanctions would be just. Further, the trial court demonstrated that it considered less severe sanctions prior to striking defendant's answer and entering judgment for plaintiffs on liability.

5. Discovery—violations—sanctions—due process analysis

In a contract dispute involving commissions, the trial court's imposition of sanctions for defendant's discovery violations did not infringe on defendant's due process rights where the trial court properly applied Civil Procedure Rule 37 and imposed sanctions that were specifically related to the claims at issue. Defendant's contention that he made a good faith effort to comply with discovery was not supported by the trial court's extensive and unchallenged findings of fact.

Appeal by Defendant from order entered 2 November 2017 by Judge Elaine M. O'Neal and two orders entered 23 January 2018 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 31 January 2019.

Bugg & Wolf, P.A., by William R. Sparrow and Joseph R. Shuford, for Plaintiffs-Appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from three discovery orders entered in Durham County Superior Court. The underlying case involves a sales commission dispute between Plaintiffs and Defendant over commissions allegedly owed to Plaintiffs by Defendant. In the first order (November

Order), the trial court granted Plaintiffs' motion to compel discovery. In the second order (Sanctions Order), the trial court granted Plaintiffs' motion for sanctions based on Defendant's failure to comply with the November Order. In the third order (Denial Order), the trial court denied Defendant's motion to compel discovery and motion for sanctions.

The November Order did not unreasonably expand the manner of discovery production, and the trial court did not abuse its discretion in entering that order. Moreover, the trial court did not abuse its discretion by striking Defendant's answer and entering judgment for Plaintiffs on liability pursuant to the Sanctions Order, and the order did not violate Defendant's due process rights. Finally, the Denial Order is an interlocutory order that does not affect a substantial right and we dismiss Defendant's appeal from that order.

I. Procedural History and Factual Background

In 2015, Feeassco, LLC, and JW Company, LLC, (Plaintiffs) entered into separate contracts with The Steel Network, Inc., (Defendant) wherein Plaintiffs would sell and solicit orders for Defendant's products within assigned territories. The contracts included a two-tiered commission structure, which paid different rates for "Basic Commission" and "Growth Commission." Plaintiffs commenced this action on 12 December 2016, asserting claims for breach of contract, quantum meruit, unfair and deceptive trade practices, and attorneys' fees. Plaintiffs alleged, amongst other things, that over the nearly two years under the contract, Defendant improperly calculated commissions payments, stopped paying commissions, and failed to provide contractually required commissions statements and sales reports.

Also on 12 December 2016, Plaintiffs served Defendant with a "First Set of Interrogatories" and a "First Requests for Production of Documents." Defendant objected to each interrogatory as "overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence[,]" and provided minimal information for some interrogatories.

Defendant objected to each request for production as follows:

> [Defendant] objects to this request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, [Defendant] will produce or make available for inspection and copying non-privileged documents responsive to this request within its

> possession at a mutually convenient time and place after entry of an appropriate confidentiality agreement and protective order.

Defendant filed an Answer on 13 February 2017.

On 13 March 2017, Defendant responded to the First Requests for Production of Documents with a one-page spreadsheet entitled "Sales Rep Summary - December 2016." On 8 May 2017, Defendant produced three more documents, one of which was a copy of the "Sales Rep Summary - December 2016." Defendant produced 430 documents on 19 June 2017.

The parties attempted mediation in September 2017, but were unable to reach an agreement. Plaintiffs filed a motion to compel discovery on 3 October 2017. In late October and early November 2017, Defendant produced approximately 19,000 pages of documents. The trial court heard Plaintiffs' motion to compel on 2 November 2017. At the conclusion of the hearing, the trial court granted Plaintiffs' motion, ordering Defendant to restate its responses to the First Set of Interrogatories without objection, except as to privilege, and to comply fully with Plaintiffs' First Requests for Production by 20 November 2017. This November Order required Defendant to produce, amongst other things: correspondence related to Plaintiffs; all "customer orders, invoices, sales confirmations and return forms for Plaintiffs' territories"; commission statements and sales reports; Defendant's state and federal tax returns for 2015 and 2016; and financial statements for 2015 and 2016.

"As part of complying fully with Plaintiffs' First Requests for Production," the November Order also required Defendant to submit to an audit of its sales data within its electronic sales and accounting systems by an independent accounting firm selected by Defendant on or before 20 November 2017. It further required Defendant to make someone available to guide the auditor through Defendant's electronic systems. The November Order allowed Plaintiffs' counsel to be present at the audit, but prohibited other Plaintiffs' representatives from being present. In auditing the electronic systems, the auditor was to have "access to all information that is 'reasonably calculated to lead to the discovery of admissible evidence' within the meaning of Rule 26 of the NC Rules of Civil Procedure." The scope of the audit was "limited to data, documents[,] and information regarding or related to the product categories identified in the Plaintiffs' sales representative agreements and to sales recorded from 2014 through the date of the audit in Plaintiffs' sales territory only."

On 19 December 2017, Defendant moved to compel Plaintiffs' answer to Defendant's interrogatory number 3 for failure to provide a complete damages calculation. Defendant also moved for sanctions, asserting Plaintiffs had not targeted discovery to the needs of the case and sought discovery disproportionately large to any amount in controversy.

On 28 December 2017, Plaintiffs moved for an order sanctioning Defendant for violations of the November Order. Following an 8 January 2018 hearing on the parties' motions, the trial court granted Plaintiffs' motion for sanctions (Sanctions Order) and denied Defendant's motion to compel and motion for sanctions (Denial Order). Defendant appeals.

II. Issues

Defendant raises four issues on appeal: (1) the trial court erred when it ordered Defendant to submit to an audit of its electronic systems in the November Order; (2) the trial court's findings of fact and conclusions of law do not support the entry of the Sanctions Order; (3) the Sanctions Order violated Defendant's due process rights; and (4) the trial court erred by denying Defendant's motion to compel and motion for sanctions.

III. Jurisdiction

[1] We first address our jurisdiction to hear the appeals from the November Order, Sanctions Order, and Denial Order as all three orders are interlocutory. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (noting that an interlocutory order "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy"). Generally, an appeal from an interlocutory order will be dismissed by this Court unless the trial court has entered certification under N.C. Gen. Stat. § 1A-1, Rule 54(b), or the appeal affects a substantial right which would be jeopardized absent a review prior to a final determination on the merits. *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 262, 618 S.E.2d 796, 802 (2005) (citation omitted).

Generally, a discovery order, including an order compelling discovery, is not immediately appealable. *Id.* (citation omitted). However, when a discovery order is enforced by sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(b), the order affects a substantial right and is immediately appealable. *Id.* (citation omitted). The appeal tests the validity of both the discovery order and the sanctions imposed. *Id.* (citation omitted). Moreover, although it is interlocutory, a party may appeal from an

order imposing sanctions by striking its answer and entering judgment as to liability. *Vick v. Davis*, 77 N.C. App. 359, 360, 335 S.E.2d 197, 198 (1985).

Here trial court's Sanctions Order struck Defendant's answer and entered judgment for Plaintiffs as to liability as sanctions pursuant to Rule 37(b) for alleged violations of the November Order compelling discovery. Accordingly, the November Order as enforced by the Sanctions Order, and the Sanctions Order striking Defendant's answer, affect a substantial right and are immediately appealable, and this appeal testing the validity of both the November Order and the Sanctions Order is properly before us. *Id.*

[2] The Denial Order denies Defendant's motion to compel and motion for sanctions. Again, "[d]iscovery orders are generally not immediately appealable because they are interlocutory and do not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Stokes v. Crumpton*, 369 N.C. 713, 719, 800 S.E.2d 41, 45 (2017) (quotation marks, brackets, and citations omitted). However, orders denying discovery are immediately appealable when "the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is *highly material to a determination of the critical question* to be resolved in the case." *Id.* (quotation marks and citations omitted).

Information desired is highly material to the determination of the critical question where the information is "essential" to proving the elements of a claim, *cf. Harbour Point Homeowners' Ass'n v. DJF Enters.*, 206 N.C. App. 152, 163, 697 S.E.2d 439, 447 (2010), and withholding that information would "effectively preclude[]" the requesting party from making or defending that claim, *cf. Tennessee-Carolina Transp. Inc. v. Strick Corp.*, 291 N.C. 618, 625, 231 S.E.2d 597, 601 (1977).

Defendant's motion requested the trial court to compel Plaintiffs to "fully and completely respond to Interrogatory No. 3." Interrogatory No. 3 requested Plaintiffs to "[i]dentify and describe all damages claimed by you in as much detail as you are able to provide, including: (a) a complete description of the method of calculation of each category of damages; [and] (b) a detailed description of each item of individual damages . . . ." Plaintiffs responded as follows:

> JWC is claiming damages for breach of contract, quantum meruit, unfair and deceptive trade practices and attorneys' fees. In particular, [Defendant] has failed to properly calculate and pay the growth commission due for both

> 2015 and 2016. This includes making improper deductions, failing to report or credit all sales within JWC's territory, failing to make payments on a monthly basis and failing to make any payments for 2016. The exact amount due cannot be determined as of the date of this response due to [Defendant]'s failures to allow an audit per the contract and to produce documents in a timely and complete manner during the lawsuit. [Defendant] has also failed to pay all of the basic commission due for 2016. Interest is due on all overdue growth and basic commission payments at the legal rate allowed by law until paid. There will also be additional commission due for 2017 and 2018 per Section 7 of the contract. The method by which JWC calculates its damages is as follows: the total commission due to JWC as provided in JWC's contract with [Defendant] minus the payments [Defendant] has already made to JWC. JWC's contract with [Defendant] may be found at TSN_0020113 together with TSN_0011814. Further, due to [Defendant]'s unfair and/or deceptive trade practices, these damages should be trebled and attorneys' fees and costs added. Finally, JWC is entitled to recover its attorney fees, costs and expenses incurred in having to file a suit to enforce the parties' contract. These fees, costs and expenses continue to accrue each day this lawsuit continues.[1]

Defendant asserted that "Plaintiffs' argument as to why it cannot calculate their alleged damages is unfounded" as Defendant had already given them all the information needed to make such calculations. While Plaintiffs' damages calculations are "essential" to Plaintiffs proving their claims for breach of contract, quantum meruit, and unfair and deceptive trade practices, Defendant essentially conceded that the information necessary for both Plaintiff and Defendant to calculate those damages is in Defendant's possession as "Defendant had already given them all the information." Moreover, Plaintiffs' inability or refusal to provide the requested calculations to Defendant would not "effectively preclude[]" Defendant from defending against Plaintiffs' claims, as Defendant was in as good or better position than Plaintiffs to make those calculations. Accordingly, the information desired is not "*highly material to a determination of the critical question* to be resolved in the case[,]" *Stokes*, 369 N.C. at 719, 800 S.E.2d at 45, and the order denying Defendant's

1. Plaintiffs' responses for JW Company, LLC, (JWC) and Feeassco, LLC, were substantively the same.

motion to compel does not affect a substantial right. Defendant's appeal from the Denial Order denying its motion to compel is dismissed.

Defendant's brief does not address the interlocutory nature of the denial of its motion for sanctions and does not contain "facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4) (2018). "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Defendant's appeal from Denial Order denying its motion for sanctions is dismissed.

IV. Discussion

A. November Order

[3] Defendant first argues the trial court erred when it ordered Defendant to submit to an audit of its electronic systems in the November Order. We disagree.

"It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480 (1977). An 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).

Discovery rules are designed to facilitate the disclosure of any relevant and material information before trial which allows the parties to narrow and sharpen the issues and facts required for trial. *Am. Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (1979) (citation omitted). Further, "the discovery rules 'should be constructed liberally' so as to substantially accomplish their purposes." *Id.* at 727, 251 S.E.2d at 888 (citation omitted).

Rule 34 of our Rules of Civil Procedure provides:

> Any party may serve on any other party a request (i) to produce and permit the party making the request . . . to inspect and copy, test, or sample any designated documents, electronically stored information, or tangible things

> . . . which are in the possession, custody or control of the party upon whom the request is served; or (ii) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

N.C. Gen. Stat. § 1A-1, Rule 34(a) (2017).

Subsection (i) governs requests for production of documents, electronically stored information, and other tangible items while subsection (ii) governs entry upon property for "inspection and measuring, surveying, photographing, testing, or sampling the property . . . ." *Id.* If, "in response to a request for inspection submitted under Rule 34, [a party] fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order . . . compelling inspection in accordance with the request." N.C. Gen. Stat. § 1A-1, Rule 37(a)(2) (2017).

Defendant concedes it did not comply with Plaintiffs' original requests for production, noting in its brief: "At the hearing on Plaintiffs' Motion to Compel, [Defendant] . . . acknowledged to the trial court that it should have included all sales within Plaintiffs' Territories as sought in Plaintiffs' initial requests." Defendant does not take issue with the trial court's order compelling Defendant to produce physical copies of the requested documents. Defendant argues, however, that because "Plaintiffs did not serve a request under Rule 34(a)(ii) to gain access to [Defendant's] electronic systems to audit [Defendant's] sales in their respective Territories[,]" the trial court had no legal authority to require Defendant to submit to an onsite audit of its electronic systems. Defendant's argument is misguided.

Plaintiffs requested production of "documents in the possession, custody and control of Defendant pursuant to Rule 34 of the applicable Rules of Civil Procedure." Rule 34(a)(i) does not specify the manner in which documents may be requested or may be compelled to be produced. While Plaintiffs requested that all responsive documents be produced at the law offices of Bugg & Wolf, P.A., upon Defendant's failure to comply with the request, the trial court ordered Defendant, "[a]s part of complying fully with Plaintiffs' First Requests for Production[,]" to submit to an audit of its electronic systems to gain access to the requested information. The trial court's order did not compel Defendant

to allow Plaintiffs' entry upon Defendant's property for "inspection and measuring, surveying, photographing, testing, or sampling the property . . . [,]" N.C. Gen. Stat. § 1A-1, Rule 34(a), but instead compelled Defendant to allow electronic systems inspection as an alternative manner for ensuring the production of the documents requested. The trial court was well-within its discretion to order this alternative means of production. *See Green v. Maness*, 69 N.C. App. 403, 316 S.E.2d 911 (1984) (holding the trial court did not abuse its discretion when it ordered additional discovery via oral depositions of defendant's expert witnesses). Defendant's argument is overruled.

B. Sanctions Order - Abuse of Discretion Claim

[4] Defendant next argues the trial court abused its discretion when it granted Plaintiffs' motion for sanctions. Specifically, Defendant argues the trial court's findings of fact do not support the conclusion that Defendant violated the November Order. We disagree.

We review the Sanctions Order, granting Plaintiffs' motion for sanctions, for an abuse of discretion. *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996) ("A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion."). The determination of whether to strike an answer and enter default judgment because of noncompliance with discovery rules "may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Essex Grp., Inc. v. Express Wire Servs. Inc.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003) (affirming sanctions order striking defendants' answer, entering default judgment against defendants, and ordering defendants to pay costs and attorney fees).

N.C. Gen. Stat. § 1A-1, Rule 37, states in pertinent part: "If a party . . . fails to obey an order to provide or permit discovery, including an order made under [Rule 37(a)] . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2). One of the options available to a trial court for addressing violations of an order to compel discovery under Rule 37(a) is the entry of an order "striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c). Thus, by virtue of its literal language, N.C. Gen. Stat. § 1A-1, Rule 37, authorizes a trial court to impose sanctions, including striking an answer and entering judgment as to liability, upon a party

for discovery violations. *See Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 910 (2006).

"According to well-established North Carolina law, a broad discretion must be given to the trial judge with regard to sanctions." *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (quotation marks and citation omitted). "A trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is 'among those expressly authorized by statute' and there is no 'specific evidence of injustice.' " *Id.* at 417, 681 S.E.2d at 795 (*quoting Roane-Barker v. Se. Hosp. Supply Corp.*, 99 N.C. App. 30, 37, 392 S.E.2d 663, 667 (1990)). However, before imposing a severe sanction such as striking an answer and entering judgment as to liability, a trial court must consider the appropriateness of less severe sanctions. *See Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911.

In its Sanctions Order, the trial court made the following relevant findings of fact:

> 1. On November 1, 2017, the Honorable Elaine M. O'Neal entered an order granting Plaintiffs' Motion to Compel Discovery from Defendant ("November Order").
>
> 2. The November Order was granted because of Defendant's failure to properly respond to Plaintiffs' First Interrogatories and First Requests for Production ("First RFPs") over the course of more than ten months, from December 2016 through October 2017.
>
> . . . .
>
> 7. Defendant did not select an accounting firm for the onsite audit by 5:00 p.m. on November 20, 2017, the deadline in the November Order.
>
> 8. Defendant did not select an accounting firm until after Plaintiffs informed Defendant that it missed the deadline.
>
> 9. Defendant failed to pay Plaintiffs' reasonable expenses associated with preparing, filing, and arguing Plaintiffs' Motion by 5:00 p.m. on November 20, 2017, as required by the Order.
>
> . . . .
>
> 11. Defendant did not pay Plaintiffs' reasonable expenses associated with preparing, filing, and arguing Plaintiffs'

Motion until after Plaintiffs reminded Defendant of its obligation. Plaintiffs did not receive Defendant's check until December 1, 2017.

12. During the onsite audit, the independent accountant made the following requests of Defendant:

a. Reports of Defendant's sales for all of Defendant's territories for 2014 through the date of the Onsite Audit;

b. A digital copy of Defendant's QuickBooks;

c. The spreadsheets and other work papers with Defendant's commission calculations for the Plaintiffs at the time Defendant paid the Plaintiffs;

d. Defendant's final and signed tax returns for 2015 and 2016; and

e. Defendant's sales tax reports for 2015 and 2016.

13. The accountant's requests were within the scope of the November Order, specifically paragraph 7(g), and the parameters for the audit provided by Plaintiffs to Defendant. Defendant never objected to Plaintiffs' parameters.

14. These requests were necessary for the independent accountant to complete the audit.

15. Defendant did not provide the independent accountant with the information he requested.

16. During the onsite audit, Defendant designated Mr. Sean Wilson as the person with knowledge of its accounting systems.

17. Mr. Wilson left the audit, without explanation, for nearly four hours.

18. Mr. Wilson's departure made it impossible for the independent accountant to complete the audit.

19. Paragraph 7(e) of the November Order provided that the independent accountant would be the person to personally review Defendant's accounting systems.

20. At the audit, Mr. Wilson did not allow the accountant to review the accounting system himself, but instead made the accountant review the accounting systems through Mr. Wilson.

21. Defendant also refused to allow Plaintiffs to obtain copies of the data and information retained by the accountant during the audit.

22. Defendant's behavior during the onsite audit prevented the independent accountant from obtaining the data and information necessary to complete the onsite audit as contemplated by the November Order.

23. Plaintiffs propounded a total of six interrogatories to Defendant.

24. Plaintiffs' interrogatories 3 and 4 requested that Defendant identify Defendant's customers in Plaintiffs' territories for 2015 through the date of Defendant's response.

25. Defendant replied identically to both Interrogatory 3 and 4 as follows:

> Nonprivileged information responsive to this interrogatory can be derived or ascertained from certain nonprivileged business document (sic) of [Defendant] that [Defendant] will produce - subject to an appropriate confidentiality agreement and protective order - by October 20, 2017 (to the extent not already produced), and the burden of deriving or ascertaining such information is substantially the same for Plaintiffs as for [Defendant].

26. The burden of deriving or ascertaining the information is not the same for Plaintiffs and Defendant. Defendant can quickly derive or ascertain the requested information from its sales and accounting systems, while Plaintiffs would need to sort through Defendant's production to derive or ascertain this information. Defendant's responses were not proper and amounted to *de facto* objections to Plaintiffs' interrogatories and were non-responsive.

27. Defendant did not produce the following documents as required by the November Order:

> a. Consolidated reports of invoices paid for all customer business within Plaintiffs' territories;
>
> b. All correspondence regarding or related to Plaintiffs; and

> c. All customer orders and invoices for Plaintiffs' territories.
>
> 28. Defendant did provide consolidated reports of invoices to the independent accountant at the onsite audit. However, Defendant did not provide those reports to Plaintiffs and did not allow the accountant to provide them to Plaintiffs.
>
> 29. Defendant has not produced all its sales reports for the Plaintiffs' territories as required by the November Order. Defendant produced many copies of these reports to the accountant during the onsite audit . . . . Defendant did not allow Plaintiffs to have these reports and did not allow the accountant to provide them to Plaintiffs.
>
> 30. Defendant did not produce its signed 2015 or 2016 state and federal tax returns to either Plaintiffs or the accountant.
>
> 31. Defendant designated every single document it produced as confidential.
>
> 32. Defendant's failure to comply with the November Order was not substantially justified and there are no circumstances making an award of expenses unjust.

Defendant does not challenge these findings; thus, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted). These findings of fact amply support the trial court's conclusion that "Defendant failed to obey the November Order on numerous occasions, and was in contempt of that Order" and that "[u]nder these facts, an order of sanctions against Defendant, pursuant to Rule 37 . . . would be just."

Defendant argues that when the electronic systems audit was performed, the auditor increased the scope of the audit allowed under the November Order. Defendant thus argues that it cannot be in violation of the November Order for failing to acquiesce to this increased scope. However, the November Order stated: "In auditing the electronic systems, the [auditor] shall be allowed access to all information that is 'reasonably calculated to lead to the discovery of admissible evidence' within the meaning of Rule 26 of the NC Rules of Civil Procedure." As explained above, the trial court did not abuse its discretion in the November Order

by ordering an audit of Defendant's electronic systems, and the findings of fact do not support a conclusion that the audit went beyond the scope of the audit as specified in the November Order. Nonetheless, even if findings of fact regarding the electronic systems audit are disregarded, the trial court's remaining findings of fact amply support its conclusions that "Defendant failed to obey the November Order on numerous occasions, and was in contempt of that Order" and that "[u]nder these facts, an order of sanctions against Defendant, pursuant to Rule 37 . . . would be just." Additionally, the trial court concluded:

> The Court has carefully considered each of the foregoing facts, as well as their cumulative effect, and has also considered the available sanctions for such misconduct, including lesser sanctions. After thorough consideration, the Court concludes that sanctions less severe than striking Defendant's answer and entering judgment for Plaintiffs as to liability only would not be adequate given the seriousness of the misconduct described above.

Accordingly, the trial court's findings of fact support the conclusion that Defendant violated the November Order on numerous occasions. Moreover, the trial court considered lesser sanctions prior to striking Defendant's answer and entering judgment for Plaintiffs as to liability, sanctions which are expressly authorized by statute. Thus, the trial court did not abuse its discretion in the Sanctions Order by granting Plaintiffs' motion for sanctions.

C. Sanctions Order - Due Process Claim

[5] Defendant next agues the trial court's Sanctions Order violates its due process rights. We disagree.

We repeat that this Court may overturn a trial court's order of sanctions only in the event of an abuse of discretion. *Essex Grp., Inc.*, 157 N.C. App. at 362, 578 S.E.2d at 707. "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quotation marks and citation omitted). Here, the numerous facts found by the trial court justify its imposition of sanctions on Defendant. Sanctions such as striking answers and entering default judgment are well within the court's discretion in cases involving an abuse of discovery rules by one party. *Kewaunee Sci. Corp. v. E. Sci. Prods.*, 122 N.C. App. 734, 738, 471 S.E.2d 451, 453 (1996) (citing *Roane-Barker*, 99 N.C. App. at 36, 392 S.E.2d at 667.)

Defendant first asserts that because it made a diligent and good faith effort to comply with the order, "[i]mposing drastic sanctions on [Defendant] under these circumstances, especially considering the limited amount in controversy, violated [Defendant]'s due process rights." We disagree.

The unchallenged findings of fact do not support Defendant's assertion of a diligent and good faith effort. To the contrary, the findings of fact demonstrate a protracted unwillingness to respond to Plaintiffs' discovery requests or comply with the trial court's discovery order based, at least in part, on Defendant's unsupported insistence that Plaintiffs' and the trial court's actions were excessive, "considering the limited amount in controversy[.]"

Defendant further contends, "even assuming arguendo that [Defendant] could be characterized as less than diligent," due process does not permit a trial court to strike its answer as a discovery sanction because the facts in this case do not support a *Hammond Packing* presumption of bad faith. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909). Again, we disagree.

"Rule 37(b)(2)(A)[2] itself embodies the standard established in *Hammond Packing Co. v. Arkansas* . . . for the due process limits on such rules." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 705 (1982). In *Hammond Packing*, "the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order." *Id.* "[I]n instances of default judgment the 'preservation of due process [is] secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.' " *Id.* (quoting *Hammond Packing*, 212 U.S. at 350-51).

"A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption." *Ins. Corp. of Ir.*, 456 U.S. at 706 (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 209-13 (1958)). "If there is no abuse of discretion in the application of the Rule 37 sanction, . . . then the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver." *Id.*

In section IV. 2., above, we concluded the trial court did not abuse its discretion in the application of the Rule 37 sanction. The trial court's

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2. Although *Hammond Packing* involves the Federal Rule of Civil Procedure 37(b)(2)(A), this rule is essentially identical to our North Carolina Rule of Civil Procedure 37(b)(2).

copious findings of fact amply supported the trial court's conclusions that "Defendant failed to obey the November Order on numerous occasions, and was in contempt of that Order[;]" that "[u]nder these facts, an order of sanctions against Defendant, pursuant to Rule 37 . . . would be just[;]" and that "[a]fter thorough consideration, the Court concludes that sanctions less severe than striking Defendant's answer and entering judgment for Plaintiffs as to liability only would not be adequate given the seriousness of the misconduct described above." The trial court's proper application of Rule 37(b)(2), as a matter of law, supported the "presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered . . . ." *Hammond Packing*, 212 U.S. at 351. Accordingly, as in *Hammond Packing*, it did not violate due process for the trial court in this case to strike Defendant's answer and enter judgment in favor of Plaintiffs as to liability based on Defendant's failure to comply with the November Order.

Defendant finally argues that the sanction striking its answer and establishing liability in favor of Plaintiffs violated Defendant's due process rights because the sanction was not " 'specifically related' to the issue upon which discovery was sought and refused[,]" as required by *Insurance Corporation of Ireland*. However, Defendant overlooks our Rule 37 and misquotes *Insurance Corporation of Ireland*, both of which refer to a "claim" as opposed to an "issue."

Rule 37 provides that the trial court may issue "[a]n order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2). This Court has broadly interpreted that language, even upholding a finding of fact establishing an entire negligence claim on behalf of the party obtaining the order. *Edwards v. Cerro*, 150 N.C. App. 551, 557–58, 564 S.E.2d 277, 281 (2002). Likewise, *Insurance Corporation of Ireland*, which involves Federal Rule 37, explains that "the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ir.*, 456 U.S. at 707.

The particular claims at issue in the November Order included breach of contract, quantum meruit, and unfair and deceptive trade practices. The sanction striking Defendant's answer and establishing liability in favor of Plaintiffs specifically related to those claims. Accordingly, the Sanctions Order striking Defendant's answer and establishing liability in favor of Plaintiffs did not violate Defendant's due process rights.

V. Conclusion

The November Order and the Sanctions Order are affirmed. Defendant's appeal from the Denial Order is dismissed.

AFFIRMED IN PART; DISMISSED IN PART; AND REMANDED.

Judges TYSON and ZACHARY concur.

ROWU CORTEZ GUNTER, BY HIS GUARDIAN AD LITEM GABRIEL ZELLER AND ROWU GUNTER, PERSONALLY, PLAINTIFFS

v.

DAVID SEAN MAHER AND LARISSA MAHER, DEFENDANTS

No. COA18-844

Filed 19 March 2019

1. Appeal and Error—appealability—interlocutory orders—order compelling discovery—statutory privilege asserted

An order compelling discovery in a negligence case was immediately appealable where appellants argued that it violated the attorney-client privilege. Although an order compelling discovery is interlocutory and, ordinarily, does not affect a substantial right, it can affect a substantial right where the appellant asserts that it violates a statutory privilege.

2. Discovery—order compelling discovery—attorney-client privilege

In a negligence action arising from a car accident, the trial court did not abuse its discretion by compelling plaintiffs to disclose the date on which they first contacted their attorney. Compelled disclosures of this sort do not violate the attorney-client privilege, so long as the substance of a party's conversation with his or her lawyer is not made part of the required disclosure.

Appeal by plaintiffs from order entered 4 January 2018 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 14 February 2019.

Schwaba Law Firm, PLLC, by Andrew J. Schwaba and Zachary D. Walton, for plaintiff-appellants.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Kara V. Bordman and Steven B. Fox, for defendant-appellees.

BERGER, Judge.

Rowu Cortez Gunter, by and through his guardian ad litem, and his father, Rowu Gunter, ("Plaintiffs") appeal from an interlocutory order that compels the disclosure of the date on which they first contacted their attorney before the commencement of this litigation. Plaintiffs argue that this date being sought through pre-trial discovery is protected by attorney-client privilege, and they cannot, therefore, be compelled to disclose it. We disagree.

Factual and Procedural Background

On June 23, 2015, Plaintiffs were driving west on Waughtown Street in Winston Salem, North Carolina at that same time that David and Larissa Maher ("Defendants") were driving east on Waughtown Street. Defendants began a left-hand turn into a private driveway and collided with Plaintiffs' vehicle.

As a result of this collision, Plaintiffs filed a complaint on July 12, 2017 against Defendants asserting negligence claims and seeking damages for their injuries. Defendants answered the complaint and also served their first set of interrogatories on Plaintiffs on September 20, 2017. In this set of interrogatories, number 24 asked that Plaintiffs "[s]tate the date when you first contacted an attorney after the accident referenced in the complaint. Please note that this request is being made pursuant to the case of *Blackmon v. Bumgardner*, 135 N.C. App. 125 (1999)." Plaintiffs responded to Defendants' interrogatories on October 31, 2017 but objected to number 24 on attorney-client privilege grounds.

Plaintiffs filed an amended complaint on November 13, 2017, and Defendants filed their amended answer on November 14, 2017. Defendants then filed a motion to compel on November 20, 2017 asking the trial court to order Plaintiffs to fully respond to their discovery requests. Plaintiffs responded to Defendant's motion on December 14, 2017.

The trial court granted Defendants' motion to compel in an order filed January 4, 2018 that required Plaintiffs to "provide the date when Plaintiff first contacted an attorney after the accident referenced in the complaint within 20 days of the entry of this order." On January 23, 2018, Plaintiffs filed their notice of appeal of the order to compel. On January 31, 2018, Plaintiffs filed a motion to stay the case with the trial court

pending the outcome of this appeal. The trial court granted the stay on February 26, 2018.

Analysis

I. Interlocutory Appeal

[1] As an initial matter, we note that Plaintiffs' appeal is interlocutory.

> An order is either interlocutory or the final determination of the rights of the parties . . . . An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.

Beroth Oil Co. v. N.C. Dep't of Transp., ___ N.C. App. ___, ___, 808 S.E.2d 488, 496 (2017) (citations and quotation marks omitted).

"An interlocutory appeal is ordinarily permissible only if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review." *Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 464, 621 S.E.2d 1, 4 (2005) (citation omitted). A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law: a material right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (*purgandum*[1]).

"An order compelling discovery is interlocutory in nature and is usually not immediately appealable because such orders generally do not affect a substantial right." *Sessions v. Sloane*, ___ N.C. App. ___, ___, 789 S.E.2d 844, 853 (2016). However, when "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581.

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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.

Plaintiffs' appeal of the order compelling discovery is interlocutory in nature and, usually, would not be immediately appealable. However, the assertion that an order will violate a statutory privilege is generally sufficient to show that an order affects a substantial right and should be immediately reviewed by this Court. Here, Plaintiffs have alleged that attorney-client privilege protects the disclosure being compelled by the trial court's order, and this allegation is sufficient for us to undertake interlocutory review. However, the merits of Plaintiffs' argument is untenable because North Carolina's case law is clear. Nevertheless, we will review the merits of Plaintiffs' appeal to strengthen the clear precedent that the date in which a party initially seeks counsel is not information protected by attorney-client privilege. In doing so, we affirm the trial court's order granting Defendants' motion to compel.

II. Attorney-Client Privilege

[2] Plaintiffs argue that, in its order compelling disclosure of the date on which Plaintiffs first contacted counsel, the trial court erred because that information is protected by attorney-client privilege. We disagree.

> Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion. We also review the trial courts' application . . . of attorney-client privilege under an abuse of discretion standard. Under an abuse of discretion standard, this Court may only disturb a trial court's ruling if it was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Sessions, ___ N.C. App. at ___, 789 S.E.2d at 853-54 (citations and quotation marks omitted). "When the trial court acts within its discretion, this Court may not substitute its own judgment for that of the trial court." *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006) (citation and quotation marks omitted).

> The attorney-client privilege protects communications if: "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege."

Id. at 411, 628 S.E.2d at 462 (quoting *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981)). "If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 534, 645 S.E.2d 117, 121 (2007) (citation and quotation marks omitted). "The burden is always on the party asserting the privilege to demonstrate each of its essential elements." *Id.* (citation and quotation marks omitted). "This burden may not be met by mere conclusory . . . assertions. . . . Rather, sufficient evidence must be adduced . . . to establish the privilege with respect to each disputed item." *Id.* (*purgandum*).

> It is well established that the substance of communications between attorney and client is privileged under proper circumstances. Not all facts pertaining to the lawyer-client relationship are privileged, however. The authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. We are of the opinion that the fact that an attorney did communicate with his client in a certain manner on a certain date is likewise not normally privileged information. It is the substance of the attorney-client communication which is protected, however, not the fact that there have been communications.

Blackmon v. Bumgardner, 135 N.C. App. 125, 141, 519 S.E.2d 335, 344-45 (1999) (citing *State v. Tate*, 294 N.C. 189, 192-93, 239 S.E.2d 821, 824-25 (1978)) (*purgandum*). Therefore, "the attorney-client privilege is not violated when an attorney questions the plaintiff concerning whether she had communications with an attorney on a particular date, as long as such questioning does not probe the substance of the client's conversation with her attorney." *Williams v. McCoy*, 145 N.C. App. 111, 114, 550 S.E.2d 796, 799 (2001) (citing *Tate*, 294 N.C. at 192-93, 239 S.E.2d at 824-25 (1978); *see Blackmon*, 135 N.C. App. at 141, 519 S.E.2d at 344-45.

Here, Plaintiffs assert that the date on which legal counsel was initially sought is substantive and therefore protected by attorney-client privilege. To that end, Plaintiffs have made several tangential arguments ostensibly supported by law from other jurisdictions, and they also

conflate what has been clearly defined as protected, privileged communications with the facts of this case. The date on which a communication took place is not equivalent to the substance of that communication. Essentially, Plaintiff asks that "we undertake the task of fitting a square peg into a round hole." *English v. Harris Clay Co.*, 225 N.C. 467, 470, 35 S.E.2d 329, 331 (1945). This we will not do.

As stated in *Blackmon v. Bumgardner*, the date on which a party initiates their attorney-client relationship is not a substantive communication to which the protections of attorney-client privilege apply. *Blackmon*, 135 N.C. App. at 141, 519 S.E.2d at 344-45. Plaintiffs are unable to carry their burden to show that the date in question was a communication to an attorney, made in confidence, that related to the matter about which their attorney was being professionally consulted, and made in the course of giving or seeking legal advice. The attorney-client privilege is not violated by the compelled disclosure of the particular date on which legal counsel is first sought, as long as the substance of that conversation between a client and his or her attorney is not part of the required disclosure.

Conclusion

We affirm the order of the trial court compelling the disclosure of the date on which Plaintiffs first sought legal counsel because this information is not protected by attorney-client privilege.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

PATRICIA HAGER, EXECUTRIX OF THE ESTATE OF ALBERT HOFFMASTER, PLAINTIFF
v.
SMITHFIELD EAST HEALTH HOLDINGS, LLC, D/B/A GABRIEL MANOR ASSISTED LIVING CENTER, SMITHFIELD OPERATIONS, LLC, SABER HEALTHCARE HOLDINGS, LLC, SABER HEALTHCARE GROUP, LLC, SHERRY TABOR, DEFENDANTS

No. COA18-651

Filed 19 March 2019

1. Fiduciary Relationship—analysis of factors for and against—patient and long-term care facility—arbitration agreement

In a medical malpractice and wrongful death action, the trial court erred in concluding that an assisted living facility owed a fiduciary duty to a patient where plaintiff, the patient's daughter, signed an arbitration agreement on his behalf after checking him into the facility. The Court of Appeals declined to impose a *de jure* fiduciary relationship between assisted living facilities with memory wards and their patients; moreover, although plaintiff lacked legal expertise and provided confidential information when signing the agreement, more factors weighed against the existence of a *de facto* fiduciary relationship, including that the plaintiff did not seek out the facility solely for its specialized knowledge or skill in caring for Alzheimer's patients like her father.

2. Arbitration and Mediation—motion to compel arbitration—standing—multiple defendants

In a medical malpractice and wrongful death action, the trial court correctly concluded that the only defendant with standing to compel arbitration was the assisted living facility where plaintiff placed her father. There was no evidence that the other named defendants—none of which were signatories to the arbitration agreement that plaintiff signed—had a relationship with the facility covered by the agreement which would establish standing to enforce that agreement.

Judge BRYANT concurring in the result only.

Appeal by Defendants from order entered 6 February 2018 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 15 January 2019.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim, for Plaintiff-Appellee.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Katherine Hilkey-Boyatt, for Defendants-Appellants.

INMAN, Judge.

A daughter's difficult decision to admit her father, who suffered from dementia, to a long-term assisted living and memory care facility as his attorney-in-fact did not create a fiduciary duty between the father and the facility.

This case arises out of a medical malpractice, negligence, and wrongful death action brought by the plaintiff Patricia Hager ("Ms. Hager"), daughter to and executrix of the Estate of Albert Hoffmaster ("Mr. Hoffmaster") against defendants Smithfield East Health Holdings, LLC d/b/a Gabriel Manor Assisted Living Center ("Smithfield East"), Smithfield Operations, LLC ("Smithfield Operations"), Saber Healthcare Holdings, LLC ("Saber Holdings"), Saber Healthcare Group, LLC ("Saber Healthcare"), and Sherry Tabor ("Tabor," collectively with Smithfield East, Smithfield Operations, Saber Holdings, and Saber Healthcare as "Defendants"). Defendants appeal the trial court's order denying their motion to compel arbitration, which found both the existence of a fiduciary relationship between Smithfield East and Mr. Hoffmaster and a breach of the corresponding fiduciary duty because Smithfield East failed to fully disclose the significance of an arbitration agreement presented to and signed by Ms. Hager as attorney-in-fact for Mr. Hoffmaster. After careful review of the record and applicable law, we reverse the order of the trial court in part and remand for entry of an order compelling arbitration of the claims against Smithfield East. We affirm the trial court's denial of the motion to compel arbitration by all other defendants except Smithfield Operations, and remand for the trial court to make findings and conclusions regarding that defendant.

I. FACTUAL AND PROCEDURAL HISTORY

The record tends to show the following:

From September 2014 until late October 2015, Ms. Hager cared for her father, Mr. Hoffmaster, who suffered from dementia, in her home in Johnston County. On the morning of 27 October 2015, Ms. Hager found Mr. Hoffmaster in the bathroom after he had urinated on the carpet and disassembled a lamp in his bedroom. He insisted that he had called for Ms. Hager all night, though she had checked on him frequently throughout that time. Ms. Hager immediately decided she needed to admit Mr. Hoffmaster to a long-term care facility; she later explained in an affidavit

that she "did not feel as though [she] could violate his dignity by bathing and toileting him" and "had told [Mr. Hoffmaster] that when the day came that [she] could not care for him with bathing and personal care [she] would have to make that decision."

Ms. Hager called her chiropractor's office for a recommendation to a nursing home facility close to her home. Ms. Hager's chiropractor referred her to Gabriel Manor, a facility where the chiropractor provided treatment to some residents. Ms. Hager telephoned Gabriel Manor and asked if there was a room available in the memory ward, which serves patients with dementia and other cognitive disabilities. Ms. Hager stated that she needed an immediate placement for her father; in response, the representative from Gabriel Manor offered Ms. Hager the opportunity to bring Mr. Hoffmaster by that day, tour the facility, and have lunch. Though she did not have the heart to tell her father, Ms. Hager had already resolved to admit him to Gabriel Manor before they left their home. She also called a family friend, Esta List ("Ms. List"), about the morning's events. Ms. List accompanied Ms. Hager and Mr. Hoffmaster to Gabriel Manor later that morning.

After arriving at Gabriel Manor, the three toured the facility and ate lunch in its dining room. Ms. Hager "decided right then that she was going to admit her father to Gabriel Manor that day" and informed facility staff. Ms. Hager entered a conference room with a Gabriel Manor representative where, as part of the intake process, she was presented with multiple documents to sign as Mr. Hoffmaster's attorney-in-fact. Among the documents she signed were an Assisted Living Residency Agreement, Patient Information Forms for Doctors Making Housecalls, and the Resident and Facility Arbitration Agreement ("Arbitration Agreement"). In completing the forms, Ms. Hager provided confidential information regarding Mr. Hoffmaster, including his social security number, contact information for his physicians, a list of medications, his Alzheimer's diagnosis, health insurance cards and policy numbers, credit card numbers, and signed authorizations to release Mr. Hoffmaster's medical records to Doctors Making Housecalls.

Of the several documents presented to Ms. Hager, no particular attention was directed towards the Arbitration Agreement. The representative did not discuss the Arbitration Agreement with Ms. Hager, and she did not ask any questions concerning it; indeed, Ms. Hager signed the document without ever reading it.

The Arbitration Agreement itself, which by its terms is governed by the Federal Arbitration Act ("FAA"), begins with the text "**NOT A**

CONDITION OF ADMISSION – READ CAREFULLY" in bolded, all capital letters. It also includes, in bolded typeface, provisions: (1) allowing Ms. Hager to cancel the agreement for any reason within 60 days of signing it; (2) allowing Ms. Hager the opportunity to read, ask questions, and propose revisions to the document prior to signing; and (3) informing Ms. Hager of her right to retain counsel to review the agreement and advising her to do so. The final provision of the agreement, in bolded and italicized capital letters, states that "***THE PARTIES UNDERSTAND THAT BY ENTERING INTO THIS AGREEMENT, THE PARTIES ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES***."

After signing the documents presented to her, Ms. Hager was provided with copies of each in a folder. She took them home and never looked at them again, and at no point exercised her right to cancel the Arbitration Agreement. Ms. Hager discarded the documents after Mr. Hoffmaster passed away on 25 February 2016, four months after his admission to Gabriel Manor.

Ms. Hager filed suit on behalf of her father's estate against Defendants, alleging claims of negligence, medical malpractice, and wrongful death in the passing of her father while in Defendants' care at Gabriel Manor. The complaint further alleged that each of the Defendants "was the agent, partner, joint venturer, representative, and/or employee of the remaining Defendants, and was acting within the course and scope of such agency, partnership, joint venture, and/or employment." Defendants filed a combined answer, motion to dismiss, and motion to compel arbitration, admitting that Smithfield East owns Gabriel Manor but denying any other alleged connection between the facility and the remaining Defendants. Saber Healthcare's general counsel filed an affidavit concurrently with the Defendants' pleading, stating that Saber Healthcare and Saber Holdings are not licensed in North Carolina and have "no involvement in the management of staff, the provision of care, control over the day to day operations, or oversight of the operation or management of Smithfield East[.]"

The motion to compel arbitration came on for hearing on 8 January 2018. In a written response to the motion and during the hearing, counsel for Ms. Hager asserted that: (1) there was no evidence that any of the Defendants was a party to the Arbitration Agreement and therefore they lacked standing to compel arbitration; and (2) Defendants, if parties to the Arbitration Agreement, owed and breached a fiduciary duty to Mr.

Hoffmaster in failing to fully disclose the terms and consequences of the Arbitration Agreement prior to obtaining Ms. Hager's signature. The trial court agreed with Ms. Hager, finding in part in a written order filed 6 February 2018 that Smithfield East was the only defendant party to the Arbitration Agreement and concluding that it breached a fiduciary duty owed to Mr. Hoffmaster in "requesting that Ms. Hager sign a document with substantial legal ramifications and which they believed to be of benefit to themselves without full disclosure to Mr. Hoffmaster" through Ms. Hager as his attorney-in-fact. The trial court's order also made factual findings, consistent with the history recited above, to support its ruling. Defendants timely appealed.

II. ANALYSIS

Defendant's appeal presents three principal questions: (1) whether Smithfield East owed a fiduciary duty to Mr. Hoffmaster through Ms. Hager; (2) whether that duty, if it existed, was breached by Smithfield East's failure to press upon Ms. Hager the significance and ramifications of the Arbitration Agreement prior to her signing it; and (3) whether all Defendants have standing to compel arbitration. In their briefs, the parties seek to resolve the first question by either distinguishing or analogizing our Supreme Court's *de facto* fiduciary duty analysis undertaken in *King v. Bryant*, 369 N.C. 451, 795 S.E.2d 340 (2017). In oral argument, counsel for Ms. Hager proposed a new *de jure* rule holding that a fiduciary relationship always exists between licensed long-term care facilities with memory care wards and their residents. Because we decline to create a new *de jure* fiduciary relationship while distinguishing *King*, we hold that the trial court erred in concluding a fiduciary relationship existed. We also hold that only Smithfield East has satisfied its evidentiary burden establishing standing to compel arbitration.

A. Appellate Jurisdiction

Ordinarily, interlocutory orders are not immediately appealable. *Griessel v. Temas Eye Care Center, P.C.*, 199 N.C. App. 314, 315, 681 S.E.2d 446, 447 (2009). An immediate appeal, however, lies from an interlocutory order where the ruling below affects a substantial right. N.C. Gen. Stat. § 1-277(a) (2017). A denial of a motion to compel arbitration falls into this latter category, and we therefore possess jurisdiction to hear Defendants' appeal. *Griessel*, 199 N.C. App. at 316-17, 681 S.E.2d at 448.

B. Standards of Review

On review of an order containing factual findings, unchallenged findings of fact are binding on appeal while conclusions of law are

reviewable *de novo*. *King*, 369 N.C. at 463, 795 S.E.2d at 348. Legal conclusions in an order imposing a fiduciary relationship, including whether the facts establish a fiduciary relationship and whether any fiduciary duty was breached, are reviewed *de novo*. *Id.* Similarly, we apply the de novo standard to the denial of a motion to compel arbitration and its underlying conclusions of law concerning issues of contract interpretation and whether the dispute is subject to arbitration. *Creed v. Smith*, 222 N.C. App. 330, 333, 732 S.E.2d 162, 164 (2012).

C. Fiduciary Relationships

[1] North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship. *Lockerman v. South River Electric Membership Corp.*, ___ N.C. App. ___, ___, 794 S.E.2d 346, 351 (2016). As our Supreme Court has recently cautioned, "[t]he list of relationships that we have held to be fiduciary in their very nature is a limited one, and we do not add to it lightly." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52, 790 S.E.2d 657, 660 (2016) (citations omitted). That list has, thus far, been limited to legal relationships, including attorney and client, physician and patient, spouses, business partners, and guardian and ward. *See Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931), *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014), *and King*, 369 N.C. at 464, 795 S.E.2d at 349 (listing the various kinds of *de jure* fiduciary relationships).

De facto relationships are less immediately identifiable, as "[c]ourts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded." *Abbitt*, 201 N.C. at 598, 160 S.E. at 906. The concept is not without definition, however:

> The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. . . . It is settled by an overwhelming weight of authority that the principle extends to every possible case in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.

Id. Beyond this intentionally amorphous description, "[t]he standard for finding a *de facto* fiduciary relationship is a demanding one: 'Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen.' " *Lockerman*, ___ N.C. App. at ___, 794 S.E.2d at 352 (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008)).

As noted *supra*, counsel for Ms. Hager advocated that we expand the category of *de jure* fiduciary relationships to include assisted living facilities with memory wards and their residents, as licensed memory wards "possess[] 'special knowledge and skill' " concerning the care of those afflicted with cognitive impairments. *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985) (holding physicians share a *de jure* fiduciary relationship with their patients because "the physician possesses special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks, and the patient has sought and obtained the services of the physician because of such special knowledge and skill." (citation and internal quotation marks omitted)). We decline to establish a new *de jure* rule for two reasons.

First, to create a *de jure* fiduciary relationship on the basis of special knowledge and skill alone would greatly expand the "limited" list that our Supreme Court has "not add[ed] to . . . lightly." *CommScope*, 369 N.C. at 52, 790 S.E.2d at 660. Second, a person may wish to place a relative with Alzheimer's in a long-term care facility for reasons other than the specialized knowledge of care providers, whether for a lack of physical space in the home or insufficient time to provide the necessary degree of care and supervision. By contrast, a patient seeks the assistance of a physician to resolve a medical ailment, injury, condition, or concern that involves highly personal information and requires the specialized knowledge and skill of a doctor to address. *Black*, 312 N.C. at 646, 325 S.E.2d at 482. We do not, therefore, hold that all long-term care facilities owe a fiduciary duty to all residents in their memory wards.

Turning to the existence of a *de facto* fiduciary duty, our Supreme Court's decision in *King* presents the most relevant precedent. Mr. King was referred by his primary care physician to a surgeon to treat an acute medical condition. *King*, 369 N.C. at 455-56, 795 S.E.2d at 344. During his first visit to the surgeon's office, Mr. King was asked to provide confidential medical information and sign several documents. *Id*. at 456, 795 S.E.2d at 344. Among the documents was a "poorly drafted, confusing, and nonsensical" arbitration agreement that failed to define what

arbitration was, state the patient in signing the agreement would waive his constitutional rights to a jury trial, or advise the patient to consult with an attorney prior to signing. *Id.* Mr. King, who lacked any education beyond high school and had limited exposure to legal documents, signed the arbitration agreement without understanding its import or optional nature. *Id.* at 453, 795 S.E.2d at 343. Once the arbitration agreement and the other intake forms were signed, Mr. King met with and received treatment from the surgeon, who allegedly injured him in the course of the surgery. *Id.* at 452-53, 795 S.E.2d at 342-43. The surgeon sought to compel arbitration in Mr. King's ensuing lawsuit, and, following an appeal to and remand from this Court, the trial court denied the motion, concluding the surgeon: (1) owed Mr. King a fiduciary duty; and (2) breached that duty by failing to disclose all material terms of the arbitration agreement. *Id.* at 455-59, 795 S.E.2d at 344-46.

On a second appeal, we affirmed the trial court, and the Supreme Court allowed discretionary review. *Id.* at 461, 795 S.E.2d at 347. In modifying and affirming our decision, the Court held that the facts disclosed a *de facto* fiduciary relationship, because the patient: (1) was referred to the surgeon by his primary care physician, who already had a *de jure* fiduciary duty to the patient; (2) sought out the surgeon for his specialized skill and knowledge;[1] (3) provided the surgeon with confidential medical information on arrival and prior to being seen; and (4) "had received a limited education and had little to no experience interpreting legal documents." *Id.* at 466, 795 S.E.2d at 350. It made clear that its holding was determined by these facts, declining to impose a *de jure* fiduciary relationship and instead concluding a *de facto* one existed following "[a] careful examination of the information contained in the findings of fact made in the [trial court's earlier] May 2013 and November 2015 orders." *Id.* The trial court orders followed mandates by this Court and the Supreme Court for additional detailed factual findings concerning the nature of the parties' relationship. *Id.* at 455-62, 795 S.E.2d at 343-47.

The uncontroverted evidence and findings of fact made by the trial court in this case are readily distinguishable from the extensively developed facts that led to the conclusion that a fiduciary relationship existed in *King*. Ms. Hager was not referred to Gabriel Manor by a person who already owed her father a pre-existing fiduciary duty, but instead was

1. At oral argument, Ms. Hager's counsel argued that this factor alone was entirely dispositive of the Supreme Court's decision in *King*. Such a reading is not supported by the language of the opinion. *Id.* at 466, 795 S.E.2d at 350.

referred by her chiropractor, who had never treated her father and who had no personal knowledge of his condition. Unlike Mr. King, Ms. Hager was not asked to sign the Arbitration Agreement before she could evaluate the care offered by Gabriel Manor; prior to signing the agreement, she toured the facility and was provided the opportunity to ask questions. She signed the agreement after assessing the facility with her friend, Ms. List, who also had the opportunity to offer her independent thoughts on the facility. The record below does not disclose Ms. Hager's degree of education. In light of these factual distinctions, *King*'s factually specific analysis and holding is not controlling here.

We also disagree with Ms. Hager's argument that the findings and evidence show she placed Mr. Hoffmaster with Gabriel Manor because of its staff's specialized skill and knowledge in caring for people suffering from Alzheimer's. The trial court's findings of fact, which Ms. Hager does not dispute, include that on 27 October 2015 she "realized that the time had come that she could no longer care for her father in her home. *She did not feel as though she could violate his dignity by bathing and toileting him.*" (emphasis added). The trial court also found that "Ms. Hager was desperate to place her father in a facility because she could no longer meet his needs[,]" which, reviewing her affidavit submitted to the trial court and uncontroverted by any other evidence, related to "bathing and personal care[,]" *i.e.*, needs common to all people, not just those with Alzheimer's and/or dementia.[2] Ms. Hager had cared for her father while he had dementia for over a year in her own home prior to admitting him to Gabriel Manor. We therefore distinguish *King* on this ground, as it does not appear that Ms. Hager sought out an assisted living facility because she was unable to exercise specialized knowledge or skill in caring for Mr. Hoffmaster's medical needs, and we do not weigh this factor in favor of concluding a fiduciary duty existed. *See King*, 369 N.C. at 465, 795 S.E.2d at 350 ("Individuals consult with surgeons, like they do with other physicians, *because* such persons possess 'special knowledge and skill . . . which the patient lacks;' accordingly, 'the patient has sought and obtained the services of the physician *because of* such special knowledge and skill.' " (quoting *Black*, 312 N.C. at 646, 325 S.E.2d at 482) (emphasis added)).

The only two facts common to both this case and *King* are the provision of confidential information by the party asserting the existence of

2. One of the documents presented to Ms. Hager in the course of admitting Mr. Hoffmaster was an "Inquiry Information" form. That form, given to all persons seeking to admit someone to Gabriel Manor, asks whether the person to be admitted needs help being bathed and clothed and, separately, whether the person should be placed in assisted living or memory care.

a fiduciary duty and their lack of legal expertise. While it is true that the provision of confidential information places confidence in the recipient, that alone does not create a fiduciary duty; for example, people seeking home financing are often required to provide confidential information to lenders, yet those transactions "are considered arm's length and do not typically give rise to fiduciary duties." *Dallaire*, 367 N.C. at 368, 760 S.E.2d at 266 (citations omitted). And, unlike Mr. King, Ms. Hager provided the confidential information only after she had the opportunity to perform her own due diligence by touring and dining at Gabriel Manor with her friend. *Cf. King*, 369 N.C. at 466, 795 S.E.2d at 350 ("Before he even saw Dr. Bryant, Mr. King demonstrated sufficient trust and confidence in him to provide Dr. Bryant with confidential medical information."). Ms. Hager's lack of legal knowledge does not suffice to show the fiduciary relationship present in *King*, particularly when the Arbitration Agreement at issue here—in contrast to the agreement in *King*—outlined the nature of arbitration, identified the rights Mr. Hoffmaster was relinquishing, and encouraged Ms. Hager to seek the advice of legal counsel before signing. And unlike Mr. King, Ms. Hager had the right to cancel the Arbitration Agreement on her father's behalf for any reason within 60 days, during which period she had the opportunity to monitor the care provided to him. In light of all the uncontroverted facts, we cannot conclude that when Ms. Hager signed the Arbitration Agreement, Gabriel Manor " 'figuratively [held] all the cards . . . [such] that the special circumstance of a fiduciary relationship ha[d] arisen.' " *Lockerman*, ___ N.C. App. at ___, 794 S.E.2d at 352 (quoting *S.N.R. Mgmt. Corp.*, 189 N.C. App. at 613, 659 S.E.2d at 451). We therefore reverse the trial court's order concluding Smithfield East owed Mr. Hoffmaster a fiduciary duty, whether that be through a *de jure* or *de facto* fiduciary relationship.

D. Standing to Compel Arbitration

[2] Defendants also appeal the trial court's determination that the only party with standing to compel arbitration is Smithfield East,[3] based on the conclusion that "[t]here is no competent evidence that [the remaining Defendants] are agents of Smithfield East . . . such that they would benefit from their non-signatory status to the Arbitration Agreement." Indeed, with the exception of Smithfield East, each Defendant has denied the allegations in the complaint asserting the existence of relationships between them, and Saber Healthcare's general counsel filed an affidavit asserting that Saber Healthcare and Saber Holdings had "no involvement in the management of staff, the provision of care, control

3. Neither party argues that the trial court erred in concluding Smithfield East was a party to the Arbitration Agreement.

over the day to day operations, or oversight of the operation or management of Smithfield East[.]"[4] From this record, we hold that the trial court did not err in concluding only Smithfield East had standing to invoke the Arbitration Agreement, as there is no evidence to show a relationship between the Defendants within the scope of the Arbitration Agreement such that Mr. Hoffmaster agreed to arbitrate claims against the non-signatory Defendants.[5] However, because the trial court failed to resolve this issue as to one of the non-signatory Defendants, Smithfield Operations, we remand to the trial court for further factual findings addressing that party.

Defendants rightly point out that in two decisions, this Court has allowed non-signatories to compel arbitration where an agency relationship exists between a non-signatory defendant and a signatory to a relevant arbitration agreement. *Brown v. Centex Homes*, 171 N.C. App. 741, 745-46, 615 S.E.2d 86, 88-89 (2005); *Ellison v. Alexander*, 207 N.C. App. 401, 411-12, 700 S.E.2d 102, 110-11 (2010). In both cases, however, the existence of a legally recognized relationship between the non-signatory and signatory was not in dispute. *Brown*, 171 N.C. App. at 746, 615 S.E.2d at 89 ("Kroening did not sign the Contract which included the arbitration clause. However, her status as an agent of Centex affords her the right of arbitration."); *Ellison*, 207 N.C. App. at 405, 700 S.E.2d at 106 ("[A] number of pertinent facts, including the following, are not in dispute between the parties: Defendant is The Elevator Channel's CEO and a Board member.").[6] Further, the party seeking to compel arbitration bears the burden of proving an agreement binding that party. *Sciolino v. TD Waterhouse Investor Services, Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). We disagree with Defendants' argument that this burden was satisfied based solely on the allegations in the complaint.

In *Revels v. Miss America Organization*, 165 N.C. App. 181, 599 S.E.2d 54 (2004), this Court dealt with an analogous issue governed by

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4. The parties pointed to no other evidence in the record concerning the existence or nature of any relationships between the Defendants.

5. At oral argument, counsel for Defendants stated that this outcome would have no practical effect on the underlying litigation or arbitration should we reverse the trial court's order invalidating the Arbitration Agreement with Smithfield East. We nonetheless must reach this issue because it was properly presented to the trial court and appealed to this Court.

6. We note that there are other legal doctrines beyond those pertaining to agency relationships that may allow for a non-signatory to compel arbitration, such as estoppel. *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 227-29, 721 S.E.2d 256, 261-62 (2012) (listing the various legal theories available to non-signatories). Defendants, however, have not raised any of these other grounds on appeal.

North Carolina's Uniform Arbitration Act.[7] There, the plaintiff's complaint alleged the existence of a written contract; that contract, however, contained an arbitration clause. *Id.* at 186, 599 S.E.2d at 58. The defendant denied that it had ever entered into the contract yet sought to compel arbitration based on the contract terms. *Id.* On appeal, the defendant "argue[d] that its burden . . . of showing a written agreement to arbitrate has been met by plaintiff's own pleadings, which uniformly allege the existence of a valid and binding contract . . . which contains an arbitration clause." *Id.* at 188, 599 S.E.2d at 59. We rejected the defendant's argument based on its denial of the plaintiff's allegations:

> It is undisputed that the [contract] was not signed by [the defendant]. Moreover, it is clear from [the defendant's] pleadings and the arguments of its counsel that, for purposes of defending against the merits of plaintiff's breach of contract claims, [the defendant] has throughout this litigation denied acceptance of the [contract] as a contract between itself and the plaintiff. Because the arbitration clause contained within the [contract] was the sole basis for [the defendant's] amended motion to compel arbitration, we hold that the trial court's findings support its conclusion that [the defendant] failed to carry its burden of proving the existence of a written agreement between plaintiff and [the defendant] to arbitrate[.]

Id. at 189, 599 S.E.2d at 59.

We are not convinced, based on the evidence introduced below, that the non-signatory Defendants in this case have standing to compel arbitration when they have denied the existence of all alleged relationships and failed to introduce any evidence of some other recognized connection to Smithfield East. We acknowledge that there exists a presumption in favor of arbitration; however, that presumption applies to the issue of whether the claims fall within the scope of a valid arbitration agreement, not to the initial determination of whether there exists a valid agreement to arbitrate *between the parties in question. AVR Davis Raleigh, LLC*

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7. Although the substantive provisions of an arbitration agreement may be governed, for purposes of substantive law, by the FAA, it is nonetheless governed by the procedural provisions of North Carolina's Revised Uniform Arbitration Act when the issue of its arbitration is raised in our Courts. *Carter*, 218 N.C. App. at 226, 721 S.E.2d at 260. That *Revels* involved an arbitration agreement governed by the Revised Uniform Arbitration Act's predecessor statute and not the FAA is, therefore, a distinction without a difference for the purposes of our analysis. *See Revels*, 165 N.C. App. at 187, 599 S.E.2d at 58 ("[W]e discern this to be a procedural, rather than substantive, issue.").

v. Triangle Construction Co., Inc., ___ N.C. App. ___, ___, 818 S.E.2d 184, 187 (2018). Here, the parties to the Arbitration Agreement—Mr. Hoffmaster and Smithfield East—agreed to arbitrate "claims against the Facility, its employees, agents, officers, directors, any parent, subsidiary or affiliate of the Facility." Though we hold that the Arbitration Agreement was valid between its signatories (and Smithfield East is therefore entitled to the presumption that Mr. Hoffmaster's claims against it fall within that agreement), the non-signatory Defendants have failed to introduce evidence showing: (1) that they are parties to any arbitration agreement with Mr. Hoffmaster; or (2) that there exists an employee, agent, officer, director, parent, subsidiary, or affiliate relationship with Smithfield East within the meaning of the Arbitration Agreement. Thus, absent any evidence showing the existence of a relationship covered by the Arbitration Agreement, the non-signatory Defendants have failed to establish that they and Mr. Hoffmaster "mutually agreed to arbitrate their disputes[,]" *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992), and this presumption in favor of arbitration does not come into play.[8]

Our holding, however, does not reach Smithfield Operations. The trial court failed to make any findings or conclusions concerning Smithfield Operations in the order denying the motion to compel. On remand, the trial court must make findings from the evidence concerning Smithfield Operations' relationship with Smithfield East and resolve whether that party has standing to compel arbitration.

III. CONCLUSION

For the reasons set forth above, we reverse the trial court's determination that Smithfield East owed and breached a fiduciary duty to Mr. Hoffmaster such that the Arbitration Agreement is unenforceable. We affirm its conclusion that the non-signatory Defendants lacked standing

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8. We note that at least one federal circuit appeals court has held, albeit in an unpublished opinion, that a non-signatory defendant failed to meet its evidentiary burden to compel arbitration where it denied the agency relationship alleged in the complaint and introduced evidence disclaiming such a relationship. *Roes v. SFBSC Management, LLC*, 656 Fed. Appx. 828 (9th Cir. 2016) (unpublished). This Court has previously done the same where there was no evidence indicating a relationship with a signatory. *Adams v. Pulliam*, 177 N.C. App. 286, 628 S.E.2d 259, 2006 WL 998090, *1-2 (unpublished) (April 18, 2006) ("First, we must determine who were the parties to the . . . agreement so that we can determine whether the party who brought the arbitration proceeding . . . had standing to do so. . . . [T]he party who filed the demand for arbitration . . . did not sign the agreement, was not a party to the agreement, nor did it succeed to any of the rights of either of the parties who did sign the agreement. . . . Thus, . . . it did [not] have standing to compel arbitration of a dispute[.]").

to compel arbitration, with the exception of Smithfield Operations, and remand for further findings and conclusions concerning whether that entity has standing. On remand, the trial court shall enter an order staying and ordering arbitration of all claims against Smithfield East; it shall also determine whether the claims against the remaining Defendants shall be stayed pending arbitration. *See Sloan Financial Group, Inc. v. Beckett*, 159 N.C. App. 470, 485, 583 S.E.2d 325, 334 (2003) (noting that whether to stay nonarbitrable claims while arbitration of other claims is pending is in the discretion of the trial court).

REVERSED IN PART, AFFIRMED IN PART AND REMANDED.

Judge DAVIS concurs.

Judge BRYANT concurs in the result only.

DENISE ANGELISTA HENRY, PLAINTIFF
v.
ELENA NICOLE MORGAN, DEFENDANT

No. COA18-731

Filed 19 March 2019

Civil Procedure—Rule 4—service of process—service by publication—due diligence requirement

In a negligence action, service of process by publication was improper where plaintiff failed to exercise due diligence under Rule 4(j1) of the Rules of Civil Procedure. Plaintiff's general internet search and single, unsuccessful attempt at personal service did not constitute due diligence where plaintiff, despite having multiple opportunities to do so, failed to ask defendant's counsel to provide defendant's address or accept service on defendant's behalf, and did not examine any public records.

Appeal by Plaintiff from order entered 22 March 2018 by Judge A. Graham Shirley in Durham County Superior Court. Heard in the Court of Appeals 15 January 2019.

Law Office of Saprina Brown Taylor, by Saprina Brown Taylor, for Plaintiff-Appellant.

Law Office of Robert E. Ruegger, *by Robert E. Ruegger*, *for Defendant-Appellee.*

INMAN, Judge.

When a plaintiff's attempts to find and serve a defendant do not meet the due diligence standard described by Rule 4(j1) of the North Carolina Rules of Civil Procedure, service of process by publication is improper and dismissal is appropriate.

Plaintiff Denise Angelista Henry ("Plaintiff") brought suit against Defendant Elena Nicole Morgan ("Defendant") for negligence. Plaintiff appeals from the trial court's order granting Defendant's motion to dismiss for lack of service of process, insufficiency of process, and insufficiency of service of process. After careful review of the record and applicable law, we hold that the trial court did not err in granting Defendant's motion and affirm.

FACTUAL AND PROCEDURAL HISTORY

The record and the trial court's undisputed findings of fact reveal the following:

On 18 July 2014, Plaintiff and Defendant were involved in a motor vehicle accident. Plaintiff filed a complaint alleging negligence on 17 July 2017, and a civil summons was issued. The summons listed Defendant's address as 2931 Springsweet Lane, Apartment 17, Raleigh, North Carolina, and service was attempted at that address by the Wake County Sheriff's Office. The summons was returned unserved on 31 August 2017, with a deputy sheriff's note indicating that after several attempts he was unable to locate Defendant.

At all times relevant to this case, Defendant has resided at 4021 Bella Park Trail, Apartment 5, Raleigh, North Carolina. Defendant's driver's license, issued 1 July 2016, reflects this fact.

On 23 August 2017, Plaintiff's attorney participated in the mediation of an unrelated case with an attorney retained by Defendant. During this meeting, the attorneys discussed Plaintiff's difficulty serving Defendant. Plaintiff's attorney told Defendant's attorney that she would "keep him posted regarding service," but did not ask for Defendant's address.

An endorsement of the original summons and complaint was issued and, on 18 September 2017, Plaintiff's attorney sent a copy to Defendant's attorney and Defendant's insurance carrier. In these communications,

Plaintiff did not ask for Defendant's address, but instead informed Defendant's attorney that Defendant would be served by publication.

Plaintiff's attorney conducted a Google search and determined that Defendant may have still resided in Raleigh, North Carolina at that time. The record reflects no evidence of any additional attempt by Plaintiff to locate Defendant. Notice of service of process by publication was published in the Midtown Raleigh News on 4 October 2017, 11 October 2017, and 18 October 2017.

On 26 December 2017, Defendant filed an answer to the Complaint, including a Motion to Dismiss for lack of service of process, insufficiency of process, and insufficiency of service of process.

The trial court granted Defendant's motion and entered an order dismissing Plaintiff's Complaint on 22 March 2018. Plaintiff appeals.

ANALYSIS

A trial court's unchallenged findings of fact are conclusive on appeal. *Dreyer v. Smith*, 163 N.C. App. 155, 157, 592 S.E.2d 594, 595 (2004). A trial court's conclusions of law are reviewed *de novo*. *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013). We review the trial court's conclusions that Plaintiff did not exercise due diligence in attempting to locate and serve Defendant, and that service of process by publication was therefore improper. When employing *de novo* review, the appellate court considers the matter anew and substitutes its judgment for that of the trial court. *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009).

Rule 4(j1) of the North Carolina Rules of Civil Procedure provides for service of process by publication for "a party that cannot with due diligence be served" by other statutory methods. N.C. Gen. Stat. § 1A-1, Rule 4 (2017). Due diligence requires a plaintiff to "use all resources reasonably available to her in attempting to locate defendants." *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980) (citations omitted). "Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Id.* Because service by publication is in derogation of the common law, statutes authorizing service by this method "are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Id.* at 586, 261 S.E.2d at 516 (citations omitted).

In considering whether a plaintiff exercised due diligence in her attempts to locate and serve a defendant, this Court has refrained from

creating a "restrictive mandatory checklist," but rather conducts a case-by-case analysis. *Jones v. Wallis*, 211 N.C. App. 353, 358, 712 S.E.2d 180, 184 (2011) (internal quotations omitted).

Here, Plaintiff's efforts to locate and serve Defendant consisted of (1) an attempt to serve the summons and complaint at an address at which Defendant did not reside and (2) a general internet search. Plaintiff also provided copies of the endorsed summons to Defendant's attorney and insurer, but did not ask either to provide Defendant's contact information or to accept service on Defendant's behalf. Plaintiff did not examine Division of Motor Vehicles ("DMV") or other public records.

No individual action that Plaintiff took or failed to take is dispositive to the issue of whether or not Plaintiff exercised due diligence. For example, this Court has in the past emphasized the importance of examining public records—*see In re Clark*, 76 N.C. App. 83, 87, 332 S.E.2d 196, 199 (1985) ("We find the following findings of fact most persuasive: . . . [t]hat the petitioner in this matter checked no public records to determine the location and identity of the father of the minor child")—but has in another decision held that the due diligence requirement was satisfied even though a plaintiff failed to consult DMV records. *Jones*, 211 N.C. App. at 358, 712 S.E.2d at 184.

Plaintiff's argument relies heavily on comparisons to *Jones*. In *Jones*, as in this case, the plaintiff did not search DMV records, use any fee-based internet search service, or ask the defendant's counsel for the defendant's address. *Id*. This Court did not find these failures determinative, because "a plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of due diligence." *Id*. at 359, 712 S.E.2d at 185. But other facts in *Jones*—not present in this case—supported the Court's conclusion. In its analysis, this Court focused on the steps "actually undertaken" by the plaintiff, rather than methods not undertaken. *Id*. at 359, 712 S.E.2d at 184. The plaintiff's attorney in *Jones* had asked the defendant's attorney to accept service of process, and the defendant's counsel refused that request, providing indicia that it would be futile for the plaintiff's attorney to ask for the defendant's address. *Id*. Here, Plaintiff's attorney did not ask Defendant's attorney to accept service and did not ask for Defendant's address. The plaintiff's counsel in *Jones* also attempted personal service at multiple addresses, searched non-DMV public records, and interviewed current residents of the defendant's former address. *Id*.

Given that the efforts undertaken here fall short of those made in *Jones*, Plaintiff's failure to search any public records at all invites

comparison to this Court's holding in *Clarke* that the petitioner had not exercised due diligence sufficient to justify service by publication. 76 N.C. App. at 87, 332 S.E.2d at 199.

We cannot hold that a single failed attempt at personal service at an address where Defendant did not reside and a general internet search constitute due diligence when readily available resources were left unexplored. To do so would render meaningless the requirement that a plaintiff use all resources reasonably available to locate a defendant. Because Plaintiff failed to exercise due diligence, service of process by publication was improper, and the trial court correctly granted Defendant's motion to dismiss the action for insufficient service of process.

AFFIRMED.

Judges BRYANT and DAVIS concur.

REBECCA HILL, Personal Representative of the Estate of CARLYLE HERBERT HILL, III, Plaintiff

v.

LINDA DURRETT, Defendant

No. COA18-515

Filed 19 March 2019

Annulment—motion for summary judgment—propriety of ruling

The trial court erred in granting an annulment on plaintiff's motion for summary judgment. The plain text of N.C.G.S. § 50-10(d) expressly permits a trial court to enter judgment for "absolute divorce," but not for annulment, at the summary judgment stage. The Court of Appeals rejected plaintiff's argument that the trial court properly granted the annulment as part of a regular bench trial, since the proceeding clearly was a hearing on summary judgment.

Appeal by defendant from order entered 9 November 2017 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 15 January 2019.

The Law Office of William L. Sitton, Jr., by William L. Sitton, Jr., for plaintiff-appellee.

Plumides, Romano, Johnson & Cacheris, P.C., by Richard B. Johnson, for defendant-appellant.

DAVIS, Judge.

In this appeal, we consider the validity of an order granting a party's motion for summary judgment on a claim to annul a marriage. Rebecca Hill ("Plaintiff"), in her capacity as the personal representative of the estate of Carlyle Herbert Hill, III ("Hill"), sought to annul Hill's marriage to Linda Durrett, arguing that the marriage was invalid because the officiant — a minister ordained by the Universal Life Church — was not legally authorized to perform a wedding ceremony in North Carolina. Because North Carolina law does not permit a judgment of annulment to be entered by means of a summary judgment, we vacate the trial court's order.

Factual and Procedural Background

Hill and Durrett took part in a wedding ceremony on 6 June 2015. The ceremony was officiated by Deborah Plante, who had received a Certificate of Ministry from the Universal Life Church on 20 July 2008. The parties separated on 17 August 2016.

One day after the separation, Hill filed a complaint in Mecklenburg County District Court asserting claims for divorce from bed and board and equitable distribution. The complaint alleged that the parties were married on 6 June 2015. On 24 January 2017, however, Hill filed an amended complaint requesting an annulment of the marriage. In this complaint, he asserted that his marriage to Durrett was, in fact, void *ab initio* because Plante "is not a magistrate, an ordained minister in a religious denomination or a minister authorized to perform weddings." Based on this assertion, the complaint alleged that Hill was entitled to an annulment under North Carolina law.

Hill died on 29 April 2017. Plaintiff was substituted as a party to the action by means of a consent order entered by the trial court on 14 July 2017.

On 27 September 2017, Plaintiff filed a motion captioned "Plaintiff's Motion For Summary Judgment." The motion stated as follows:

> NOW COMES PLAINTIFF, through the undersigned, who respectfully moves the court for an order granting an absolute divorce by summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure because the

> pleadings, affidavits and exhibits of record in this action show that there is no genuine issue of material fact and plaintiff is entitled to judgment granting an annulment and declaring the marriage of Carlyle Herbert Hill, III and Linda Durrett void *ab initio*.
>
> WHEREFORE, Plaintiff respectfully requests that the Court enter summary judgment granting an annulment and grant to Plaintiff such other relief as seems just and proper.

Plaintiff's motion for summary judgment was heard before the Honorable Kimberly Best-Staton on 26 October 2017. After hearing arguments from counsel with regard to an evidentiary matter, the trial court asked the attorneys for both parties whether live testimony would be received concerning the request for an annulment. The following exchange occurred:

> [THE COURT]: Am I anticipating any type of -- I'm assuming I'm -- there should -- there's going to be testimony. Yes?
>
> [DEFENSE COUNSEL]: Correct.
>
> [THE COURT]: All right. If I could have everyone who may testify, if you could stand, place your left hand on the Bible and raise your right.
>
> [PLAINTIFF'S COUNSEL]: Your Honor?
>
> [THE COURT]: Yes.
>
> [PLAINTIFF'S COUNSEL]: I just want to point out that this is a motion for summary judgment.
>
> [THE COURT]: It is a motion for summary judgment?
>
> [PLAINTIFF'S COUNSEL]: Yes, it is. Yes, ma'am. And I'm -- I think live testimony is inappropriate, which is why --
>
> [THE COURT]: Okay.
>
> [PLAINTIFF'S COUNSEL]: -- we submitted --
>
> [THE COURT]: No. You all can argue on that. I -- I thought it was -- Okay, I've been told it was a motion for summary -- for a declaratory judgment. Okay. Summary judgment[.]
>
> . . . .

> [DEFENSE COUNSEL]: I do think that we will need some testimony.
>
> . . . .
>
> [THE COURT]: Well, let's go ahead and get everyone sworn in, just in case. Okay.

Following this exchange, the trial court swore in two witnesses. Neither witness, however, actually testified at the hearing. Instead, the trial court proceeded to hear arguments from counsel and received into evidence an affidavit from Hill's previous attorney as well as a transcript of deposition testimony given by Plante.

On 9 November 2017,[1] the trial court entered an order entitled "Judgment of Annulment" that stated, in pertinent part, as follows:

> THIS MATTER having come on for hearing on October 26, 2017 before the Honorable Kimberly Best-Staton during the civil non-jury session of the Mecklenburg County District Court *on Plaintiff's motion for summary judgment* seeking an Annulment. . . . [T]he Court, having reviewed the verified pleadings, affidavits, deposition testimony of record, the law and heard the arguments of counsel, *finds and concludes that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law.*

(Emphasis added.)

In its order, the trial court made findings of fact and conclusions of law in support of its ruling. Durrett gave notice of appeal to this Court.

Analysis

On appeal, Durrett argues that the trial court erred by (1) granting the annulment at the summary judgment stage in violation of the North Carolina General Statutes; (2) admitting into evidence an affidavit from Hill's previous attorney; and (3) determining that Hill was not estopped from claiming his marriage was void *ab initio*. Because we agree that the trial court erred in granting the annulment on a motion for summary

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1. It appears that the trial court originally entered its order on 3 November 2017 and then — for reasons that are not disclosed in the record — issued a subsequent order on 9 November 2017 that was substantively identical to the order entered on 3 November. Durrett's notice of appeal referenced both orders. For clarity, we refer to the order being appealed as the 9 November order.

judgment, we need not consider the additional arguments raised by Durrett.

N.C. Gen. Stat. § 50-10 states, in pertinent part, as follows:

> (a) . . . [T]he material facts in every complaint asking *for a divorce or for an annulment* shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury.
>
> . . . .
>
> (d) The provisions of G.S. 1A-1, Rule 56, shall be applicable to actions *for absolute divorce* pursuant to G.S. 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, but in the event the court determines that no genuine issue of material fact remains for trial by jury, the court must find the facts as provided herein. The court may enter a judgment of *absolute divorce* pursuant to the procedures set forth in G.S. 1A-1, Rule 56, finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading.

N.C. Gen. Stat. § 50-10 (2017) (emphasis added).[2]

As an initial matter, neither party challenges the proposition that marriages in North Carolina cannot be annulled at the summary judgment stage. Nor could such an argument be successfully made. While the amended statutory language contained in N.C. Gen. Stat. § 50-10(d) expressly allows for a judgment of absolute divorce to be granted by a trial court on summary judgment, subsection (d) makes no mention of annulment proceedings being similarly permitted at the summary judgment stage. Thus, basic principles of statutory construction mandate the conclusion that the General Assembly intended to treat annulments differently than absolute divorces in this respect. *See Appalachian Materials, LLC v. Watauga Cty.*, __ N.C. App. __, __, 822 S.E.2d 57, 61 (2018) ("Under the *expressio unius est exclusio alterius* canon of statutory construction, the expression of one thing implies the exclusion

2. The prior version of N.C. Gen. Stat. § 50-10 did not include subsection (d). The statute was amended in 1991 to include this subsection. 1991 N.C. Sess. Laws ch. 568, § 50-10.

of another." (citation and quotation marks omitted)); *see also Evans v. Diaz*, 333 N.C. 774, 780, 430 S.E.2d 244, 247 (1993) ("[W]hen a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." (citation omitted)).

Instead, Plaintiff argues that although her motion was denominated as a motion for summary judgment, the trial court's order nevertheless complied with the requirements of N.C. Gen. Stat. § 50-10. This is so, she contends, because "[i]n practice . . . the trial court conducted a bench trial[.]" We disagree.

This Court has previously addressed similar arguments. In *Edwards v. Edwards*, 42 N.C. App. 301, 256 S.E.2d 728 (1979), a case decided under the prior version of N.C. Gen. Stat. § 50-10, the plaintiff filed a motion for summary judgment in connection with his request for a divorce. *Id.* at 302, 256 S.E.2d at 729. At the hearing on the motion, the plaintiff "testified on direct and cross-examination and presented the testimony of a corroborating witness to prove the facts alleged in the complaint." *Id.* Following the hearing, the trial court entered an order granting the plaintiff's motion for summary judgment for an absolute divorce. *Id.*

On appeal, this Court observed "that a summary judgment may not be entered granting an absolute divorce in this State" pursuant to N.C. Gen. Stat. § 50-10 and that "if such a decree had been entered in this case, it would have been error." *Id.* at 306-07, 256 S.E.2d at 731-32. Nevertheless, we held that the judgment entered by the trial court was not, in fact, a summary judgment.

> Examination of the record reveals, however, that although plaintiff moved for a summary judgment and the court at one point seemed to indicate that it was allowing the motion, what actually occurred was that the court heard the testimony of witnesses, who were subject to cross-examination by defendant's counsel, and after hearing this evidence and on the basis thereof, the court found the facts as required by G.S. 50-10. Thus, the judgment entered in this case was not a summary judgment but was one rendered by the court after making appropriate findings of fact.

Id. at 307, 256 S.E.2d at 732.

In *Hawkins ex rel. Thompson v. Hawkins*, 192 N.C. App. 248, 664 S.E.2d 616 (2008), the trial court granted an annulment by means of a

default judgment. *Id.* at 250, 664 S.E.2d at 617. On appeal, the defendant argued that "the trial court lacked the authority to enter a judgment of annulment by default under N.C. Gen. Stat. § 50-10[.]" *Id.* at 250, 664 S.E.2d at 618.

This Court began its analysis with the observation that "Defendant is correct that a judgment for annulment cannot be entered by default." *Id.* at 251, 664 S.E.2d at 618. We then stated the following with regard to the trial court's order:

> The order indicates that the trial court did hear testimony from witnesses, but because there is no transcript in the record on appeal, we are unable to determine if any of the testimony addressed the facts supporting the annulment. Even if there were such testimony, the trial court expressly based all of its findings relevant to the annulment upon the allegations of the complaint, . . . ignoring the fact that N.C. Gen. Stat. § 50-10(a) requires that the allegations of the complaint are deemed to be denied even in the absence of an answer.

Id. at 252, 664 S.E.2d at 619 (quotation marks omitted). We further stated that the trial court lacked jurisdiction to grant the annulment because it "did not find from the evidence any material facts regarding the annulment claim upon which it could grant the relief sought by plaintiff." *Id.* at 253, 664 S.E.2d at 619.

In the present case, Plaintiff filed a motion on 27 September 2017 that was expressly denominated "Plaintiff's Motion for Summary Judgment." The motion stated that Plaintiff was entitled to summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure "because the pleadings, affidavits and exhibits of record in this action show that there is no genuine issue of material fact and plaintiff is entitled to judgment granting an annulment[.]" On that same date, Plaintiff served Durrett's counsel with a notice of hearing stating as follows:

> PLEASE TAKE NOTICE that Plaintiff will bring its Motion for Summary Judgment in this matter before the Mecklenburg County District Court . . . on the 26th day of October, 2017 at 9:00 a.m., or as soon thereafter as the Court can hear it.

At the 26 October 2017 hearing on Plaintiff's motion, the trial court initially stated its belief that the matter before it was a motion for a declaratory judgment. Plaintiff's counsel clarified that the matter being heard

was instead a motion for summary judgment and argued that — for this reason — live testimony would be inappropriate. In response, the trial court acknowledged that the motion sought a summary judgment but decided to "go ahead and get everyone sworn in, just in case." Neither of the two witnesses subsequently sworn in by the trial court actually testified. Instead, the trial court heard only arguments from counsel and received into evidence an affidavit and a deposition transcript.

Based on our thorough review of the record, we conclude that the trial court's ruling was, in fact, a summary judgment and therefore was not authorized under N.C. Gen. Stat. § 50-10. While *Edwards* can perhaps be viewed as a willingness by our Court to relax the distinction between a summary judgment proceeding and a bench trial based on the specific circumstances at issue in that case, we are unwilling to do so in the scenario currently before us.

Here, the request for an annulment was expressly contained in a motion for summary judgment. Notice was given to the opposing party of an upcoming summary judgment hearing. At the hearing, the trial court was reminded that the parties were present for a summary judgment motion and proceeded to acknowledge that fact. The evidence ultimately considered by the court consisted solely of an affidavit and a deposition transcript. Finally, the trial court's order stated that "Plaintiff's motion for summary judgment seeking an [a]nnulment" was heard on 26 October 2017. The order also contained the legal standard applicable to motions for summary judgment by providing that "the Court . . . finds and concludes that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law."

Thus, the proceedings in this case possessed virtually all of the hallmarks of summary judgment. "To paraphrase a popular expression: if it looks like [summary judgment], walks like [summary judgment], and quacks like [summary judgment], it is reasonable to infer that it is [summary judgment]." *State v. Maag*, 3d Dist. Hancock No. 5-03-32, 2005-Ohio-3761, 2005 WL 1712898, at *11.

For these reasons, we conclude that the trial court's 9 November 2017 order was an order granting an annulment by means of summary judgment in violation of N.C. Gen. Stat. § 50-10. Accordingly, we are compelled to vacate the trial court's order.

* * *

We take this opportunity to remind the bench and bar that summary judgments and trials are separate and distinct proceedings that apply

in different circumstances under our Rules of Civil Procedure, and the meaningful distinctions that exist between them should not be blurred. While we recognize that family law cases under Chapter 50 often require the presiding judge to serve as the finder of fact, the North Carolina Rules of Civil Procedure remain applicable to such cases absent the existence of statutes establishing a different procedure.[3]

Conclusion

For the reasons stated above, we vacate the trial court's 9 November 2017 order and remand to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges BRYANT and INMAN concur.

3. In light of our holding, we express no opinion on the substantive issues addressed in the trial court's order.

HUML v. HUML

[264 N.C. App. 376 (2019)]

APRIL J. HUML, PLAINTIFF
v.
KEVIN C. HUML, DEFENDANT

No. COA18-484

Filed 19 March 2019

1. Child Custody and Support—permanent custody order—findings of fact—evidentiary support

The Court of Appeals overruled a father's challenge to findings of fact in a permanent custody order that related to the trial court's concern about possible inappropriate sexual behavior between the father and his daughter, where the findings were supported by the evidence. The trial court did not actually find that inappropriate behavior occurred, and even if the findings were omitted, the remaining findings of fact supported the trial court's conclusions of law.

2. Appeal and Error—waiver—child custody proceeding—admission of recorded conversations

A father waived his argument regarding the admission of recorded conversations in a custody proceeding where he failed to object at the time the recordings were admitted.

3. Child Custody and Support—permanent custody order—denial of all contact with minor child—sufficiency of findings

In an action to modify custody which resulted in removal of a father's visitation rights and prohibition against having any contact with the minor child or access to any information about her, the Court of Appeals rejected the father's argument that the order effectively terminated his parental rights. Unlike an order of termination, custody orders can be modified at any time based on a substantial change of circumstances that affect the best interest of the child. Here, the trial court's findings of fact supported its conclusion that the father should have no direct contact with his daughter, and the trial court did not abuse its discretion by allowing the mother to withhold her address from the father or by barring the father from obtaining information about his daughter from third parties, where father exhibited threatening behavior and failed to comply with court-mandated programs.

Judge DILLON concurring with separate opinion.

Judge BERGER dissenting.

Appeal by defendant from order entered on or about 20 November 2017 by Judge Lori Christian in District Court, Wake County. Heard in the Court of Appeals 31 October 2018.

Marshall & Taylor, PLLC, by Travis R. Taylor, for plaintiff-appellee.

Schiller & Schiller, PLLC, by Jaime L. Williams, for defendant-appellant.

STROUD, Judge.

Defendant-father appeals from a permanent custody order which grants sole custody of the parties' daughter to plaintiff-mother and eliminates his visitation privileges. The trial court made extensive findings of fact regarding the many reasons it determined in its discretion that continuing visitation is not in the child's best interest. The order on appeal is the last in a series of orders in which the trial court used every possible method to help and encourage Father to address his mental health and domestic violence problems and provided visitation with various conditions to protect the child. All of these attempts have failed because Father has consistently refused to take advantage of any opportunity ordered by the trial court to allow Father to resume visitation. Father has repeatedly failed to participate in counseling as ordered, to take medication as prescribed, to comply with the trial court's orders regarding public visitation and with the rules governing supervised visitation, and to protect the child from exposure to domestic violence in his relationship with his current wife. We affirm.

I. Background

Mother and Father were married in February of 2006 and are the parents of Susan,[1] who was born in September of 2006. The parties separated in 2008 and later divorced. Since the parties separated in 2008, the trial court entered several orders regarding custody and visitation. The trial court entered a temporary custody order in January of 2009, when Susan was two years old. The trial court found that Susan was having difficulty transitioning between the parties' homes and noted that Mother had consulted a child psychologist, but Father had not participated. The trial court found Father had been "overly emotional" when dropping Susan off at day care, making it difficult for her

1. We will use a pseudonym to protect the privacy of the minor child.

to transition. In addition, Susan's regular pediatrician had refused to see her because of an incident in the office with Father. Susan had some significant chronic health problems, so continuity of her medical care was particularly important. The trial court also found that Father had been "unable to appropriately control his anger and other emotions" in front of Susan. The temporary order required Father to have a psychological evaluation with Dr. Reid Whiteside and to comply with any recommendations, including taking medication as prescribed.

After the psychological evaluation was done, the trial court entered a permanent custody order by consent on 5 October 2009 which gave Mother and Father joint legal custody of Susan; Mother had primary physical custody, and Father had about six overnight visits in every two week period. Father was required to follow Dr. Whiteside's recommendations, including treatment with his personal therapist for at least two years and thereafter unless he was released from therapy. Father was ordered to continue to take his medication as prescribed and to continue to participate in family therapy. The consent order also provided for appointment of a parenting coordinator who was also a psychologist or psychiatrist to monitor any psychological issues relating to the parties' co-parenting; Dr. Alan Bloom was appointed.

On 31 July 2015, Mother filed a motion to modify custody based upon a substantial change in circumstances; she alleged, in part, that Father had willfully ignored the requirements of the consent order; refused to communicate with her; interfered with her custodial time; failed to provide proper care and supervision of the child; slept in the same bed with the child on a regular basis; failed to follow instructions from the child's physicians and dietician; and that he had been arrested for assault on a female on 1 June 2015. Mother also requested appointment of another parenting coordinator as Dr. Bloom's term had expired.

Before the motion for modification was heard, on 4 October 2015, Father's girlfriend, whom he later married, Karen Huml, contacted Mother and told her she "was in fear of" Father. Karen did not want Father to know she had contacted Mother, and she informed Mother of domestic violence in Father's home while Susan was present. On 7 October 2015, Mother filed a motion for emergency custody based upon the information that Susan had been uncontrollably crying when exposed to domestic violence in Father's home. The trial court entered an emergency custody order and set a return hearing for 12 October 2015. The emergency order limited Father's visitation to three hours, two days a week, in a public place such as a museum or mall, until a return hearing scheduled for 12 October 2015. Mother subpoenaed Karen for the

12 October 2015 hearing, and both she and Father requested a continuance, so the return hearing was set for 23 October 2015. On 23 October, Father did not appear for the hearing on time, and the trial court had resolved the matter before he arrived. The trial court entered a temporary order with the same visitation as in the emergency order.

On Thanksgiving night, 2015, Karen again contacted Mother "with photo attachments and messages that [Father] had injured" her. A few days later, Mother asked Father about the incident; he did not deny it, but Karen then said that Father had not injured her.

Father continued to bring Karen to his public visits with Susan, despite the domestic violence between them. On 10 December 2015, Father and Karen got married, but Mother did not learn of the marriage until she "received an anonymous email" on Christmas Eve. Mother allowed Susan to go to Father's home to open gifts on 26 December 2015. That night, back at her Mother's home, Susan wet the bed, although she had not had this problem in several years.

In January of 2016, Father " 'weaned' himself off his medication" because he felt " 'it takes away my life-I'll take the little ups and downs.' " On 3 April 2016, Father informed Mother that Karen had texted him "photographs of her forearms sliced up." Father called the police, and they discovered Karen was intoxicated. Karen made claims to the police that Father "was sexually inappropriate while in the presence of" Susan; she was then placed under a mental commitment. Hearing on Mother's pending motion to modify custody was scheduled for the next day, 4 April 2016.

At calendar call on 4 April 2016, Father informed the trial court he would be seeking a domestic violence protective order ("DVPO") against Karen. With the consent of the parties, the trial court entered a temporary custody consent order; this order appointed Dr. Cynthia Sortisio as a reunification therapist for Father and Susan; appointed a new parenting coordinator, Helen O'Shaunessy; and set up a three-tiered plan for gradually increasing Father's visitation. Father was also required to have another psychological evaluation; to comply with all recommendations, including any prescribed medication; and to continue attending and to complete the DOSE domestic violence program.[2]

Father did not comply with the temporary custody consent order and never moved past the first tier of visitation, so his visits continued to

2. DOSE is the acronym for "Developing Opportunities for a Safe Environment," a domestic violence intervention and education program.

be public. Further, Father did not timely pay the parenting coordinator; failed to engage in any of the required therapy for over a year; and did not timely complete the parenting classes. Father also did not obtain a DVPO against Karen, but instead allowed her to "facetime" with Susan from his car during his public visits. In January 2017, Father completed the psychological evaluation ordered in April 2016.

In August of 2016, Mother hired an investigator because she was concerned that Father was not complying with the terms of the order regarding public visitation. The investigator confirmed that Father was removing Susan from the public locations where he was supposed to be visiting with Susan. Mother informed the reunification therapist and parenting coordinator, who notified Father this was not appropriate.

On 8 September 2016, Father was arrested again for assault on a female, against Karen. Karen sent the parenting coordinator voice recordings she claimed were of Father "making threats to kill" Mother. Karen also sent text messages she claimed were from Father threatening Judge Denning, the judge who entered the temporary custody consent order. The parenting coordinator informed the police of the threats, and they advised Mother to leave home and stay at an undisclosed location, which she and Susan did for about a week. On 21 November 2016, Mother also got an *ex parte* DVPO which extended into a permanent DVPO by consent. Judge Denning recused because of the threats, and a new family court judge was assigned. Because of safety concerns, neither the parenting coordinator nor Susan's therapist would meet with Father alone.

Because of the DVPO, Father could no longer exercise his public visits, and on 19 May 2017, Father began supervised visitation with Susan at Time Together. After Susan visited with Father, she "became withdrawn, cried uncontrollably, began to experience stomach pains, showed signed of anxiety and stress," to the extent that she missed school on 22 May 2017. At the June visit at Time Together, staff had to redirect Father for whispering to Susan. Susan again experienced extreme emotional distress after this visit. On 15 June 2017, Mother filed a motion to suspend Father's visitation.

The hearing on modification of custody was held on 19 July and 20 July 2017, and on 17 November of 2017, the trial court entered an "ORDER MODIFYING PERMANENT CUSTODY AND CHILD SUPPORT ORDER[;]" the order at issue on appeal. The trial court made extensive and detailed findings of fact, just a few of which we have summarized above. The trial court concluded there had been many substantial

changes in circumstances affecting the best interest of Susan; the trial court found these circumstances and detrimental changes in detail. Regarding violence the trial court found:

> c. As a result of Defendant's actions since the entry of the prior Permanent Custody Order the Plaintiff is terrified of the Defendant and she has good cause to be afraid of the Defendant.
>
> d. Since the entry of the prior Permanent Custody Order, at least on four separate occasions the Defendant made threatening statements about the Plaintiff which included statements regarding a murder/suicide, blowing her head wide open, snapping her neck and putting a strangle around her neck. These statements were laced with profanity and made explicit comments about having to take DOSE classes for 26 weeks, showing that Defendant took no responsibility for his own actions and emphasizing that Defendant has anger issues that he has never adequately addressed even after completing his DOSE classes in 2016.
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> . . . .
>
> f. Defendant took a deferral plea for Assault on a Female related to [Karen] Huml in Wake County file no. 15 CR 212182 that was subsequently expunged, and as part of that deferral plea the Defendant was required to complete a DOSE program. The Defendant's anger and rage as heard by this Court in the voice recordings of the Defendant are disturbing; and Defendant's anger issues and refusal to appropriately address his anger have had a detrimental impact on not only the minor child to not feel safe around the Defendant but the Plaintiff, her parents, Plaintiff's friends, Plaintiff's co-workers and various professionals involved with this family.
>
> . . . .
>
> s. Since the entry of the prior Permanent Custody Order, and starting around December 2014, Defendant was not transparent or forthcoming regarding the well-being of the minor child when she was in his care,

including, but limited [(sic)] to failing to inform the Plaintiff of the domestic violence in his home while their child was present, misrepresenting his location during public visitations, denying that he was still in a relationship with [Karen] Huml and such other matters set forth in these findings of fact. Defendant's actions related to these issues have had a detrimental impact on the minor child.

t. The Defendant has shown a consistent pattern of making poor parenting decisions including those referenced in the above findings of fact.

u. Defendant downplays and ignores the minor child's anxiety and/or stress. Defendant has been angry around the minor child and the child has experienced significant trauma related to the Defendant's actions.

v. Since the entry of the prior Permanent Custody Order and starting around December 2014 Defendant has exhibited inconsistent, unstable, and erratic behavior while providing care for the minor child.

The trial court also determined that Father "should not have any further contact with" Susan as a "direct result of his actions and his failure to take steps that could have improved his relationship with his daughter." The trial court also set out detailed findings regarding why Father should not have any custodial rights or visitation with Susan:

a. The April Temporary Order entered in 2016 gave the Defendant liberal visitation with the minor child and established a three tier visitation schedule. Defendant failed to take advantage of this opportunity to repair and rehabilitate his relationship with his daughter. There was a reunification therapist that was available to the Defendant for over a full calendar year (April 2016 to July 2017) and other than two initial phone calls in June 2016 and one meeting in July 2017 the Defendant did absolutely nothing to work with the reunification therapist to improve his relationship with his daughter. Defendant first met together with the reunification therapist and the minor child's therapist on July 17, 2017 two days before this hearing.

b. The communication that the Defendant did have with the child's therapist was not productive. Defendant ignored recommendations that Defendant write a letter taking responsibility for everything in December 2016 in response to Defendant's attempt to send Christmas cards/correspondence to the minor child. In December 2016, Dr. Meisburger advised Defendant that he would need to send her written correspondence via postal mail and await her reply the same. After December 2016 until July 2017, there was no further contact between Dr. Meisburger and Defendant. Defendant failed to grasp that the recommendations from the child's therapist were based [on] the needs of the minor child. Defendant has continuously put his needs above the minor child's needs without concern for the detrimental impact his own actions had on the minor child.

c. Even after the DVPO was entered in November 2016 the Defendant had the ability to reach out to the reunification therapist and the child's therapist to maintain a role in [Susan's] life. Defendant made the choice to do nothing.

d. Since July 2016 until his deposition in June 2017, Defendant paid no child support to the Plaintiff despite having an agreement to make payments to her. Defendant made a $400 payment in June 2017. Defendant ignored all medical bills, therapy bills, and healthcare related items for the minor child from July 2016 through the date of this hearing. Defendant was not concerned about anyone's well-being but his own.

e. Defendant's threats against the Plaintiff put the Plaintiff in a real fear of her life. Defendant's threats against the Plaintiff resulted in the Plaintiff and minor child having to go in hiding at hotels for a period of time. The threats from Defendant against Plaintiff resulted in Plaintiff's employer requiring her to work from home because of safety concerns at her employer's office. She was not allowed to return to work at her office from September 2016 through the date of this hearing. These threats by Defendant also resulted

in the minor child being restricted to be supervised by an adult while outside at her home. The minor child had to be advised of how to respond if Defendant appeared at her home at her mother's house, or school or any public location.

f. Under the DVPO the Defendant's visitation with the minor child was to be supervised at Time Together. Once Defendant started supervised visits at Time Together, Defendant's supervised visitation at Time Together had to stop as the result of the minor child's extremely negative reaction and behavior after these visits.

g. Defendant violated the supervised visitation rules that are imposed by Time Together. During his second visit Defendant whispered to the minor child and had to be redirected by the staff at Time Together. Defendant objected to Time Together visits because it was not "natural" and didn't allow him to be himself with his daughter.

This Court is not able to rule out that the Defendant has had inappropriate sexual contact with the minor child or rule out that Defendant has engaged [in] sexualized behavior in the minor child's presence.

h. Defendant has willfully ignored the Court Orders in his case regarding public visitation with the minor child. Plaintiff had to hire a private investigator to follow the Defendant during his public visitations because of Plaintiff's concerns that the Defendant was not following the requirement that Defendant's visit occur in a public location as most recently set forth in this Court's April Temporary Order. The private investigator observed the Defendant remov[ing] the minor child from specific public locations where he told the Plaintiff that he would be exercising his public visitation with the minor child. The Plaintiff's private investigator, Michael Flowers with Cat's Eye Investigations, found that the Defendant removed the minor child from these locations. On one such occasion as soon as Plaintiff dropped off the minor child for a visit the Defendant took the minor child and immediately exited the location through a side door

and walked through an adjacent building to ultimately take the minor child to a[] parking garage. During multiple visits, once the Defendant entered in the parking garage, the Defendant would get into rental car or truck. Defendant would have already backed the rental car into a parking space[]. By removing the child from his public visitation this allowed the Defendant to be alone with the minor child. The private investigator could not determine that Defendant was facetiming, only that the minor child was looking at an iPad or mobile phone. This also allowed Defendant to have the minor child facetime with [Karen] Huml–another violation of the April Temporary Order. It is concerning that Defendant was removing the minor child from public and taking her to locations where she was isolated and sitting in the back seat of a rental car with the Defendant. Defendant's explanation about backing into parking spaces, using a rental car instead of his personal vehicle, and insisting that Defendant and the minor child had to eat food that he prepared at home in the back seat of a vehicle rather than at the public location was not credible. The private investigator also observed an angry outburst by the Defendant while he was with the minor child at the IMAX movie theater in Raleigh which was directed toward an employee working at the IMAX theater. On another occasion, the private investigator observed the minor child crying while she was walking with the Defendant in public.

i. Based on the foregoing findings of fact the Defendant cannot put the needs of the minor child first. Defendant blames everyone but himself. Defendant does not take responsibility for his actions. Defendant is very smart. Defendant took steps during his public visits with the minor child to do what he wanted to do while ignoring restrictions that were in place to protect the minor child. It is impossible to believe that Defendant did not know that his actions would have a detrimental impact on the minor child.

j. It is in the child's best interests and welfare of the minor child that she have no further contact with

the Defendant. The minor child's anxiety and stress level decreases when the child has no contact with Defendant. The minor child's physical symptoms such as stomach pains also are eliminated when she does not have contact with Defendant. The minor child performed exceptionally well in school, including being accepted to the Duke University TIPS program.

k. The Plaintiff and minor child have reasons to fear the Defendant.

l. For almost two years the Defendant has failed to take opportunities to change his behavior and to be a positive influence in his daughter's life. Defendant has failed to take the opportunity to exercise visitations with his child, and when he did take those visits he repeatedly violated court orders concerning the restrictions placed on him to including, but not limited to, removing the minor child from public visits, exposing the child to [Karen]Huml, and failing to follow the clear rules established at Time Together.

m. As the direct result of his actions, confrontational attitude and failure to act in a manner consistent with his parental responsibilities to provide support, love, and guidance, the Defendant has had a detrimental influence on his daughter since at least July 2015.

The trial court concluded:

4. There has been a substantial change in circumstances warranting a modification of custody as set forth herein.

5. Plaintiff is a fit and proper person to have sole legal and exclusive physical custody of the minor child as set forth herein.

6. Defendant is a not a fit and proper person to have any visitation or contact with the minor child as set forth herein.

7. This Order is in the best interests and welfare of the minor child.

The trial court decreed:

> 2. Defendant shall not have any custodial time with the minor child.
>
> 3. Defendant shall have no contact with the minor child. Defendant shall not be allowed to speak with the minor child. Defendant shall not be allowed to communicate to the minor child in any format, including, but not limited to, no letters, no email, no text messaging, no face-to-face communication, and no telephone calls.
>
> 4. Defendant shall not have any access to the minor child. Defendant shall not have the ability to obtain any information concerning the minor child including, but not limited to, requesting information through third party care givers, teachers, medical professionals, instructors or coaches.
>
> 5. Defendant shall have no contact with the Plaintiff. Defendant shall not be allowed to speak with the Plaintiff. Defendant shall not be allowed to communicate with the Plaintiff in any format, including, but not limited to, no letters, no email, no text messaging, no face-to-face communication, and no telephone calls.

Father timely filed notice of appeal from this order.

II. Standard of Review

In *Shipman v. Shipman*, our Supreme Court set forth the requirements for modification of a custody order, and this Court's standard of review of an order modifying custody. *See Shipman v. Shipman*, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003).

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. 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.

As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.

The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

When reviewing a trial court's decision to grant or deny 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.
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Id. (citations, quotation marks, and brackets omitted).

III. Issues and Analysis

[1] Father first argues "the trial court erred in failing to make sufficient factual findings regarding the best interest of the child[,]" (original in all caps), but Father's approximately one-page argument on this issue does not address best interests at all.[3] Instead, Father contends two portions of findings of fact regarding possible inappropriate sexual contact between Father and Susan are not supported by the evidence.

A. Findings of Fact

The two challenged portions of the findings are, "Plaintiff was alerted to the fact that Defendant was exhibiting 'grooming' behaviors toward his daughter" and "[t]his Court is not able to rule out that the Defendant has had inappropriate sexual contact with the minor child or rule out that Defendant has engaged in sexualized behavior in the minor child's presence."

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3. Father attempts to raise other issues in his reply brief, but he has waived these arguments. *See State v. Triplett*, ___ N.C. App. ___, ___, 810 S.E.2d 404, 407–08 (2018) ("Defendant may not use his reply brief to make new arguments on appeal. A reply brief is not an avenue to correct the deficiencies contained in the original brief." (citation, quotation marks, and brackets omitted)).

But the trial court did not find that any inappropriate sexual contact or behavior actually happened. Also, while Father claims that the "grooming" finding is "a bare recitation of Appellee's testimony" it is more properly characterized as the trial court's summary of Mother's extensive testimony regarding her concerns about Father's actions toward Susan. And Father contends the "inappropriate sexual contact" finding "fails to acknowledge the conflicting testimony of the therapist or the CPS investigation," but the finding actually *notes* the conflict by stating that the trial court "cannot rule out" the behavior. In other words, the trial court was concerned about the possibility of inappropriate sexual behavior but the evidence was not sufficient for the trial court to make a finding it had occurred or had not occurred.

Furthermore, even if these two portions of findings were omitted, the trial court's conclusions of law would still be supported by the remaining abundant and detailed findings of fact. Thus, this argument is overruled. But Father challenges a few other findings of fact, and his challenge is based only upon the admission of the recordings of phone conversations, so we will next address that issue.

B. Admission of Recordings

[2] Defendant argues that "[t]he trial court erred in admitting the recorded conversations submitted as Plaintiff-Appellee's exhibits #1-4 as the recordings were insufficiently authenticated and the admission of the evidence was prejudicial to Appellant." The recordings were mentioned many times during the testimony of witnesses. Dr. Diane Meisburger, Susan's therapist, testified about her reasons for concern about Susan's safety; one reason for her concern was Father's statements in the recordings threatening to kill Mother and his cursing about being required to go to an anger management program. At this point, the recordings themselves were not played or introduced but were discussed only as part of the information Dr. Meisburger had considered. Father's attorney objected, "We haven't heard this recording. Again, we are talking about something that has not been entered into evidence, hasn't been offered. There is no foundation. I don't think it is appropriate for her to speak to it." Mother's attorney responded that Father's attorney had "opened the door" for it when she asked about the basis for Dr. Meisburger's testimony about concern for Susan's safety. The trial court allowed this line of questioning without further objection.

Later in the trial, other witnesses also testified about hearing the recordings and their responses to the recordings; Father did not object. For example, Mother first learned about the recordings when the

parenting coordinator was notified by Karen that Father "had threatened to kill [Mother] three different" ways. Based upon these threats, Mother contacted the police and "went into hiding," staying out of town at a hotel in an undisclosed location. Mother actually heard the recordings a few days later at her attorney's office. Based upon these threats, Mother filed for a Domestic Violence Protective Order on 14 September 2016. Mother had also learned that Father was arrested for assault on a female involving Karen on 8 September 2016; this was his second arrest for assaulting Karen.

Mother testified that she could recognize the voice on the recordings as Father. Mother's counsel then presented the recordings themselves as exhibits and moved for admission into evidence, noting that "Mr. Huml has heard this. He has heard the recordings. Any authentication issue, if he is saying it is not him, then he can testify to that, but she is able to ident – authenticate his voice and identify it." Father's counsel did not dispute she had heard the recordings and did not raise any further question regarding authentication or any other objection. The recordings were then played, and Mother testified about each one.

Father has waived his argument regarding admission of the recordings as he did not object to the admission of any of the recordings.

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. App. P. 10(a)(1); *see Hoover v. Hoover*, ___ N.C. App. ___, ___, 788 S.E.2d 615, 618, *disc. review denied*, 369 N.C. 187, 794 S.E.2d 519 (2016) ("As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal." (citation and quotation marks omitted)). Father does not argue that the findings of fact based upon the recordings are not supported by that evidence. Therefore, the trial court did not err in allowing the recordings to be admitted as evidence, and all of the trial court's findings of fact were supported by the evidence. This argument is without merit.

C. Denial of Contact with the Child

[3] Father next contends "the trial court erred in denying [him] access to any contact with or information concerning" Susan. (Original in all

caps.) Father argues that he "has been barred from access to any information which would allow him to seek modification of the Order in the future." Specifically, Father claims these paragraphs of the decree "remove[] all of [Father's] remaining parental rights with respect to access to any information concerning" Susan:

> 2. Defendant shall not have any custodial time with the minor child.
>
> 3. Defendant shall have no contact with the minor child. Defendant shall not be allowed to speak with the minor child. Defendant shall not be allowed to communicate to the minor child in any format, including, but not limited to, no letters, no email, no text messaging, no face-to-face communication, and no telephone calls.
>
> 4. Defendant shall not have any access to the minor child. Defendant shall not have the ability to obtain any information concerning the minor child including, but not limited to, requesting information through third party care givers, teachers, medical professionals, instructors or coaches.
>
> 5. Defendant shall have no contact with the Plaintiff. Defendant shall not be allowed to speak with the Plaintiff. Defendant shall not be allowed to communicate with the Plaintiff in any format, including, but not limited to, no letters, no email, no text messaging, no face-to-face communication, and no telephone calls.
>
> . . . .
>
> 11. Should the Plaintiff desire to relocate with the minor child, she shall not be required to provide any information to the Defendant. Plaintiff shall be allowed to pursue any additional privacy protections as allowed for victims of domestic violence.

Father also argues that the order is "the functional equivalent of the termination of his parental rights." Father cites only "*Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898, 900 (1998) . . . . and N.C.G.S. § 50-13.7(a)" in support of his argument, though it is not entirely clear *how* they relate to his argument; Father seems to be contending that without access to information about Susan he would never be able to seek modification of custody, so his parental rights have been effectively terminated.

We first note that after briefs in this case were filed and the case was heard, this Court issued an opinion, *Routten v. Routten*, ___ N.C. App. ___, 822 S.E.2d 436 (2018) (COA17-1360), which appears to establish a different standard for denial of visitation to a parent than prescribed by well-established North Carolina Supreme Court and Court of Appeals precedent.[4] *See, e.g.*, *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003); *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001); *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). Throughout the opinion and in its conclusion, *Routten* relies on *Owenby*, *see Routten* N.C. App. at ___, 822 S.E.2d at ___, but fails to note that *Owenby* involved a dispute between a parent and a non-parent third party, and that the Supreme Court explicitly stated that "*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*." *Owenby*, 357 N.C. at 142-45, 579 S.E.2d at 265-67 (emphasis added) (citation and quotation marks omitted). Other Supreme Court cases cited by *Routten*, *see generally Routten*, ___ N.C. App. ___, 822 S.E.2d 436, unlike *Routten* itself, also distinguish between the standards applicable to custody disputes between two parents (or two non-parents) and a parent versus a non-parent. *See Adams*, 354 N.C. at 58-61, 550 S.E.2d at 500-02 (involving a custody dispute between parents and grandparents and providing that "*[i]n a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the best interest of the child test. Price*, however, involved a custody dispute between a natural parent and a third party who is not a natural parent. After acknowledging the *Petersen* presumption—that natural parents have a constitutionally protected, paramount right to custody of their children—we conducted a due-process analysis in which the parent's well-established paramount interest in the custody and care of the child is balanced against the State's well-established interest in protecting the welfare of children") (emphasis added) (citations and quotation marks omitted)); *see also Price*, 346 N.C. at 71-72, 484 S.E.2d at 529-30 (involving a custody dispute between a parent and a non-parent and noting, "[t]he General Assembly has prescribed the standard to be applied in a custody proceeding in North Carolina in N.C.G.S. § 50–13.2, which provides that an order for custody of a minor child entered pursuant to

4. There was a dissent in *Routten*, and the case was appealed to the North Carolina Supreme Court; that appeal is still pending.

this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. Therefore, *in a custody dispute between two natural parents (we intend this phrase to include both biological and adoptive parents) or between two parties who are not natural parents, this best interest of the child test must be applied. The case now before us, however, is between a natural parent and a third party who is not a natural parent")* (emphasis added) (citation and quotation marks omitted); *Petersen*, 337 N.C. at 399-404, 445 S.E.2d at 902-05 (involving a custody dispute between adoptive parents and natural parents after adoption was declared void and stating, "[f]urther, plaintiffs argue that as to parents' custodial rights, our law recognizes no more than a higher evidentiary standard which must apply in custody disputes between parents and those who are not natural parents; but the welfare of the child is paramount to all common law preferential rights of the parents. In light of *Flores*, *Stanley*, and the principles enunciated in *Jolly* and *Hughes*, we explicitly reject these arguments. We hold that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail. Language to the contrary in *Best v. Best*, 81 N.C. App. at 342, 344 S.E.2d at 367, is hereby expressly disavowed." (quotation marks omitted)).

Further, recent publication of *Routten* exacerbates the quandary presented by *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), as noted by the dissent in *Routten*:

> At first glance, this approach might seem appropriate. After all, *In re Civil Penalty* tells us that one panel cannot overrule another on the same issue. If it appears a second panel did precisely that by refusing to follow the precedent set by the first panel, should the third panel faced with the issue not ignore the second and follow the first? But, what if a fourth panel comes along and concludes that the second panel properly distinguished or limited the first panel? That fourth panel could refuse to follow the third panel on the ground that it improperly overruled the second.

Routten, ___ N.C. App. at ___, 822 S.E.2d at 449 (Inman, J., dissenting) (citation omitted).[5] "Where a panel of the Court of Appeals has decided

5. *Routten* includes an extensive discussion of *In Re Civil Penalty* due to the conflict in prior cases issued by this Court. *See Routten*, ___ N.C. App. at ___, 822 S.E.2d at 444-47. Fortunately, the North Carolina Supreme Court now has the opportunity to resolve this conflict in the appeal of *Routten*.

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. The dilemma of *In re Civil Penalty* arises when panels of this Court have decided the same issue two different ways, since we are theoretically bound by two opposing precedents or lines of precedent. And the Court may have a double dilemma where a prior panel of this Court has addressed not only the underlying issue but also the effect of *In re Civil Penalty* on the same issue in different ways. *See Routten*, ___ N.C. App. at ___, 822 S.E.2d at 449 (Berger, J., concurring) ("As the case before us here demonstrates, this Court can be trapped in a chaotic loop as different panels disagree, not only on the interpretation of the law, but also on what law appropriately controls the issue."). We have that double dilemma here, since this Court addressed the same issue *and* application of *In re Civil Penalty* in *Respess*, *see Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), coming to one conclusion in 2014, and in *Routten*, coming to the opposite conclusion, in 2018. *See Routten*, ___ N.C. App. ___, 822 S.E.2d 436.

Yet we must resolve this double dilemma, and we conclude *Respess* is the precedent which must be followed. Where there is a conflict in cases issued by this Court addressing an issue, we are bound to follow the "earliest relevant opinion" to resolve the conflict:

> 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. Further, our Supreme Court has clarified that, where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines. With that in mind, we find *Skipper* and *Vaughn* are irreconcilable on this point of law and, as such, constitute a conflicting line of cases. Because *Vaughn* is the older of those two cases, we employ its reasoning here.

State v. Gardner, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) (citations and quotation marks omitted). Thus, we turn to *Respess*. *See Respess*, 232 N.C. App. 611, 754 S.E.2d 691.

In 2014, this Court addressed the same issue as to the required standard of proof in a custody dispute between two parents and findings necessary to deny visitation in *Respess*:

Although courts seldom deny visitation rights to a noncustodial parent, a trial court may do so if it is in the best interests of the child:

> The welfare of a child is always to be treated as the paramount consideration. Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.

This principle is codified in N.C. Gen. Stat. § 50–13.5(i), which provides that:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

The statutory language is straightforward and unambiguous and requires that if a trial court does not grant reasonable visitation to a parent, its order must include a finding either that the parent is an unfit person to visit the child or that visitation with the parent is not in the best interest of the child. Although our Supreme Court has not issued an opinion discussing this statute, during the past 30 years this Court has issued numerous opinions applying N.C. Gen. Stat. § 50–13.5(i). For example, in *King v. Demo*, 40 N.C. App. 661, 666–667, 253 S.E.2d 616, 620 (1979), we stated that:

> Unless the child's welfare would be jeopardized, courts should be generally reluctant to deny all visitation rights to the divorced parent of a child of tender age. Moreover, G.S. 50–13.5(i) provides that prior to denying a parent the right of reasonable visitation, the trial court shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

And, in *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 824 (1980), we held that:

> In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration. G.S. 50–13.5(i) provides that in any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.
>
> During the 33 years since *Johnson* was decided, we have consistently followed both its application of the best interests standard to disputes between parents regarding child custody and visitation, and its acceptance of the plain language of N.C. Gen. Stat. § 50–13.5(i).

Id. at 615–17, 754 S.E.2d at 696–97 (citations, quotation marks, ellipses, and brackets omitted).

The *Respess* court addressed the same issue arguably presented here based upon a conflict in the cases created by *Moore v. Moore* and determined that under *In re Civil Penalty* it was bound to follow the consistent precedents prior to *Moore* and the plain language of North Carolina General Statute § 50-13.5(i). *See id.* at 615-17, 754 S.E.2d at 695-97. We are likewise bound to follow *Respess*, since it addressed the same underlying issue and analysis of a conflict in the cases under *In re Civil Penalty* as we do here, *see id.*, 232 N.C. App. 611, 754 S.E.2d 691, since it was decided in 2014 and *Routten* in 2018. *See Routten*, ___ N.C. App. ___, 822 S.E.2d 436.

Addressing Father's argument and our dissenting colleague's position that the order on appeal effectively terminates his parental rights, we first note that a custody proceeding under Chapter 50 is neither functionally nor legally the equivalent of a proceeding for termination of parental rights. *Contrast with* N.C. Gen. Stat. Chap. 50; Chap. 7B (2017). Custody proceedings under Chapter 50 differ procedurally and substantively from a proceeding to terminate parental rights under Article 11 of Chapter 7B, from the initiation of the actions to the end results. *Contrast with* N.C. Gen. Stat. Chap. 50; Chap. 7B (2017). Further, the procedures set forth by Chapter 7B control over any conflicting procedures set out by the Rules of Civil Procedure. *See Matter of Peirce*, 53

N.C. App. 373, 380, 281 S.E.2d 198, 203 (1981) ("Due to the legislature's prefatory statement in G.S. 7A-289.22 with regard to its intent to establish judicial procedures for the termination of parental rights, and due to the specificity of the procedural rules set out in the article, we think the legislative intent was that G.S., Chap. 7A, Art. 24-B, exclusively control the procedure to be followed in the termination of parental rights. It was not the intent that the requirements of the basic rules of civil procedure of G.S. 1A-1 be superimposed upon the requirements of G.S., Chap. 7A, Art. 24-B.").

Before ordering termination of parental rights, the trial court must find specific grounds as provided by North Carolina General Statute § 7B-1111 by clear, cogent, and convincing evidence and must find that termination is in the child's best interest. *See In re C.C.*, 173 N.C. App. 375, 380, 618 S.E.2d 813, 817 (2005) ("A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B–1111(a) exists . . . . If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child."). Termination of parental rights "completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued." N.C. Gen. Stat. § 7B-1112 (2017). Termination of parental rights makes a child available for adoption by another person, rendering the child a legal stranger to the biological parent. *See In re Estate of Edwards*, 316 N.C. 698, 706, 343 S.E.2d 913, 918 (1986) ("Adoption effects a complete substitution of families and makes the child legally a stranger to the bloodline of his natural parents."). Termination cuts off the obligation of the parent to pay child support. *See In re Tate*, 67 N.C. App. 89, 95–96, 312 S.E.2d 535, 540 (1984) ("A parent retains an obligation to pay support up to the actual adjudication of termination of parental rights.").

But the most crucial difference in this case is that a Chapter 50 custody order can always be modified based upon a substantial change in circumstances affecting the best interest of the child, *see Shipman*, 357 N.C. at 473, 586 S.E.2d at 253, while an order terminating parental rights

is permanent and ends all legal rights to the child. *See* N.C. Gen. Stat. § 7B-1112. After termination, parental rights cannot be restored, no matter what changes may occur in the lives of the parent or the child after the order is entered. *See id.* In fact, a parent whose rights have been terminated has no standing to legitimate a child, even with the consent of the other parent. *See Gorsuch v. Dees*, 173 N.C. App. 223, 227, 618 S.E.2d 747, 750 (2005) ("We find unconvincing Petitioner's argument that 'permanent' as used in North Carolina General Statutes section 7B–1112 should be construed as temporary and modifiable to be without merit. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language. Dictionaries may be used to determine the plain meaning of language. Permanent means 'continuing or enduring (as in the same state, status, place) without fundamental or marked change; not subject to fluctuation or alteration.' We find Petitioner's argument that the 'permanent' termination of his parental rights could allow for modification and restoration to be without merit. In sum, we find Petitioner's argument that the trial court erred in concluding that Petitioner had no standing or right under the law to legitimate A.B.D. because his parental rights had been terminated to be without merit." (citations and quotation marks omitted)). In contrast to termination of parental rights, child custody orders are modifiable "at any time" until the child is 18 years old. *See* N.C. Gen. Stat. § 50-13.7 (2017) ("Except as otherwise provided in G.S. 50-13.7A, an order of a court of this State for support of a minor child may be modified or vacated *at any time*, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10." (emphasis added)).

Our courts have long recognized that sometimes, a custody order denying a parent all visitation or contact with a child may be in the child's best interest:

> Although courts seldom deny visitation rights to a noncustodial parent, a trial court may do so if it is in the best interests of the child:
>
> > [T]he welfare of a child is always to be treated as the paramount consideration[.] . . . Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.

> *Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967) (citing *Griffin v. Griffin*, 237 N.C. 404, 75 S.E.2d 133 (1953)). *See also*, *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 848–49 (1971) (" 'The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child.' ") (quoting *Willey v. Willey*, 253 Iowa 1294, 1302, 115 N.W.2d 833, 838 (1962)). This principle is codified in N.C. Gen. Stat. § 50–13.5(i), which provides that:
>
> > In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

Respess v. Respess, 232 N.C. App. 611, 615–16, 754 S.E.2d 691, 696 (2014). The trial court's findings of fact support its conclusion that Father should have no direct contact with Susan. In addition, because of Father's threats to kill Mother, failure to engage in therapy, complete failure to benefit from the DOSE program, and repeated domestic violence with Karen, the trial court did not abuse its discretion in allowing Mother not to inform Father of her and Susan's address.

Father also contends there is no need for the trial court's complete bar of his access to information about Susan, even from third parties such as "teachers, medical professionals, instructors or coaches." While we agree that it is unusual for a parent to have such limited rights regarding his child, the trial court did not abuse its discretion by eliminating his access to information. This restriction of access to information is based upon the specific facts of this case and the trial court described its rationale in detail. In fact, the order on appeal is exceptionally detailed, well-organized, and thorough.

In Finding of Fact 68, which has 23 subsections, the trial court noted the factual basis for the restrictions even to obtaining information from third parties. Father's actions and threats affected many third parties associated with the family, to the detriment of Susan. Mother's employer required her to "work from home because of safety concerns at her employer's office." At the time of the hearing, Mother had been working from home almost a year. Father's threats and actions made third-party

professionals trying to help this family sufficiently concerned about their own safety they would not see him unless another person was present and at one point the child's pediatrician stopped seeing her because of Father's actions. The trial court found that Father's "anger and rage" are disturbing and have "had a detrimental impact on not only the minor child to not feel safe around the Defendant but the Plaintiff, her parents, Plaintiff's friends, Plaintiff's co-workers and various professionals involved with this family."

The trial court also made detailed findings regarding Father's failure to follow the requirements of prior orders. Based upon the trial court's findings, if Father could continue to contact third parties such as teachers, physicians, and coaches to get information about the child, based upon his past behavior, it is likely that his anger and threats would make them fearful for their own safety, just as the third parties described in the order were. And to protect their own safety and the safety of their workplaces, these third parties may reasonably refuse to work with Susan, continuing to interfere with her ability to lead a normal life.

Besides endangering the third parties who deal with Susan, allowing Father to contact them to get information about Susan would endanger Mother and Susan directly. Some of Father's actions were unusual and disturbing, such as taking the child to sit in a rental car in a parking garage with him when he was supposed to be visiting in a public place. Father had a car of his own but rented a car and backed into a parking space for these visits, apparently to avoid detection; this surreptitious behavior raises additional concerns. And if he were allowed to get information from third parties, Father would necessarily learn the addresses and locations where Mother and Susan could be found. For example, if Father were permitted to obtain Susan's educational information, he would have to know the name and location of her school, and he would learn from the school records which classes Susan attends and her usual daily schedule; he could then easily find Mother's home simply by following Susan's school bus or following any person who picks her up from school. Under these circumstances, it is in Susan's best interest to prevent Father from having access to information about her education and care because it protects Mother, Susan, and third parties who deal with them. The trial court's detailed and extensive findings of fact support the decretal provisions, including barring Father from obtaining information from third parties.

Father's argument that he would be unable to seek future modification of custody without access to information about Susan is also without merit. Father fails to recognize that the substantial changes which

need to occur for him to resume a relationship with Susan are changes that *only he* can make. We addressed a similar situation in *Walsh v. Jones*, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 15, 2019) (COA18-496), where several years after a custody order which "immediately and permanently suspended and terminated" all visitation *and contact of any sort* with defendant-father, the trial court later modified its custody order, allowing the father to resume visitation, although he had not seen or had contact with the child for several years. *Id.* at ___, ___ S.E.2d at ___. The trial court modified his visitation based upon the defendant-father's changes in his own life which addressed the problems which led to the termination of his visitation, finding that the father

> completed the [Drug Abuse Research Treatment] 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.

Id. at ___, ___ S.E.2d at ___ (quotation marks and brackets omitted). Here, as in *Walsh*, *see id.*, ___ N.C. App. ___, ___ S.E.2d ___, Father's lack of access to information about Susan's care does not prevent him from taking the steps he needs to take to have the opportunity to change the custodial arrangement in the future. The order does not prevent Father from taking his medication as prescribed, seeking treatment and counseling to control his anger, ceasing his acts of violence against Karen, and ceasing his threats of violence against Plaintiff and others involved in this case. If Father does the things the trial court has repeatedly ordered him to do throughout this case and can show he has changed and can provide a safe and loving environment for Susan, he has the same opportunity as any parent to request a change in custody based upon a substantial change in circumstances which would positively affect the minor child; *his positive behavior* could be such a change. *See Shipman*, 357 N.C. at 473-74, 586 S.E.2d at 253. ("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.") This argument is overruled.

IV. Conclusion

We affirm.

AFFIRMED.

Judge DILLON concurs with separate opinion.

Judge BERGER dissents with separate opinion.

DILLON, Judge, concurring.

I fully concur in the majority opinion.

In this Chapter 50 custody case between two natural parents, the trial court granted sole legal and physical custody of the child to Mother, and further prohibited Father from any visitation with and access to information about the child. The trial court based its order on its determination that this arrangement was in the best interest of the child. And there was evidence to support this order.

The main disagreement between the majority and the dissent concerns whether the trial court used the correct standard in weighing the evidence:

The majority states that the trial court correctly applied the "preponderance of the evidence" standard.

The dissent, however, relies on two cases from our Court which suggest that where a trial court orders that one parent is not allowed any custody, visitation, or the right to information in a Chapter 50 custody dispute with the other parent, the trial court must use a heightened "clear, cogent, and convincing" standard. *Routten v. Routten*, ___ N.C. App. ___, ___, 822 S.E.2d 436, 444 (2018); *Moore v. Moore*, 160 N.C. App. 569, 573-74, 587 S.E.2d 74, 76 (2003).

I agree with the majority that our law does not require this heightened standard in a Chapter 50 custody dispute between parents. *See Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) (holding that making a determination based on the heightened standard "is irrelevant in a [Chapter 50] custody proceeding between two natural parents[.]").

The dissent correctly notes that the Due Process Clause protects the fundamental right of natural and adoptive parents to make decisions concerning the care, custody, and control of their children. And

it is well-settled that where a parent's rights are completely stripped in a Chapter 7B termination case – whether in an action brought by the other parent or by a third party – the trial court must apply the heightened "clear, cogent, and convincing" standard. *In re Oghenekevebe*, 123 N.C. App. 434, 437, 473 S.E.2d 393, 396 (1996). It is also well-settled that this heightened standard must be applied in a Chapter 50 custody action where a parent's rights are abrogated in favor of a non-parent; *e.g.*, granting visitation rights to a grandparent, because such orders affect the "constitutionally protected paramount right of parents" to their children. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266.

However, with the exception of the two cases cited by our dissenting colleague, our courts have uniformly recognized that, in a Chapter 50 custody dispute between two parents, a trial court may abrogate a parent's right to care, custody, and control in favor of the other parent *without* using the heightened "clear, cogent, and convincing" standard. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267. Indeed, every Chapter 50 order which does not grant equal, joint custody to both parents effectively is taking away *some* of the care, custody, and control rights previously enjoyed by one of the parents.[1] For example, a Chapter 50 order may limit one parent's rights to supervised visitation, based on findings that the parent is not presently fit for unsupervised visits.

But a Chapter 50 custody order dividing the rights between two parents – no matter the severity – is never as invasive of a parent's fundamental right to care, custody, and control as a Chapter 7B termination order. Under this Chapter 50 order, Father retains the ability and right to move for reinstatement of some or all of his previously-enjoyed rights by showing that he has changed his ways.[2] But if his rights were to be

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1. And it could be argued that even Chapter 50 orders that grant joint custody abrogate *some* of the rights of each parent, by giving exclusive custody to each parent during different periods to the exclusion of the other parent.

2. I believe that the "best interest of the child" standard applied in Chapter 50 custody cases is in harmony with protecting the Due Process rights of each parent to be involved with his child. Specifically, I believe that there is a strong presumption that it is in the best interest of any child to have a relationship with each parent, though, of course, this presumption can be overcome under the right facts: A trial judge should view the best interest of the child issue at least partially through a "constitutional lens" of considering the right of each parent to remain involved, as such involvement is presumptively in the child's best interest. So, in this case, if Father truly changes his ways and his rights have not otherwise been terminated under Chapter 7B, there would be a strong argument that the trial court would be de facto terminating Father's rights if it refused to allow Father some involvement in the life of his child, even if the child may be thriving at that time. But such is not the case currently in this matter.

terminated under Chapter 7B, Father would have no opportunity to do so, which is why a heightened standard is required in such cases.

BERGER, Judge, dissenting in separate opinion.

Because clarity is needed in this area of the law as it relates to custody disputes between parents when the trial court denies one parent all visitation and contact, I respectfully dissent.

Based upon the evidence in the record and the findings of the trial court, Defendant-father clearly has issues that he needs to address. Because of these issues, the trial court concluded as a matter of law that the father is "not a fit and proper person to have any visitation or contact with the minor child . . . [and] [t]his order is in the best interests and welfare of the minor child." The trial court, in addition to denying Defendant-father any physical custody or contact with the minor child, denied Defendant-father all rights and responsibilities of parentage. The trial court precluded Defendant-father from obtaining "*any* information concerning the minor child," (emphasis added) from teachers, medical professionals, third-party caregivers, and other similar individuals. Upon entry of this order, there existed the very real possibility that Defendant-father would not see his daughter again and would never know anything about her. The practical effect of this custody order, which the majority admits is "unusual," is the termination of Defendant-father's parental rights.

This order is far different from the situation in which visitation is denied. Here, all contact is prohibited, as is the Defendant-father's ability to obtain any information about the child. This may be the correct result, but there is case law which requires a higher burden of proof before a parent can be deemed "unfit" and thereafter cut off entirely from their biological child. This Court has previously held that when a custody order is the functional equivalent of a termination of parental rights, a parent must prove the other parent's unfitness by clear, cogent, and convincing evidence. *Moore v. Moore*, 160 N.C. App. 569, 573, 587 S.E.2d 74, 76 (2003).

In *Moore v. Moore*, the biological parents engaged in a custody dispute over their minor child. The father filed a motion to reinstate visitation after his visitation rights had been suspended pending an investigation. The trial court determined that it was in the best interests of the minor child that the order suspending visitation remain in effect. This Court stated that, because the practical effect of the trial court's

order was the termination of father's parental rights, the standard of proof required in termination proceedings was to be applied. *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76. *Moore* also noted that

> The "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000). "[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994). N.C. Gen. Stat. § 50-13.5(i) states:
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> > [T]he trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.
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> N.C. Gen. Stat. § 50-13.5(i) (2001). North Carolina courts have held that unless the child's welfare would be jeopardized, courts generally should be reluctant to deny all visitation rights to the divorced parent of a child of tender age. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E.2d 324 (1967). "In the absence of extraordinary circumstances, a parent should not be denied the right of visitation." *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971), (quoting *Willey v. Willey*, 253 Iowa 1294, 115 N.W.2d 833 (1962)). North Carolina case law also states that when severe restrictions are placed on the right of visitation, N.C. Gen. Stat. § 50-13.5(i) requires the trial judge to make findings of fact supported by competent evidence of unfitness of the parent or the judge must find that the restrictions are in the best interest of the child. *Falls v. Falls*, 52 N.C. App. 203, 208, 278 S.E.2d 546, 551 (1981); *see also Johnson v. Johnson*, 45 N.C. App. 644, 263 S.E.2d 822 (1980).
>
> It is presumed that fit parents act in the best interest of their children. *Troxel*, 530 U.S. at 69, 147 L. Ed. 2d at 59. A parent's right to a relationship with his child is constitutionally protected. *See Quilloin v. Walcott*, 434 U.S.

> 246, 255, 54 L. Ed. 2d 511, 519 (1978). Once conduct that is inconsistent with a parent's protected status is proven, the "best interest of the child" test is applied. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). Without proof of inconsistent conduct, the "best interest" test does not apply and the trial court is limited to finding that the natural parent is unfit in order to prohibit all visitation or contact with his or her child.
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> The burden of proof rests upon the person seeking to show by clear, cogent, and convincing evidence the unfitness of a natural parent to overcome his constitutionally protected rights. N.C. Gen. Stat. § 7B-1111(b) (2001). Here, in effect, the trial court terminated plaintiff's right to visitation and any contact with his daughter without terminating his obligations as a parent. The proper evidentiary standard of proof in termination of parental rights proceedings is clear and convincing evidence. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). In termination proceedings "the burden ... shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence." N.C. Gen. Stat. § 7B-1111(b).
>
> Plaintiff was prohibited from all visitation rights or any contact whatsoever with his child. To sustain this total prohibition of visitation or contact, defendant must prove plaintiff's unfitness. The trial court did not find the plaintiff to be an unfit parent based upon clear, cogent, and convincing evidence.

Moore, 160 N.C. App. at 572-74, 587 S.E.2d at 76-77.

Here, the trial court effectively terminated Defendant-father's parental rights without findings by clear, cogent, and convincing evidence that Defendant-father was an unfit parent. Under *Moore*, the trial court's order is insufficient.

IN THE MATTER OF J.L.

No. COA18-473

Filed 19 March 2019

1. Child Abuse, Dependency, and Neglect—standing—mother—appeal of permanency planning order—declined request to place child with different family

A mother had standing to appeal a permanency planning order that awarded guardianship of her child to a foster family where both statutory requirements for appeal were satisfied (N.C.G.S. § 7B-1001(a)(4) and § 7B-1002(4)). The order changed legal custody of the child from a county department of social services to a foster family, and the mother was a nonprevailing party because the trial court declined her request to place the child with a different foster family.

2. Child Abuse, Dependency, and Neglect—foster parents—participation in proceedings—limited

The trial court did not abuse its discretion in a permanency planning hearing by allowing a child's foster parents and their counsel to participate to a limited extent in the proceedings. The trial court did not allow the foster parents to intervene as parties, but it did hear their testimony, as required by section 7B-906.1(c), and it did allow their counsel to ask questions of an expert who was testifying about the impact of removing the child from their home.

3. Child Abuse, Dependency, and Neglect—expert testimony—no personal evaluation of child—consequences of moving child—support of findings

In a permanency planning hearing, an expert's testimony regarding the potential consequences of moving a 13-month-old child from his foster family to another foster family was sufficient competent evidence to support the trial court's findings on the matter. The Court of Appeals rejected the mother's argument that the expert's testimony should have been discounted because she had not personally evaluated the child and did not know for certain how he would respond to a move from his foster family's home.

4. Child Abuse, Dependency, and Neglect—fitness of parent—sufficiency of order—application of clear and convincing evidence standard

The trial court erred in an order declaring a mother unfit and as having acted against her constitutionally protected status as a parent by failing to indicate that it had applied the clear and convincing evidence standard. Because the trial court also did not state the appropriate standard of proof in open court on the record, the matter was remanded for findings consistent with the appropriate standard.

5. Child Abuse, Dependency, and Neglect—visitation—consistency of order

The Court of Appeals rejected a mother's argument that the trial court's permanency planning order contained inconsistent provisions regarding visitation. The trial court's conclusion that the mother was a parent whose status conveyed a right to visitation was not inconsistent with its determination that it would be in the child's best interest for the mother to have no visitation with him.

6. Child Abuse, Dependency, and Neglect—visitation—inconsistent with child's best interest—sufficiency of findings

The trial court did not abuse its discretion in concluding that visitation with his mother was not in a 13-month-old's best interest consistent with his health and safety, where the trial court's findings included the mother's long history with child protective services that resulted in the removal of her three older children and her minimal progress in addressing issues related to substance abuse, domestic violence, mental health, parenting, and stable housing and employment.

7. Child Abuse, Dependency, and Neglect—visitation—right to file motion to review visitation plan—failure to inform

In entering an order denying a mother visitation with her child who had been adjudicated neglected and dependent, the trial court committed reversible error in violation of N.C.G.S. § 7B-905.1(d) by failing to inform the mother of her right to file a motion to review the visitation plan.

Judge DIETZ concurring with separate opinion.

Appeal by respondent-mother from order entered 12 February 2018 by Judge Paul A. Holcombe, III, in Johnston County District Court. Heard in the Court of Appeals 28 February 2019.

No brief filed for petitioner-appellee Johnston County Department of Social Services.

Jeffrey L. Miller for respondent-appellant mother.

Marie H. Mobley for guardian ad litem.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, for guardian-appellees.

BRYANT, Judge.

Respondent, the mother of the minor child J.L. ("Jay"),[1] appeals from the trial court's permanency planning order awarding guardianship of the child to his foster parents ("Mr. and Ms. C"). We hold the trial court erred by failing to indicate that the findings of fact supporting the determination that respondent was unfit as a parent and had acted inconsistent with her constitutionally protected parental status were found to a clear and convincing evidence standard of proof and by failing to notify respondent of her right to file a motion for review of the visitation plan, as required by General Statutes, section 7B-905.1(d). We vacate those portions of the trial court's 12 February 2018 permanency planning order and remand for further proceedings consistent with this opinion. The order is otherwise affirmed.

Two days after Jay's birth in October 2016, the Johnston County Department of Social Services ("DSS") filed a juvenile petition alleging Jay was a neglected and dependent juvenile. The petition alleged that: (1) DSS received a Child Protective Services ("CPS") report that respondent had a history with CPS in Wake County and Johnston County; (2) three other children had been removed from respondent's care; (3) respondent had been unable to acquire adequate housing, complete parenting classes, attend budgeting classes, or remain compliant with recommended mental health treatment, and as a result, the permanent plan for those children had been changed to adoption; (4) respondent subsequently relinquished her parental rights to those children;[2] (5) respondent's current roommate had a history with CPS and did not have custody of any of her own children; and (6) respondent displayed concerning behaviors at the hospital, including failing to feed Jay in a timely manner, an "overall lack of knowledge in basic infant care" during

1. Pseudonyms are used throughout this opinion to protect the juvenile's identity and for ease of reading.

2. DSS court reports indicate that respondent relinquished her parental rights to two of her children through proceedings in Wake County, but her oldest child was adopted in Alabama following termination of her parental rights.

feedings and diaper changes, and an inability to control the amount of force exerted when moving Jay's limbs. The same day, DSS obtained nonsecure custody of Jay and placed him in foster care with Mr. and Ms. C.

A hearing on the petition was held on 7 December 2016. Respondent stipulated to the factual basis of the petition and consented to an adjudication of neglect and dependency. The trial court entered an order on 2 February 2017 adjudicating Jay to be a neglected and dependent juvenile. The same day, the trial court entered a separate dispositional order continuing custody of Jay with DSS. Jay remained placed in foster care with Mr. and Ms. C, and respondent was allowed one-hour of supervised visitation twice a month. The trial court ordered respondent to cooperate with DSS and follow any and all DSS recommendations, which included the following: complete parenting classes and demonstrate learned knowledge; complete a mental health assessment and follow all recommendations; take all medications as prescribed; submit to drug screens as requested by DSS; obtain and maintain safe, stable housing that is clean, appropriately furnished, and free from substance abuse and domestic violence; obtain and maintain sufficient financial resources to meet Jay's needs; educate herself regarding budgeting and demonstrate learned knowledge; and conduct herself in an appropriate manner during visitations.

After a permanency planning hearing on 22 March 2017, the trial court entered an order ceasing reunification efforts with respondent and establishing a primary permanent plan of custody or guardianship with a court-approved caretaker, with a secondary plan of adoption. Jay remained in DSS custody and in his foster care placement with Mr. and Ms. C. Respondent's visitation was reduced to a monthly, one-hour supervised visit.

A subsequent permanency planning hearing was held on 2 and 9 August 2017. At the beginning of the hearing, DSS informed the trial court it had located the foster parents who had adopted two of Jay's older half-siblings ("Mr. A and Ms. F"), and it recommended that Jay be moved to that foster home. Jay's guardian *ad litem* ("GAL") and respondent agreed with DSS's recommendation. At that time, counsel for Jay's current foster parents, Mr. and Ms. C, indicated they intended to file a motion to intervene in the matter. The trial court stated Mr. and Ms. C could not be made parties to the case, but it would permit their counsel to facilitate their testimony on direct examination since it was required to hear information from any person providing care for the juvenile. *See* N.C. Gen. Stat. § 7B-906.1(c) (2017). During the hearing,

the trial court heard testimony from the following witnesses: (1) Jay's social worker; (2) Jay's GAL; (3) Jay's foster parents, Mr. and Ms. C; (4) the GAL for Jay's two older half-siblings who were adopted by Mr. A and Ms. F; and (5) Ms. F. After receiving all of the evidence, the trial court orally rendered its decision to grant guardianship of Jay to Mr. and Ms. C and entered a temporary order to that effect on 9 August 2017. The temporary order stated that a final order would be prepared and entered within thirty days.

On 1 September 2017, before the final order from the hearing was entered, respondent filed a motion to re-open the evidence for the purpose of presenting expert testimony. The trial court granted the motion, and a hearing on the motion was held on 8 November 2017. At the hearing, the trial court heard testimony from two psychologists regarding the impact on Jay of being removed from the foster home of Mr. and Ms. C and being placed in the foster home of Mr. A and Ms. F with two of his half-siblings. Dr. Stephanie Best was called by counsel for respondent. Dr. Ginger Calloway, who was procured to testify by Mr. and Ms. C, was called by Jay's GAL attorney advocate and directly examined by counsel for Mr. and Ms. C. On 12 February 2018, the trial court entered a subsequent permanency planning order again awarding guardianship of Jay to Mr. and Ms. C. The trial court further ordered that respondent was to have no face-to-face visitation with Jay, but she could have telephonic communication with him as monitored by Mr. and Ms. C. Respondent timely appealed.

Standing

[1] As a preliminary matter, we note that Mr. and Mrs. C's brief submitted to this Court is entitled "Guardians-Appellees' Motion to Dismiss and Brief" and contains a section requesting that respondent's appeal be dismissed due to lack of standing.

It is well established that "[m]otions to an appellate court may not be made in a brief but must be made in accordance with N.C.R. App. P. 37." *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996) (citation omitted); *see also Smithers v. Tru-Pak Moving Sys.*, 121 N.C. App. 542, 545, 468 S.E.2d 410, 412 (1996) ("[The] [d]efendant's motion to dismiss plaintiff's appeal is not properly before us. A motion to dismiss an appeal must be filed in accord with Appellate Rule 37, not raised for the first time in the brief as defendant has done here." (citation omitted)). Because Mr. and Ms. C have not filed a motion to

dismiss respondent's appeal in accordance with Rule 37, the motion to dismiss contained in their brief is not properly before this Court.

We are, however, compelled to address whether respondent has standing to appeal. "Standing is jurisdictional in nature and [c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re T.M.*, 182 N.C. App. 566, 570, 643 S.E.2d 471, 474 (2007) (alterations in original) (citation omitted). "As the party invoking jurisdiction," respondent has the burden of proving that she has standing to file an appeal. *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 532 (2009) (citation omitted).

The Juvenile Code provides that an appeal may be taken to this Court from "[a]ny order, other than a nonsecure custody order, that changes the legal custody of a juvenile." N.C. Gen. Stat. § 7B-1001(a)(4) (2017). Under General Statutes, section 7B-1002(4), "[a] parent . . . who is a nonprevailing party" may bring an appeal. *Id.* § 7B-1002(4) (2017).

In this case, both statutory requirements are satisfied. First, the trial court's 12 February 2018 permanency planning order awarding guardianship of Jay to Mr. and Ms. C changed legal custody of Jay from DSS to Mr. and Ms. C. *See id.* § 7B-600(a) (2017) (providing, in relevant part, that "[t]he guardian shall have the care, custody, and control of the juvenile"). Second, respondent is Jay's parent who was a "nonprevailing party" below. "A prevailing party is defined as one in whose favor the decision or verdict is rendered and judgment entered[.]" *T.B.*, 200 N.C. App. at 746, 685 S.E.2d at 534 (alteration in original) (quoting *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195, 412 S.E.2d 893, 896 (1992)). At the subsequent permanency planning hearing, respondent's counsel argued that Jay should be placed in the foster home of Mr. A and Ms. F, and she objected to Mr. and Ms. C being granted guardianship of Jay. Contrary to respondent's request, the trial court awarded guardianship of Jay to Mr. and Ms. C, thereby declining to place him with Mr. A and Ms. F. Because the trial court failed to grant respondent's request, she has demonstrated that she was a nonprevailing party. *Cf. id.* at 746, 685 S.E.2d at 534 (concluding the maternal grandmother was not a nonprevailing party when the trial court granted her requests that the paternal grandmother and her husband not be awarded permanent physical custody and that she be granted visitation privileges).

In support of their argument that respondent lacks standing to challenge the trial court's permanency planning order appointing them as Jay's guardians, Mr. and Ms. C cite to this Court's opinion *In re C.A.D.*,

247 N.C. App. 552, 786 S.E.2d 745 (2016). In *C.A.D.*, the respondent-mother argued that the trial court erred by ceasing reunification efforts in a permanency planning order because her children should have been placed with their maternal grandparents. *Id.* at 563, 786 S.E.2d at 751. The maternal grandparents were the former custodians of at least one of the juveniles involved in the case and could have appealed from the order at issue, but they did not. *Id.* at 556, 786 S.E.2d at 747. This Court held that the respondent-mother lacked standing to raise the argument because she was not aggrieved by the trial court's decision, stating:

> [T]he maternal grandparents have not appealed the trial court's permanency plan. They do not complain of the court's findings of fact or conclusions of law, and they do not complain they were injuriously affected by the trial court's decision to pursue adoption. [The] [r]espondent cannot claim an injury on their behalf. Therefore, she has no standing to raise . . . [this] claim.

Id. at 563, 786 S.E.2d at 752.

The instant case is distinguishable from *C.A.D.* Here, Mr. A and Ms. F were not parties to the case and could not have independently appealed from the trial court's 12 February 2018 order. *See* N.C. Gen. Stat. § 7B-1002 (enumerating the proper parties to take an appeal). Respondent is not attempting to present a claim on behalf of Mr. A and Ms. F, but instead asserts her own parental interest in having Jay placed in a foster home with two of his half-siblings. *See In re D.S.*, ___ N.C. App. ___, ___, 817 S.E.2d 901, 904–05 (2018) (holding respondent-father had standing to contend on appeal that the trial court erred in failing to consider placement with the paternal grandmother before granting guardianship to a non-relative where paternal grandmother was never a party to the juvenile case). Accordingly, we conclude that respondent has standing to bring this appeal.

On appeal, respondent argues that (I) the trial court erred in permitting Mr. and Ms. C to contest DSS's placement recommendation and present evidence as if they were a party to the case; (II) the expert testimony relied upon by the trial court was insufficient, unreliable, and too speculative to support its findings; (III) the trial court erred in failing to indicate that it applied the correct standard of proof in finding respondent was unfit and had acted inconsistently with her constitutionally

protected status as a parent; and (IV) the trial court erred in failing to establish an appropriate visitation schedule for respondent. We address each argument in turn.

I

[2] First, respondent argues the trial court erred by allowing foster parents Mr. and Ms. C and their counsel to participate in the proceedings in the manner that it did, contending the court essentially conferred party status on them in violation of General Statutes, sections 7B-401.1(e1) and (h). We disagree.

Except in limited circumstances, a foster parent for a juvenile is not a party to the case and may not be allowed to intervene. *See* N.C. Gen. Stat. § 7B-401.1(e1), (h) (2017). However,

> [a]t each hearing, the court shall consider information from the parents, the juvenile, the guardian, *any person providing care for the juvenile*, the custodian or agency with custody, the guardian ad litem, and *any other person or agency that will aid in the court's review*. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-906.1(c) (emphases added).

It is well settled that "[t]he trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of the evidence is largely within the sound discretion of the trial judge and his control of a case will not be disturbed absent a manifest abuse of discretion." *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986). "An abuse of discretion is a decision 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).

Respondent has failed to show an abuse of discretion by the trial court under the specific circumstances of this case. The trial court did not allow Mr. and Ms. C to intervene as parties. Rather, the trial court permitted counsel for Mr. and Ms. C to facilitate their testimony on direct examination, which was information the court was required to hear under section 7B-906.1(c). Mr. and Ms. C's counsel was not afforded the

opportunity to present other witnesses, introduce exhibits, cross-examine witnesses, lodge objections, or present closing argument as a party to the proceeding would have been allowed to do. In addition, the GAL attorney advocate specifically requested that Mr. and Ms. C's counsel conduct the direct examination of Dr. Calloway. The trial court apparently determined that information from Dr. Calloway would "aid in the court's review" as evidenced by the fact that it re-opened the evidence for the sole purpose of hearing expert testimony on the impact on Jay of being removed from the foster home of Mr. and Ms. C and being placed in the foster home of Mr. A and Ms. F with two of his half-siblings. Mr. and Ms. C's counsel's involvement was limited to asking Dr. Calloway questions on direct and redirect examination. Again, unlike a party, counsel was not permitted to call other witnesses, cross-examine the opposing expert witness, lodge objections, or present closing argument. Because the trial court was statutorily required to hear testimony from the foster parents and any person who would aid in the court's review, *see* N.C.G.S. § 7B-906.1(c), its decision to permit Mr. and Ms. C and their counsel to participate in the proceedings as it did was not "manifestly unsupported by reason[,]" *Briley*, 348 N.C. at 547, 501 S.E.2d at 656. This holding is limited to the specific facts of this case. Accordingly, respondent's argument is overruled.

II

[3] Respondent challenges the evidentiary support for the findings of fact in the 12 February 2018 order insofar as the trial court relied upon Dr. Calloway's testimony. Respondent contends Dr. Calloway's testimony should be discounted because she had not personally evaluated Jay and did not know for certain how Jay would respond to a move to Mr. A and Ms. F's home. We disagree.

"[Appellate] review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). "The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re J.H.*, 244 N.C. App. 255, 268, 780 S.E.2d 228, 238 (2015) (citation omitted).

Respondent asserts that Dr. Calloway's testimony was insufficient, unreliable, and too speculative to support the following findings of fact:

6. . . .

. . . .

c. . . . The members of the [Mr. and Ms. C] family are those with whom [Jay] identifies by sight, sound and smell, and has done so for his entire life (thirteen (13) months as of 11-8-2017).

. . . .

e. . . . Having had the opportunity to observe the appearance, attitude, tone and demeanor of both tendered experts, the court accredits the testimony of Dr. Ginger Calloway that in being removed from the only home the thirteen (13) month old juvenile has ever known, the juvenile would suffer disruption and some level of mental, emotional, and psychological trauma. Furthermore, given his specific age, he would not have the benefit of being able to process why he was being moved nor would he be able to articulate his level of mental, emotional and psychological discomfort.

Citing to two cases involving workers' compensation claims, respondent insists that Dr. Calloway's testimony was speculative and "insufficient to establish a connection for causal findings by the court."

In accordance with the Juvenile Code, at a permanency planning hearing, "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-906.1(c).

Dr. Calloway, who reviewed the reports prepared by DSS and GAL for the August 2017 permanency planning hearing and listened to the audio recording of that hearing, testified that Jay had seen, smelled, and been cared for by Mr. and Ms. C's family for over a year. She agreed that a nine-to-ten month old child could be expected to have formed an attachment relationship with the people he lived with, stating that such a relationship begins when the child starts being around people. When asked about the consequences of moving Jay to another home in light of his young age, Dr. Calloway specifically opined:

> For any child who has, or any baby who has formed attachments to specific people, loss of those attachments is like

> death because this child has relationships already with the family that he knows, which is the family that he lives with, and that's his reality. So you take that child away from that reality, you're -- he will suffer. . . . In working with children, and clinically when I have provided clinical services to children, I think the children that were maybe the most touching and moving in some ways are the children for whom language did not exist when the trauma happened because the experience of loss and trauma is every bit as real pre-verbally as it is verbally, but you don't have the cognitive or verbal skills to be able to make sense of it, you don't have the verbal skills to be able to talk about it, but it is real nonetheless.

She further opined that removing Jay from Mr. and Ms. C "will cause loss and trauma." When asked about the long-term consequences of such loss and trauma, Dr. Calloway testified:

> What the literature suggests is that when children experience traumas and losses, and when they become removed from the caregivers that they know as infants, that there can be consequences to their learning in school, to their self-confidence, to their ability to regulate their emotions, to even -- there are some studies that even show antisocial behaviors are characteristics of some children. So there can be a range of negative consequences, and all of that, of course, is dependent on what happens to the child afterwards, meaning after the loss or the trauma.

We conclude that Dr. Calloway's testimony was sufficient competent evidence to support the trial court's findings of fact. Accordingly, we find no error in the challenged findings.

III

[4] Respondent next argues the trial court erred by failing to indicate it applied the correct standard of proof in determining that respondent was unfit and had acted inconsistent with her constitutionally protected status as a parent. We agree.

"[N]atural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children." *Bennett v. Hawks*, 170 N.C. App. 426, 428, 613 S.E.2d 40, 42 (2005) (alteration in original) (quoting *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530

(1997)). "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). Therefore, "[t]he trial court must clearly 'address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent.' " *In re K.L.*, ___ N.C. App. ___, ___, 802 S.E.2d 588, 597 (2017) (quoting *In re P.A.*, 241 N.C. App. 53, 66–67, 772 S.E.2d 240, 249 (2015)).

> Because the decision to remove a child from a natural parent's custody "must not be lightly undertaken[,] . . . [the] determination that a parent's conduct is inconsistent with . . . her constitutionally protected status must be supported by clear and convincing evidence." [*Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001)]. . . . "Clear and convincing" evidence is an intermediate standard of proof, greater than the preponderance of the evidence standard applied in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in most criminal cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984).

In re E.M., ___ N.C. App. ___, ___, 790 S.E.2d 863, 874 (2016) (alterations in original). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (citation omitted).

Here, the trial court found that respondent was unfit to have custody of Jay, and that she had acted "against her constitutionally protected interest" as a parent. The trial court's order, however, fails to indicate that it applied the clear and convincing evidence standard in making these determinations. In addition, careful review of the transcript reveals that the trial court did not state the appropriate standard in open court on the record. "Absent an indication that the trial court applied the clear and convincing standard in this case, we reverse the order of the trial court and remand this case for findings of fact consistent therewith." *Bennett*, 170 N.C. App. at 429, 613 S.E.2d at 42; *see also David N.*, 359 N.C. at 307, 608 S.E.2d at 754 (reversing and remanding for finding consistent

with the clear and convincing standard, where the trial court "failed to apply the clear and convincing evidence standard as set forth in *Adams* in making th[e] determination" that the defendant's conduct was inconsistent with a natural parent's constitutionally protected interest).

IV

Lastly, respondent argues the trial court erred in failing to establish an appropriate visitation schedule for her. Her contentions are threefold: (1) the trial court's order contains inconsistent provisions regarding visitation; (2) the trial court's findings were insufficient to support a denial of visitation; and (3) the trial court failed to inform her of her right to file a motion to review the visitation plan, in violation of N.C. Gen. Stat. § 7B-905.1(d) (2017). We conclude the trial court's findings concerning visitation were not inconsistent and were sufficient to support a denial of visitation. However, we agree that the trial court failed to comply with N.C. Gen. Stat. § 7B-905.1(d).

A. Provisions Regarding Visitation

[5] Respondent contends that the trial court's 12 February 2018 order contains inconsistent provisions regarding visitation. We disagree.

In its 12 February 2018 its order, the trial court determined that "[t]he following rights and responsibilities remain with [respondent]: all rights of inheritance, financial responsibility and visitation." However, pursuant to General Statutes, section 7B-905.1(a), when considering what visitation schedule would be in Jay's best interest consistent with his health and safety, the court ordered that respondent was to have no visitation with Jay.[3] *See* N.C. Gen. Stat. § 7B-905.1(a) (2017).

We do not believe these provisions are inconsistent. Although labeled as a finding of fact, the trial court's determination that the right of visitation remained with respondent is a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, . . . any determination requiring the exercise of judgment or the

3. Specifically, the trial court ordered that respondent was to have no face-to-face visitation with Jay, but that she could have telephonic communication with him as monitored by Mr. and Ms. C. This Court has previously held that electronic communication may supplement visitation, but it is not a replacement or substitute for in-person contact. *In re T.R.T.*, 225 N.C. App. 567, 573-74, 737 S.E.2d 823, 828 (2013) (concluding that videoconferencing was not visitation). As a result, an order that provides only for electronic communication effectively denies a respondent-parent visitation. *See id.* at 574, 737 S.E.2d at 829. Therefore, in this case, the trial court effectively denied respondent visitation when it prohibited face-to-face visitation but instead allowed respondent to communicate with Jay via telephone as monitored by Mr. and Ms. C.

application of legal principles is more properly classified as a conclusion of law." (citations omitted)). This conclusion follows the trial court's determination that Mr. and Ms. C should be appointed Jay's guardians, and it conveys the parental status that respondent retained following that determination. The trial court's conclusion that respondent was a parent whose status conveyed a right to visitation was subject to the trial court's determination of the scope and duration of visitation "as may be in the best interest[] of the juvenile consistent with the juvenile's health and safety." N.C.G.S. 7B-905.1(a). We hold the trial court's visitation provisions on this point are not inconsistent; therefore, respondent's argument is overruled.

B. Denial of Visitation

[6] Respondent contends the trial court's findings in its 12 February 2018 order were insufficient to support a denial of visitation. We disagree.

An order which continues placement outside of a parent's home "shall provide for appropriate visitation as may be in the best interest[] of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a). Conversely, the court may prohibit visitation or contact by a parent when it is in the juvenile's best interest consistent with the juvenile's health and safety. *See id.*; *see also In re J.S.*, 182 N.C. App. 79, 86–87, 641 S.E.2d 395, 399 (2007) (affirming the order of the trial court that there be no contact between the respondent-father and J.S. where the evidence indicated that the respondent-father physically abused the juvenile daily). This Court reviews an order disallowing visitation for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

> [I]n the absence of findings that the parent has forfeited [his or her] right to visitation or that it is in the child's best interest to deny visitation[,] the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised. As a result, even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

In re K.C., 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009) (alterations in original) (citation omitted).

Here, the trial court made the ultimate finding that visitation would be inappropriate and not in Jay's best interest consistent with his health and safety. This ultimate finding is supported by the trial court's evidentiary findings, which include the following: (1) respondent had a long history with CPS that resulted in the removal of her three older children; (2) the "protective issues" identified with respect to Jay were similar to the issues which resulted in the removal of the older children; (3) DSS developed a case plan with respondent to address issues related to substance abuse, domestic violence, mental health, parenting, and stable housing and employment, but respondent was "only minimally participating in services to resolve the protective issues and is not able to demonstrate knowledge gained"; (4) respondent had not utilized any visitation since 23 February 2017; and (5) respondent had signed a relinquishment of her parental rights to Jay. Based on these findings, the trial court did not abuse its discretion in concluding visitation with respondent was not in Jay's best interest consistent with his health and safety. Therefore, respondent's argument is overruled.

C. Notice of Right to Review Pursuant to N.C. Gen. Stat. § 7B-905.1(d)

[7] Respondent argues that the trial court committed reversible error by failing to inform her of her right to file a motion to review the visitation plan, in violation of General Statutes, section § 7B-905.1(d).

Section 7B-905.1(d) states that "[i]f the court retains jurisdiction, all parties *shall* be informed of the right to file a motion for review of any visitation plan entered pursuant to this section." N.C. Gen. Stat. § 7B-905.1(d) (2017) (emphasis added). Here, the trial court did not waive future review hearings and retained jurisdiction over Jay's case. However, in its order, the trial court did not notify respondent of her right to file a motion for review of the visitation plan. In addition, careful review of the transcript reveals that the trial court did not inform respondent of this right in open court on the record. Accordingly, we vacate the trial court's visitation order and remand for an order compliant with N.C. Gen. Stat. § 7B-905.1(d). *See In re J.S.*, No. COA16-1039, 2017 WL 2119415, at *8 (N.C. Ct. App. May 16, 2017) (unpublished) (vacating the trial court's visitation order for failure to inform parties of the right to file a motion for review and remanding for entry of an order compliant with N.C. Gen. Stat. § 7B-905.1(d)).

Conclusion

We hold the trial court erred in (1) failing to state it applied the correct standard of proof in determining respondent was unfit as a parent and had acted inconsistent with her constitutionally protected status as a parent; and (2) failing to notify respondent of her right to file a motion for review of the visitation plan, as required by General Statutes, section 7B-905.1(d). We vacate those portions of the 12 February 2018 subsequent permanency planning order and remand for further proceedings consistent with this opinion. The order is otherwise affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judge ARROWOOD concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, concurring.

I agree with the majority's statement that "motions may not be made in a brief" filed with this Court. The Rules of Appellate Procedure impose different rules for motions and briefs and, for that reason, the two should not be joined in a single filing. I write separately to emphasize that this rule does not prohibit an appellee from arguing in a brief that the appeal should be dismissed, whether for lack of appellate jurisdiction or any other reason. Both the Rules of Appellate Procedure and our precedent permit litigants to argue in their briefs that the proper disposition of an appeal, or some portion of it, is dismissal.

ALEXANDER JULIAN, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF
v.
THE UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM, D/B/A THE UNIVERSITY OF NORTH CAROLINA HOSPITALS, DEFENDANT

No. COA18-477

Filed 19 March 2019

1. Hospitals and Other Medical Facilities—hospital billing policy—charging a patient for a component of a health care procedure

In a class action against a health care system, a hospital policy of charging patients for operating room time in half-hour increments did not violate the statutory prohibition against charging patients for any "component" of a health care procedure that was not supplied (N.C.G.S. § 131E-273). Charging plaintiff for two and a half hours (five half-hour blocks of time) in the operating room when he actually spent two hours and a few minutes in the operating room was permissible because health care providers may charge for partially used components of a health care procedure.

2. Contracts—breach of contract—express terms regarding hospital billing policy

In a class action against a health care system, a hospital did not breach its contract with a surgery patient by overcharging the patient for operating room use. The contract's express terms stated that the hospital billed patients for time spent in the operating room measured in half-hour increments, so the hospital properly billed the patient for five half-hour increments where the patient spent approximately two hours plus two to four minutes in the operating room.

Appeal by plaintiff from order entered 28 November 2017 by Judge Michael J. O'Foghludha in Orange County Superior Court. Heard in the Court of Appeals 28 November 2018.

Lewis & Roberts, PLLC, by Matthew D. Quinn and James A. Roberts, III, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for defendant-appellee.

DIETZ, Judge.

Alexander Julian brought this class action lawsuit against the University of North Carolina Health Care System after a visit to one of the system's hospitals. The hospital charges for operating room time in half-hour increments. Julian alleges that this billing practice permits the hospital to overcharge patients—Julian, for example, was in the operating room for approximately two hours and four minutes but the hospital billed him for two and a half hours of operating room time. This, Julian claims, is a breach of the contract between the hospital and its patients.

The trial court dismissed Julian's complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted. As explained below, we affirm that ruling. Julian asserts that N.C. Gen. Stat. § 131E-273—a statute he believes is incorporated by law into his contract with the hospital—bars healthcare providers from charging for a "component of any health care procedure that was not performed or supplied." Julian contends that the hospital violated this statute by charging him for time when he was not actually in the operating room.

But even assuming that this statute is part of the contract and means what Julian claims (the hospital disputes both these points), the "component" of a healthcare procedure at issue here is a half-hour block of operating room time. The hospital supplied that component to Julian, although he did not use it in full. This is no different from charging a patient for a bag of solution used in an intravenous fluid drip even though the patient does not use every drop of fluid in the bag. The plain language of N.C. Gen. Stat. § 131E-273 permits a hospital to bill for these types of components of a procedure even if they are only partially used.

Julian's express contract claim fails for a similar reason: the terms of the contract state that operating room time is billed in "half hour increments" even if only a portion of that final half hour block is used. This means the hospital billed Julian precisely as the contract required. Accordingly, Julian's claims fail as a matter of law and the trial court properly dismissed them under Rule 12(b)(6).

Facts and Procedural History

On 17 October 2014, Alexander Julian, III arrived at the UNC Ambulatory Surgery Center in Chapel Hill for outpatient surgery. Before beginning his surgery, Julian entered into a contract with the hospital. Julian concedes that this contract included a document that the parties refer to as the "O.R. Charge Rules," although Julian did not receive a copy of that particular document before his surgery. The O.R. Charge Rules establish the rates the hospital will charge for operating room services. The rules state that the hospital charges patients for operating

room time "based on half hour increments with time measured from the time the patient enters the room until the patient leaves the room." The charge rules also state that "[i]f the procedure goes into the next time increment, the charge is for the next increment of time."

In January 2015, Julian received a non-itemized bill from the hospital for his surgery. The bill was much higher than Julian expected, so he contacted the hospital for additional information. In February 2015, the hospital sent Julian a letter explaining that his total operating room time was "2 hours and 4 minutes" and "OR time is charged in 30 minutes [sic] increments, making 2 hours and 4 minutes fall between the OR time charge of 2:01 to 2:30 hours." Although Julian concedes in this lawsuit that he agreed to be bound by the terms of the O.R. Charge Rules when he signed the contract with the hospital, the parties also acknowledge that Julian did not receive a copy of the O.R. Charge Rules when he signed the contract and agreed to be bound by its terms. As a result, when Julian received this response from the hospital, it was the first time Julian learned that the hospital billed for operating room time in half-hour increments.

In 2016, Julian filed a putative class action against the University of North Carolina Health Care System, alleging claims for breach of contract, breach of implied-in-fact contract, and breach of the implied covenant of good faith and fair dealing. The complaint also requested a declaratory judgment and injunctive relief. The hospital moved to dismiss the complaint under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. After a hearing, the trial court granted the hospital's motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim on which relief could be granted. Julian timely appealed.

Analysis

The basis of this breach of contract action is the hospital's practice of charging for operating room time in half-hour increments. Julian was in the hospital operating room for slightly more than two hours and billed for two hours and thirty minutes of operating room usage. Julian alleges that, as a result of this practice, he was charged for twenty-six to twenty-eight minutes of operating room time when he was not actually in the operating room receiving medical care.

The trial court dismissed Julian's claims under Rule 12(b)(6) for failure to state a claim on which relief can be granted. We review that ruling *de novo*, examining "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted

under some legal theory." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, __ N.C. App. __, __, 796 S.E.2d 120, 123 (2017).

[1] Julian first contends that the hospital's operating room billing practice violates N.C. Gen. Stat. § 131E-273, a statute that he contends is incorporated into the terms of the parties' contract. Section 131E-273 prohibits health care providers from charging patients for any component of a health care procedure that was not actually performed or supplied:

> It shall be unlawful for any provider of health care services to charge or accept payment for any health care procedure or component of any health care procedure that was not performed or supplied. If a procedure requires the informed consent of a patient, the charge for any component of the procedure performed prior to consent being given shall not exceed the actual cost to the provider if the patient elects not to consent to the procedure.

N.C. Gen. Stat. § 131E-273. Julian argues that the hospital's practice of billing for operating room time in half-hour increments violates this statute because, unless the patient was in the operating room for every minute of that half-hour block of time, the hospital necessarily charged the patient for some operating room time that was not actually supplied to the patient.

Even assuming this statutory provision is incorporated into the contract between Julian and the hospital—an issue we need not reach today—we reject Julian's argument that the hospital's billing practice violates this provision. The flaw in Julian's legal theory is that the half-hour blocks of operating room time *are* the components for which he was charged.

The term "component" and the phrase "component of any health care procedure" are not defined in N.C. Gen. Stat. § 131E-273 or anywhere else in that chapter of the General Statutes. Thus, we give those words their plain meaning. *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016). A "component" is "a constituent part" or "one of the parts of something." Merriam-Webster Dictionary (2018). A "procedure" is "a medical treatment or operation." *Id.*

Applying this plain meaning of the statute, the intermediate steps within a complete healthcare procedure certainly are components of the overall procedure. In a cancer surgery, for example, those components

might include administering the anesthesia, making the incision, removing the tumor, and so on. Julian contends that the statute also governs the *material* components used in the surgery—the operating room, the surgical instruments, the gauze, etc.

But even if we assume that the statute covers charges associated with the material components used in a healthcare procedure, that is precisely what the hospital did here. The statute prohibits healthcare providers from charging for components that were not "supplied"—it does not prohibit charging for components that were supplied but were only partially used during the procedure. Consider, for example, a hospital that charges patients for the bags of solution used for an intravenous fluid drip. Under Julian's theory, if a patient used only a portion of the fluid in the bag before being disconnected from the IV, the hospital would violate N.C. Gen. Stat. § 131E-273 by charging the patient for the bag.

That it not a reasonable interpretation of what this statute renders unlawful. To be sure, if the hospital never provided the patient with a bag of IV solution during the procedure, it could not charge the patient for one. But if the hospital used the bag during the procedure, it does not violate N.C. Gen. Stat. § 131E-273 by charging the patient for it, even if some portion of the solution in the bag went unused.

The same is true for time in the operating room. The hospital provides access to the operating room for patients in half-hour blocks of time. Those blocks of time are components of the healthcare procedure. Although Julian did not use the entire final half-hour block of time, he used some of that component, just as a patient connected to an IV fluid drip might use some of the solution in a fluid bag, but not all of it. Thus, the statute, by its plain terms, permitted the hospital to charge Julian for that last half-hour block of time because that was a component of the procedure supplied to Julian. Accordingly, the trial court did not err in determining that Julian's claim for breach of contract based on a violation of N.C. Gen. Stat. § 131E-273 fails as a matter of law.

[2] Julian next argues that the hospital breached the parties' contract because the contract states that the patient will only be charged for "clinic facility, drugs, and drug administration, and any tests *you receive during your visit*" and that the patient will be charged for use of the operating room based "on the amount of time the OR is *used*." (Emphasis added). Julian contends that the hospital breached these provisions because he "was billed for 28 minutes of operating room time" that he did not actually receive or use.

This argument fails because the language of the contract, which is incorporated into the complaint, expressly refutes it.[1] The provision of the contract governing charges for operating room time states that patients will be billed "based on the amount of time the OR is used" but then immediately follows that statement with the explanation that "[t]he charge is based on half hour increments":

> **1. OR Time Charges**
>
> **Definition – The charge for the use of the operating room is currently based on the amount of time the OR is used, regardless of OR site.** The charge is based on half hour increments with time measured from the time the patient enters the room until the patient leaves the room. **(Total time from 1-30 minute is the first step, 31-60 minutes the second, etc.).**
>
> **Calculation of Charge – A specified or set charge based upon the length of the case is established for each ½ hour increment of time. If the procedure goes into the next increment, the charge is for the next increment of time . . .**

(Boldface in original).

In other words, the parties' contract states that it is based on "time the OR is used" but defines how that use is calculated as being in "half hour increments." Julian's complaint alleges that he was billed in half hour increments, and that, after spending approximately two hours and two to four minutes in the operating room, was billed for five half-hour increments. This is precisely what the contract requires. Accordingly, the trial court properly determined that this breach of contract claim also fails as a matter of law.

We acknowledge that it is healthcare providers, not patients, who choose how to draw these lines. Here, for example, the hospital decided to use half-hour increments instead of, say, 10-minute increments, or 5-minute ones. Julian certainly believes that smaller increments would be more reasonable, and many other patients likely would agree. But Julian concedes that he is not challenging (and cannot challenge) the

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1. Although the O.R. Charge Rules were not attached to Julian's complaint, Julian concedes that this document is part of the contract that is the subject matter of the lawsuit and thus the trial court properly considered it when evaluating the hospital's Rule 12(b)(6) motion. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60–61, 554 S.E.2d 840, 847 (2001).

reasonableness of that decision because our precedent precludes that claim. *See Shelton v. Duke Univ. Health Sys.*, 179 N.C. App. 120, 123, 633 S.E.2d 113, 115 (2006).

Julian also argues that the hospital's billing practice permits it to "double bill" patients and inflate healthcare costs. In Julian's case, for example, he left the operating room and went to a recovery room, resulting in charges for "being in two places at the same time." But this is a policy argument, not a contract one. If the parties to a contract assent to a billing structure that permits "double billing" or billing for time "in two places at once," it is not a breach of contract when that type of billing occurs—that is the nature of freedom of contract. If Julian believes that hospitals ought to be prohibited from offering these contract terms to their patients, he must take that up with the other branches of government. The role of the courts is limited to interpreting contract law as it exists, not to rewriting it to rein in rising healthcare costs. *Fagundes v. Ammons Dev. Grp., Inc.*, __ N.C. App. __, __, 796 S.E.2d 529, 533 (2017).

In sum, because Julian's contract claims failed to state a claim on which relief could be granted as a matter of law, the trial court properly dismissed them under Rule 12(b)(6). And, because Julian's remaining claims all necessarily depend on the breach of contract claims (and Julian does not contend otherwise on appeal), the trial court properly dismissed the complaint in its entirety.[2] We therefore affirm the trial court's order.

Conclusion

For the reasons explained above, we affirm the trial court's order.

AFFIRMED.

Judges STROUD and MURPHY concur.

2. Julian's appellate brief only addresses the two contract arguments analyzed in this opinion. Thus, even if there were other arguments that could be made with respect to the remaining claims, Julian abandoned those arguments by failing to raise them in his brief. *See* N.C. R. App. P. 28(b)(6).

RAMSEY v. RAMSEY

[264 N.C. App. 431 (2019)]

GARY PHILIP RAMSEY, PLAINTIFF
v.
KALLEY ELIZABETH RAMSEY, DEFENDANT

No. COA18-600

Filed 19 March 2019

Appeal and Error—Appellate Rules violations—substantial—warranting dismissal

In an appeal from an order of civil contempt for failure to comply with a domestic consent judgment, the nature and quantity of appellant's violations of the Rules of Appellate Procedure constituted gross and substantial violations warranting dismissal of the appeal.

Judge DILLON dissenting.

Appeal by plaintiff from order entered 27 February 2018 by Judge Susan Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 13 November 2018.

Mary E. Arrowood for plaintiff-appellant.

No brief filed for defendant-appellee.

ZACHARY, Judge.

Plaintiff Gary P. Ramsey appeals from the trial court's order holding him in contempt. However, because our ability to conduct meaningful appellate review has been impaired due to Plaintiff's gross and substantial noncompliance with the North Carolina Rules of Appellate Procedure, we dismiss the appeal.

I. Nonjurisdictional Appellate Rules Violations

Included among the North Carolina Rules of Appellate Procedure is a litany of nonjurisdictional requirements that are "designed primarily to keep the appellate process flowing in an orderly manner." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Though not jurisdictional, compliance with these rules is mandatory. *Id.* at 194, 657 S.E.2d at 362.

One such directive is Rule 12, which requires the appellant to file the record on appeal within fifteen days after the record has been settled pursuant to Rule 11. N.C.R. App. P. 12(a). Another nonjurisdictional but mandatory requirement is Rule 28(b), which governs the content of an appellant's brief. N.C.R. App. P. 28(b). The function of Rule 28 is to ensure that the parties' briefs "define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C.R. App. P. 28(a). Rule 28(b) contains a list of ten rules designed to promote that function. For example, before setting forth his substantive argument, the appellant's brief must first contain a separate statement of the issues presented for review; a statement of the procedural history of the case; and a statement of the grounds for appellate review, including citation to the statute permitting appellate review. N.C.R. App. P. 28(b)(2)-(4). An appellant's brief must also include a section containing "[a] full and complete statement of the facts"—that is, a "summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review." N.C.R. App. P. 28(b)(5).

A "failure of the parties to comply with the[se] rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice." *Dogwood*, 362 N.C. at 193, 657 S.E.2d at 362. Rule 25 therefore allows this Court, on its own initiative, to sanction a party for noncompliance. N.C.R. App. P. 25(b). However, sanctions are only appropriate where the party's noncompliance "rise[s] to the level of a 'substantial failure' or 'gross violation.' " *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. Factors relevant to that determination will include, among others, "whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Id.* at 200, 657 S.E.2d at 366-67. "The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review." *Id.* at 200, 657 S.E.2d at 367.

If it is determined that a party's violation of nonjurisdictional rules does indeed rise to the level of gross or substantial, then Rule 34(b) provides a list of appropriate sanctions that this Court may impose. N.C.R. App. P. 34(b); *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. The list of appropriate sanctions includes dismissal of the appeal, monetary sanctions, and "any other sanction deemed just and proper." N.C.R. App. P. 34(b)(1)-(3).

In determining which of the Rule 34(b) sanctions to impose, it is well settled that this Court ordinarily "should impose a sanction other than dismissal . . . . This systemic preference not only accords fundamental fairness to litigants but also serves to promote public confidence in the administration of justice in our appellate courts." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366. Ultimately, "the sanction imposed should reflect the gravity of the violation," *id.*, and be well tailored to this Court's discretionary "authority to promote compliance with the appellate rules," *id.* at 199, 657 S.E.2d at 366, bearing in mind that dismissal is reserved only for the "most egregious instances of nonjurisdictional default." *Id.* at 200, 657 S.E.2d at 366.

If after consideration of other sanctions it is nonetheless determined that the party's noncompliance warrants dismissal, this Court "may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal." *Id.* at 201, 657 S.E.2d at 367. "In this situation, [we] may only review the merits on 'rare occasions' and under 'exceptional circumstances,' 'to prevent manifest injustice to a party, or to expedite decision in the public interest.' " *Id.* (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) and N.C.R. App. P. 2). The decision whether to invoke Rule 2 is within the discretion of this Court. *Selwyn Vill. Homeowners Ass'n. v. Cline & Co.*, 186 N.C. App. 645, 650, 651 S.E.2d 909, 912 (2007).

II. Nature of the Appellate Rules Violations in the Instant Case

Plaintiff's appeal in the instant case violates at least seven mandatory rules of the North Carolina Rules of Appellate Procedure: Rules 28(b)(2), 28(b)(3), 28(b)(4), 28(b)(5), 28(b)(6), 28(b)(9), and 28(j)(2). Particularly concerning is that Plaintiff's brief contains no Statement of the Facts, as required by Rule 28(b)(5). Plaintiff's brief instead begins immediately with his Argument, providing this Court with no context from which to understand his scattered references to the various errors alleged therein. *Cf. Pers. Earth Movers*, *Inc. v. Thomas*, 182 N.C. App. 329, 330, 641 S.E.2d 751, 752 (2007) ("[D]efendant's account of the facts is exactly one paragraph with eighteen lines. Additionally, the facts are at best vague[] [and] fail to set forth the material facts necessary to adequately understand the questions presented for appellate review . . . ."). Nor is there a Statement of the Case as required by Rule 28(b)(3). Even after having fully read Plaintiff's brief, this Court is left entirely unaware of the procedural posture from which the appeal resulted.

Furthermore, wholly absent from Plaintiff's brief is a Statement of the Grounds for Appellate Review, with accompanying citation of the

supporting statutory authority, as required by Rule 28(b)(4). Plaintiff's brief also violates Rule 28(b)(6), which requires that his "argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues." N.C.R. App. P. 28(b)(6). Here, Plaintiff only includes the standard of review at the beginning of the second of his three argument sections. Even then, Plaintiff merely provides that "The standard of review is whether or not there is competent evidence to support findings of fact and whether the findings are supported by conclusions of law."[1] The first and third argument sections do not reference a governing standard of review until the final sentences wherein, again, Plaintiff simply proclaims in conclusion that "The standard of review is whether or not there was an abuse of discretion by the trial court." Moreover, in blatant violation of Rule 28(b)(6), none of Plaintiff's three arguments contain any citation of authority verifying that his proffered standard of review is, in fact, correct.

We also briefly address other more minor errors contained in Plaintiff's brief, although they do not hinder our ultimate review of the merits as do those errors mentioned above.

First, Plaintiff's brief does not contain a statement of the issues presented for review, in violation of Rule 28(b)(2). Next, the Certificate of Service attached to Plaintiff's brief simply provides that it was served "upon all parties to this cause," rather than specifically identifying "the names of the persons served," as required by Rules 26(d) and 28(b)(9).[2] N.C.R. App. P. 26(d); N.C.R. App. P. 28(b)(9). Though seemingly negligible, this violation is concerning in that no appellee brief was filed in the instant case. *See Dogwood*, 362 N.C. at 199-200, 657 S.E.2d at 366 (explaining that the Court's "exercise of remedial discretion under Rules 25 and 34 entails a fact-specific inquiry into the particular circumstances of each case"). Also minor, yet indicative of his overall noncompliance with the Appellate Rules, is Plaintiff's Certificate of Compliance, which declares the precise number of words contained in his brief, instead of

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1. We further note that this is not the correct standard of review. *See Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) ("The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether *the findings support the conclusions of law*." (emphasis added)), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

2. Plaintiff's Certificate of Service does include a "CC" at the bottom that identifies the attorney for Defendant.

the statement required by Rule 28(j)(2) that it "contains no more than [8,750] words." N.C.R. App. P. 28(j), (j)(2).

Finally, we note that the record leaves some doubt as to whether Plaintiff timely filed the Record on Appeal. The deadline for filing the record with this Court is triggered by the settlement of the record, which may occur in several ways. Where, as here, there is no transcript of the trial court's proceedings[3] and the parties do not settle the record by agreement, the appellant must, within thirty-five days after filing notice of appeal, "serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9." N.C.R. App. P. 11(b). An appellee who is served by mail shall then have thirty-three days to "serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c)." N.C.R. App. P. 11(b); N.C.R. App. P. 27(b). If the appellee fails to do so, the appellant's proposed record "thereupon constitutes the record on appeal." N.C.R. App. P. 11(b). The appellant must file the record on appeal with this Court within fifteen days after settlement. N.C.R. App. P. 12(a).

In the instant case, there is no signed certificate of service attesting to the date of service of the proposed record upon Defendant. The record does contain a statement of the "Settlement of Record on Appeal," which provides:

> The proposed Record on Appeal was served upon attorney for Defendant . . . by depositing a copy of the proposed Record on Appeal in a postpaid wrapper in a post office depository under the exclusive care and custody of the United States Postal Service on the 23rd day of April, 2018.
>
> Counsel for Defendant has not made objection to the proposed Record on Appeal and the proposed Record on Appeal is now deemed the Record on Appeal.

Accepting this statement as true, Defendant generally would have had until 26 May 2018 to serve objections or amendments to Plaintiff's proposed record. N.C.R. App. P. 11(b); N.C.R. App. P. 27(b). However, because 26 May 2018 fell on a Saturday, and the following Monday,

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3. Here, there is no transcript because the parties agreed that the matter be decided on affidavits. Although we do not hold this against Plaintiff, we nevertheless note that the lack of transcript made our review of this case all the more difficult, in light of Plaintiff's failure to include a factual and procedural background in his brief.

28 May 2018, was Memorial Day, Defendant's deadline was instead Tuesday, 29 May 2018. *See* N.C.R. App. P. 27(a) (providing that, in computing time periods prescribed by the Rules, the last day "is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day" that is neither a weekend nor a holiday). According to Plaintiff, Defendant failed to timely respond; therefore, on 29 May 2018, Plaintiff's proposed record became the final, settled record by operation of Rule 11(b). Plaintiff filed the Record on Appeal with our Court on 13 June 2018, the fifteenth and final day to do so pursuant to Rule 12(a).

However, Plaintiff's Record on Appeal was timely filed *only if* he is entitled to the three additional days generally accorded for service by mail. In accepting the truth of Plaintiff's unverified Settlement of Record on Appeal, we must overlook his failure to certify service of the proposed record upon Defendant, itself a violation of Rule 26. *See* N.C.R. App. P. 26(d) ("Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed."). Unlike the final, settled record—which was also served by mail, evidenced by a signed certificate of service—there is no signature attesting that the proposed record was, in fact, served upon Defendant on 23 April 2018. While the absence of a certificate of service may seem minor as a general matter, here, this omission is germane to the timeliness of Plaintiff's filing of the Record on Appeal. *See* N.C.R. App. P. 9(a)(1)(i) (providing that the appellate record in a civil action shall contain "a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, . . . and of any agreement, notice of approval, or order settling the record on appeal").

Given their nature and striking quantity, we conclude that these appellate rules violations are so "gross" and "substantial" as to warrant sanctions under Rules 25 and 34 of the North Carolina Rules of Appellate Procedure. *See, e.g.*, *Tabor v. Kaufman*, 196 N.C. App. 745, 746-47, 675 S.E.2d 701, 702-03, *disc. review denied*, 363 N.C. 381, 679 S.E.2d 836 (2009). We must therefore "determine which, if any, sanction under Rule 34(b) should be imposed." *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. We conclude that Plaintiff's violations are so egregious as to warrant dismissal of his appeal.

Quite frankly, this Court was left dumbfounded as to the pertinent facts and issues of the instant case even after a complete and thorough

reading of Plaintiff's brief. Plaintiff has completely failed to provide meaningful procedural and factual background information, leaving this Court to make its own "voyage of discovery through the record" in order to glean for ourselves the relevant circumstances underlying his appeal. *Pers. Earth Movers, Inc.*, 182 N.C. App. at 331, 641 S.E.2d at 752. This we will not do. Nor will we accept the additional delegation of Plaintiff's responsibility to research his grounds for appellate review and, assuming that such grounds exist, the standards of review that apply. Of particular implicit concern in the appellate rules is a regard for the already exhaustive catalog of responsibilities that this Court must necessarily undertake. And where not flagrant by virtue of their substance, Plaintiff's remaining violations of the appellate rules supplant the overall egregiousness by virtue of their quantity. We have considered sanctions permitted under Rule 34(b) other than dismissal. However, in a case such as this, and in order to ensure better compliance with the appellate rules, we conclude that dismissal is appropriate and justified.

Finally, we must determine whether to invoke Rule 2 and review the merits of the instant appeal despite Plaintiff's gross violations of the appellate rules. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367.

"Appellate Rule 2 has most consistently been invoked to prevent manifest injustice in criminal cases in which substantial rights of a defendant are affected." *Selwyn Vill. Homeowners Ass'n.*, 186 N.C. App. at 650, 651 S.E.2d at 912. This is not such a case. *Cf.*, *e.g.*, *State v. Castaneda*, 196 N.C. App. 109, 115, 674 S.E.2d 707, 711 (2009) (invoking Rule 2 and reviewing the merits of the defendant's appeal despite substantial appellate rules violations because it would have been "manifestly unjust" to ignore the defendant's argument as he "face[d] life imprisonment and [made] a compelling argument that the trial court's error prejudiced him"). As best we can tell from parsing the record on appeal, the order from which Plaintiff appeals appears to have required Plaintiff to pay to his ex-wife the alleged damages and attorney's fees that resulted from his year-long refusal to abide by the terms of the parties' Consent Judgment. We conclude that nothing inherent in these circumstances indicates the exceptionality or manifest injustice necessary to justify suspending the appellate rules in order to reach the merits of Plaintiff's appeal. Therefore, in the exercise of our discretion, we decline to invoke Rule 2.

Accordingly, the instant appeal is dismissed.

APPEAL DISMISSED.

Judge BRYANT concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

In this appeal, Appellant Gary P. Ramsey ("Husband") appeals from an order finding him in civil contempt for failing to immediately file a Qualified Domestic Relations Order ("QDRO") as required by a consent judgment ("Consent Judgment") entered between him and his ex-wife Kalley Elizabeth Ramsey ("Wife"). I agree with the majority that Husband has committed a number of non-jurisdictional errors in his brief on appeal that *may* warrant sanctions. However, for the reasons stated below, I disagree with the majority that these errors rise to the level of warranting dismissal of the appeal and, therefore, would reach the merits of Husband's arguments. Based on my review of Husband's arguments, I would affirm in part and reverse in part the order of civil contempt.

I. Background

In May 2015, Husband filed this action seeking divorce from Wife and equitable distribution of their marital assets. In August 2016, the trial court entered a Consent Judgment, which required Husband to file a QDRO to cause the rollover of $14,500 from Husband's 401(k) to Wife:

> [Husband] shall pay $29,000.00 distributive award to [Wife]; [Half] to be paid at time of refinance of Narrows Court mortgage **and [half] to be rolled over from [Husband's] NC 401(k) account. Counsel for [Husband] shall immediately draft ["QDRO"] to effectuate said rollover to [Wife] as soon as possible**.

(Emphasis added).

Five months later, in December 2016, Wife filed a Motion for Contempt as Husband had failed to timely comply with this provision.

Ten months later, in October 2017, Husband finally filed the QDRO, as required by the Consent Judgment. And in December 2017, the QDRO was approved by Husband's plan administrator, and $14,500 was transferred from Husband's 401(k) to Wife.

Notwithstanding Husband's eventual compliance with the Consent Judgment, in February 2018, after conducting a hearing on Wife's

contempt motion, the trial court entered a Contempt Order which essentially did three things: (1) it held Husband in *civil* contempt; (2) it awarded Wife damages in the amount of $1,268.68, representing the interest Wife lost for the 14-month delay by Husband in transferring to her the $14,500 from his 401(k); and (3) it ordered Husband to pay Wife's attorney's fees in the amount of $2,000. Husband timely appealed to our Court.

II. Non-Compliance with the Rules of Appellate Procedure

As noted by the majority, compliance with the North Carolina Rules of Appellate Procedure is mandatory. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008). Thus, our Court may sanction a party if he fails to comply with these Rules. *Id.* at 199, 657 S.E.2d at 366; N.C. R. App. P. 25(b). However, our Supreme Court has advised that our Court, in cases of noncompliance with non-jurisdictional requirements, "should simply perform its core function of reviewing the merits of the appeal to the extent possible." *Id.* Indeed, Rule 34(b) provides a list of sanctions a court may impose and, in most situations, "[our Court] should impose a sanction other than dismissal and review the merits of the appeal." *Dogwood* at 200, 657 S.E.2d at 366; N.C. R. App. P. 34(b).

Here, I do not believe that Husband's non-jurisdictional errors prevent us from our ability to understand Husband's appeal. For instance, even though Husband's brief only contains "Argument" sections (omitting factual and procedural background sections, etc.), his first argument does commence by describing exactly what he is appealing: "The trial court found Plaintiff in civil contempt for failure to immediately file a [QDRO]." And the arguments in the brief clearly describe why Husband believes the trial court erred in entering its Contempt Order. As there are several other sanctions available, I believe that, based on *Dogwood*, dismissing Husband's appeal is not warranted. Accordingly, I believe it is appropriate to address the merits of Husband's appeal, which I do, below.

III. Civil Contempt Order

A. Civil Contempt

Husband argues that the trial court erred in holding him in civil contempt, as he had already complied with the Consent Judgment before the Contempt Order was entered. I agree.

The trial court held Husband in civil contempt for "failure to abide by the Judgment provision that he immediately file a Qualified Domestic

Relations Order[.]" The purge condition, though, did not require Husband to file a QDRO, as he had already done so. Rather, the trial court erroneously required Husband to pay Wife damages for lost interest as a purge condition.

Civil contempt is proper where a party fails to comply with an order of the court and "(1) [t]he order remains in force; (2) [t]he purpose of the order may still be served by compliance with the order; (2a) [t]he noncompliance by the person to whom the order is directed is willful; and (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." N.C. Gen. Stat. § 5A-21(a) (2016); *see O'Briant v. O'Briant*, 313 N.C. 432, 434-35, 329 S.E.2d 370, 372-73 (1985). Our Supreme Court has held that civil contempt "is not a form of punishment; rather, it is a civil remedy to be utilized exclusively to enforce compliance with court orders." *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980). It follows that civil contempt is only proper where one is *currently* not in compliance with a court order. *See id.*; *see also Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003) (holding that a court "does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in [civil] contempt of court.").

In the present case, Husband, while late, *did comply* with the Consent Judgment. And there was nothing in the Consent Judgment which required him to pay lost interest. Therefore, there was no ground for the trial court to hold Husband in civil contempt at the time the Contempt Order was entered. *See id.* I would vacate that portion of the trial court's Contempt Order holding Husband in civil contempt.

B. Damages

Husband argues that the trial court exceeded its authority by ordering him to pay Wife damages in the context of a contempt proceeding. Again, I agree.

North Carolina takes the minority position that damages are not appropriate in a contempt proceeding. *See Hartsell v. Hartsell*, 99 N.C. App 380, 391, 393 S.E.2d 570, 577 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991); *accord Elliott v. Burton*, 19 N.C. App 291, 295, 198 S.E.2d 489, 491 (1973) (stating that "even then the trial judge in this State has no authority to award indemnifying fines or other compensation to a private party in a contempt proceeding"). Thus, I would vacate that portion of the trial court's Contempt Order awarding Wife $1,268.68 in

lost interest. Wife may have a remedy, perhaps through a motion in the equitable distribution proceeding, to seek relief for Husband's behavior; however she may not do so through a contempt motion.

C. Attorney's Fees

Husband argues that the trial court exceeded its authority by awarding Wife attorney's fees. I disagree.

Attorney's fees are generally not available in a civil contempt proceeding unless the moving party prevails. *Ruth v. Ruth*, 158 N.C. App. 123, 127, 579 S.E.2d 909, 912 (2003). However, our Court has held that, "in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney's fees is proper." *Id*. Thus, in this case, even though Husband complied with the Consent Judgment prior to the entry of the Contempt Order, thereby eliminating the court's ability to hold him in contempt and award Wife damages, the trial court could and did award Wife attorney's fees. *Id*. Therefore, my vote is to affirm that portion of the Contempt Order.[1]

IV. Conclusion

My vote is to affirm the portion of the Contempt Order awarding wife attorney's fees but to reverse the remainder of that Order.

1. I note Husband's argument that the trial court's findings are not supported by competent evidence. However, Wife's contempt motion was verified by Wife, and Wife's attorney filed an affidavit regarding attorney's fees. I conclude that the trial court's award of attorney's fees is supported by the evidence that was before the trial court.

SIMMS v. BOLGER

[264 N.C. App. 442 (2019)]

SHANEEKQUA SIMMS, PLAINTIFF/MOTHER
v.
LEROY BOLGER, DEFENDANT/FATHER

No. COA18-551

Filed 19 March 2019

1. Child Custody and Support—substantial change of circumstances—settlement of Workers' Compensation claim—increase in child's expenses

The trial court did not err by concluding that a substantial change of circumstances warranted modification of defendant-father's ongoing child support obligation where defendant himself alleged a substantial change of circumstances resulting from the settlement of his workers' compensation claim and the termination of monthly temporary disability payments, and where the trial court's findings focused on defendant's allegations and the increase in the child's expenses for day care and health insurance.

2. Child Custody and Support—lump sum payment—from settlement funds—non-recurring income

The trial court did not abuse its discretion by ordering defendant-father to make a lump sum child support payment from the settlement funds he received from a work-related accident, which constituted non-recurring income subject to the N.C. Child Support Guidelines.

3. Child Custody and Support—request for deviation from Child Support Guidelines—deviation not required

The trial court did not abuse its discretion by denying defendant-father's motion requesting a deviation from the N.C. Child Support Guidelines where defendant argued the Guidelines approach would exceed the reasonable needs of the child. Trial courts are not required to deviate from the Guidelines even when presented with compelling reasons to do so; further, the trial court made appropriate findings and concluded that application of the Guidelines would not be unjust or inappropriate.

4. Child Custody and Support—lump sum and monthly obligation—based on current income—impact on future income

The trial court did not abuse its discretion by ordering defendant-father to pay child support that included both monthly payments and a lump sum payment where the trial court based its

award on defendant's current income at the time of the hearing and there was no evidence on the impact the lump sum payment would have on defendant's future income.

5. Child Custody and Support—custodial savings account—surplus funds to child upon emancipation

The trial court erred by ordering defendant-father to pay a lump sum child support payment to establish a custodial savings account for the benefit of his child, which would result in surplus funds being directed to the child upon emancipation. The purpose of the state's child support statute is to provide support prior to the child's emancipation, not after.

6. Child Custody and Support—arrearages—use of past income

The trial court erred in calculating defendant-father's arrearage owed in child support by using defendant's income for each past year rather than by using defendant's current income at the time of the hearing, without making any finding to support the use of such a method.

7. Child Custody and Support—attorney fees—reasonableness and amount

The trial court did not abuse its discretion in a child support action by ordering defendant-father to pay plaintiff-mother attorney fees awards of $16,240 and $25,000 where the evidence supported the trial court's determinations as to the reasonableness and amount of the awards.

Appeal by Defendant from Orders entered 2 June 2017, 27 July 2017, and 20 November 2017 by Judge Kimberly Best in Mecklenburg County District Court. Heard in the Court of Appeals 14 January 2019.

Arnold & Smith, PLLC, by Matthew R. Arnold, for plaintiff-appellee.

Plumides, Romano, Johnson & Cacheris, P.C., by Richard B. Johnson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Leroy Bolger (Defendant) appeals from three separate Orders: (A) Modifying Permanent Child Support; (B) Denying in part his Motion to Reconsider and Revise the Order Modifying Permanent Child Support

filed under N.C.R. Civ. P. 52, 59 and 60; and (C) Reconsidering and revising the Order Modifying Permanent Child Support. The Record before us demonstrates the following relevant facts:

Defendant and Shaneekqua Simms (Plaintiff) are the parents of a minor child born in 2009. In July 2006[1], prior to his relationship with Plaintiff, Defendant was injured in a work-related car accident when the vehicle in which he was a passenger was struck head on by a stolen car. Defendant has been disabled and unable to work ever since. Defendant received weekly temporary total workers' compensation benefits following his accident.

At some point in 2009, the State of North Carolina, on Plaintiff's behalf, initiated this action against Defendant seeking to establish paternity of the minor child, establishing Defendant's child support obligation and seeking medical insurance.[2] On 26 May 2010, the Mecklenburg County District Court entered an Order establishing Defendant's paternity of the minor child, setting his child support obligation at $349 per month, with arrearages and fees for the DNA test, and requiring him to pay 24% of uninsured medical expenses for the child.

On 13 July 2011, Defendant, *pro se*, filed a Motion for Modification of Child Support alleging he was no longer receiving weekly Workers' Compensation benefits. He attached a copy of a North Carolina Industrial Commission Order Approving and Agreement for Partial Compromise Settlement and Release (Workers' Comp settlement). The Workers' Comp settlement disclosed Defendant had received third-party settlement funds of $606,666.67. Defendant settled the disability portion of

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1. The trial court found Defendant's accident was in 2005. This appears to be a clerical error as the Record demonstrates the accident was in 2006. The actual date is immaterial to the analysis of this case.

2. It appears this matter began as a "IV-D" case in which child support obligations are enforced by a local Child Support Enforcement agency on behalf of a parent. The Record in this case does not include any initiating pleadings in this action in violation of N.C.R. App. P. 9(a)(1)(d). As a practical matter, it is helpful—if not an absolute necessity—for this Court to be able to review the initiating pleadings in any action to ascertain whether a matter is properly before our courts. However, in light of the fact the parties do not dispute the existence of a valid child support proceeding giving rise to the child support modification before us, and the fact Plaintiff has stipulated to this limited record, this omission does not significantly impede our review, and we endeavor to address the merits. We recognize there are instances where omissions from the record may be fatal to an appeal and, indeed, caution the present case may well be an exception and not the rule. We also encourage counsel for both parties to review the most current version of N.C.R. App. P. 26(g)(1) when making their choices of font in documents filed in our appellate courts as Courier-style fonts are no longer approved.

his workers' compensation case for a $292,500 lump sum award which included an attorneys' fee. Future medical expenses were left open. Defendant received a net amount of $826,041.67 from these settlements and deposited the amount of $793,976.42 into an investment account (Baird Account) which he uses to generate interest and dividend income as his primary source of income.

On 19 September 2011, Plaintiff filed a verified Motion seeking, *inter alia*, modification of child support and attorneys' fees. The parties' respective motions for modification of child support both filed in 2011 were not heard until 25 October 2016. The trial court entered its Order Modifying Permanent Child Support and Awarding Attorneys' Fees on 2 June 2017 (June Order).

In the June Order, the trial court found Defendant had received non-recurring income in the amount of $826,041.67. The trial court further found Defendant's current monthly income, comprised of interest and dividend income, Social Security income, and Social Security child benefit, was $5,485. Based on this, the trial court calculated Defendant's child support obligation under the North Carolina Child Support Guidelines (the Guidelines) to be $1,004.78 per month. Factoring in Social Security benefits paid directly to Plaintiff for the child as a result of Defendant's disability, this resulted in the trial court ordering Defendant to pay $702.78 per month in prospective child support. The trial court further determined, based on the modified child support award and giving Defendant credits for payments made and Social Security Benefits paid for the child, Defendant owed an arrearage of $36,443.04 for the time period between the time Plaintiff filed her motion and entry of the June Order. The trial court also ordered Defendant to make a lump sum payment from his non-recurring income in the Baird Account of $156,947.91 to be placed in trust for the child. Additionally, the trial court awarded Plaintiff $25,000 in attorneys' fees.

On 12 June 2017, Defendant filed a Motion to "Reconsider and Revise" the June Order, seeking relief under Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure. Defendant's Motion requested: (1) the trial court correct an error stemming from Defendant's financial affidavit resulting in his Social Security income being counted twice in his current monthly income; (2) the trial court reconsider his ongoing child support obligation in light of the fact the lump sum payment of support and attorneys' fees from the Baird Account would have a corresponding impact on his monthly income; and (3) modification of the requirement the funds be placed in a trust account.

Defendant's Motion was heard on 17 July 2017 and the trial court rendered its ruling allowing Defendant's Motion in part and setting the case for rehearing on 27 July 2017. On 27 July 2017, the trial court entered its Order on Defendant's Motion to Reconsider and Revise the June Order (July Order). In the July Order, the trial court granted Defendant's Motion in part: granting a new trial on the "double counting" of Defendant's Social Security benefits; re-addressing the lump sum distribution to a trust account; and consideration of an additional award of attorneys' fees. The trial court denied Defendant's request to reconsider his child support obligation in light of the reduction in principal in the Baird Account. The same day, Defendant filed a motion requesting the trial court deviate from the Guidelines. The trial court denied this motion. The trial court held its new hearing, and on 20 November 2017 entered a written Order (November Order).

In the November Order, the trial court revised its finding of Defendant's monthly income to $4,455. Under the Guidelines and applying a credit for Social Security payments, the trial court ordered Defendant to pay prospective child support in the amount of $553.35 per month. The trial court also recalculated Defendant's arrearages from September 2011 through entry of its Order. Rather than calculate Defendant's arrearages based on his current income, the trial court used Defendant's income for each individual year from 2011 through November 2017.

The trial court's November Order modified the lump sum award of support from the Baird Account, requiring it be placed in an account bearing both the names of Plaintiff and the child, with Plaintiff being named custodian of the account. Further, the trial court awarded Plaintiff additional attorneys' fees of $16,240.

Appellate Jurisdiction

The November Order serves as a final judgment in this case resolving all pending issues. In his timely Notice of Appeal, Defendant expressly preserves his appeal from the June, July, and November Orders. Consequently, Defendant's appeal is properly before this Court. N.C. Gen. Stat. § 7A-27(b)(2) (2017).

Issues

Defendant presents the following issues for review: (I) Whether the trial court erred in concluding there was a substantial change in circumstances justifying a modification of child support; (II) Whether the trial court erred in making its lump sum award of child support without

deviating from the Guidelines; (III) Whether the trial court erred in ordering the lump sum amount to be held in a custodial account for the child; (IV) Whether the trial court erred in calculating Defendant's arrearages based on his historical income in each individual year; and (V) Whether the trial court abused its discretion in awarding Plaintiff attorneys' fees.

Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). "In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law." *Id.* at 441-42, 567 S.E.2d at 837 (citations omitted).

Analysis

I. Substantial Change of Circumstances

[1] Defendant contends the trial court erred in concluding a substantial change of circumstances existed warranting modification of Defendant's ongoing child support obligation. Defendant argues Plaintiff's allegations of increased daycare expenses for the child and Defendant's increased income cannot constitute a substantial change in circumstances. Defendant, however, had himself alleged a substantial change of circumstances resulting from the settlement of his Workers' Compensation claim and resulting termination of monthly temporary disability payments.

N.C. Gen. Stat. § 50-13.7, governing modification of child support orders, provides in relevant part: "an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a) (2017). It is true our Courts have held an increase in the payor's income alone is not enough to prove a change of circumstances to support modification of child support. *Thomas v. Thomas*, 134 N.C. App. 591, 595-96, 518 S.E.2d 513, 516 (1999). However, our Courts have also recognized an increase in the payor's income may be a factor in determining changed circumstances when taken in context of changes in the child's needs. *See, e.g.*, *Gibson v. Gibson*, 24 N.C. App. 520, 523, 211 S.E.2d 522, 524 (1975) (an increase in support was properly justified by a showing of increased support costs and substantially increased spendable income of the payor).

Here, the trial court's findings were not focused on Defendant's increased income, but instead related to the fact Defendant had settled his Workers' Compensation and third-party claim resulting in two large distributions and cessation of his monthly Workers' Compensation benefits, the child's expenses for day care and health insurance, which had both increased since the prior Order, along with the total reasonable needs of the child, and the disability benefit Plaintiff receives on behalf of the child, which had increased to $302 from $10 at the time of the initial Order. We conclude the totality of the trial court's findings in this case support the conclusion there had been a substantial change in circumstances since the initial child support Order entered in May 2010. Consequently, the trial court did not abuse its discretion in modifying Defendant's monthly child support obligation.

II. Lump Sum Child Support Payment

A. Non-Recurring Income

[2] Defendant also contends the trial court abused its discretion in ordering him to make a lump sum child support payment under the Guidelines from the settlement funds he received arising from his 2005 work-related accident.

Under N.C. Gen. Stat. § 50-13.4, a trial court is generally required to "determine the amount of child support payments by applying the presumptive guidelines . . . ." N.C. Gen. Stat. § 50-13.4(c) (2017). Income is broadly defined under the Guidelines as:

> "Income" means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), . . . retirement or pensions, interests, trusts, annuities, capital gains, Social Security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action.

2019 Ann. R. 53. The Guidelines further provide, "[w]hen income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time *or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support*." *Id.* (emphasis added). "Child support set in accordance with the Guidelines 'is conclusively

presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support.' " *Spicer v. Spicer*, 168 N.C. App. 283, 286, 607 S.E.2d 678, 681 (2005) (quoting *Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000)).

As a result of his Worker's Compensation and third-party settlements, Defendant received the net amount of $826,041.67. The trial court classified this as "non-recurring income[.]" The trial court, applying the Guidelines, found Defendant had the "ability to transfer a lump sum of 19%, or $156,947.91," of that income for the benefit the child.

Defendant first questions whether the settlement payments should constitute "current income" for purposes of calculating child support, as the payouts occurred in 2011 and the initial hearing on child support modification did not occur until 2016. Defendant's contention only underscores the correctness of the trial court's finding these disbursements to Defendant constituted *non-recurring* income to him. *See Spicer*, 168 N.C. App. at 290, 607 S.E.2d at 684. Defendant makes no argument that the settlement payouts did not constitute income to him or that the lump sum amount was calculated incorrectly. Thus, we conclude the trial court acted within its discretion to find the settlement payouts to Defendant, in this case, constituted non-recurring income to him subject to application of the Guidelines.

B. Denial of Motion to Deviate from the Guidelines

[3] On 27 July 2017, the day of the rehearing, Defendant filed a Motion requesting a deviation from the Guidelines as it related to the non-recurring income contending the Guidelines approach would exceed the reasonable needs of the child.[3]

N.C. Gen. Stat. § 50-13.4(c) provides:

> upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not

3. Plaintiff objected to the filing of this Motion as untimely. The trial court elected to deny the Motion in its discretion rather than dismiss it as untimely. Thus, we need not address the timeliness of the Motion under *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991) and N.C. Gen. Stat. § 50-13.5(d)(1) (2017).

> meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines.

N.C. Gen. Stat. § 50-13.4(c). Here, between the June and November Orders, the trial court made findings regarding both the needs of the child and each parent's relative ability to provide support. The trial court did not find application of the Guidelines would be unjust or inappropriate. Moreover, the trial court is "not *required* to deviate from the guidelines no matter how compelling the reasons to do so[.]" *Pataky v. Pataky*, 160 N.C. App. 289, 303, 585 S.E.2d 404, 413 (2003). Therefore, the trial court did not abuse its discretion in declining to deviate from the Guidelines.

C. Consideration of the Lump Sum Award on Defendant's Future Income

[4] Defendant next contends the trial court abused its discretion in both awarding the lump sum child support payment from the Baird Account and requiring Defendant to pay ongoing monthly child support without considering the impact of the lump sum award on Defendant's future income and impact on Defendant's disability and health.

In *Spicer*, this Court addressed similar arguments. In *Spicer*, the father-payor was also seriously injured in a motor vehicle accident and received a lump sum settlement that was held in a trust to provide income to him. Mr. Spicer, like Defendant, contended the trial court should not have invaded the trust principal and also awarded monthly child support payments from his recurring income. This Court recognized the broad discretion granted to trial courts to devise a child support award in light of the circumstances of all the parties, including Mr. Spicer's disability and potential future medical care. *Spicer*, 168 N.C. App. at 290, 607 S.E.2d at 684. This Court held the trial court did not err "when it sought to supplement the funds available for the child's support by invading the trust principal." *Id.* at 291, 607 S.E.2d at 684.

Our Court further noted:

> This Court has previously held that a trial court "is not limited to ordering one method of payment to the exclusion of the others provided in the statute. The Legislature's use of the disjunctive and the phrase 'as the court may order' clearly shows that the court is to have broad discretion in providing for payment of child support orders."

Id. at 291, 607 S.E.2d at 684 (quoting *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978)). Thus, we held the trial court did not err by determining the "child support obligation could be fulfilled by requiring income from both monthly payments and a lump sum award." *Id.* at 292, 607 S.E.2d at 684. Likewise, we conclude in this case, the trial court did not abuse its discretion in awarding child support that included both monthly payments and a lump sum award.

Defendant argues the trial court erred by denying his Motion to Reconsider and Revise as to the calculation of his income. He contends his future interest and dividend income will be proportionately impacted by the reduction in the Baird Account principal from the lump sum, arrearage, and attorneys' fees payments. However, "[i]t is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997).

Here, the trial court applied Defendant's current income at the time of the hearing to calculate his future ongoing monthly child support payments. We conclude the trial court did not abuse its discretion in so doing where there was no evidence as to the actual impact on Defendant's future income from the lump sum payments. Moreover, the trial court pointed out, and we agree, once the actual impact on Defendant's income is realized, it may well support a new motion to modify Defendant's child support obligation. Consequently, the trial court did not abuse its discretion in making its award of lump sum and ongoing monthly child support payments.

III. Direction of Payment to a Custodial Account

[5] In the November Order, the trial court modified the June Order which required Defendant to use the lump sum award to establish a trust account for the minor child, with Plaintiff as trustee. In the November Order, the trial court instead directed Defendant to transfer the lump sum to an account in the names of both Plaintiff and the child, with Plaintiff named custodian of the account.

The trial court modified its June Order based on this Court's holding in *Parrish v. Cole*. In *Parrish*, this Court struck a provision of a child support order that required payment of a portion of the payor's annual bonus into an interest bearing savings account with any surplus accruing directly to the child once they turned 18 years old. This Court held "The [trial] court, however, was without the power to, in effect, attempt to create a savings account for the use of the children after they reach

legal maturity at the age of 18." *Parrish v. Cole*, 38 N.C. App. 691, 695, 248 S.E.2d 878, 880 (1978).

We are sensitive to the trial court's efforts to balance the two competing interests of (1) ensuring a portion of the benefits received by Defendant are used for the benefit of the child; while (2) ensuring Plaintiff, herself, does not receive unfettered benefit of any surplus funds intended for the child. However, in the context of *Parrish*, we are unable to discern any difference between the trust account utilized in the June Order and the custodial account required by the November Order. *See Belk ex rel. Belk v. Belk*, 221 N.C. App. 1, 14, 728 S.E.2d 356, 364 (2012) (citing numerous authorities "recognizing the parallels between a custodial account established under UTMA and a formal trust, especially noting the similarity between the rights and duties of an UTMA custodian and a trustee"). Thus, as the custodial account contemplated by the November Order is an attempt to create a savings account for the use of the child after the child reaches legal maturity at the age of 18 or is otherwise emancipated, we conclude the trial court erred in directing payment of child support to a custodial account for the benefit of the child, and reverse and remand.

The parties frame this argument around the question of who should be properly designated as a recipient of child support under N.C. Gen. Stat. § 50-13.4(d). However, *Parrish* focuses more on the purpose of our child support statute: to provide support for the child *prior* to the child's emancipation, not after. *See* N.C. Gen. Stat. § 50-13.4(b) (primary liability for support of a minor child); N.C. Gen. Stat. § 50-13.4(c) (defining when child support terminates).

This is why the error in creating a custodial account is not harmless. Here, the trial court's Order establishes a custodial account that would result in surplus funds being directed to the child upon emancipation under the terms of the custodial account. Instead, the funds should be ordered directed to the benefit of the minor child no differently than in any other child support award. Like in *Parrish*, "[i]f it should subsequently appear that all of that amount is not needed for the support of his child[], [D]efendant will be at liberty to make an appropriate motion in the cause to reduce his obligation." *Parrish*, 38 N.C. App. at 695, 248 S.E.2d at 880.

IV. Calculation of Defendant's Child Support Arrearage

[6] Defendant next challenges the trial court's calculation of his child support arrearage owed from the date of Plaintiff's Motion to Modify

Child Support until the November Order. In the November Order, the trial court calculated Defendant's child support obligation for each individual year from the 2011 filing to the 2017 decision, rather than apply Defendant's current income and child support obligation at the time of the hearing.

The arrearages owed by Defendant from the filing of Plaintiff's Motion are a form of prospective child support. *See Respess v. Respess*, 232 N.C. App. 611, 628, 754 S.E.2d 691, 702-03 (2014) (child support awarded from the time a party files a complaint for child support to the date of trial is prospective child support).

Again, " '[i]t is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified.' " *Kaiser v. Kaiser*, ___ N.C. App. ___, ___, 816 S.E.2d 223, 228 (2018) (quoting *Ellis*, 126 N.C. App. at 364, 485 S.E.2d at 83). "Although this means the trial court must focus on the parties' current income, past income often is relevant in determining current income." *Id.* Under certain circumstances, " 'a trial court may permissibly utilize a parent's income from prior years to calculate the parent's gross monthly income for child support purposes.' " *Id.* (quoting *Midgett v. Midgett*, 199 N.C. App. 202, 208, 680 S.E.2d 876, 880 (2009)). For example, this Court has recognized such an approach is permissible where the income is highly variable or seasonal, or where the evidence of income is unreliable. *Id.* "What matters in these circumstances is the reason *why* the trial court examines past income; the court's findings must show that the court used this evidence to accurately assess current monthly gross income." *Id.*

In this case, the trial court made no findings providing a rationale for using Defendant's income for each individual year rather than using his current income to calculate child support owed back to the filing of Plaintiff's motion. Notably, in the June Order, the trial court did use Defendant's current income and support obligation in its calculation of Defendant's arrearage. The use of Defendant's historical income to calculate prospective child support in the form of arrears dating back to the filing of Plaintiff's Motion without any finding to support the use of this method was error. We reverse and remand this matter to the trial court. On remand, the trial court should calculate Defendant's arrearage owed using his gross income as of the time its modification order was originally entered, *Lawrence v. Tise*, 107 N.C. App. 140, 149, 419 S.E.2d 176, 182 (1992), or, alternatively, make findings to support its use of Defendant's historical income to calculate arrearages.

V. Awards of Attorneys' Fees

[7] In his fifth argument, Defendant contends the trial court erred in ordering him to pay Plaintiff's attorneys' fees in the amounts of $16,240 and $25,000.

Our General Statutes permit an award of attorneys' fees in child support and custody cases under appropriate circumstances. N.C. Gen. Stat. § 50-13.6 (2017). We typically review the amount of an award of attorneys' fees for abuse of discretion. *Sarno v. Sarno*, ___ N.C. App. ___, ___, 804 S.E.2d 819, 824 (2017).

Defendant contends the trial court abused its discretion in awarding attorneys' fees. First, Defendant contends the trial court abused its discretion in awarding $16,240 in attorneys' fees in the November Order. Defendant argues "the majority of these fees were incurred prior to Defendant-Appellant filing his Motion to Reconsider on 12 June 2017[,]" "[t]he Court had already ordered $25,000.00 in attorney's fees to Plaintiff-appellee[,]" and this award was not supported by the evidence. We disagree.

During the 27 July 2017 hearing on Defendant's Motion to Reconsider, Plaintiff's counsel presented evidence of "supplemental attorney's fees and expenses in connection with this matter in the amount of $17,440." Counsel explained these fees included expenses incurred as of that date. The trial court, accordingly, found Plaintiff "has incurred total attorney fees of $17,440.00 since October 25, 2016, not encompassing work done on the date of the July 27, 2017 hearing in this matter or prospective fees." The trial court further found this amount to be reasonable, and determined Defendant had the ability to pay Plaintiff's attorneys' fees in the amount of $16,240.

There is evidence to support the trial court's determination as to the reasonableness and amount of attorneys' fees. Defendant has not shown the trial court abused its discretion in ordering the payment of $16,240 in attorneys' fees.

Next, Defendant contends the trial court abused its discretion in awarding $25,000 in attorneys' fees in the June Order. Defendant contends this award was unreasonable. However, Plaintiff's Affidavit of Attorneys' Fees was introduced into evidence without objection. Plaintiff testified she believed these fees were reasonable. Shortly after this affidavit was introduced, Plaintiff was subject to cross-examination, and at no point did Defendant challenge the reasonableness of the fees.

The trial court relied on this evidence in the June Order, finding Plaintiff "has incurred total attorney fees of Thirty One Thousand Four Hundred Sixty Six Dollars and Ninety Cents ($31,466.90)," and the work done "was reasonable." The court further broke down the work done in the case, including an hourly rate for Plaintiff's counsel, hourly rate for his associate, and hourly rate for his staff, and noting these rates were "reasonable in relation to [counsel]'s experience, the type of legal services he provides and his skill level given that he practices law in Mecklenburg County, North Carolina and is a Board Certified Specialist in Family Law." The court noted Plaintiff had the "means and ability to defray a large portion of the expenses of this suit[,]" and an award of $25,000 would be both just and within Defendant's ability to pay.

Based on the Record before us, we cannot say the original award of attorneys' fees in the amount of $25,000 was unreasonable or otherwise constituted an abuse of discretion. We, therefore, affirm the awards of attorneys' fees.

Conclusion

Accordingly, we affirm the trial court's conclusion there was a substantial change of circumstances justifying a modification of child support. We affirm the trial court's award of the lump sum child support payment from the Baird Account. We also affirm the trial court's awards of attorneys' fees. We reverse and remand the November Order, in part, for the trial court to reconsider its calculation of the child support arrearage owed by Defendant. We further reverse the November Order, in part, and direct the trial court to require the lump sum child support payment be directed to Plaintiff for the benefit of the minor child.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge HUNTER concur.

SIMMS v. BOLGER

[264 N.C. App. 456 (2019)]

SHANEEKQUA SIMMS, PLAINTIFF
v.
LEROY BOLGER, DEFENDANT

No. COA18-716

Filed 19 March 2019

Child Custody and Support—civil contempt—failure to pay attorney fees during pendency of appeal—subject matter jurisdiction

In an action concerning child support, the trial court had subject matter jurisdiction to hold defendant-father in civil contempt for failure to pay an award of attorney fees during the pendency of his appeal of the child support order.

Appeal by Defendant from Order entered 15 March 2018 by Judge Kimberly Best in Mecklenburg County District Court. Heard in the Court of Appeals 14 January 2019.

Arnold & Smith, PLLC, by Matthew R. Arnold, for plaintiff-appellee.

Plumides, Romano, Johnson & Cacheris, P.C., by Richard B. Johnson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Leroy Bolger (Defendant) appeals from an Order holding him in civil contempt for willfully failing to pay an award of attorneys' fees included in a child support award during the pendency of his appeal of the child support award. Relevant to this appeal, the Record tends to establish the following:

This case stems from its companion case, *Simms v. Bolger*, ___ N.C. App. ___, ___ S.E.2d ___ (2019) (COA18-551) (*Simms I*). Defendant and Shaneekqua Simms (Plaintiff) are the parents of a minor child. On 26 May 2010, the Mecklenburg County District Court entered an Order establishing Defendant's paternity of the minor child and establishing Defendant's child support obligation.

On 2 June 2017, the trial court entered an Order (the June Order) modifying permanent child support, requiring Defendant to pay a lump

sum child support payment to a trust for the minor child, establishing Defendant's arrearages owed to Plaintiff, and awarding attorneys' fees to Plaintiff in the amount of $25,000. On 12 June 2017, Defendant filed a Motion to Reconsider and Revise the June Order asserting grounds under N.C.R. Civ. P. 52, 59 and 60.

On 26 July 2017, Plaintiff filed a Verified Motion for Civil Contempt, alleging Defendant's failure to pay monthly child support payments, to pay child support arrearages, to establish a trust for the benefit of the minor child, and to pay attorneys' fees, as required by the June Order. On 27 July 2017, the trial court entered an order requiring Defendant to appear and show cause as to why he should not be held in contempt. The same day, the trial court entered an Order granting in part Defendant's Motion to Reconsider and Revise (the July Order).

Subsequently, on 20 November 2017, the trial court entered another Order (the November Order), partially modifying the June Order by adjusting Defendant's monthly child support obligation, adjusting his arrearages owed, and directing the lump sum child support payment to a custodial account. The trial court ordered Defendant to pay additional attorneys' fees in the amount of $16,240. On 11 December 2017, Defendant filed Notice of Appeal from the June, July and November Orders. These Orders are the subject of *Simms I*.

On 26 January 2018, Defendant filed a Motion to Stay, requesting the trial court set a bond to stay enforcement of the lump sum child support award and the arrearages owed to Plaintiff pending the appeal in *Simms I*. Defendant did not seek a stay of the attorneys' fee awards pending appeal.

On 5 February 2018, Plaintiff filed an Amended Verified Motion for Civil Contempt. The Amended Motion alleged Defendant had still failed to pay ongoing child support, child support arrearages, and the lump sum payment ordered by the trial court, as well as the two different attorneys' fee awards. On 7 February 2018, the trial court entered another show cause order.

On 12 March 2018, the trial court granted in part Defendant's Motion to Stay by permitting Defendant to post a cash bond of $100,000 to stay enforcement of the lump sum child support award.

On 15 March 2018, the trial court entered its Order on Plaintiff's Motion for Civil Contempt. The trial court found Defendant in willful contempt of both the June and November Orders. The trial court noted Defendant had purged himself of contempt by paying ongoing

child support and arrearages prior to the hearing. The trial court also noted the lump sum payment was stayed during the appeal pending the posting of the cash bond. However, the trial court found Defendant had made no attempt to stay the awards of attorneys' fees. Accordingly, the trial court concluded: (A) Defendant was not in contempt with respect to ongoing child support or arrearages; (B) Defendant's obligation with respect to the lump sum payment was stayed; and (C) Defendant was in civil contempt for failure to pay the two attorneys' fee awards.

Appellate Jurisdiction

Defendant timely filed Notice of Appeal from the 15 March 2018 Order holding him in civil contempt. This Order constitutes a final judgment of the District Court resolving the then sole pending issue before the trial court. N.C. Gen. Stat. § 7A-27(b)(2) (2017). Further, Defendant's appeal of the trial court's finding of civil contempt is properly taken to this Court. N.C. Gen. Stat. § 5A-24 (2017).

Issue

In his sole argument on appeal, Defendant contends the trial court lacked subject matter jurisdiction to hold him in civil contempt for failure to pay the attorneys' fee awards during the pendency of his appeal in *Simms I*.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

B. Analysis

Typically, "[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]" N.C. Gen. Stat. § 1-294 (2017). In the context of child support, however, there is a specific statutory exception:

> Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may

> stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.

N.C. Gen. Stat. § 50-13.4(f)(9) (2017).[1] Thus, orders for the payment of child support are enforceable by civil contempt pending appeal of the underlying order, including any sanctions entered pursuant to an order of civil contempt. *Guerrier v. Guerrier*, 155 N.C. App. 154, 159, 574 S.E.2d 69, 72 (2002).

Defendant contends this exception does not extend to attorneys' fees awarded in a child support action under N.C. Gen. Stat. § 50-13.6. Our Courts, however, have regularly recognized attorneys' fee awards to be an enforceable component of child custody, child support, and alimony awards pending appeal. *See Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999); *Berger v. Berger*, 67 N.C. App. 591, 600, 313 S.E.2d 825, 831 (1984); *Faught v. Faught*, 50 N.C. App. 635, 639, 274 S.E.2d 883, 886 (1981).

Historically, prior to the early to mid-1980's, trial courts had no jurisdiction to utilize contempt to enforce custody and support orders while the case was on appeal. *Joyner v. Joyner*, 256 N.C. 588, 592, 124 S.E.2d 724, 727 (1962). Instead, our Supreme Court ruled that orders requiring the payment of alimony, child support, and counsel fees constituted money judgments. *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663 (1982). The significance of this was that it meant these orders could be enforced as money judgments pursuant to N.C. Gen. Stat. § 1-289, even pending appeal.

Under N.C. Gen. Stat. § 1-289: "If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, as set forth in this section." N.C. Gen. Stat. § 1-289(a) (2017). Therefore, an appeal did not stay civil execution proceedings against the obligor's property unless a supersedeas bond or stay was obtained. *Quick*, 305 N.C. at 462, 290 S.E.2d at 663. Indeed, this Court recognized "appeal from [an] order requiring defendant to pay alimony *and counsel fees* did not automatically stay execution on the judgment, and the trial court had the authority, in accordance with G.S. § 1-289, to require defendant to 'execute a written undertaking' in

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1. Similar statutory exceptions permitting civil contempt proceedings during an appeal exist for child custody, N.C. Gen. Stat. § 50-13.3(a) (2017), and alimony, N.C. Gen. Stat. § 50-16.7(j) (2017). Equitable distribution, however, does not have such an exception. *Guerrier v. Guerrier*, 155 N.C. App. 154, 159, n.4, 574 S.E.2d 69, 72, n.4 (2002).

order to stay execution." *Faught*, 50 N.C. App. at 639, 274 S.E.2d at 886 (emphasis added).

Notwithstanding the remedy of execution, our Supreme Court, nevertheless, decried the lack of contempt proceedings during an appeal, noting it created "a lengthy period of virtual immunity from support obligations[,]" *Quick*, 305 N.C. at 461, 290 S.E.2d at 663, and urged "some more adequate provision should be made for the child during the legal battle of its parents." *Joyner*, 256 N.C. at 592, 124 S.E.2d at 727.

In 1983, the General Assembly specifically amended N.C. Gen. Stat. § 50-13.4(f)(9) and N.C. Gen. Stat. § 50-13.3(a) to permit civil contempt proceedings pending an appeal in child support and custody actions. 1983 N.C. Sess. Law 530 (An Act to Permit Enforcement of Child Support and Custody Judgments while on Appeal). In 1985, the General Assembly amended N.C. Gen. Stat. § 50-16.7(j) to provide the same in alimony cases. 1985 N.C. Sess. Law 482, Sec. 1 (An Act to Permit Enforcement of Alimony Judgments while on Appeal).

In 1999, however, this Court in *Cox*, relying on *Faught*, held that where a party did not post a valid undertaking under N.C. Gen. Stat. § 1-289, civil contempt proceedings for failure to pay attorneys' fees in a child support order were not stayed pending an appeal. *Cox*, 133 N.C. App. at 233, 515 S.E.2d at 69. The suggestion in *Cox* is that a party could, notwithstanding the language of N.C. Gen. Stat. § 50-13.4(f)(9), stay civil *contempt* proceedings for failure to pay attorneys' fees ordered in a child support proceeding by posting an appropriate undertaking under N.C. Gen. Stat. § 1-289, which is normally applicable to civil *execution* proceedings.

In the instant case, Defendant filed his Motion to Stay seeking to stay enforcement of the November Order as it related to his arrearages and lump sum child support payment pending his appeal. Defendant sought relief, *inter alia*, expressly citing N.C. Gen. Stat. § 1-289. Nowhere in his motion did Defendant seek to stay enforcement of the payment of attorneys' fees.

The trial court expressly found in its Contempt Order that Defendant did not post a bond or seek a stay for the award of attorneys' fees in either the June Order or the November Order. It is undisputed Defendant did not post a bond or written undertaking to stay enforcement of the trial court's award of attorneys' fees.

Consequently, we hold the trial court had subject matter jurisdiction to enforce the attorneys' fee awards in the June and November Orders

through civil contempt pending the appeal in *Simms I*. N.C. Gen. Stat. § 50-13.4(f)(9). Moreover, where Defendant made no attempt to post an undertaking or supersedeas bond to stay civil contempt proceedings on the attorneys' fee awards pursuant to N.C. Gen. Stat. § 1-289, Defendant was subject to civil contempt proceedings pending his appeal under our prior holding in *Cox*.

Conclusion

Thus, for the foregoing reasons, we affirm the trial court's 15 March 2018 Order holding Defendant in civil contempt.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER concur.

JAMES BRYAN SLUDER, Plaintiff
v.
MARILYN W. SLUDER, Defendant

No. COA18-920

Filed 19 March 2019

Divorce—equitable distribution—property classification—marital debt—refinanced mortgage

The trial court did not abuse its discretion when it classified a refinanced mortgage as a marital debt to be paid equally by the divorced parties at equitable distribution. Although the husband refinanced the mortgage after the date of separation and in his name only, there was competent evidence that it was incurred to pay off other marital debts and that both parties agreed the mortgage was marital debt.

Appeal by defendant from order entered 4 April 2018 by Judge Andrea E. Dray in Buncombe County District Court. Heard in the Court of Appeals 29 January 2019.

Siemens Family Law Group, by Diane K. McDonald, for plaintiff-appellee.

Charles R. Brewer for defendant-appellant.

BRYANT, Judge.

Defendant Marilyn W. Sluder appeals from the trial court's order on equitable distribution concluding that a refinanced mortgage was a marital debt to be paid equally by defendant and plaintiff James Bryan Sluder. Where the findings of fact are supported by competent evidence and support the conclusions of law, we affirm the trial court's ruling.

Plaintiff and defendant were married on 25 June 1994 until they separated on 1 July 2007. An absolute divorce was entered on 29 October 2012. During the course of their marriage, the parties acquired several items of property, including real estate properties. One of the properties was a residential property on Panorama Drive. On the date of separation, the parties had an existing mortgage of $207,780.21 on the Panorama Drive property.

Prior to any court involvement, the parties entered into a mutual separation and property settlement agreement regarding the division of their marital assets and debts on 28 February 2008. The separation agreement listed, *inter alia*, the Panorama Drive property as marital property "formerly used by the parties as their family residence" and noted that the parties agreed to be "equally responsible for mortgage payments." The parties also agreed that plaintiff "shall be allowed to reside in home at [the Panorama Drive property] and be responsible for utilities, general maintenance, keeping the house clean and in market ready condition" until the date of sale.

On 25 June 2008, four months after the parties executed the separation agreement, plaintiff refinanced the existing mortgage on the Panorama Drive property to pay off the parties' marital debts. Plaintiff filed a complaint seeking an absolute divorce and equitable distribution on 18 July 2011. Defendant filed an answer and a counterclaim for equitable distribution. The trial court addressed the issue of equitable distribution in three separate orders; collectively serving as the trial court's equitable distribution judgment.

On 2 March 2012, the trial court entered an order for partial settlement for equitable distribution, in which the parties agreed to list the Panorama Drive property for sale and specifically set out that plaintiff agreed "to complete the staining of the deck, paint[] the hallway and pressure wash of the deck and other small repairs" in exchange for defendant's agreement "to make stain and paint available for the above repairs."

On 10 July 2012, the trial court entered a consent judgment for equitable distribution, in which the parties agreed to list the Panorama Drive

property. Defendant also agreed to pay plaintiff $22,500, which "shall be paid first after the payment of the ordinary expenses of sale of real estate from the proceeds of the sale of the Panorama [Drive] property. The subsequent percentage division of the proceeds of the Panorama [Drive] property remains undecided by the parties and shall be an issue for the [trial c]ourt."

On 1 October 2012, the trial court entered a judgment and order for equitable distribution. The parties "had agreed that each would pay one-half of the mortgage[] on [the Panorama Drive property]" and the trial court ordered them to split the proceeds upon sale of the Panorama Drive property after payment of reasonable expenses—"[p]laintiff [will] receiv[e] 47% of the proceeds and [d]efendant [will] receiv[e] 53% of the proceeds[.] . . . [T]his result in part is based on the fact that the parties have agreed that [d]efendant can list the property as a realtor and will receive at least 3% for the sale price." The trial court permitted defendant, who had experience in the real estate business, to handle the sale of the Panorama Drive property, which included the sole discretion of setting the sale price.

In early 2017, the parties were in dispute involving the sale of the Panorama Drive property, and the trial court issued an order on 18 April 2017 allowing defendant and her mother to purchase the property. The contract was signed by the parties in May 2017. Defendant took possession of the property and paid one-half of the mortgage payments until September 2017. Although defendant had stopped making mortgage payments, she continued to reside at the property.

A hearing was held before the trial court on 23 January 2018 to address whether the refinanced mortgage should be designated as a separate debt of plaintiff. On 20 March 2018, the trial court issued an "Order In the Cause" and concluded that "the refinanced debt on the Panorama Drive property was the refinance of a marital debt[,]" and therefore, was not a separate debt of plaintiff. Defendant appeals.

On appeal, defendant argues the trial court erred by ordering that plaintiff and defendant are equally responsible for payment of the mortgage where plaintiff refinanced the existing mortgage after date of separation. We disagree.

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was

> unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted). "Under N.C.G.S. § 50-20(c), equitable distribution is a three-step process; the trial court must (1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (internal quotation marks and citation omitted).

> We have stated that "[t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary."

Johnson v. Johnson, 230 N.C. App. 280, 282, 750 S.E.2d 25, 27 (2013) (quoting *Peltzer v. Peltzer*, 222 N.C. App. 784, 786, 732 S.E.2d 357, 359 (2012)).

In the instant case, the trial court's Order In the Cause, in relevant part, makes the following unchallenged findings of fact:

> 15. On June 25, 2008, [p]laintiff refinanced the mortgage identified in the Separation Agreement which had a balance of $207,780.21. He took the mortgage out in his name alone. In addition, enough money was borrowed to pay some existing debt[s] to writ; an Advanta credit card in the amount of $14,264.31, a Countrywide equity line in the amount of $17,152.66 and a Lowes credit card in the amount of $1,309.05.
>
> . . . .
>
> 20. Both parties['] ED Affidavit also listed as the same marital debt, debts to Advanta, P.O. Box 31032, Tampa, FL 3363, both affidavits carried a notion that the Advanta debt was paid off in the refinance of [the] Panorama Drive property in 2008 in the amount of $14,264.31. Also paid

> off in the refinance of 2008 was a Countrywide loan in the amount of $17,152.66.
>
> . . . .
>
> 38. While it is arguable that the parties could have chosen to litigate whether the refinanced mortgage on the Panorama Drive property became the separate debt of [p]laintiff, the parties did not litigate that matter. That the [trial c]ourt's ED Judgment on 10/1/12 does not designate the refinanced mortgage debt as a separate debt of [p]laintiff.
>
> 39. That based on the competent and credible evidence presented at the time of the hearings that resulted in the ED Judgment of 10/1/12, the [trial c]ourt was aware of the debt on the Panorama Drive property and that the [trial c]ourt was able to consider said debt in determining an equitable distribution of the estate.
>
> 40. That the [trial c]ourt was also aware, at the time of the entry of the ED Judgment of 10/1/12, that the debt on the Panorama Drive property was the refinance of the previous debt on the property and that this was both marital property and marital debt and that the Panorama Drive property could not be sold without the payment of the lien. . . .

The trial court then concluded, *inter alia*, "[t]hat the refinanced debt on the Panorama Drive property was the refinance of a marital debt."

We agree with the trial court's conclusion. This Court has previously recognized that "any debt incurred by one or both of the spouses after the date of separation to pay off a marital debt existing on the date of separation is properly classified as a marital debt." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). Additionally, while defendant contends that the refinanced mortgage was a separate debt because it was in plaintiff's name and it occurred after date of separation, there was competent evidence to support that the parties also agreed that the refinanced mortgage was marital debt.

The record reveals that on 2 March 2012, the order for partial settlement on equitable distribution was entered, with the consent of the parties and their respective counsel, in which the parties agreed to "expressly waive[] the necessity for the [trial c]ourt to make any detailed

[f]indings of [f]act to identify, classify, value or distribute a portion of their marital property and debts[.]" Prior to this order, the parties separately submitted affidavits delineating their assets. On defendant's affidavit, she certified that the Panorama Drive property was a marital asset and that the refinanced mortgage of $250,000 was a marital debt.

During the 23 January 2018 hearing, plaintiff stated that he refinanced the parties' existing mortgage due to high interest rates and because the parties could not reach a decision on the property—"it was just [in] our best financial interest to consolidate our existing four debts and then that way we had a payment to share till [sic] we got everything situated." In fact, defendant acknowledged, during an earlier equitable distribution hearing in 2012, that because she was under financial strain before the property was listed for sale, "we refinanced" the property to get a lower rate; presumably indicating that she agreed to the refinancing. Defendant stated that her name was left off the refinanced mortgage because her "credit score was not as good as [plaintiff's credit score]." Therefore, defendant cannot now assert on appeal that the refinanced mortgage should be considered separate debt when it was incurred to pay off marital debt, and she agreed it was, in fact, marital debt.

Accordingly, the trial court's findings of fact are supported by the evidence in the record, which in turn supported the trial court's conclusion that the refinanced mortgage was a marital debt. The trial court's ruling is

AFFIRMED.

Judges DAVIS and INMAN concur.

STATE v. GAMEZ

[264 N.C. App. 467 (2019)]

STATE OF NORTH CAROLINA
v.
SEBASTIAN GAMEZ

No. COA18-436

Filed 19 March 2019

1. Confessions and Incriminating Statements—member of armed forces—incriminating oral statement—to superior officer

Where a member of the armed forces (defendant) was questioned by a superior officer about his involvement in a murder, the trial court's order denying defendant's motion to suppress his incriminating response was vacated in part and remanded because the order did not contain factual findings on several issues central to whether a *Miranda* violation had occurred and did not apply the correct legal standard. The order should have determined whether the superior officer was acting as a law enforcement officer and was engaged in a custodial interrogation of defendant.

2. Confessions and Incriminating Statements—member of armed forces—incriminating letter—to superior officer

The circumstances under which a member of the armed forces (defendant) wrote an incriminating letter from jail to his superior officer about his involvement in a murder did not require *Miranda* warnings where defendant's letter was in response to an informal letter from the superior officer asking how the victim had died. Questioning conducted through an exchange of written letters does not constitute a custodial interrogation; further, defendant was in the midst of being discharged from the military.

Judge BRYANT concurring in the result only.

Appeal by defendant from judgments entered 6 February 2017 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 15 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton and Assistant Attorney General Joseph L. Hyde, for the State.

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

DAVIS, Judge.

In this case, we reexamine the circumstances under which *Miranda* warnings are required when a member of the armed forces is questioned by his superior officer about his involvement in the commission of a crime. Defendant Sebastian Gamez entered an *Alford* plea to the charges of second-degree murder, aiding and abetting a first-degree kidnapping, and conspiracy to commit kidnapping, but his plea was conditioned on his right to appeal the trial court's denial of his motion to suppress certain oral and written inculpatory statements made by him to a superior officer. Because we conclude that the trial court's order denying his motion to suppress lacked findings of fact on key issues and the court did not fully apply the correct legal standard in ruling on Defendant's motion, we vacate the order in part and remand for further proceedings.

Factual and Procedural Background

On 25 March 2013, Defendant, then a private in the United States Army stationed at Fort Bragg, was indicted by a grand jury on charges of murder, concealing the death of a person, first-degree kidnapping, and conspiracy to commit first-degree kidnapping. On 2 June 2016, Defendant filed a motion to suppress four items of inculpatory evidence: (1) statements he made to detectives at the Harnett County Sheriff's Office on 16 August 2011; (2) statements made to detectives at the Cumberland County Sheriff's Office on 17 August 2011; (3) an oral statement made to Sergeant Rebecca Schlegelmilch on 18 August 2011; and (4) written statements contained in a letter sent by him from jail to Sergeant Schlegelmilch dated 2 September 2011.

A hearing was held on Defendant's motion to suppress on 5 December 2016 in Harnett County Superior Court before the Honorable C. Winston Gilchrist. On 10 March 2017, the trial court entered an order (the "Suppression Order") denying Defendant's motion in its entirety. In the Suppression Order, the trial court made the following pertinent findings of fact:

> 1. On August 16, 2011 Rebecca Schlegelmilch was a first sergeant in 3rd brigade of the United States Army stationed at Fort Bragg, North Carolina. She was then, and at all times material herein a non-commissioned officer.
>
> 2. On August 16, 2011 Christopher Blackett and Sebastian Gamez were privates in her company. Blackett was her driver and Gamez was in the distribution platoon as a truck driver.

3. During this time, Lavern Sellers was a sergeant also in Schlegelmilch's company.

4. The primary duties of the first sergeant are to look after the health and welfare of the soldiers under her. These included training and professional development. While at times these also include some investigations of criminal conduct by soldiers, that is not a specific duty but is based on a case by case basis.

5. At no time material herein was Schlegelmilch conducting an investigation into the death of Vincent Carlisle or the involvement of Blackett and Gamez. In fact, the military as a whole was not investigating this as a criminal matter.

6. On August 16, 2011 Sellers contacted Schlegelmilch after Blackett told him that Blackett had shot somebody. Upon learning that information Schlegelmilch had Sellers call Blackett so they could meet. When Blackett showed up at company headquarters Schlegelmilch asked him what had happened.

7. At first Blackett did not want to tell her anything because he did not want to involve Schlegelmilch. However, after Schlegelmilch told him that she needed to know what happened he told her that somebody broke into his and Gamez's house and that the two of them tried to capture the individual. When they did that, the individual pulled a gun on Gamez and Blackett shot that individual. He also said that he and Gamez then took the individual into the woods. He said that he was not sure if the individual was alive or dead.

8. Initially Schlegelmilch was not sure if this had even happened, whether the individual was alive or dead, or where this might have happened. Blackett agreed to take her and Sellers on highway 210 in the direction he said he and Gamez went in an attempt to locate where the body was left.

9. After driving some time, Schlegelmilch began Googling "police station" or something similar on her phone to locate the nearest law enforcement center. At that time, they were near the Harnett County Sheriff's Office (hereinafter

HCSO or HC) so she directed Sellers to that location. Once there she recommended to Blackett that he tell the police what was going on, but if he didn't, she would have to. She was concerned that there might [be] a threat against one of her soldiers or that the individual shot might need help.

10. During the drive, she called Gamez to ask him what happened in an attempt to confirm the information Blackett was giving her. Gamez's response was that he did not know what she was asking. He said he had no knowledge of what she was talking about. She did not ask him any direct questions about what Blackett had told her.

11. Once at the Sheriff's office, she asked if they could talk to someone who could help and Blackett, Sellers and she were placed in a room. Once an officer came in the room, Blackett started telling the officer why they were there. The officer left and some detectives arrived. Blackett went to a different area of the sheriff's office while Schlegelmilch and Sellers remained in the hallway.

12. While Blackett was with the detectives Schlegelmilch called her commander (Captain Lett) to inform her of the situation. Also, at some point during the interview Schlegelmilch stepped outside the Sheriff's office to smoke and called Lett to ask her to get a hold of Gamez and have him go [to] the Sheriff's office so he could be interviewed. A detective or officer overheard her and pulled her aside. That officer told her that she couldn't "tell these people to come up here or make people come up here. If they want to they can." She then called back to the company and talked to the NCO taking Gamez to the Harnett County Sheriff's Office and told him that they couldn't make Gamez go to the Sheriff's office and he didn't have to go there if he didn't want to. However, Gamez was already on his way.

13. Upon receiving the call from Schlegelmilch that the detectives wanted to talk to Gamez, Captain Lett informed her battalion Commander, Lt. Col[.] Baumeister, and command Sergeant Major Hall, of the situation. Captain Lett was told to bring Gamez to the company headquarters. She left headquarters and went to the firing range to get Gamez. She told Gamez to get back to the headquarters without

explaining to him the reasons for his return. Driving back to headquarters, Gamez did not ask any questions and was not asked any by Captain Lett or anyone else.

14. Lt. Bobby Reyes with the Cumberland County Sheriff's Office (hereinafter CCSO or CC) received information from Nan Trogden [sic] of the CCSO that she had received a call from Harnett County Sheriff's Office that they had a soldier there who was telling them about a shooting homicide, possibly in Cumberland County. He then contacted Lt. Webb of the HCSO to confirm the information. Reyes and Sgt. Brown then went to the Harnett County Sheriff's Office. Reyes also dispatched Sgt. Gagnon and Sgt. Trogdon to 102 Carmichael Street in Spring Lake, the location where the shooting was alleged to have occurred.

15. Upon arriving at the HCSO Reyes and Brown were briefed by Lt. Webb. They were advised that a person, later identified as Vincent Carlisle, had broken into Blackett's and Gamez's residence days earlier and that on Sunday evening he broke in again. There was a scuffle in the living room. Mr. Carlisle ran out the back door and was chased by Blackett. Gamez ran out the front door to cut Carlisle off. Blackett said that Carlisle then pulled a gun on Gamez and Blackett shot Carlisle several times. After that the two soldiers got trash bags, wrapped up Carlisle's body, put it in the back of Gamez's Hummer and drove to Harnett County where they disposed of the body. The information also was that they had thrown the victim's gun into the Cape Fear River and that Blackett's gun was disassembled and stored inside Blackett's vehicle on Ft. Bragg.

16. When Reyes and Brown arrived at the HCSO, Blackett was not there but was with a HC deputy, Schlegelmilch and Sellers travelling the roads looking for the location where the body might have been left. Gamez was also not at the HCSO but was on the way. Reyes contacted other deputies with Cumberland County and had them go to Fort Bragg in order to retrieve the weapon from Blackett, which he agreed to give them.

17. When Gamez arrived at the HCSO Schlegelmilch told him, "I can't make you be here, so you don't have to talk or do anything." His response to her was "okay" or "Yes, First

Sergeant." Gamez then walked into the HCSO and went to the same area where Blackett had been to be interviewed. Gamez was directed into the interview room by Lt. Webb of the HCSO who thanked Gamez for being there. There he was interviewed by Reyes and Brown. Neither Reyes nor Brown had anything to do with Gamez appearing at the Sheriff's Office. Prior to being interviewed, Gamez was not given any Miranda rights [sic].

18. Before, during and after the interview, Gamez was not handcuffed or restrained in anyway [sic]. He was not threatened at all. He was not promised anything. Except for the actual interview, detectives with Cumberland County had no prior contact with Gamez and did not ask him any questions. During the interview Gamez gave a statement that essentially mirrored that given by Blackett.

19. At one point during the interview, Reyes told Gamez that they were going to take him in a car to look for Carlisle's body. To this, Gamez responded that he was not going to do that, that he did not have to do that, and that he was told he was at the Sheriff's Office only to give information. At that point, Reyes nor Brown pushed the issue further. Additionally, based on the information given during the interview, detectives were not sure whether Carlisle was hurt, alive or deceased. During the interview, Gamez never asked for an attorney, nor did he state that he did not want to answer any further questions. He was cooperative throughout.

20. At the conclusion of the interview, Gamez was not arrested or further detained. He was allowed to leave the Sheriff's Office. Nether Reyes nor Brown was aware of who Gamez left with.

21. After interviewing Gamez, Reyes and Brown then interviewed Blackett.

22. At the conclusion of the interviews of Blackett and Gamez, Blackett told Schlegelmilch that he had the weapon involved in the shooting and was willing to give it to the Cumberland County detectives. Gamez was present at this conversation. Sellers, Schlegelmilch, Blackett and Gamez then left the HCSO in Seller[s'] vehicle and drove back to Fort Bragg. At no point was Gamez under

any orders to cooperate with law enforcement or to give statements or information to them. Upon arriving at Fort Bragg, Blackett went to his car with Schlegelmilch, located the weapon used in the shooting, assembled it, [and] gave it to Schlegelmilch, who then gave it to an MP. Blackett then agreed to go to his residence and allow law enforcement to search his residence. Blackett, Schlegelmilch and Sellers then went to 102 Carmichael Drive, Spring Lake, the home of Blackett and Gamez.

23. Shortly after they arrived, Detectives Gagnon and Trogdon of the Cumberland County Sheriff's Office left the residence to go to Fort Bragg to meet Gamez to obtain consent to search the Hummer and residence. Upon meeting with Gamez at Fort Bragg, he signed a consent to search the residence and his vehicle.

24. Blackett, after giving law enforcement the weapon used in the shooting, arrived at the residence and signed a consent for the search of that home.

25. As a part of the search of Gamez's Hummer, the officers desired to spray the inside with Blue Star reagent to detect the presence of blood. However, where the vehicle was initially parked there was too much lighting. Gamez drove his vehicle to another location on post where it was dark enough to use the reagent. Schlegelmilch went with him as a passenger.

26. The Defendant's home was searched by Cumberland County officers. Schlegelmilch and Sellers remained outside the residence some distance away. During this search, law enforcement came to the conclusion that the incident could not have happened as it was described to them by Gamez and Blackett.

27. After the search, law enforcement asked Blackett and Gamez if they would agree to go to the CCSO to be interviewed on August 17. They agreed and Cumberland County detectives arranged to contact Schlegelmilch about the time and place for this interview. At the least, Blackett specifically agreed that night to go to the August 17, 2011 interview and Gamez, being present when the question was posed, did not object in any way.

28. Upon return to base, Blackett and Gamez had their liberty restricted to base and were not allowed to live at the Carmichael residence. Their sleeping location was restricted to the conference room at headquarters. While liberty restrictions were not unusual for soldiers, First Sgt. Schlegelmilch, had not been involved in a restriction of this type. However, this restriction was not for punishment, but for concern over the safety and welfare of the soldier, including fear of retaliation (the victim was the neighbor of the defendant), fear of reprisals and gossip among other soldiers, and safety of Gamez from harm to himself (he had already attempted suicide one previous time). Criminal investigation and general law enforcement were not considered as a part of this decision.

29. On the 17th of August, Schlegelmilch received a call from CC detectives setting up an interview with Gamez and Blackett for that day.

30. On the morning of the 17th Gamez went about his duties. At some point Gamez came to headquarters and Sellers, Schlegelmilch, Gamez and Blackett went to the CCSO in the same vehicle. At no time did Gamez object to going. He was under no compulsion to do so. Though escorted by Schlegelmilch and Sellers, neither had the authority to force Gamez to go to the Cumberland County Sheriff's Office or to give an interview.

31. Upon arriving at the CCSO the four signed in. Sellers and Blackett went into one room and Schlegelmilch and Gamez went into another. Detective Gagnon joined Schlegelmilch and Gamez in that interview room.

32. At no point was Schlegelmilch conducting any type of investigation. At no time did Gamez object to talking with law enforcement.

33. Det. Gagnon conducted an interview with Gamez. In the room was Gagnon, Schlegelmilch, and Gamez. At the beginning of the interview Gagnon explained to Gamez that the military had different rules than civilians. She explained that she wanted to make sure Gamez was there because he wanted to be there and that he was not ordered to be at the Sheriff's Office, nor was he ordered to give an

interview. She specifically asked Gamez if he wanted to be at the Sheriff's Office or whether he was ordered to be there. He replied that he wanted to be there and he was there on his own. He was asked if he wanted his first sergeant in the room during the interview and he said he did.

34. At no time was Gamez restrained in any way. He was free to leave and not answer questions. His demeanor was cooperative. At no time did Schlegelmilch require him to answer any questions. At one point during the interview Reyes knocked on the interview room door and called for Schlegelmilch to leave the room out of concern that it would appear Gamez was being required to give the interview. After Gagnon explained to him that Gamez requested Schlegelmilch to be in the room Gagnon went back in the room and again asked Gamez, alone, about her presence. Gamez told Gagnon that he would not speak to Gagnon without Schlegelmilch being present.

35. At the end of the interview, Gamez was released to go about his business and he left the CCSO.

36. At no time did anyone associated with Harnett County law enforcement or Cumberland County law enforcement request that Gamez be detained prior to his actual arrest, and at no time did anyone associated with either agency request Schlegelmilch or others in the Army to elicit information from Gamez.

37. During the day of August 18, 2011 officers with the Harnett County Sheriff's Office and the Cumberland County Sheriff's Office discovered the body of Vincent Carlisle in the woods off of Shady Grove Road in Harnett County. The location was discovered by using cell phone data from the phones of Blackett and Gamez pinpointing their location during the night of August 14, 2011.

38. Based upon the location of the body and the fact that shell casings and projectiles were found near and under Carlisle's body, it became clear to law enforcement that the killing had occurred in Harnett County and that the version of events given to them by Blackett and Gamez was not the truth.

39. At that point, a decision was made to arrest the defendant. This decision was not told to Schlegelmilch.

40. Schlegelmilch first realized that Blackett had lied to her about what happened after Gamez's mother called her and informed her that Carlisle's body had been found. Upon receiving this information she went to the building where Gamez and Blackett had been placed and saw law enforcement from Harnett and Cumberland counties present at headquarters. At that point she pulled Gamez aside and told him that she knew Blackett had lied to her and she asked Gamez what happened. She did not do this at the direction of law enforcement.

41. At that point Gamez told her that Gamez and Blackett had invited Carlisle over to their house to confront him about a break-in at their house. Once there, Gamez said they started beating and choking him. Gamez told her that it got out of hand and they took Carlisle to the woods. Gamez told her that he drove. While Blackett took Carlisle into the woods Gamez drove around. After a few minutes Blackett called him telling him to come back and get him. When Gamez picked Blackett up, Blackett told Gamez that Carlisle tried to get away and he shot Carlisle.

42. After some time had passed, Schlegelmilch told this to Cumberland County detectives and later gave this statement to Harnett County law enforcement.

43. Gamez and Blackett were arrested on August 18, 2011 and charged with the murder of Vincent Carlisle. They were placed in the Harnett County jail. Gamez was appointed an attorney.

44. On August 18, 2011 Gamez was read his Fifth Amendment rights and did not waive them, nor did he give a statement to law enforcement.

45. Separation proceedings from the Army were begun on Gamez on August 25, 2011. He was personally served with those papers at the Harnett County detention center by Captain Lett on August 31, 2011 and waived his rights to counsel and a hearing, and to propose any defense, and to contest the decision to discharge him.

46. From the time Gamez was arrested, Schlegelmilch visited Gamez in the detention center, talked to him on the

phone and the two wrote letters to each other. The letters were friendly in nature.

47. On August 31, 2011 Schlegelmilch wrote a letter to Gamez while he was in the Harnett County detention center. At the end of the letter she inquired of Gamez what happened that night. She stated that "I really want to know why all this took place. Will you tell me the real reason this all happen[e]d? It can't be just over a break-in. I am going to try to go to your court date on the 6th, if I can."

48. In response, Gamez wrote Schlegelmilch on September 2, 2011 acknowledging receipt of her letter and telling her that he would have his lawyer get the September 2nd letter to her. He went on to tell her that he and Blackett asked Carlisle to their house, he tried to run so they caught him, handcuffed him, beat him, threatened him, "bagged" him and . . . drove him to the woods. Then Blackett took him into the woods and shot him while Gamez drove around.

49. Gamez was under no compulsion to write this letter and did so on his own volition. This letter was not the result of any interrogation by law enforcement.

Based on these findings, the trial court concluded that none of Defendant's statements were "the product of any custodial interrogation by law enforcement or the equivalent of law enforcement," that "[e]ach of the statements was freely and voluntarily given by the Defendant and [was] not coerced by anyone," and that the 2 September 2011 letter "was freely and voluntarily written by him and given to [Sergeant Schlegelmilch] . . . . not as a result of any interrogation by her or anyone else."

On 6 February 2017, Defendant entered an *Alford* plea to the charges of second-degree murder, aiding and abetting a first-degree kidnapping, and conspiracy to commit kidnapping. As part of the plea arrangement, the State took a voluntary dismissal of the charge of concealing the death of a person and Defendant reserved his right to appeal the trial court's denial of his motion to suppress. Defendant gave timely notice of appeal to this Court.

Analysis

On appeal, Defendant contends that the trial court erred in denying his motion to suppress (1) the oral statement he made to Sergeant Schlegelmilch on 18 August 2011; and (2) the 2 September 2011 letter

he sent her from jail.[1] He contends that the suppression of these statements to Sergeant Schlegelmilch was required because he did not receive *Miranda* warnings before making them despite the fact that the statements were made during custodial interrogation. In making this argument, he contends that based on prior decisions from this Court Sergeant Schlegelmilch effectively served as a law enforcement officer at the time the statements were given, thereby triggering his right to receive *Miranda* warnings. We address in turn his arguments as to each of these statements.

I. 18 August Oral Statement

[1] "When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted). "Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review." *State v. Warren*, 242 N.C. App. 496, 498, 775 S.E.2d 362, 364 (2015) (internal citations and quotation marks omitted), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016).

It is well established that *Miranda* warnings are required to be given when a defendant is subjected to custodial interrogation. *See, e.g.*, *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) ("[The North Carolina Supreme Court] has consistently held that the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation."). This Court has previously explained the potential applicability of *Miranda* to members of the military being investigated for crimes under civilian law.

> In *Miranda v. Arizona*, the Supreme Court defined custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. When dealing with a defendant who is a member of the armed forces and whose statement is given to a superior officer, the inquiry becomes whether

1. Because his appeal is limited to those two issues, he has waived his right to challenge the trial court's rulings as to the remaining evidence referenced in his motion to suppress.

> a reasonable Marine in [the defendant's] situation would believe his freedom of movement was limited to the same extent as if [he] were under formal arrest.

State v. Walker, 167 N.C. App. 110, 123-24, 605 S.E.2d 647, 657 (2004) (internal citations and quotation marks omitted), *vacated in part on other grounds*, 361 N.C. 160, 695 S.E.2d 750 (2006).

Our Supreme Court has explained that "[b]ecause *Miranda* is limited to custodial interrogations, statements made to private individuals unconnected with law enforcement are admissible so long as they were made freely and voluntarily." *In re W.R.*, 363 N.C. 244, 248, 675 S.E.2d 342, 344 (2009) (citation and quotation marks omitted). Our courts have recognized exceptions to this general rule, however, where a private individual is "acting as an agent of law enforcement," *id.*, or, in the military context, under certain circumstances where a member of the armed forces is subject to custodial interrogation by a superior officer, *Walker*, 167 N.C. App. at 124, 605 S.E.2d at 657.

This Court has addressed the applicability of *Miranda* in the military context in two prior cases. First, in *State v. Davis*, 158 N.C. App. 1, 582 S.E.2d 289 (2003), the defendant, who was a Marine, received a phone call warning him that deputy sheriffs were on the way to arrest him because he was a suspect in a murder. The defendant told his sergeant that he needed to talk to a lawyer. When his sergeant asked him why, he refused to answer. The defendant was escorted shortly thereafter to the office of his platoon commander, Chief Warrant Officer Kenneth Lee Brown. *Id.* After Brown was informed of the defendant's request, he asked the defendant "if he was involved in the murder and defendant replied 'sort of.' Brown then said: 'Well, are you involved or not involved? Yes or no question.' " *Id.* The defendant proceeded to admit that he was, in fact, involved and that he had been told that the victim had raped his wife. *Id.*

On appeal, this Court addressed the issue of whether the statements made to Brown "were the product of a custodial interrogation" for purposes of *Miranda*. *Id.* We first considered the "military context" of the interrogation, stating the following:

> In deciding whether the Platoon Commander's questioning of defendant constituted a custodial interrogation, we must consider the realities and necessities of military life. We cannot disregard the military context. The United States Supreme Court has long recognized that the military is, by necessity, a specialized society separate from

civilian society. Requiring a member of the armed forces to choose either to disregard a direct question of a commanding officer or forego his or her Fifth Amendment rights, will risk undermining the discipline and order that is the necessary hallmark of our military. Those members of the armed forces who commendably act in accordance with their training should not, for their reward, be punished by being stripped of their Fifth Amendment rights.

. . . .

The United States Supreme Court has observed that the military's law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Indeed, the military can only function with strict discipline and regulation that would be unacceptable in a civilian setting.

A superior officer must be assured that a soldier will react immediately and without question to a command on the battlefield. That instinctive reaction has to be instilled in a soldier long before he goes to war: The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.

. . . .

The United States Court of Appeals for the Armed Forces has recognized that the unique environment of the military must be taken into account when determining, under *Miranda*, the admissibility of statements made to commanding officers. [The Court has] stated: In the armed forces, a person learns from the outset of recruit training to respond promptly to the direct orders and the indirect expectations of superiors and others, such as military police, who are authorized to obtain official information. Failure to respond to direct orders can result in criminal offenses unknown in civilian life.

. . . .

The Supreme Court has stressed that the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the

> civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. Only Congress has the authority to decide how to balance the rights of men and women in the service with the needs of the armed forces: The Framers expressly entrusted that task to Congress.
>
> Yet, if civilian courts may hold . . . that unwarned questioning by superior officers is not custodial interrogation and does not violate *Miranda* in the civilian courts, then that balance will be substantially disrupted. Although a member of the armed forces should not be encouraged to debate whether or not to answer his superior's question, a rule making his responses admissible would effectively mandate that he do so. On the other hand, a man or woman in the service who acts instinctively and answers automatically—as he or she has been trained—can hardly be considered to have acted voluntarily to the same extent as a civilian.

Id. at 6-8, 582 S.E.2d at 293-95 (internal citations, quotation marks, ellipses, emphasis, and brackets omitted).

We held that because Brown "was both a commissioned officer and Platoon Commander [and thus] had authority to order the arrest" of the defendant, he "was effectively functioning as a law enforcement officer at the time that defendant's statements were elicited." *Id.* at 9, 12, 582 S.E.2d at 295, 296. We further ruled that for purposes of *Miranda* the defendant had been in custody while he was being questioned. With regard to this issue, we explained that the trial court "should have considered what a reasonable Marine in defendant's position, under the totality of the circumstances, would have believed. A court may make this determination only by reviewing the expectations governing Marines." *Id.* at 10, 582 S.E.2d at 296.

We observed that the defendant had not voluntarily subjected himself to questioning by Brown in that the defendant "could not, while he was being questioned, leave Brown's office without Brown's permission," and that Brown's question as to whether the defendant had been involved in the murder sounded "remarkably like an order." *Id.* at 10, 11, 582 S.E.2d at 296. For these reasons, we concluded "that a custodial interrogation had occurred and that defendant's statements to Brown should not have been admitted into evidence." *Id.* at 12, 582 S.E.2d at 297.

We next applied these principles in *State v. Walker*. The defendant in *Walker* was a Marine who had been convicted of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. At trial, statements that the defendant made to his superior officer, Master Gunnery Sergeant Dean, were admitted into evidence. The defendant argued on appeal that because he had not been read his *Miranda* rights prior to giving these statements, the trial court should have excluded them. *Walker*, 167 N.C. App. at 117, 123, 605 S.E.2d at 651, 656-57. This Court "acknowledge[d] that interrogation by a superior officer in the military raises a significant risk of inherent compulsion, which is of the type *Miranda* was designed to prevent." *Id.* at 124, 605 S.E.2d at 657 (citation omitted). Nevertheless, we held that the record did "not indicate [that the defendant] was 'in custody' at the time he" made the statements at issue such that *Miranda* warnings were not required. *Id.*

> The record shows that . . . Walker was questioned by First Sergeant Nylon, of the Naval Criminal Investigative Services, and Investigator Melton, and at each questioning he received *Miranda* warnings. Dean did not see Walker until the next day. Dean testified that when Walker came in the next morning "we started talking in my office, and basically he explained to me what the agent wanted." Dean then asked Walker if "he had anything to do with this mess" and whether he was carrying a weapon of any kind. Walker told Dean he was at [the nightclub] that night, but he had only gone to watch [another Marine's] back because [he] was having some kind of dispute with the owner's boyfriend. Walker also told Dean that he carried a baseball bat of some type and he remained outside watching the bouncers. There was no testimony that Walker felt he could not leave or that he had to answer Dean's questions. Instead, it appears that Dean was simply inquiring into why Walker was being questioned. Since Dean's questioning of Walker did not constitute a custodial interrogation, Dean was not required to administer *Miranda* warnings prior to their conversation.

Id. (quotation marks and ellipses omitted).

In the present appeal, Defendant argues that *Davis* is controlling because like the defendant in that case, he was interrogated by a superior officer — Sergeant Schlegelmilch — who had the power to arrest him. The State, conversely, contends that *Davis* applies only in situations

where a soldier is questioned by a commissioned officer because only commissioned officers possess independent arrest authority.

Federal law governs the power of arrest in the armed forces. 10 U.S.C. § 809 states, in pertinent part, as follows:

> (a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
>
> (b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. *A commanding officer may authorize . . . noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.*

10 U.S.C. § 809 (2012) (emphasis added).

Thus, a commanding officer is authorized to delegate his or her arrest authority to a non-commissioned officer. In situations where this has occurred, the non-commissioned officer's interrogation of a soldier can trigger the need for *Miranda* warnings.[2]

It is undisputed that Sergeant Schlegelmilch was a non-commissioned officer at all times relevant to this case. Therefore, in order to resolve the issue of whether Defendant was entitled to *Miranda* warnings when he made the 18 August oral statement to her, it is necessary to first determine whether Sergeant Schlegelmilch had previously been delegated authority to arrest Defendant by a commanding officer as authorized by 10 U.S.C. § 809(b).

Defendant has not challenged any of the trial court's findings of fact contained in its Suppression Order, and we are therefore required to accept them as binding on appeal. *See Warren*, 242 N.C. App. at 498, 775 S.E.2d at 364 (2015). However, although the trial court noted in its order that Sergeant Schlegelmilch was a non-commissioned officer, it did not make any findings of fact as to whether the authority to arrest Defendant had, in fact, been delegated to her. We note from our review of the transcript that at the suppression hearing Sergeant Schlegelmilch testified

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2. We note that under federal law, any enlisted member of the armed forces who "willfully disobeys the lawful order of a . . . noncommissioned officer . . . shall be punished as a court-martial may direct." 10 U.S.C. § 891 (2012).

that earlier on the morning of 18 August she had placed Defendant and Blackett into separate rooms with a non-commissioned officer stationed in each room to make sure they did not leave. The trial court failed to make any findings, however, on the circumstances under which Sergeant Schlegelmilch took this action or who authorized her to do so. Such findings are central to the question of whether Sergeant Schlegelmilch should be deemed to have been acting as a law enforcement officer for purposes of *Miranda*.

Furthermore, in its analysis the trial court did not fully apply the correct legal standard with regard to this issue. The court appropriately made findings of fact and conclusions of law on the issue of whether Sergeant Schlegelmilch acted at the behest of civilian law enforcement officers in questioning Defendant such that she was acting as an agent of those officers. However, the trial court neither acknowledged *Davis* and *Walker* nor analyzed the evidence in light of the legal principles set out therein. Indeed, the Suppression Order bears no indication that the trial court recognized the potential applicability of *Miranda* if Sergeant Schlegelmilch had, in fact, been delegated the authority to arrest Defendant and then proceeded to question him under circumstances amounting to custodial interrogation.

Nor did the trial court make findings about the specific degree to which Defendant's liberty had been restricted at the time he made the 18 August statement to Sergeant Schlegelmilch. As noted above, Sergeant Schlegelmilch testified that at some time during the morning of 18 August 2011, she placed Defendant and Blackett into separate rooms with assigned non-commissioned officers posted in each room as guards to ensure that they did not leave. This restriction on their movements was significantly greater than the restrictions that had been placed on Defendant and Blackett two days earlier, which required them to remain on base and sleep in the same conference room but permitted them to move about the base, complete job assignments, and fulfill other responsibilities under supervision. The trial court's order, however, did not address the change in their confinement or mention the specific types of restrictions to which Defendant was subject at the time he made the 18 August statement to Sergeant Schlegelmilch.

As discussed above, *Miranda* warnings are required only when the defendant is subjected to *custodial* interrogation. *Gaines*, 345 N.C. at 661, 483 S.E.2d at 404. "A person is in custody for purposes of *Miranda* when it is apparent from the totality of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Garcia*, 358 N.C. 382, 396, 597 S.E.2d

724, 736 (2004) (citation and quotation marks omitted), *cert. denied*, 542 U.S. 1156, 161 L. Ed. 2d 122 (2005). Thus, findings as to the specific manner in which Defendant's freedom of movement had been restrained at the time he was questioned by Sergeant Schlegelmilch are necessary in order to determine whether he was subjected to custodial interrogation.

This Court has explained that "[i]n ruling upon a motion to suppress evidence, the trial court must set forth in the record its findings of fact and conclusions of law. The general rule is that the trial court should make findings of fact to show the bases of its ruling." *State v. McCrary*, 237 N.C. App. 48, 51, 764 S.E.2d 477, 479 (2014) (internal citations, quotation marks, and brackets omitted), *aff'd in part and remanded*, 368 N.C. 571, 780 S.E.2d 554 (2015).

> Findings [of fact] and conclusions [of law] are required in order that there may be a meaningful appellate review of the decision on a motion to suppress.
>
> . . . [W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court. Remand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.

State v. Salinas, 366 N.C. 119, 124, 729 S.E.2d 63, 66-67 (2012) (internal citations and quotation marks omitted). *See State v. McKinney*, 361 N.C. 53, 63, 65, 637 S.E.2d 868, 875, 876 (2006) ("We . . . should afford the trial court an opportunity to evaluate the validity of [a] warrant using the appropriate legal standard," where the trial court makes only "limited findings of fact," none of which "indicate[ ] whether the trial court would have . . . upheld the validity of the warrant" if it had applied the correct legal standard.)

In *McCrary*, the defendant appealed the trial court's denial of his motion to suppress evidence resulting from a blood test. The trial court made the following factual findings: Deputy Justin Fyle responded to the call of a homeowner after the defendant pulled into the homeowner's driveway and apparently fell asleep in his car. Deputy Fyle arrested the defendant after administering an Alcosensor test yielding results "so high that Deputy Fyle determined that there may be a need for medical attention for the defendant." *McCrary*, 237 N.C. App. at 49, 764 S.E.2d

at 478 (quotation marks omitted). The defendant was taken to the hospital at his request, and while there he grew increasingly belligerent and refused to consent to a blood test. Deputy Fyle ultimately collected the defendant's blood without a warrant, approximately three hours after he had responded to the homeowner's call. *Id.* at 50, 764 S.E.2d at 478-79.

The defendant was convicted of driving while impaired. On appeal, he contended that the results of the warrantless blood test should have been suppressed because the test was unconstitutional based upon the legal standard established in *Missouri v. NcNeely*, a United States Supreme Court case that had been decided "just over a month after the trial court ruled upon [the defendant's] motion to suppress." *Id.* at 54, 764 S.E.2d at 481. The defendant did "not challenge the trial court's findings of fact but argue[d] only that his case [was] similar to the situation presented in *Missouri v. McNeely*[.]" *Id.* The defendant "focuse[d] on the lack of findings of fact as to the time that it would have taken Deputy Fyle to obtain a search warrant for the blood test." *Id.*

In the defendant's appeal, he noted a number of factual issues that had not been decided by the trial court. We declined to address these issues, explaining, in pertinent part, as follows:

> [A]ll of these questions are squarely within the authority of the trial court to make the factual findings as to these issues and to make the appropriate legal conclusions upon those facts. It is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.
>
> . . . .
>
> Defendant is correct that the trial court did not make any specific findings addressing the availability of a magistrate at the time of the incident and the probable delay in seeking a warrant, although Deputy Fyle did testify about this matter, but it seems . . . that the trial court considered the time factor in mentioning [that Deputy Fyle had a reasonable belief that there was an exigency based upon the] "additional time and uncertainties in how much additional time would be needed to obtain a search warrant." Without findings of fact on these details, however, we cannot properly review this conclusion. We must therefore remand

> this matter to the trial court for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed.

Id. at 55-56, 57, 764 S.E.2d at 482, 483 (internal citations and quotation marks omitted).

Thus, because we were unable to properly review the trial court's order, we remanded the case to the trial court for additional findings of fact. *Id.* at 57, 764 S.E.2d at 483. Our decision was appealed to the Supreme Court. *See State v. McCrary*, 368 N.C. 571, 780 S.E.2d 554 (2015). In its opinion, the Court stated the following:

> [W]e remand to the Court of Appeals with instructions to that court to vacate the portion of the trial court's . . . order denying defendant's motion to suppress [the warrantless blood test] and further remand to the trial court for (1) additional findings and conclusions—and, if necessary—a new hearing on whether the totality of the events underlying defendant's motion to suppress gave rise to exigent circumstances, and (2) thereafter to reconsider, if necessary, the judgments . . . entered[.]

Id. at 571-72, 780 S.E.2d at 554.

Here, the trial court similarly did not make factual findings on several issues that were integral to the question of whether a *Miranda* violation had occurred. Nor — as discussed above — did the trial court fully apply the correct legal standard applicable to this issue. Therefore, we are presently unable to determine whether *Miranda* warnings were required at the time of Defendant's 18 August statement in response to Sergeant Schlegelmilch's questioning.

Because trial courts have "institutional advantages over appellate courts in the application of facts to fact-dependent legal standards," we hold that a determination as to whether Sergeant Schlegelmilch was acting as a law enforcement officer and engaged in custodial interrogation of Defendant under the principles articulated in *Davis* "should, in the first instance, be made by the trial court." *McKinney*, 361 N.C. at 64-65, 637 S.E.2d at 876 (citation and quotation marks omitted). We therefore vacate the portions of the Suppression Order relating to the 18 August oral statement and remand to the trial court for additional findings of fact and conclusions of law along with a new hearing, if necessary, on that issue.

II. 2 September Letter

[2] We reach a different result with regard to the statements contained in the 2 September letter written by Defendant from jail to Sergeant Schlegelmilch. The record reveals that while Defendant was being held in the Harnett County Detention Center following his arrest the decision was made to initiate military discharge proceedings against him. The discharge process began on 25 August 2011. On 31 August 2011, Captain Lett hand-delivered a notice of separation to Defendant. That same day, Defendant signed a memorandum stating, in pertinent part, that he desired to waive his "right to consult with a qualified representative from Trial Defense Services and wish[ed] to continue immediately with the proceedings."

While Defendant was in jail, he exchanged a number of letters with Sergeant Schlegelmilch, several of which were given to law enforcement officers. Sergeant Schlegelmilch wrote a letter to Defendant dated 31 August 2011, which read as follows:

> I hope today is a good day for you. I got your computer but can't get it to work [right]. Not sure why. But I will keep trying. Next time you see your lawyer ask him if he can do a power of [attorney] from you for me so I can help take care of your stuff for you and your mom.
>
> I love talking to your mom she is such a great person. She is like my best friend. You are lucky to have her as your mom.
>
> Be careful what you tell the other inmates they aren't the most honest people and they will tell the police in order to help themselves.
>
> I really want to [know] why all this took place will you tell me the real reason this all happened it can't be just over a break in. I am going to try to go to your court date on the 6th if I can.
>
> Hope your visit from Cpt. Lett went well. If you have any questions let me [know] and I will get you the answers.
>
> So what do you do to pass the time? I think you should [write] a book about your life I would love to read it. Who [knows] we could get it published.

> I have one other question. Why him you [knew] him and worked out together were drugs involved? We got to get you down to at least a murder 2 charge.
>
> Be strong and know we are always thinking about you!!
>
> Becky Schlegelmilch

Defendant replied to Sergeant Schlegelmilch's questions in a letter dated 2 September 2011 in which he gave the following account of Carlisle's death: After he had witnessed Carlisle in the act of breaking into the 102 Carmichael Drive home, Blackett lured Carlisle back to the residence by telling him that Blackett was interested in buying drugs from him. Upon returning to 102 Carmichael Drive, Carlisle soon realized that he had been induced to return there on false pretenses. He attempted to flee, but Defendant "choked him out and took him to the ground." Blackett then began to beat Carlisle. At that point, Defendant handcuffed Carlisle, questioned him about the robbery, and began beating him when he denied being involved. Once Carlisle finally admitted to having taken part in the break-in, Defendant responded that Carlisle would "get[ ] a second chance" and that they would not report him to the police.

Defendant argues that this letter should have been suppressed because the letter from Sergeant Schlegelmilch asking him to explain how Carlisle had actually died constituted custodial interrogation. We are satisfied, however, that the circumstances under which Defendant's letter was written did not implicate *Miranda*. First, we note that Defendant has failed to cite any caselaw in support of the proposition that questioning conducted through such an exchange of letters can constitute custodial interrogation for purposes of *Miranda*. Nor has our own research revealed any legal authority in support of such an argument.

Furthermore, when Defendant responded to Sergeant Schlegelmilch's letter, he was in the midst of being discharged from the military. While Defendant was not formally removed from Alpha Company until 14 September 2011, the record makes clear that Defendant was aware of the discharge proceedings at the time he responded to Sergeant Schlegelmilch's letter and was not contesting them. In short, these circumstances simply do not amount to the type of coercive environment that *Miranda* was intended to address.[3]

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3. We also observe that the letter from Sergeant Schlegelmilch was not written on official letterhead, was very informal in nature, and was signed "Becky."

Conclusion

For the reasons stated above, we (1) affirm the portions of the Suppression Order denying Defendant's motion to suppress the statements made by him to detectives on 16 and 17 August 2011 and in the 2 September 2011 letter to Sergeant Schlegelmilch; (2) vacate the portion of the order denying Defendant's motion to suppress the 18 August 2011 oral statement made to Sergeant Schlegelmilch; and (3) remand for additional findings of fact, conclusions of law, and — if necessary — a new hearing as to whether the 18 August 2011 oral statement was made during custodial interrogation such that *Miranda* warnings were required.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED WITH INSTRUCTIONS.

Judge INMAN concurs.

Judge BRYANT concurs in the result only.

STATE OF NORTH CAROLINA
v.
MALON KYSHEEF GRIFFIN, DEFENDANT

No. COA18-681

Filed 19 March 2019

1. Assault—inflicting serious bodily injury—sufficiency of evidence—serious bodily injury

The State presented sufficient evidence of the "serious bodily injury" element of assault inflicting serious injury where defendant, a mixed martial arts fighter, attacked the victim, causing the victim to suffer permanent, severe headaches along with a concussion, numerous lacerations, a swollen and bruised face, and difficulty swallowing.

2. Burglary and Unlawful Breaking or Entering—breaking and entering—intent to terrorize or injure—sufficiency of evidence

In a prosecution for breaking and entering with intent to terrorize or injure, the State presented sufficient evidence of the intent element where defendant, a mixed martial arts fighter, entered the

victim's home uninvited, began arguing with the victim over an incident involving defendant's girlfriend, and then violently attacked the victim. A jury could infer that defendant intended to put the victim in a high degree of fear and, therefore, acted with the intent to terrorize. A jury also could infer that defendant was so recklessly or manifestly indifferent to the consequences of his actions that he had constructive intent to injure the victim.

Appeal by defendant from judgments entered 10 January 2018 by Judge Beecher R. Gray in Beaufort County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.

Anne Bleyman for defendant.

ARROWOOD, Judge.

Malon Kysheef Griffin ("defendant") appeals from judgments entered on his convictions of felony assault inflicting serious bodily injury and felony breaking and entering with intent to terrorize or injure. For the reasons stated herein, we find no error.

I. Background

On 14 July 2014, a Beaufort County Grand Jury indicted defendant for felony assault inflicting serious bodily injury and felony breaking and entering. On 16 March 2015, a Beaufort County Grand Jury issued a superseding indictment for felony breaking and entering with intent to terrorize or injure. On 9 January 2018, this matter came on for trial in Beaufort County Superior Court, the Honorable Beecher R. Gray presiding. The State's evidence tended to show as follows.

On 24 May 2014, defendant, a mixed martial arts fighter, opened the front door of Mr. Marcus Frank ("Mr. Frank" or "victim")'s home, and entered uninvited. Mr. Frank heard the door open, so he walked towards the front of the house to see who opened the door, and saw defendant. The two men exchanged words, in reference to an incident involving defendant's girlfriend.[1] Mr. Frank insisted he was not involved in the incident, but defendant did not believe Mr. Frank, and hit him in the face.

1. Although the victim and his girlfriend testified there was an ongoing dispute between defendant's girlfriend and the victim, the cause of the dispute was never entered into evidence.

The two men started fighting. Defendant threw Mr. Frank over a dog cage. Mr. Frank attempted to run to the kitchen, but could not get away from defendant, who was hitting, kneeing, and kicking his face, head, neck, torso, and limbs. Eventually, Mr. Frank was able to escape to the kitchen. He threw a wooden spoon at defendant, and defendant fled in a car driven by his girlfriend's stepfather.

Mr. Frank contacted his girlfriend, Sherry Bailey ("Ms. Bailey"), who called 911. When law enforcement and medical personnel responded to the call, Mr. Frank recounted the attack to Officer Christopher Cordina of the Washington Police Department, identifying defendant as his attacker.

Mr. Frank reported being unable to swallow, and was diagnosed with a concussion. He also had numerous lacerations, swelling and bruising on his face, and wounds on his knees and elbows. Ms. Bailey testified Mr. Frank "looked -- his face was deformed. He didn't look like himself, and he had -- where he had been, I guess maybe on the carpet where he had -- he had blood. Like it was to the white meat."

Mr. Frank went to the police station, and Officer Cordina took photographs of his injuries. Mr. Frank then went to the emergency room. He testified he went to the hospital because:

> I was in pain, and it was -- it was like really bothering me. I had like a serious, serious bad headache, and that headache lasted me from like four days from the incident happened. And to this day, I'm still like getting like migraine headaches. I'm taking 800 ibuprofen, but it wears off and it come right back.

At the close of the State's evidence, defendant moved to dismiss all charges. The motion was denied. Defendant presented evidence, and then renewed his motion to dismiss at the close of all evidence. The trial court denied the motion.

On 10 January 2018, the jury found defendant guilty as charged. The trial court sentenced defendant to 16 to 29 months imprisonment for the felony assault inflicting serious bodily injury conviction, and ordered defendant pay $319.99 in restitution. Defendant was sentenced to a consecutive term of 8 to 19 months imprisonment for the felony breaking and entering conviction.

Defendant appeals.

II. Discussion

Defendant argues on appeal that the trial court erred by denying his motion to dismiss both charges, felony assault inflicting serious bodily injury and felony breaking and entering with intent to terrorize or injure, for insufficient evidence.

Our "Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

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

A. Felony Assault Inflicting Serious Bodily Injury

[1] Defendant argues the trial court erred by denying his motion to dismiss the felony assault inflicting serious bodily injury charge because there was insufficient evidence of a serious bodily injury.

The elements of felony assault inflicting serious bodily injury are: "(1) an intentional assault on another person (2) resulting in serious bodily injury." *State v. Williams*, 154 N.C. App. 176, 180, 571 S.E.2d 619, 622 (2002). Pursuant to N.C. Gen. Stat. § 14-32.4, "Serious bodily injury" is a "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4 (2017). "Our courts have defined serious injury as injury which is serious but falls short of causing death and have indicated that the element of serious bodily injury requires proof of more severe injury than the element

of serious injury." *Williams*, 154 N.C. App. at 181, 571 S.E.2d at 622 (citation and internal quotation marks omitted).

In the light most favorable to the State, the victim suffered from difficulty swallowing, numerous lacerations, a concussion, and severe headaches as a result of the attack. The victim testified that the headaches continued at least through the time of trial, which occurred four years after the attack. Therefore, the headaches constitute a permanent or protracted condition that causes extreme pain. Accordingly, we hold the trial court did not err when it denied defendant's motion to dismiss the felony assault inflicting serious bodily injury charge.

B. Felony Breaking and Entering

[2] Next, defendant argues the trial court erred by denying his motion to dismiss the breaking and entering charge because there was insufficient evidence of an intent to injure or terrorize the victim.

Defendant was charged with N.C. Gen. Stat. § 14-54(a1) (2017). Pursuant to this statute, "[a]ny person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony." N.C. Gen. Stat. § 14-54(a1). There are no published cases specifically addressing the sufficiency of evidence of intent to terrorize or injure under N.C. Gen. Stat. § 14-54(a1). However, in an unpublished decision, our court held the "evidence was sufficient for the jury to answer the question of Defendant's intent to terrorize and injure" the victim where the defendant and two others "burst through the [victim's] door without knocking" and without permission, one of the individuals said "get her" while the defendant was on top of the victim, the victim was badly beaten without provocation, the victim's children witnessed the event and were crying hysterically, and, before the attack, one of the intruders told the victim's husband they were going to "get her[.]" *State v. Walker*, 253 N.C. App. 841, 801 S.E.2d 180, 2017 WL 2608057, at *4 (2017) (unpublished).[2]

In reaching this decision, the Court emphasized that the intent to terrorize or injure must exist at the time of entry under N.C. Gen. Stat. § 14-54(a1). *Id.* at __, 801 S.E.2d at __, 2017 WL 2608057, at *3 (citing *State v. Ly*, 189 N.C. App. 422, 430, 658 S.E.2d 300, 306 (2008) ("An essential element of the crime is that the intent exist at the time of the breaking or entering." (citation and internal quotation marks omitted));

2. We address this unpublished and nonprecedential opinion only because it was cited and discussed in the State's brief.

State v. Costigan, 51 N.C. App. 442, 444, 276 S.E.2d 467, 468 (1981)). "Intent is a mental attitude and can seldom be proved by direct evidence and is most often proved by circumstances from which it can be inferred." *Costigan*, 51 N.C. App. at 444, 276 S.E.2d at 468 (internal citations and quotation marks omitted). Thus, a defendant's intent at the time of the breaking and entering, "may be inferred from the acts he committed subsequent to his breaking or entering the building." *State v. Bowden*, 216 N.C. App. 275, 278, 717 S.E.2d 230, 233 (2011) (citation and internal quotation marks omitted).

Because our Court has not yet considered what constitutes "intent to terrorize or injure" under N.C. Gen. Stat. § 14-54(a1) in a published opinion, we look to other offenses with similar elements for guidance. In *Walker*, the court considered the definition of "terrorize" used for the purposes of kidnapping, noting " 'terrorize' has been repeatedly defined for the purposes of kidnapping as, more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *Walker*, __ N.C. App. at __, 801 S.E.2d at __, 2017 WL 2608057, at *3 (citing *State v. Surrett*, 109 N.C. App. 344, 349, 427 S.E.2d 124, 127 (1993) (internal citations and quotation marks omitted); *State v. Watson*, 169 N.C. App. 331, 337-38, 610 S.E.2d 472, 477 (2005) (defining terrorize as "[t]o fill or overpower with terror; terrify" for the purposes of the felony stalking statute)).

Furthermore, although there are no decisions in North Carolina addressing the sufficiency of evidence of an implied intent to injure *specifically* in the context of N.C. Gen. Stat. § 14-54(a1), "our Supreme Court has held *generally* that . . . constructive intent to injure exists where the actor's conduct 'is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent.' " *Wilcox v. City of Asheville*, 222 N.C. App. 285, 289, 730 S.E.2d 226, 231 (2012) (citation omitted); *see State v. Jordan*, 59 N.C. App. 527, 529, 296 S.E.2d 823, 825 (1982) (holding that, in the context of felonious burning of personal property, intent to injure the owner of the property could be inferred based on the "nature of the act and the manner in which it was done").

Here, the State's evidence tends to show that defendant entered uninvited and did not announce himself. When Mr. Frank saw defendant, defendant began to argue with Mr. Frank because he believed Mr. Frank was involved in an incident with his girlfriend. Defendant, a mixed martial arts fighter, then proceeded to violently attack Mr. Frank. The jury could find these circumstances put the victim in a high degree of fear

or that defendant acted so recklessly or manifestly indifferent to the consequences to the victim that there was constructive intent to injure. Therefore, we find these acts sufficient to support an inference that defendant entered the victim's home with the intent to terrorize or injure Mr. Frank, and we hold the trial court did not err by denying defendant's motion to dismiss the breaking and entering with the intent to terrorize or injure charge.

III. Conclusion

For the forgoing reasons, the trial court did not err.

NO ERROR.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
JONATHAN LOPEZ

No. COA18-13

Filed 19 March 2019

1. Rape—second-degree—physical helplessness of victim—sufficiency of evidence

In a second-degree rape trial, the State's evidence was sufficient to establish the element that the victim was physically unable to resist intercourse or communicate her unwillingness to submit to intercourse. Inferences could be drawn in favor of the State that the quantity of the victim's alcohol consumption, her physical state, her lack of memory of most of the evening (aside from a blurry memory of pushing someone off of her), her physical soreness the next day, and the subsequent behavior of the defendant all indicated the victim's physical helplessness at the time of the incident.

2. Evidence—second-degree rape—expert testimony—impact of intoxication on memory

In a prosecution for second-degree rape, the opinion of defendant's expert, a neuropharmacologist, that even someone who has ingested enough alcohol to experience a blackout "might not be physically helpless" was properly excluded. The State's case did not rest on the victim's lack of memory, other evidence indicated the

victim engaged in volitional activities while intoxicated (thereby undermining the usefulness of the expert's opinion), and defendant could not establish prejudice given the other evidence of the victim's physical helplessness at the time of the incident.

3. Criminal Law—jury instructions—second-degree rape—physically helpless victim—lack of consent instruction not required

In a second-degree rape trial, the trial court was not required to instruct the jury on lack of consent of the victim in addition to giving the pattern jury instructions for rape of a physically helpless person, since lack of consent is implied with a victim who has been statutorily deemed incapable of consenting.

4. Appeal and Error—preservation of issues—satellite-based monitoring—reasonableness—automatic preservation by statute

Defendant's challenge to the imposition of lifetime satellite-based monitoring (SBM) after he was convicted of second-degree rape was not automatically preserved for appellate review pursuant to N.C.G.S. § 15A-1446(d)(18), because the issue raised—whether the imposition was reasonable under the Fourth Amendment—was outside the purview of the statute.

5. Appeal and Error—preservation of issues—satellite-based monitoring—reasonableness of search

Defendant's constitutional challenge to the imposition of lifetime satellite-based monitoring (SBM) following his conviction of second-degree rape was preserved for appellate review even though he failed to lodge an objection at the SBM hearing, where the State initiated the discussion of the reasonableness of the Fourth Amendment search pursuant to *Grady v. North Carolina*, 575 U.S. __ (2015), and the trial court addressed the issue.

6. Satellite-Based Monitoring—lifetime—reasonableness—State's burden—lack of evidence

The trial court's imposition of lifetime satellite-based monitoring (SBM) following defendant's conviction of second-degree rape was reversed because the State failed to present any evidence that SBM was a reasonable search of defendant.

Appeal by Defendant from judgment and order entered 30 March 2017 by Judge Reuben F. Young in Superior Court, Wake County. Heard in the Court of Appeals 14 January 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez and Assistant Appellate Defender James R. Grant, for Defendant.

McGEE, Chief Judge.

Jonathan Lopez ("Defendant") appeals from judgment entered after a jury found him guilty of second-degree rape. Defendant argues the trial court erred by (1) denying his motion to dismiss the charge for insufficient evidence, (2) excluding testimony of his expert witness, and (3) providing inadequate jury instructions. Defendant further contends the cumulative effect of these errors deprived him of a fair trial. We hold the trial court did not err in denying Defendant's motion to dismiss, did not prejudicially err in excluding Defendant's expert witness, and did not err in its instructions to the jury. As we hold the trial court did not commit prejudicial error, we hold that Defendant is not entitled to a reversal based on cumulative error.

Defendant also appeals from the trial court's order imposing lifetime satellite-based monitoring ("SBM"). Defendant argues the trial court erred in ordering lifetime SBM because the State failed to present evidence that lifetime SBM of Defendant was a reasonable Fourth Amendment search. We hold that the trial court erred in ordering lifetime SBM, and reverse the trial court's order.

I. Factual & Procedural History

Miranda,[1] a college student studying business administration in Virginia, traveled to Raleigh with her friend, Perla, on 4 July 2014 to attend her godmother's vow renewal the following day. At the time, Miranda was twenty-two years old and had been in a relationship with her boyfriend for four-and-a-half years.

In the days leading up to the vow renewal, Miranda exchanged text messages with Defendant, a close family friend who lived in Raleigh. Miranda and Defendant agreed to meet while in Raleigh. Miranda considered Defendant "even as a brother to [her]." Miranda testified that, on one occasion when Defendant and Miranda were in their early teens,

1. We adopt the pseudonym "Miranda" used in the briefs to protect the identity of Miranda.

they kissed during a game of "truth or dare." Miranda testified that, on another occasion when they were approximately sixteen years old, Defendant attempted to "hit on" Miranda, and she "blew it off." However, with the exception of those two instances, Miranda and Defendant never engaged in a romantic relationship.

The night before the vow renewal, Miranda and Perla drove to Defendant's apartment and, on their drive, they drank mixed drinks consisting of vodka and juice. At approximately 6:00 p.m., they arrived at Defendant's apartment (hereafter at times, "the apartment"), which Defendant shared with Jose Oswaldo Palacios-Martinez ("Lenny"). At the apartment, Miranda drank a Mike's Hard Lemonade, a Fireball shot, and a mixed liquor drink. A while after arriving at the apartment, Miranda, Perla, Defendant, and Lenny decided to go to a club. Lenny drove the group to the club.

At the club, Miranda and Perla separated from Defendant and Lenny, and each had another drink, and danced with each other. In the subsequent hours, Miranda drank a "Blue Motorcycle" – purchased by Defendant – and one and one-half shots of tequila. Miranda appeared drunk to Perla. Miranda testified that she had blurry vision, began to stumble, and was unable to send a text message. Miranda told Perla that she wanted to leave the club so she could go to sleep. After midnight, Defendant, Lenny, Perla, and Miranda left the club, and Miranda threw up in the parking lot of the club. Miranda texted her boyfriend, but was unable to recall any other detail from the drive back to Defendant's apartment.

Upon arriving back at Defendant's apartment building, Miranda went up the stairs to Defendant's third floor apartment, holding onto the stair rail and wearing one shoe, and Defendant followed. Perla and Lenny remained in the parking lot, and Perla began to throw up. Lenny waited with Perla and, once Perla felt better, Lenny helped her up the stairs. Perla then fell asleep in the living room of the apartment.

Miranda testified she awoke the following morning at 8:00 a.m. and felt another person's leg touching her leg. Miranda realized Defendant was in bed next to her. Miranda's shirt was off, her skirt was pushed up to her waist, and her underwear was on the bed. Miranda testified that her vagina felt sore, as if she had had sex. Defendant woke up and asked Miranda if she was okay. Miranda ignored Defendant, grabbed her phone, and ran out of Defendant's bedroom. Miranda testified she had a blurry memory of pushing or kicking someone off of her while she was sleeping.

Perla testified she awoke in the morning to hear Miranda frantically asking why she had been left alone with Defendant. Miranda then

walked out of the apartment to her car where she began crying. Perla called Miranda's cell phone, and Miranda told Perla that she thought "something had happened." Perla then questioned Defendant about what had happened the previous night, and Defendant assured Perla that nothing had happened. Miranda sent Perla a text message stating she wanted to leave, and she returned to the apartment to retrieve her things. Defendant asked Miranda again if she was okay and offered for her to use his shower.

Miranda and Perla left Defendant's apartment and drove to a family friend's house. Perla testified that Miranda appeared "frazzled" in the car. Miranda told Perla that she woke up without her underwear, and Perla convinced Miranda to return to Defendant's apartment to confront him.

Miranda and Perla drove to Defendant's apartment where, again, Defendant denied having sex with Miranda. Miranda explained to Defendant that her vagina felt sore. Defendant asked to speak with Miranda privately. Once in private, Defendant told Miranda that when he entered his bedroom and saw Miranda in his bed with her skirt pulled up to her waist, he instinctively "wanted to do something." He explained that Miranda kicked and pushed him off, so he left her alone.

Miranda and Perla decided to leave Defendant's apartment. As they walked out of the apartment, Defendant invited Miranda and Perla to a party that he was hosting that night and joked that he would lock Miranda and Perla in his room to assure nothing bad happened to them. Miranda and Perla drove back to Virginia. Perla testified that on the drive, Miranda appeared "upset and confused and didn't really know where to go or what to do after that."

The following afternoon, Perla called Miranda. Perla recommended Miranda seek medical attention and complete a rape kit, and they agreed to meet at a hospital in Woodbridge, Virginia. After waiting hours in the emergency room without being seen, Perla and Miranda drove to a pharmacy to purchase Plan B.

Miranda called Defendant on speakerphone from the car and again asked what had happened on the night of 4 July. Defendant denied anything happened. Miranda explained that she was parked in front of a hospital, where the doctors and nurses would be able to ascertain the last time she had sex. Miranda threatened that, if Defendant had lied to her and her rape kit revealed she had had sexual intercourse, she would go to the police. Defendant inquired whether Miranda was alone, and Miranda said yes. Defendant then admitted he had sex with Miranda. Miranda began to cry and told Defendant she had not given

him permission to touch her. Defendant said, "it's me. Why would you feel disgusted?" Defendant urged Miranda not to contact the police. After they hung up the phone, Defendant repeatedly called and texted Miranda saying, "we need to talk." Miranda responded one time, saying: "How could you do this to me? I trusted you. You were considered my friend."

After speaking with Defendant, Miranda and Perla returned to the emergency room, and Miranda completed a rape kit. An off-duty security guard interviewed Miranda, filled out a police information report, and had Miranda and Perla each fill out written statements. The case was dispatched to an officer of the Raleigh Police Department on 7 July 2014. The officer contacted Miranda, received her oral statement, and prepared a report, which he passed on to the Raleigh Police Department's Detective Division.

Detective Corinne McCall ("Detective McCall") of the Raleigh Police Department's Special Victims Unit testified that she was assigned the case on 8 July 2014. Detective McCall contacted Miranda by phone and asked Miranda "to tell [her] what had happened." Detective McCall's testimony regarding Miranda's story to her was consistent with Miranda's testimony at trial. Detective McCall testified that Miranda's story remained consistent throughout the course of the investigation.

Detective McCall testified she interviewed Defendant on 25 July 2014, and recorded the interview. Initially, Defendant told Detective McCall that, on 5 July, when Miranda confronted him at his apartment, he told Miranda that the two had engaged in sexual intercourse the previous night. Defendant also told Detective McCall that he had not talked to Miranda since that day in his apartment when he disclosed to her that they had had sex. Defendant later admitted that he actually first told Miranda that they had had sex during a phone conversation on 6 July 2014. Detective McCall received Miranda's phone records, which revealed that Defendant lied about not contacting Miranda.

In August 2014, Miranda returned to school. However, she struggled to concentrate in class and had periodic emotional outbursts that required her to leave campus. Although she only had six months left to graduate, she dropped out of school approximately three weeks later. Perla testified that, prior to 4 July 2014, Miranda had been "a very upbeat and a very happy girl"; however, after that date, "[Miranda] kind of became very depressed."

In 2015, Miranda was transported to the hospital after attempting suicide by cutting her wrists. Miranda attempted suicide a second

time by overdosing on pills and was again transported to the hospital. Miranda subsequently started treatment with a therapist once a week and was prescribed antidepressants and sleep medication.

At trial, Defendant testified on his own behalf. He described his relationship with Miranda as "friends with benefits." Defendant testified that, on one occasion, during a game of "spin the bottle," Miranda kissed him and danced on top of him and, on another occasion, Miranda touched his penis.

Defendant testified that on 4 July 2014, he went to a club with Miranda, Perla, and Lenny. Defendant could not recall how much alcohol he consumed at the club. Defendant explained he could not recall any detail about leaving the club or about the drive back to the apartment because of the three year lapse.

Defendant further testified that, after returning from the club on the night of 4 July, Defendant went out on his balcony and smoked a cigarette. Defendant entered his room and saw Miranda sleeping in his bed. Defendant told Miranda to move, as she was lying on his side of the bed. Miranda woke up and moved over. About thirty minutes later, Defendant's leg touched Miranda's leg. Defendant put his hand on Miranda's back, and Miranda said, "yes." Defendant then said, "let's f—," and they had sex. The following morning, at approximately 7:00 a.m., Defendant and Miranda had sex for the second time. Miranda then went to the bathroom and left Defendant's apartment.

Defendant testified that after Miranda came back in the apartment, Miranda and Perla entered Defendant's room, and asked Defendant whether he had engaged in sex with Miranda the previous night. Defendant denied anything happened. Defendant testified: "I cannot tell you why at that moment I opted not to tell her." Defendant testified when Miranda and Perla returned to his apartment later that afternoon and again asked him what had transpired, Defendant denied anything happened, because he "just didn't know what to do."

Defendant was indicted on 20 March 2017 for one count of second-degree rape. The case came on for hearing 27 March 2017. The jury found Defendant guilty of second-degree rape on 30 March 2017. Defendant was sentenced to 73-148 months' imprisonment. Defendant was ordered to register as a sex offender for his lifetime and to enroll in an SBM program. Defendant appeals.

II. Appellate Jurisdiction and Writs of *Certiorari*

As an initial matter, this Court's jurisdiction must be determined. Defendant has filed two petitions for writ of *certiorari*; we address each in turn.

Defendant was convicted of second-degree rape and sentenced to 73-148 months' imprisonment on 30 March 2017. After receiving the jury verdict, but prior to the pronouncement of the judgment, the defense attorney gave oral notice of appeal and asked for the appointment of the Appellate Defender. The trial court noted the request on the record and dismissed the jury. When the jury returned, the trial court accepted the verdict of the jury and ordered that it be recorded as a final judgment. Subsequently, appellate entries were filed, and the Appellate Defender was appointed to represent Defendant. Defense counsel filed the record on appeal in this Court on 9 January 2018. Defendant filed a petition for writ of *certiorari*, pursuant to Rule 21(a) of the North Carolina Rules of Appellate Procedure on 20 February 2018. *See* N.C. R. App. P. 21(a) (2018).

Rule 4 of the North Carolina Rules of Appellate Procedure provides that notice of appeal from a criminal action may be taken by: "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4(a) (2018). In the present case, defense counsel prematurely entered an oral notice of appeal before entry of the final judgment, in violation of Rule 4. Therefore, "[w]hile this Court cannot hear [D]efendant's direct appeal, it does have the discretion to consider the matter by granting a petition for writ of *certiorari*." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). In our discretion, we allow Defendant's first petition for writ of *certiorari* in order to reach the merits of his appeal.

At the sentencing hearing, upon finding that Defendant had committed an aggravated offense, the trial court ordered Defendant to enroll in SBM. Defense counsel gave oral notice of appeal, but did not file written notice of appeal. Defendant also filed a second petition for writ of *certiorari* from the SBM order on 11 May 2018.

A defendant must file a written notice of appeal from an SBM order pursuant to Rule 3 of the Rules of Appellate Procedure because of the civil nature of SBM proceedings. N.C. R. App. P. 3 (2018); *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) ("In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice

pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper 'in a civil action or special proceeding.' "). Rule 3 provides that a party must enter notice of appeal from a civil action

> (a) by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties . . .
>
> . . . .
>
> (c) . . . .
>
> > (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
> >
> > (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period[.]

N.C. R. App. P. 3(a), (c). In the present case, Defendant did not file a written notice of appeal in compliance with Rule 3. However, in our discretion, we allow Defendant's second petition for writ of *certiorari*.

III. Analysis

A. *Insufficiency of the Evidence*

[1] Defendant argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. Specifically, Defendant argues there was insufficient evidence showing that Miranda was "physically helpless" during sexual intercourse. We disagree.

A motion to dismiss for insufficiency of the evidence is reviewed *de novo*. *State v. English*, 241 N.C. App. 98, 104, 772 S.E.2d 740, 744 (2015). " 'Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

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

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

> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.22(a) (2017).[2] "Physically helpless" is defined as either "[a] victim who is unconscious" or "[a] victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.20(3) (2017).

Defendant argues Miranda's lack of memory is not affirmative evidence that she was unconscious, physically unable to resist intercourse or a sexual act, or unable to communicate unwillingness to intercourse or a sexual act. Defendant contends there was insufficient evidence that Miranda was physically helpless because the *only* evidence presented regarding consent was Defendant's statement to police and his testimony that Miranda consented to intercourse on two separate occasions, and that the State presented no evidence that Miranda did not consent.

The State presented evidence that Miranda consumed sizable portions of alcohol over an extended period of time, was physically ill in the parking lot of the club, and was unable to remember anything after leaving the club. When Miranda returned to Defendant's apartment, she stumbled up the stairs and had to hold on to the stair rail. Miranda woke up the following morning with her skirt pulled up to her waist, her shirt off, and her underwear on the bed. Miranda's vagina was sore, and she had a blurry memory of pushing someone off her. Miranda never had a prior sexual relationship with Defendant. Moreover, Defendant's actions following the incident — his adamant initial denial that anything of a sexual nature occurred and subsequent contradictory admissions — tend to indicate Defendant knew of his wrongdoings, *i.e.*, Miranda was physically helpless at the time of the rape. Viewed in the light most favorable to the State, and drawing all reasonable inferences in favor of the State, there was sufficient evidence presented that Miranda was physically unable to resist intercourse or to communicate her unwillingness to submit to intercourse. Thus, Defendant's motion to dismiss was properly denied.

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2. Defendant was charged under N.C. Gen. Stat. § 14-27.3(a) (2013). The statute has since been recodified at N.C.G.S. § 14-27.22. 2015 N.C. Sess. Law ch. 181, § 4(a).

B. *Expert Testimony*

[2] Defendant argues that, in refusing to allow the testimony of his proposed expert who would have testified as to an intoxicated person's ability to engage in volitional activities and not have any memory after the fact, the trial court abused its discretion, which amounted to prejudicial error. We disagree.

"We review a trial court's admission of expert testimony for abuse of discretion." *State v. Babich*, ___ N.C. App. ___, ___, 797 S.E.2d 359, 361 (2017). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

North Carolina Rule of Evidence 702 controls the admissibility of expert testimony and states:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017).

"Even when an abuse of discretion occurs, a defendant is not entitled to a new trial unless the error was prejudicial." *State v. Mendoza*, ___ N.C. App. ___, ___, 794 S.E.2d 828, 834 (2016). The erroneous exclusion of expert testimony is prejudicial "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." N.C. Gen. Stat. § 15A-1443(a) (2017). Defendant bears the burden of demonstrating prejudice. N.C.G.S. § 15A-1443(a).

At trial, defense counsel attempted to tender Dr. Wilkie Wilson ("Dr. Wilson"), a neuropharmacologist, as an expert witness. During *voir dire*,

Dr. Wilson testified that one of his areas of expertise was alcohol and its effect on memory. Dr. Wilson explained that he would testify "about what's possible and what's, in fact, very, very likely and [sic] when one drinks a lot of alcohol." Dr. Wilson proffered his opinion "that someone who is having a blackout might not be physically helpless." The State objected to Dr. Wilson's testimony, arguing that Dr. Wilson's inability to demonstrate more than "maybe" possibilities meant his testimony would not be helpful to the jury. The trial court then sustained the State's objection, explaining that "this doctor will not assist the trier of fact to understand the evidence or to determine a fact in issue in this case[.]"

The State did not present evidence of Miranda's lack of memory as affirmative evidence that she was physically helpless at the time of the sexual encounter. Dr. Wilson's testimony was to the effect that an intoxicated person can engage in volitional activities and not remember. Because the State's theory of physical helplessness did not rest on Miranda's lack of memory, Dr. Wilson's testimony would not have helped the jury "determine a fact in issue in this case." Indeed, the State presented evidence that Miranda engaged in volitional activities when she was intoxicated, such as walking up the stairs to Defendant's apartment, although Miranda had no memory of that action. Therefore, the trial court did not abuse its discretion in excluding Dr. Wilson's testimony.

Even assuming, *arguendo*, that the trial court erred in excluding Dr. Wilson's testimony because it was not in the common knowledge of the jurors, this error did not prejudice Defendant. The State presented evidence of physical helplessness in the form of testimony regarding Miranda's consumption of large amounts of alcohol prior to, and after, arriving at the club; her blurry memory of pushing someone off her; and Defendant's deception and lies after the encounter. Therefore, the State presented overwhelming evidence of Miranda's physical helplessness, and Defendant has not met his burden of showing that there was "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C.G.S. § 15A-1443(a).

C. *Jury Instruction*

[3] Defendant argues the trial court committed plain error in failing to instruct the jury that lack of consent was an element of rape of a physically helpless person. We disagree.

The trial court instructed the jury in accordance with the pattern jury instructions for rape of a physically helpless person, N.C.P.I.—Crim. 207.25. The trial court instructed the jury that

> the State must prove three things beyond a reasonable doubt: First, that the defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary. Second, that the victim was physically helpless. A person is physically helpless if the person is unconscious, physically unable to resist an act of vaginal intercourse, physically unable to communicate unwillingness to submit to an act of vaginal intercourse, or physically unable to resist a sexual act. And, third, that the defendant knew or should reasonably have known that the victim was physically helpless. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in vaginal intercourse with the victim and at that time the victim was so physically unable to resist an act of vaginal intercourse, to communicate unwillingness to submit to an act of vaginal intercourse, or resist a sexual act as to be physically helpless, and that the defendant knew or should reasonably have known that the victim was physically helpless, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt about one or more of these things, it would be your duty to return a verdict of not guilty.

Defense counsel did not object to the jury instructions at trial or at the charge conference. It is well established that, when no objection is made to jury instructions, this Court's review is limited to the plain error standard.

"In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (internal quotation marks and brackets omitted). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79. "A prerequisite to our engaging in a 'plain error' analysis is the determination that the

instruction complained of constitutes 'error' at all." *State v. Johnson*, 320 N.C. 746, 750, 360 S.E.2d 676, 679 (1987).

The Supreme Court of North Carolina held:

> In the case of a sleeping, or similarly incapacitated victim, it makes no difference whether the indictment alleges that the vaginal intercourse was by force and against the victim's will or whether it alleges merely the vaginal intercourse with an incapacitated victim. In such a case sexual intercourse with the victim is *ipso facto* rape because the force and lack of consent are implied in law.

State v. Moorman, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987); *see also State v. Atkins*, 193 N.C. App. 200, 204, 666 S.E.2d 809, 812 (2008) (citing *Moorman* and explaining that the second theory of second-degree rape "is applicable when the victim falls within a special class of victims, who are deemed by law incapable of resisting or withholding consent; thus, force and the absence of consent need not be proved by the State, as they are implied in law").

Defendant acknowledges that the pattern jury instruction follows the text of the statute. *See Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994) ("This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions."). However, Defendant argues the jury should have been instructed that lack of consent is an element of rape of a physically helpless person. Defendant's argument is predicated on our Supreme Court's holding in *State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994).

In *Holden*, our Supreme Court determined that the submission of a judgment at a sentencing hearing, entered upon a defendant's prior conviction of attempted second-degree rape, was sufficient for the State to prove, as an aggravating circumstance under N.C.G.S. § 15A–2000(e)(3) (1988), that the defendant had committed a prior felony involving the use or threat of violence to the person. 338 N.C. at 403-07, 450 S.E.2d at 883-85. The defendant in *Holden* — unlike Defendant in the present case — did not argue on appeal that the trial court should have instructed the jury that lack of consent was an element of second-degree rape. Instead, the defendant argued the judgment entered upon his prior conviction for attempted second-degree rape did not establish, on its own, that the prior felony was accompanied by the use or threat of violence. *Id.* at 404, 450 S.E.2d at 883. Thus, under the defendant's reasoning, because second-degree rape can involve a person who is mentally defective,

mentally incapacitated, or physically helpless, violence or the threat of violence is not necessarily required. *Id.* at 404, 450 S.E.2d at 883.

Our Supreme Court disagreed with the defendant's contention, and "reject[ed] the notion of any felony which may properly be deemed 'non-violent rape.' " *Id.* at 405, 450 S.E.2d at 884. The Court held that "[t]he acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting — just as with a person who refuses to consent — involve the 'use or threat of violence to the person[,]' " noting that it did not "believe that having or attempting to have sexual intercourse with a 'physically helpless' person in violation of N.C.G.S. § 14-27.3(a)(2) may properly be deemed 'non-violent' rape or attempted rape." *Id.* at 406, 450 S.E.2d at 884.

In the present case, the trial court properly instructed the jury on all of the elements of second-degree rape of a physically helpless person. Since "the force and lack of consent are implied in law," *Moorman*, 320 N.C. at 392, 358 S.E.2d at 506, the trial court was not required to instruct the jury that lack of consent was an essential element of second-degree rape. *See State v. Compton*, 244 N.C. App. 153, 780 S.E.2d 760, No. 15-567, 2015 WL 7288456 (2015) (unpublished) ("The trial court properly instructed the jury on the elements of second-degree rape of a physically helpless person because the force and lack of consent are implied in law." (internal quotation marks and citation omitted)). Accordingly, we hold Defendant has failed to demonstrate error, let alone plain error, in the trial court's instructions to the jury.

D. *Cumulative Error*

Defendant argues that, because the trial court erred by denying Defendant's motion to dismiss, excluded Dr. Wilson's testimony, and failed to instruct the jury on an element of the crime, the trial court committed cumulative error, warranting a new trial. "Cumulative errors lead to reversal when taken as a whole they deprived the defendant of his due process right to a fair trial free from prejudicial error." *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (internal quotation marks and brackets omitted). Since we hold that Defendant has failed to show prejudicial error at trial, we necessarily find no cumulative error.

E. *SBM*

Defendant argues the trial court erred in ordering lifetime SBM for Defendant because the State did not meet its burden of proving that it was a reasonable Fourth Amendment search. We agree.

Our General Assembly has enacted "a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . designed to monitor" the location of individuals convicted of certain sex offenses after they are released from prison." N.C. Gen. Stat. § 14-208.40(a) (2017). The United States Supreme Court held in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015) that SBM is a "search" under the Fourth Amendment. 575 U.S. at ___, 191 L. Ed. 2d at 461-62. Therefore, before subjecting a defendant to enrollment in SBM, North Carolina Courts must first "examine whether the State's monitoring program is reasonable —when properly viewed as a search." *Id.* at ___, 191 L. Ed. 2d at 463. "This reasonableness inquiry requires the court to analyze the 'totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.' " *State v. Greene*, ___ N.C. App. ___, ___, 806 S.E.2d 343, 344 (2017) (quoting *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 462).

1. Preservation of the Issue

[4] We must first address whether this issue was preserved for appellate review. At the sentencing hearing, the State asked the trial court to

> have the hearing, to have the [c]ourt find under the totality of the circumstances, balancing those interests of both the intrusion into his privacy versus a compelling State interest, that it is not unreasonable and the search is not unreasonable under these circumstances. You've heard the evidence in the case. I would also submit to you, one, there have been many cases that come down and talk about the fact that the United States -- you know, the United States Supreme Court has recognized the dangers of recidivism in cases of sex offenders and that when sex offenders reenter society they are much more likely than any other type of offender to be arrested for a new rape or sexual assault. Especially concerning to the State is the fact that, from what everything I could see in this case, . . . I still don't think he gets it. I really don't. And so that makes me concerned that the level of ability to re-offend and recidivate is much higher. And so I would ask that you do that balancing test and that under the circumstances find that it is not an unreasonable search and order lifetime satellite based monitoring as well.

Defendant failed to object. After hearing the State's argument, the trial court announced from the bench:

> [T]he Court further finds that -- based on the evidence that has been submitted in this case and the [c]ourt taking into consideration the totality of the circumstances, the [c]ourt at this time finds that it is appropriate and necessary that upon release from imprisonment that this defendant shall enroll in a satellite based monitoring program for his natural life until such time that the monitoring is terminated pursuant to the North Carolina General Statutes.

The trial court then specifically asked the parties if either wanted to add anything to the discussion, and both parties declined.

The State contends that Defendant failed to preserve the issue of whether the imposition of SBM on Defendant was reasonable under the Fourth Amendment because he did not object or raise this issue at trial. Defendant argues that, because SBM was imposed at the sentencing hearing, the issue was automatically preserved pursuant to *State v. Dye*, ___ N.C. App. ___, 802 S.E.2d 737 (2017). We reject Defendant's argument because the procedural posture of *Dye* is inapposite to the present case.

In *Dye*, the defendant was convicted of statutory rape and sentenced to a term of imprisonment and SBM for a thirty-year period. *Id.* at ___, 802 S.E.2d at 739. The defendant was sentenced under a statute that required the trial court to determine whether the defendant fit into a statutorily designated category. *Id.* at ___, 802 S.E.2d at 742. The statute mandated that, if the trial court determined the defendant did not fit into a statutorily designated category, the Division of Adult Correction was required to conduct a risk assessment. *Id.* at ___, 802 S.E.2d at 742. The trial court was then able to consider the risk assessment before making a determination as to whether the defendant required the highest possible level of supervision and monitoring. *Id.* at ___, 802 S.E.2d at 742.

The trial court determined the defendant did not fit into a statutorily designated category and, therefore, ordered that the Division of Adult Correction conduct a risk assessment. *Id.* at ___, 802 S.E.2d at 743. The risk assessment conducted on the defendant indicated that he was in the "Moderate-High" risk category. *Id.* at ___, 802 S.E.2d at 743. Based on the assessment, the trial court found that the defendant required the highest level of monitoring and supervision, and imposed SBM. *Id.* at ___, 802 S.E.2d at 743. The defendant did not object. *Id.* at ___, 802 S.E.2d at 741-42.

On appeal, the defendant argued the trial court erred by ordering SBM without making sufficient findings of fact that the defendant required the highest level of monitoring. *Id.* at ___, 802 S.E.2d at 741. The defendant contended the matter was automatically preserved pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2017)[3] (providing grounds under which errors are preserved without objection, including if "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law"). The State argued that the defendant failed to preserve the issue because he did not object at the SBM hearing. *Id.* at ___, 802 S.E.2d at 741-42.

In its decision, this Court cited prior decisions that held that a " 'Moderate-High' risk category was insufficient to support a finding that the highest possible level of supervision and monitoring was required." *Id.* at ___, 802 S.E.2d at 743. This Court held the trial court erred in finding that the defendant required the highest level of supervision and monitoring based solely on the risk assessment, and vacated the order imposing SBM on the defendant. *Id.* at ___, 802 S.E.2d at 743-44.

In *Dye*, the SBM order was clearly erroneous, as the trial court's finding was in direct conflict with precedent of this Court. In contrast, in the present case, Defendant argues the trial court erred in imposing SBM because the State did not prove that Defendant's enrollment in SBM was a reasonable Fourth Amendment search. This Court has never found that the issue of reasonableness within the context of SBM hearings was within the purview of N.C.G.S. § 15A-1446(d)(18). Thus, we reject Defendant's argument and hold that the matter was not automatically preserved by statute.

[5] Having determined the issue was not automatically preserved, we now address whether the matter was otherwise preserved. "Our appellate courts will only review constitutional questions raised and passed upon at trial." *State v. Mills*, 232 N.C. App. 460, 466, 754 S.E.2d 674, 678 (2014).

We acknowledge that this is a tumultuous time in our case law regarding the parties' burdens and the role of the trial court in hearings on SBM ("*Grady* hearings"). A review of recent case law reveals three

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3. Although our Supreme Court "has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court, subdivision (18) is not one of them." *State v. Meadows*, ___ N.C. ___, ___, 821 S.E.2d 402, ___ (2018) (footnote omitted).

broad scenarios in which this Court addressed preservation issues in the context of *Grady* hearings. In the first scenario, a defendant fails to object to the imposition of SBM, the State offers no statements regarding reasonableness, and the trial court does not pass on the issue. *See State v. Lindsey*, ___ N.C. App. ___, 818 S.E.2d 344 (2018) (holding the *Grady* issue was not preserved for appellate review when it was not raised at trial by either party and not ruled upon by the trial court, and declining to invoke Rule 2 because the law regarding preservation of it in the context of *Grady* hearings was settled); *see also State v. Bishop*, ___ N.C. App. ___, 805 S.E.2d 367 (2017). In the second scenario, a defendant objects to a trial court's imposition of SBM, but does not specify that the objection is grounded in Fourth Amendment or *Grady*. *See State v. Bursell*, ___ N.C. App. ___, 813 S.E.2d 463 (2018) (holding the issue of *Grady* was preserved at trial when it was apparent from the context that the defendant's objection implicated the defendant's right to a reasonableness determination). In the third scenario, the State specifically argues that the imposition of SBM on a defendant is a reasonable Fourth Amendment search, the defendant does not object to the imposition of SBM, and the trial court passes on the issue. *See State v. Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (2018) (holding the *Grady* issue was preserved when it was raised at trial and passed upon by the trial court); *see also State v. Hammonds*, No. COA17-931, 2018 WL 1386738 (N.C. Ct. App. Mar. 20, 2018) (unpublished).

In essence, our Courts have distinguished between cases in which (1) the trial court failed to conduct a reasonableness inquiry, and (2) the State initiated a reasonableness inquiry, and the trial court passed on the matter. In the former, a defendant must object to preserve the issue because "[a]lthough the State has the burden of proof of reasonableness of SBM under the Fourth Amendment as directed by *Grady*, the defendant still must raise the constitutional objection so the State will be on notice it must present evidence to meet its burden." *Lindsey*, ___ N.C. App. at ___, 818 S.E.2d at 349 (internal citation omitted); *see also State v. Stroessenreuther*, ___ N.C. App. ___, ___, 793 S.E.2d 734, 735 (2016) ("Under *Grady*, the trial court was required to consider the reasonableness of the satellite-based monitoring when [the defendant] challenged that monitoring on Fourth Amendment grounds."). In the latter, the State initiates the *Grady* discussion and, thus, has the opportunity to satisfy its burden of proving a search is reasonable under the Fourth Amendment, and the trial court has the opportunity to rule on it. Therefore, an objection is not necessary to preserve the *Grady* issue for appellate review.

In the present case, the State initiated the *Grady* discussion and argued imposition of SBM on Defendant was a reasonable Fourth Amendment search. Although Defendant did not object at trial, the reasonableness of SBM of Defendant was raised and passed upon by the trial court. In *State v. Hammonds*, an unpublished opinion with facts similar to the present case, the State initiated a *Grady* discussion, and the trial court found SBM of the defendant was a reasonable search. 2018 WL 1386738, at *1. The defendant failed to object. *Id.* at *2. This Court held that "[t]he dialogue quoted above reflects that the issue of whether SBM constituted a reasonable search pursuant to *Grady* was raised by the State during the hearing and passed on by the trial court. The State cannot now argue that the issue was waived." *Id.* at *2. Here, as in *Hammonds*, it is evident the State recognized that a *Grady* hearing was necessary, and the trial court understood it needed to conduct a balancing test. Therefore, although Defendant did not object at trial, we hold the *Grady* issue was preserved for appellate review.

2. Reasonableness Inquiry

[6] We now address whether the trial court properly determined that SBM was a reasonable Fourth Amendment search of Defendant. "The State bears the burden of proving that enrollment in satellite-based monitoring is a permissible Fourth Amendment search of each particular defendant targeted." *State v. White*, ___ N.C. App. ___, ___, 820 S.E.2d 116, ___. (2018).

In the present case, the State initiated the discussion about reasonableness and the Fourth Amendment. The State asked the trial court to balance the invasion of privacy against the State's compelling interest, and to find that the imposition of SBM on Defendant was not an unreasonable search. The State requested that the trial court consider the evidence of the case and that: (1) "the United States Supreme Court has recognized the dangers of recidivism in cases of sex offenders and that when sex offenders reenter society they are much more likely than any other type of offender to be arrested for a new rape or sexual assault;" and (2) based on the State's observation, Defendant does not "get[] it," which makes the State "concerned that the level of ability to re-offend and recidivate is much higher." The trial court announced from the bench that, after considering the totality of the circumstances, Defendant's enrollment in SBM was "appropriate and necessary."

It is apparent from the transcript that the State had both the knowledge of its burden and the opportunity to put on sufficient evidence to satisfy its burden. *Cf. Id.* at ___, 820 S.E.2d at ___ (vacating and

remanding an SBM order when "[t]he trial court did not afford the State an opportunity to present evidence in order to establish the constitutionality of enrolling [the d]efendant in satellite-based monitoring"). In the present case, the State failed to carry its burden of proving SBM of Defendant was a reasonable Fourth Amendment search because it did not put on any evidence regarding reasonableness. *See Greene*, ___ N.C. App. at ___, 806 S.E.2d at 345-46 (reversing the trial court's order because "the nature of the State's burden was no longer uncertain at the time of defendant's satellite-based monitoring hearing. [Previous cases from this Court] made clear that a case for satellite-based monitoring is the State's to make"). Therefore, because "the State will have only one opportunity to prove that SBM is a reasonable search of the defendant[,]" and, in the present case, the State was previously afforded such an opportunity and failed to prove that SBM is a reasonable search of Defendant, we reverse the trial court's SBM order. *State v. Grady*, ___ N.C. App. ___, ___, 817 S.E.2d 18, 28 (2018)

E. *Ineffective Assistance of Counsel*

Defendant argues that, in the event this Court does not reach the merits of the SBM issue, Defendant received ineffective assistance of counsel. However, because we have reached the merits of the above issue, we need not address this alternative argument.

IV. Conclusion

For the reasons stated above, this Court holds that the trial court did not err in denying Defendant's motion to dismiss and in instructing the jury in accord with the pattern jury instructions for second-degree rape. We also hold that the trial court did not commit prejudicial error in excluding the testimony of Dr. Wilson. Finally, we hold that the trial court erred in imposing SBM on Defendant, and we reverse the SBM order.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; REVERSED IN PART.

Judges HUNTER, JR. and HAMPSON concur.

STATE v. MILLER

[264 N.C. App. 517 (2019)]

STATE OF NORTH CAROLINA
v.
MARVIN LOUIS MILLER, JR.

No. COA17-1215-2

Filed 19 March 2019

Drugs—maintaining a dwelling to keep controlled substances—totality of the circumstances—evidence beyond single sale

Evidence of a single sale of crack cocaine from defendant's home was insufficient to support a conviction for maintaining a place to keep controlled substances where the State failed to present other incriminating evidence—such as drugs, drug paraphernalia, large amounts of cash, or weapons—to show that defendant was using his home for selling or keeping a controlled substance.

Appeal by defendant from judgment entered 28 April 2017 by Judge Christopher W. Bragg in Union County Superior Court. Originally heard in the Court of Appeals 2 May 2018, with unanimous opinion issued 7 August 2018. The Supreme Court of North Carolina allowed the State's petition for discretionary review on 5 December 2018, for the limited purpose of remanding for reconsideration to this Court in light of that Court's recent decision in *State v. Rogers*, __ N.C. __, 817 S.E.2d 150 (2018).

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepción, for the State.

Leslie Rawls for defendant-appellant.

TYSON, Judge.

This case is before this Court on remand by Order of the North Carolina Supreme Court to be reconsidered in light of that Court's recent decision in *State v. Rogers*, __ N.C. __, 817 S.E.2d 150 (2018).

I. Factual and Procedural Background

The facts underlying this case are set forth in detail in our Court's previous opinion, *State v. Miller*, __ N.C. App. __, 817 S.E.2d 503, 2018 WL 3734368 (2018) (unpublished). They are recounted briefly below.

The State's evidence showed Union County Sheriff's Sgt. Mark Thomas received a complaint asserting Defendant was "involved in

sales and narcotics" and began an investigation. Sgt. Thomas hired a trusted confidential informant to attempt to purchase crack cocaine from Defendant. After Thomas contacted the informant, she told Sgt. Thomas she knew Defendant, but did not assert she had previously purchased drugs from him. Officers provided the informant with a recording device and $48.00 in cash. The informant went to Defendant's home and was allowed to enter into his living room. She had a conversation with Defendant and a female, who was also present inside the house. She gave Defendant $48.00 to purchase crack cocaine. Defendant left the room, walked outside and went towards an old school bus parked on his property. When Defendant returned, he provided the requested crack cocaine rocks to the informant, who then shared a portion of the rocks with the other female inside the house.

Defendant was indicted for possession with intent to sell and deliver cocaine, sale of cocaine, and maintaining a place to keep controlled substances. The jury convicted Defendant on all three counts. Defendant appealed to this Court.

Defendant's sole argument asserts that the trial court erred by denying his motion to dismiss the charge of maintaining a place to keep controlled substances. This Court unanimously agreed and reversed Defendant's conviction for that one count. *Miller*, 2018 WL 3734368 at *2. The Supreme Court of North Carolina issued its 17 August 2018 opinion in *Rogers*, __ N.C. __, 817 S.E.2d 150. The Court also remanded this case for our reconsideration based upon the issue before the Court in *Rogers*, __ N.C. __, 817 S.E.2d 150.

II. Analysis

In deciding *State v. Miller* ("*Miller I*"), this Court relied in part upon *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), to reach the conclusion that the State had failed to present sufficient evidence tending to show Defendant was maintaining a dwelling for the keeping of a controlled substance in violation of N.C. Gen. Stat. § 90-108(a)(7). In *Rogers*, our Supreme Court disavowed its earlier statement in *Mitchell* that "keep" denotes "not just possession, but possession that occurs over a duration of time." *Rogers*, __ N.C. at __, 817 S.E.2d at 156. To determine *Rogers'* impact on Defendant's case, we initially review *Mitchell*.

A. *State v. Mitchell*

In *Mitchell*, the State's evidence was that a convenience store clerk had seen the defendant exit a car with darkly tinted windows. When the defendant approached the clerk's counter and asked for rolling papers,

the clerk asked what was in his pockets. The defendant acknowledged it was marijuana and handed it to the clerk. The clerk called the police. *Id.* at 31, 442 S.E.2d at 29.

Our Supreme Court recognized the "fundamental issue" was whether the evidence produced by the State was enough to prove that the defendant's "vehicle was used for keeping or selling marijuana." *Id.* at 32, 442 S.E.2d at 29. The State had shown that the defendant possessed two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that in a subsequent search of his home, police found two marijuana cigarettes, plastic baggies and scales. *Id.* at 33, 442 S.E.2d at 30.

The Court in *Mitchell* held "[t]hat an individual within a vehicle possesses marijuana on one occasion cannot establish that the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element. . . . we do not believe that our legislature intended to create a separate crime simply because the controlled substance was temporarily in a vehicle." *Id.*

In its opinion holding the State had not shown that the vehicle was used for selling or keeping a controlled substance, the Court reiterated: "the focus of the inquiry is on the *use*, not the contents, of the vehicle." *Id.* at 34, 442 S.E.2d at 30. Recognizing that while the contents of a vehicle are relevant in the determination of whether the vehicle was used for the sale of drugs, the presence of a marijuana cigarette did not alone "implicate the car with the sale of drugs." *Id.* at 33, 442 S.E.2d at 30. The Court also cited cases in which the presence of drugs, together with other incriminating circumstances – such as the defendant's financing and supervision of a place known for drug transactions, or the presence of numerous items of drug paraphernalia or large amounts of cash – supported "[t]he determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances." *Id.* at 34, 442 S.E.2d at 30.

B. *State v. Dickerson*

This Court's decision in *Miller I* also cites *State v. Dickerson*, 152 N.C. App. 714, 568 S.E.2d 281 (2002), as support to show the State's evidence of a single sale is "insufficient to withstand his motion to dismiss." *Miller I*, 2018 WL 3734368 at * 2.

In *Dickerson*, the defendant was arrested and charged with, among other things, "keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine." 152 N.C. App. at 715, 568 S.E.2d at 281. The

defendant had been charged after completing a single cocaine sale to a law enforcement officer. *Id.* A police informant arranged an undercover drug purchase from the defendant. The defendant met the informant and the undercover officer in a parking lot behind the informant's apartment. *Id.* When the informant and officer arrived, the defendant was seated in the passenger seat and an unidentified person was in the driver's seat of the vehicle. *Id.* It was later determined that the vehicle was registered to the defendant. *Id.*

This Court cited the now abrogated language from *Mitchell* and relied upon the Court's statement in *Mitchell* "[t]hat an individual within a vehicle possesses marijuana on one occasion cannot establish . . . the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." *Id.* at 716, 568 S.E.2d at 282 (quoting *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30). The State had presented no evidence in addition to the "[d]efendant having been seated in a vehicle when the cocaine purchase occurred." *Id.* at 716-17, 568 S.E.2d at 282.

This Court held "the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance[]" and reversed the defendant's conviction of keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine. *Id.* We need not address whether *Rogers* would require a different outcome in *Dickerson*, as *Dickerson* does not singularly control the outcome of the present case.

C. *State v. Rogers*

In *State v. Rogers*, law enforcement was familiar with the defendant after a months-long drug investigation. __ N.C. at __, 817 S.E.2d at 152. A detective obtained information implicating the defendant in drug activity that "needed to be acted upon that day." *Id.* The detective also learned that the defendant would be driving a particular white Cadillac, registered to another person, and staying in a particular room of a specific hotel. *Id.* at __, 817 S.E.2d at 152-53.

The officers followed the defendant as he drove around and pulled him over to serve outstanding arrest warrants. *Id.* While the defendant was held in police custody, he received numerous text messages containing the slang term, "lick," which the officer knew to describe someone who purchases drugs. *Id.* After obtaining a search warrant, the officers searched the defendant's white Cadillac and found two purple plastic baggies containing cocaine in the space covering the gas cap. *Id.* The

gas cap release door was only operated from inside of the car. *Id.* Inside the car, the officers found a marijuana cigarette, $243.00 in cash hidden inside a boot and a months' old car service receipt for the white Cadillac with the defendant's name on it. *Id.* At the defendant's hotel room, officers found similar purple plastic baggies containing larger amounts of cocaine, scales and small zip-lock bags. *Id.*

The issues before the Court in *Rogers* were: (1) whether there was substantial evidence tending to show the defendant kept or maintained the Cadillac; and, (2) whether there was substantial evidence the car was used for the keeping of controlled substances. The Court answered the first question in the affirmative, holding "the word 'keep,' in the 'keep or maintain' language of subsection 90-108(a)(7), refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use." *Id.* at __, 817 S.E.2d at 154. The Court noted not only had officers observed the defendant arrive and depart from his hotel room driving the white Cadillac, a service receipt for that vehicle bearing the defendant's name was found inside of the car. The receipt was dated two and a half months prior to the defendant's arrest. *Id.*

With respect to the second question, "used for the keeping of" controlled substances, the Court in *Rogers* concluded that the defendant was using the car "to store crack cocaine when he was arrested." *Id.* at __, 817 S.E.2d at 152. To reach this conclusion, the Court re-analyzed *Mitchell*.

> *Mitchell* interpreted "the keeping . . . of [drugs]" to mean "not just possession, but possession that occurs over a duration of time." But the statutory text does not require that drugs be kept for "a duration of time." As we have seen, the linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place "for the keeping . . . of" drugs is whether the defendant was using that vehicle, building, or other place for the storing of drugs. So, for instance, *when the evidence indicates that a defendant has possessed a car for at least a short period of time, but that he had just begun storing drugs inside his car at the time of his arrest, that defendant has still violated subsection 90-108(a)(7)—even if, arguably, he has not stored the drugs for any appreciable "duration of time*." The critical question is whether a defendant's car is used to store drugs, not how long the defendant's car has been used to store drugs for. As a result, we reject

> any notion that subsection 90-108(a)(7) requires that a car kept or maintained by a defendant be used to store drugs for a *certain minimum period of time*—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7). *But again, merely having drugs in a car (or other place) is not enough to justify a conviction under subsection 90-108(a)(7). The evidence and all reasonable inferences drawn from the evidence must indicate, based "on the totality of the circumstances," that the drugs are also being stored there.* To the extent that *Mitchell*'s "duration of time" requirement conflicts with the text of subsection 90-108(a)(7), therefore, this aspect of *Mitchell* is disavowed.

Id. at __, 817 S.E.2d at 156-57 (internal citations omitted) (emphasis supplied).

Rogers specifically states the result reached in *Mitchell* is correct, but *Mitchell*'s reasoning that "keep" "denotes not just possession, but possession that occurs over a duration of time" was an incorrect interpretation of N.C. Gen. Stat. § 90-108(a)(7). *Rogers*, N.C. at __, 817 S.E.2d at 156. Our prior opinion in *Miller I* specifically cites to this now abrogated portion of *Mitchell*.

Rogers' disavowal and removal of the "duration of time" of possession does not undermine our holding that an isolated or single incident of Defendant selling a controlled substance from his home fails to demonstrate that he "used" or maintained the home to keep or sell drugs in violation of § 90-108(a)(7). After clarifying the term "keep" as used in each clause of the crime of maintaining a dwelling, our Supreme Court in *Rogers* qualified,

> *But again, merely having drugs in a car (or other place) is not enough to justify a conviction under subsection 90-108(a)(7).* The evidence and all reasonable inferences drawn from the evidence must indicate, based "on the totality of the circumstances," that the drugs are also being stored there.

Rogers, __N.C. at __, 817 S.E.2d at 157 (internal citations omitted) (emphasis supplied).

The State's evidence tends to show that drugs were kept on Defendant's property on this one occasion. The question is whether the

evidence shows he possessed the property for the purpose of selling or keeping cocaine.

III. Totality of the Circumstances

> In determining whether a defendant maintained a dwelling for the purpose of selling illegal drugs, this Court has looked at factors including the amount of drugs present and paraphernalia found in the dwelling." *State v. Battle*, 167 N.C. App. 730, 734, 606 S.E.2d 418, 421 (2005) (emphasis omitted). Our Court has also noted that the discovery of "a large amount of cash" in the dwelling or building can indicate that a particular place is being used to keep or sell controlled substances. *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (2001).

State v. Williams, 242 N.C. App. 361, 373, 774 S.E.2d 880, 889 (2015), *disc. review denied*, __N.C. __, 782 S.E.2d 516 (2016).

In *Williams*, the State presented evidence tending to show a bag containing almost 40 grams of a controlled substance "was discovered inside the pocket of a pair of men's pants within [d]efendant's bedroom closet alongside another plastic bag, which contained 'numerous little corner baggies.' " *Id.* Digital scales and U.S. currency of $460.00 in twenty-dollar bills were also found in the same bedroom. The State offered testimony that the corner baggies and digital scales are typically used to package and sell drugs. *Id.* Testimony was also admitted that "purchases of controlled substances are frequently made in $20 increments." *Id.*

This Court held this evidence was sufficient to permit "a reasonable jury to conclude that the residence in question was being used for keeping or selling controlled substances." *Id.* (quoting *State v. Shine*, 173 N.C. App. 699, 708, 619 S.E.2d 895, 900 (2005) (evidence that digital scales "of the type frequently used to weigh controlled substances for sale" were found in residence in close proximity to two bags of cocaine and scrap papers with names and dollar amounts written on them was sufficient to show residence was used for keeping or selling controlled substances)).

The Supreme Court also cited this Court's prior decision in *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987), which held that the discovery of cocaine along with evidence of "materials related to the use and sale" of drugs, such as "numerous small plastic bags, and 'tools commonly used in repackaging and selling cocaine' " was sufficient to

sustain the defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7). *Williams*, 242 N.C. App. at 373, 774 S.E.2d at 889 (citing *Rich*, 87 N.C. App. at 383-84, 361 S.E.2d at 324).

The holdings in *Williams* and *Rich* are not anomalous. Prior precedents have consistently held the State must produce other incriminating evidence to show that based "on the totality of the circumstances," the vehicle or building was used for selling or keeping the controlled substance. *See, e.g.*, *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) ("jury could reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged and the presence of other packaging materials"); *State v. Cowan*, 194 N.C. App. 330, 337, 669 S.E.2d 811, 817 (2008) (trial court did not err in denying the defendant's motion to dismiss the charge of maintaining a dwelling where there was evidence that the "defendant possessed controlled substances, 'materials related to the use and sale' of controlled substances, and firearms"); *State v. Simpson*, 230 N.C. App. 119, 122, 748 S.E.2d 756, 759 (2013) (evidence showing only that the defendant and another used controlled substances in the defendant's vehicle insufficient to show that the defendant "allowed others to resort to his vehicle to consume controlled substances" in violation of § 90-108(a)(7)).

As restated in *Rogers*, the State must produce other incriminating evidence of the "totality of the circumstances" and more than just evidence of a single sale of illegal drugs or "merely having drugs in a car (or other place)" to support a conviction under this charge. *Rogers*, __ N.C. at __, 817 S.E.2d at 156.

Here, the State offered no evidence showing any drugs or drug paraphernalia, scales, residue, baggies, large amounts of cash, weapons, or other implements of the drug trade, were observed or seized from Defendant's home. The State offered no evidence of any other drug sales taking place at Defendant's home, beyond the sale at issue.

The Supreme Court's holding in *State v. Rogers* and this Court's other cases involving maintaining a dwelling for keeping or selling controlled substances support and confirm this Court's unanimous conclusion in *Miller I*. Defendant's conviction for maintaining a dwelling was properly reversed for the trial court's failure to grant Defendant's motion to dismiss at trial. Under "the totality of the circumstances," "merely having drugs in a car [or residence] is not enough to justify a conviction under subsection 90-108(a)(7)." *Rogers*, __ N.C. at __, 817 S.E.2d at 157.

IV. Conclusion

State v. Rogers is distinguishable from the instant case in that it involves the keeping of drugs in a motor vehicle, where other drugs and incriminating evidence of ongoing sales of drugs were present. *Rogers'* disavowal of the duration of time language in *State v. Mitchell* does not compel or mandate a different outcome in the present case.

Under the required consideration of "the totality of the circumstances," the State failed to present sufficient other incriminating evidence, beyond a single sale, to show Defendant kept or maintained a dwelling for the keeping or sale of cocaine. As this Court previously held, the trial court erred by denying Defendant's motion to dismiss that count. Defendant's conviction of maintaining a dwelling for the keeping or sale of cocaine is reversed. *It is so ordered.*

REVERSED.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JOSE ISRAEL RIVERA

No. COA18-517

Filed 19 March 2019

1. Appeal and Error—preservation of issues—waiver—constitutional challenge to evidence—untimely motion to suppress

In a prosecution for taking indecent liberties with a child, defendant waived his right to appeal the admission of his videotaped police interview on constitutional grounds where his counsel did not properly move to suppress the videotape. Defense counsel neither filed a motion to suppress before trial nor met the procedural requirements of the various statutory exceptions allowing motions to suppress to be made during trial.

2. Appeal and Error—effective assistance of counsel—propriety of review on direct appeal

In a prosecution for taking indecent liberties with a child, the record was insufficient to permit appellate review of defendant's

ineffective assistance of counsel claim where his trial counsel did not properly move to suppress evidence. The trial court did not conduct a suppression hearing on defendant's purported motion, and without knowing what evidence might have been produced at such a hearing, it was impossible to determine on direct appeal whether trial counsel's error prejudiced the defense.

Appeal by Defendant from judgment entered 18 August 2017 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 14 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant.

McGEE, Chief Judge.

Jose Israel Rivera ("Defendant") appeals from his 18 August 2017 conviction for taking indecent liberties with a child. For the reasons stated below, we dismiss his appeal.

I. Factual Basis and Procedure

In the early fall of 2015, Defendant was living in Raleigh with his wife, his wife's parents, and his minor children. Defendant's nine-year-old daughter ("daughter") was a close friend of a ten-year-old girl ("G.") who lived nearby. G. was a regular visitor at Defendant's house, and also had a close relationship with Defendant. On 22 September 2015, Defendant's birthday, he came home from work between 4:30 p.m. and 5:00 p.m. Defendant celebrated his birthday at home with his family and G. by having dinner and watching a movie together. During the movie, Defendant's daughter and G. sat on the arms of an oversized armchair while Defendant sat in the seat of the chair—a blanket covered their laps. According to G., while they were watching the movie, Defendant moved his left hand under the blanket to her genital region, and touched her genitals both over and under her underwear. The touching continued for five to ten minutes, until Defendant's wife announced that Defendant's birthday cake was ready to eat and everyone went into the kitchen to eat cake. G. went home after eating the cake, but did not report the alleged touching to anyone that evening.

Defendant's daughter went to G.'s house the next morning, 23 September 2015, and G. told her what had happened the night before. G. testified that Defendant's daughter told G. "to tell [G.'s] parents about what happened[,]" so they both went to G.'s parents' bedroom to report the alleged abuse. G. first told her father, and he then told her mother. G.'s parents immediately walked over to Defendant's house, where they encountered Defendant's wife and told her what G. had told them. G.'s parents called the police, and officers were dispatched to investigate the accusations. Detective Kevin Hubard ("Detective Hubard") of the Raleigh Police Department's Juvenile Unit interviewed G. at the police station later that day.

After interviewing G., Detective Hubard and two additional officers went to Defendant's house, between 6:00 p.m. and 7:00 p.m. on 23 September 2015, to question Defendant about the allegations. After Detective Hubard talked to Defendant, and explained the accusations, Defendant and his wife agreed to drive to the police station in order to be interviewed. Once they arrived at the police station, Detective Hubard interviewed Defendant in one room, while another detective talked with Defendant's wife in another room. Detective Hubard again informed Defendant that the interview was voluntary, and Defendant again agreed to be interviewed. The interview, which was recorded on video, began at approximately 8:00 p.m. on 23 September 2015, and lasted "at least an hour."

Approximately forty minutes into the interview, Defendant began to indicate that he "guess[ed] it [was] possible" that he had improperly touched G. the night before. Defendant stated: "I don't remember, I guess I must have because she says, it must have happened," "she's too close to me," "I want to move on from this[.]" However, Defendant vacillated between indicating that he had, or possibly could have, sexually assaulted G.; stating that he did not remember doing anything; and stating that he "would never" do something like that. At approximately 8:39 p.m., Detective Hubard suggested Defendant write an "apology" to G.'s parents, and Defendant agreed to do so. Detective Hubard gave Defendant paper and a pen, and left the interview room around 8:42 p.m. to allow Defendant to write the "apology." Defendant wrote a short statement in which he indicated that he was sorry for having hurt G. However, while he was alone in the interview room writing the "apology," he also made conflicting verbal statements concerning his culpability. Detective Hubard returned to the interview room and read the "apology" aloud. Defendant still continued to give conflicting statements concerning whether he did, or could have, molested G. Defendant

asked to speak with his wife, and she was brought into the interview room and left alone with Defendant. Defendant's vacillation continued in his conversation with his wife. Defendant's wife left the interview room, and Defendant was then arrested at approximately 9:26 p.m. on 23 September 2015.

Defendant was indicted for sexual offense with a child and taking indecent liberties with a child. Defendant's trial began on 14 August 2017, and pretrial motions were heard that morning before jury selection. At this pretrial motions hearing, Defendant's attorney informed the trial court that he wanted to move to suppress the inculpatory statements Defendant had made in his interview with Detective Hubard. The State objected, informing the trial court that Defendant had not filed a motion to suppress and that it had received no notice that Defendant was intending to move to suppress this evidence. Based upon Defendant's violation of the statutes governing motions to suppress, the trial court ruled that it would not consider Defendant's purported pretrial "motion to suppress," and the proceedings continued to trial.

During the direct questioning of Detective Hubard, the State sought to introduce the video recording of Defendant's interview with Detective Hubard at the police station. Defendant's attorney informed the trial court that he would like to be heard, and the jury was sent out of the courtroom. Defendant asked the trial court's

> permission to voir dire [Detective Hubard] on the question of the last thing he said on direct examination about his decision to arrest, and this relates to my earlier motion to suppress. I believe in the context of this interview, [Detective Hubard] had made a decision to arrest and it occurred sometime before his final decision to put my client in custody.

Defendant's attorney stated: "I would submit to the Court that [Detective Hubard] had made a decision to arrest [Defendant] at about 8:40 -- 8:40 p.m., where my client had decided to make an apology." The trial court stated that, in its opinion, it did not make "any difference what subjective decisions [Detective Hubard] made about arresting or not arresting" until those decisions were expressed to Defendant; the trial court then overruled Defendant's objection. Defendant's attorney responded: "Fair enough," and the trial proceeded. The video of Defendant's inculpatory statements was admitted into evidence and published to the jury. When asked if he had any further objections, Defendant's attorney stated that he did not, and the trial continued. Defendant was found not guilty of a

sex offense with a child, but was convicted on 18 August 2017 of taking indecent liberties with a child. Defendant appeals.

II. Analysis

Defendant argues that the "trial court erred, and committed plain error, by admitting [Defendant's] statements [because Defendant] did not receive *Miranda* warnings[,]" and because Defendant's "statements were involuntary." Defendant has waived any right of appellate review of these arguments, and we dismiss.

A. *Waiver of Right of Appeal*

[1] Defendant's arguments are based upon alleged violations of the Fifth and Fourteenth Amendments of the Constitution of the United States. Article 53, Chapter 15A of the North Carolina General Statutes, N.C. Gen. Stat. § 15A-971, *et seq*. ("Article 53"), "governs the suppression of unlawfully obtained evidence in our trial courts." *State v. Miller*, __ N.C. __, __, 814 S.E.2d 81, 83 (2018). As our Supreme Court said:

> N.C.G.S. § 15A-974(a)(1) states that, "[u]pon timely motion, evidence must be suppressed if . . . [i]ts exclusion is required by the Constitution of the United States[.]" And N.C.G.S. § 15A-979(d) specifies that "[a] motion to suppress evidence made pursuant to this Article is the *exclusive* method of challenging the admissibility of evidence" on constitutional grounds. (Emphasis added.) A defendant generally "may move to suppress evidence only prior to trial," N.C.G.S. § 15A-975(a) (2017), subject to a few, narrow exceptions that permit a defendant to move during trial, *see id.* § 15A-975(b), (c) (2017).
>
> In other words, the governing statutory framework requires a defendant to move to suppress at *some* point during the proceedings of his criminal trial. Whether he moves to suppress before trial or instead moves to suppress during trial because an exception to the pretrial motion requirement applies, a defendant cannot move to suppress for the first time *after* trial. . . . . When a defendant files a motion to suppress before or at trial *in a manner that is consistent with N.C.G.S. § 15A-975, that motion gives rise to a suppression hearing and hence to an evidentiary record pertaining to that defendant's suppression arguments*. But when a defendant, such as defendant here, does *not* file a motion to suppress at the

> trial court stage, the evidentiary record pertaining to his suppression arguments has not been fully developed, and may not have been developed at all.

Id. at __, 814 S.E.2d at 83 (penultimate emphasis added). This Court recognized in an opinion affirmed *per curiam* by our Supreme Court:

> A defendant who seeks to suppress evidence upon a ground specified in N.C. Gen. Stat. § 15A–974 must comply with the procedural requirements outlined in Article 53, Chapter 15A of the North Carolina General Statutes. *State v. Satterfield*, 300 N.C. 621, 624, 268 S.E.2d 510, 513 (1980); *State v. Holloway*, 311 N.C. 573, 576, 319 S.E.2d 261, 264 (1984), *habeas corpus granted*, *Holloway v. Woodard*, 655 F. Supp. 1245 (1987). . . . . The burden is upon the defendant to show that he has complied with the procedural requirements of Article 53. *Satterfield*, 300 N.C. at 624–25, 268 S.E.2d at 513–14.

State v. Creason, 123 N.C. App. 495, 499, 473 S.E.2d 771, 773 (1996), *affirmed*, per curiam, 346 N.C. 165, 484 S.E.2d 525 (1997). In *Holloway*, the defendant's motion to suppress failed to include a supporting affidavit as required by N.C. Gen. Stat. § 15A–977(a), but the State did not object and the trial court conducted a suppression hearing on the defendant's Fourth Amendment argument, which it denied. *State v. Holloway*, 311 N.C. 573, 576-77, 319 S.E.2d 261, 263-64 (1984). This Court, with one judge dissenting, agreed with the defendant's argument and remanded for the taking of additional evidence. *Id.* at 576, 319 S.E.2d at 263. On appeal by the State, our Supreme Court held that failure to comply with the requirements of Article 53 constituted a waiver of the defendant's right to challenge the denial of his motion to suppress—*even though that issue had already been litigated in the trial court*:

> The defendant contends that because the State did not object to the sufficiency of the motion to suppress at trial, or to the evidentiary hearing held on the motion, the State cannot now raise the issue of the motion's deficiency for the first time before this Court. We find no merit in this contention. We have held that defendants by failing to comply with statutory requirements set forth in N.C.G.S. 15A–977 waive their rights to contest on appeal the admission of evidence on constitutional or statutory grounds. *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984); *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980). The

> State's failure to object to the form of the motion affects neither that waiver nor the authority statutorily vested in the trial court to deny summarily the motion to suppress when the defendant fails to comply with the procedural requirements of Article 53. The trial court could properly have denied the defendant's motion to suppress based on the defendant's procedural failures alone, and we therefore reverse the decision of the Court of Appeals.

Holloway, 311 N.C. at 578, 319 S.E.2d at 264.

In the present case, Defendant *did not file* a motion to suppress—or give proper notice and file other required documents—as directed by N.C. Gen. Stat. §§ 15A-972, 15A-974, 15A-975, 15A-976, 15A-977, and 15A-979(d) (2017) ("A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974."). The State, based upon violations of N.C.G.S. § 15A-977,[1] objected, and the trial court ruled: "Okay. I'm not going to entertain a motion to suppress at this stage." No hearing was conducted, but the trial court opined, based on the forecast of evidence, that Detective Hubard's questioning of Defendant did not appear to constitute custodial interrogation for *Miranda* purposes. The trial court again stated that it would not consider Defendant's motion to suppress because "the procedural bar at this stage [Article 53] would bar the consideration of a motion to suppress on this matter. And so I will not entertain that." The trial court's ruling was clearly correct, and we affirm it. *Creason*, 123 N.C. App. at 499, 473 S.E.2d at 773.

During direct questioning of Detective Hubard at trial, the State sought to introduce the video recording of Defendant's interview with Detective Hubard at the police station. Defendant informed the trial court that he would like to be heard, and the jury was sent out of the courtroom. Defendant's attorney asked the trial court's "permission to voir dire [Detective Hubard] on the question of the last thing [Detective Hubard] said on direct examination about his decision to arrest, and this relates to my earlier motion to suppress.[2]" Defendant's attorney

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1. "A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion."

2. The State had asked Detective Hubard whether he had at any point during the interview told Defendant "that he was not free to leave." Detective Hubard responded: "The only time anything like that would have been said was when we told him he was under arrest. At that point I was no longer interviewing him."

stated: "I believe in the context of this interview, [Detective Hubard] had made a decision to arrest and it occurred sometime before his final decision to put my client in custody." Defendant's attorney stated: "I would submit to the Court that [Detective Hubard] had made a decision to arrest [Defendant] at about 8:40 -- 8:40 p.m., where my client had decided to make an apology." Defendant's argument was that once Detective Hubard decided that he was going to arrest Defendant—when Defendant agreed to write out an "apology"—the interview "segue[d] from a non-custodial interview to a custodial interview" because "during the course of that interview the police officers did make a decision to arrest. And at that point, . . . the obligation of [Detective Hubard] to put [Defendant] on notice with Miranda warning was" triggered. Defendant's sole authority for his argument was *Dickerson v. United States*, 530 U.S. 428, 147 L. Ed. 2d 405 (2000). The trial court did not find Defendant's legal authority persuasive, stating:

> I don't see the factual parallel. [*Dickerson*] sounds like a custodial interrogation where no Miranda was given. And the Fourth Circuit said since it was a voluntary statement that Miranda was not required. And the [Supreme Court] in 2000 is saying it doesn't matter whether its voluntary or not, if it's a custodial interrogation, Miranda warning[s are] required. I'm not sure I'm seeing the principle of law that I asked you about, mainly whether in the course of a non-custodial interview if someone makes an inculpatory statement, whether at that point in the interview law enforcement is required to provide a Miranda Warning because the -- can you point me to the[] facts that support that position?

Defendant's attorney did not *voir dire* Detective Hubard concerning his questioning of Defendant at the police station, nor did Defendant's attorney request the trial court to view the video of Defendant's questioning prior to ruling on his objection to the introduction of the evidence of Defendant's inculpatory statements.[3] *State v. Roper*, 328 N.C. 337, 361, 402 S.E.2d 600, 614 (1991) (when the defendant desires to make a motion to suppress at trial, he "must . . . specify that he is making a motion to suppress and request a voir dire."). The trial court considered

3. Although Defendant's attorney initially stated that he wanted to *voir dire* Detective Hubard concerning when Detective Hubard had decided to arrest Defendant, he did not *voir dire* Detective Hubard concerning this or any other subject; did not make any follow-up request to *voir dire* Detective Hubard prior to the ruling of the trial court; nor request *voir dire* to preserve Detective Hubard's testimony for appellate review.

Defendant's argument to be an objection to the admission of the video, not a motion to suppress, and it overruled Defendant's objection. The trial court expressed its ruling as follows:

> I'm going to *overrule the objection* that at a certain point of this non-custodial interview, based on statements made by [] Defendant, it made any difference what subjective decisions [Detective Hubard] made about arresting or not arresting [] Defendant. It still has the character of a non-custodial interview, not requiring Miranda Warnings, so therefore I would *overrule the objection* on that basis. (Emphasis added).

Defendant's attorney responded: "Fair enough[,]" and the trial proceeded.

The objection made by Defendant's attorney did not constitute a motion to suppress pursuant to Article 53, nor could it:

> A defendant may move to suppress evidence at trial only if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (twenty working days) of its intention to use certain types of evidence; or that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion. G.S. 15A-975.

State v. Satterfield, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980); *see also State v. Maccia*, 311 N.C. 222, 227–28, 316 S.E.2d 241, 244 (1984) (citations omitted) ("The defendant has the burden of showing that he has complied with the procedural requirements of Article 53. In Superior Court a 'defendant may move to suppress evidence *only prior to trial*' unless he falls within certain exceptions. G.S. 15A–975 (emphasis added)."). Because none of the exceptions set forth in N.C.G.S. § 15A–975 apply in the present case, Defendant could not timely make a motion to suppress during the trial. *Id.*; *State v. Stowes*, 220 N.C. App. 330, 333, 727 S.E.2d 351, 354 (2012) (citations omitted) ("In the present case, Defendant objected at trial to the introduction of Exhibits 4 and 5 by the State and the trial court itself elected to treat Defendant's objection as a motion to suppress. The trial court then denied Defendant's motion to suppress and overruled the objection. We hold that Defendant's 'motion to suppress' was not timely, and the trial court did not err in denying it."); *State v. Harris*, 71 N.C. App. 141, 143–44, 321 S.E.2d 480, 482–83 (1984) (trial court properly denied the defendant's attempted motion

to suppress at trial without conducting a *voir dire* hearing where none of the N.C.G.S. § 15A–975 exceptions applied). Because Defendant has failed in his burden of establishing that his purported "motion to suppress" at trial was made in compliance with the requirements of N.C.G.S. § 15A–975, Defendant waived any right to appellate review, and the trial court did not err in denying it on that basis alone. *Holloway*, 311 N.C. at 578, 319 S.E.2d at 264.

"The defendant has the burden of establishing that the motion to suppress is both timely and in proper form." *Roper*, 328 N.C. at 360, 402 S.E.2d at 613-14 (citations omitted). Defendant has not met this burden. We hold that Defendant waived appellate review of both his purported "motions to suppress," and we are required to dismiss these arguments pursuant to the holdings in *Creason*, 346 N.C. at 165, 484 S.E.2d at 525, *affirming*, per curiam, *Creason*, 123 N.C. App. at 499, 473 S.E.2d at 773, and *Holloway*, 311 N.C. at 577–78, 319 S.E.2d at 264. In addition, our Supreme Court recently held that a defendant waives even plain error review if his purported "motion to suppress" is not made in accordance with the requirements of Article 53. *Miller*, __ N.C. at __, 814 S.E.2d at 83–86.

B. *Ineffective Assistance of Counsel*

[2] Defendant further argues that his attorney was constitutionally ineffective because the attorney failed to properly move to suppress Defendant's inculpatory statements. The test to determine if a defendant's attorney's representation has violated the defendant's Sixth Amendment rights was set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984) (the "*Strickland* test"). Pursuant to the *Strickland* test, in order to prevail on a claim of ineffective assistance of counsel ("IAC"), a defendant must prove two things:

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

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted).

However, it is rare that this Court will be in a position to decide a defendant's IAC claim on direct appeal: "Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, __ N.C. App. __, __, 821 S.E.2d 860, 861 (2018) (citation omitted). This Court will only consider IAC claims brought on direct appeal " '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 the appointment of investigators or an evidentiary hearing.' " *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (citation omitted). "Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* at 123, 604 S.E.2d at 881 (citation omitted).

We agree with Defendant that the record before us demonstrates that his "counsel's performance was deficient[,]" thus satisfying the first prong of the *Strickland* test. *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (citation omitted). Defendant's counsel failed to file a pretrial motion to suppress as was required by Article 53. This failure prevented Defendant from being afforded the opportunity to present his evidence and arguments in a *voir dire* suppression hearing and, therefore, no ruling was obtained nor order entered. This failure also prevented Defendant from the ability to obtain appellate review of the trial court's ruling and order in the event his motion to suppress had been denied. The fact that Defendant's counsel attempted to make an oral motion to suppress at the pretrial motions hearing demonstrates that this failure was not intentional nor part of any trial strategy. Defendant's "counsel was not functioning as the 'counsel' guaranteed [D]efendant by the Sixth Amendment." *Id.* (citation omitted).

However, the record before us is insufficient for review of the prejudice prong of the *Strickland* test on direct appeal. In order to meet the requirements of proving prejudice, Defendant must show " 'that [his] counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.' " *Id.* (citation omitted) (emphasis removed). "A defendant must demonstrate a reasonable probability that the trial result would have been different absent counsel's error." *State v. Warren*, 244 N.C. App. 134, 145, 780 S.E.2d 835, 842 (2015) (citation omitted). Defendant argues: "Had [Defendant's attorney] properly preserved these issues, there is a reasonable probability that either (1) the trial court

would have suppressed the statements and at least one juror would have voted to acquit, or (2) this Court would reverse the denial of the suppression motion and vacate the conviction[.]" In order for this Court to hold that Defendant has met his burden of showing prejudice pursuant to either of these arguments, we would have to hold, at least implicitly, that there was no legitimate possibility that additional relevant evidence would have been elicited had a suppression hearing been conducted in this case. We cannot know what evidence might have been produced in a hearing that never occurred and, therefore, direct review of an IAC claim on facts similar to those before us will rarely be appropriate:

> "In order to determine whether a defendant is in a position to adequately raise an ineffective assistance of counsel claim, we stress this Court is limited to reviewing this [argument] only on the record before us, without the benefit of information provided by [the State, or by] defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor, that could be provided in a full evidentiary hearing on a motion for appropriate relief."

State v. Perry, __ N.C. App. __, __, 802 S.E.2d 566, 573, *disc. review denied*, 370 N.C. 377, 807 S.E.2d 568 (2017) (citation omitted).

Without a suppression hearing, the State is not given the opportunity to tailor its evidence and arguments in response to the arguments set forth in a defendant's motion to suppress. Further, the defendant's counsel cannot fully present his legal arguments, introduce evidence in support of his arguments, nor directly counter the State's evidence through cross-examination or the admission of contradictory evidence.

In the present case, Defendant now asks this Court to make a determination on whether there was "a reasonable probability that the trial result would have been different absent counsel's error," *Warren*, 244 N.C. App. at 145, 780 S.E.2d at 842 (citation omitted), based not on the evidence and arguments that Defendant's counsel and the State would have presented at a suppression hearing, but on the arguments Defendant's appellate counsel has decided to present to this Court based upon the evidence presented at trial, which was not tailored toward the issues Defendant would have raised during a pretrial suppression hearing.

In *Miller*, our Supreme Court held that a request for plain error review is not an appropriate method for making a constitutional challenge to the admission of evidence when there has been no suppression hearing due to the defendant's counsel's failure to follow the requirements of Article 53. *Miller*, __ N.C. App. at __, 814 S.E.2d at 85.

In reaching its holding, the Court thoroughly discussed the dangers inherent in conducting a prejudice review on appeal when the issue has not been litigated in a suppression hearing at trial. *Miller*, __ N.C. App. at __, 814 S.E.2d at 83-85. Although *Miller* involves plain error review, the defendant's burden to demonstrate prejudice on plain error review is very similar to the defendant's burden to demonstrate prejudice on direct appeal of an IAC claim, and we find the Court's reasoning applicable to Defendant's IAC argument in the present case.

The procedural facts in *Miller* are analogous to the procedural facts in the present case—the defendant in *Miller* failed to file any pretrial motion to suppress in accordance with Article 53, and failed to move to suppress during trial.[4] Instead, the defendant raised an argument that the relevant evidence had been obtained in violation of the Fourth Amendment for the first time on appeal: "[The d]efendant argued to the Court of Appeals that the trial court 'plainly erred' by 'admitting the cocaine and testimony about the cocaine,' and that the seizure of the cocaine resulted from various Fourth Amendment violations." *Miller*, __ N.C. App. at __, 814 S.E.2d at 82. In overruling this Court's decision to conduct plain error review—and thereby overruling the decision to grant the defendant a new trial—our Supreme Court discussed why a defendant's failure to comply with Article 53—when this failure prevents a proper motion to suppress hearing from being conducted by the trial court—significantly impairs the ability to conduct meaningful or fair appellate review:

> Whether [a defendant] moves to suppress before trial or instead moves to suppress during trial because an exception to the pretrial motion requirement applies, a defendant cannot[, pursuant to Article 53,] move to suppress for the first time *after* trial.[5] By raising his Fourth Amendment arguments for the first time on appeal, however, that is effectively what defendant has done here. When a defendant files a motion to suppress before or at trial in a manner that is consistent with N.C.G.S. § 15A-975, that motion gives rise to a suppression hearing and hence

4. There is no indication that the defendant in *Miller* could have made a motion to suppress during trial because, as in the present case, there was no evidence that any of the requirements of N.C.G.S. § 15A-975 allowing a motion to suppress during trial applied.

5. The defendant in *Miller* did not make any motion to suppress after his trial; the Court is simply stating that the defendant's request for plain error review on appeal is akin to such a request, which Article 53 does not allow.

to an evidentiary record pertaining to that defendant's suppression arguments. But when a defendant, such as defendant here, does *not* file a motion to suppress at the trial court stage, the evidentiary record pertaining to his suppression arguments has not been fully developed, and may not have been developed at all.

To find plain error, an appellate court must determine that an error occurred at trial. The defendant, additionally, must demonstrate that the error was "fundamental"—meaning that the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." But here, considering the incomplete record and the nature of defendant's claims, our appellate courts cannot conduct appellate review to determine whether the Fourth Amendment required suppression. [The d]efendant asked the Court of Appeals . . . to review whether defendant voluntarily consented to a search that resulted in the discovery of incriminating evidence. Fact-intensive Fourth Amendment claims like these require an evidentiary record developed at a suppression hearing. Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments.

When a defendant does not move to suppress, moreover, the State does not get the opportunity to develop a record pertaining to the defendant's . . . claims. Developing a record is one of the main purposes of a suppression hearing. At a suppression hearing, both the defendant and the State can proffer testimony and any other admissible evidence that they deem relevant to the trial court's suppression determination. In this case, though, the trial court did not conduct a suppression hearing because defendant never moved to suppress [the] evidence[.] And because no suppression hearing took place, we do not know whether the State would have produced additional evidence at a suppression hearing, or, if the State had done so, what that evidence would have been. *Cf. Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 1163, 22 L.Ed.2d 398 (1969) ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly

> was not compiled with those questions in mind."). To allow plain error review in a case like this one, therefore, "would 'penalize the [g]overnment for failing to introduce [at trial] evidence on probable cause for arrest [or other matters bearing on the defendant's claim] when defendant's failure to raise an objection before or during trial seemed to make such a showing unnecessary.' ").

Miller, __ N.C. App. at __, 814 S.E.2d at 83-84 (citations omitted) (emphasis in original). The same concerns are present on direct appeal of an IAC claim when no suppression hearing has been conducted. This Court can only surmise who might have testified at the suppression hearing and what evidence that testimony would have elicited. As the Court in *Miller* stated: "We just do not know, because no suppression hearing occurred." *Id.* at __, 814 S.E.2d at 84. It is therefore difficult, if not impossible, to conduct meaningful prejudice review.

The *Miller* Court also discussed the potential for intentional abuse of the system when appellate review is allowed without the full consideration of the relevant issues and evidence afforded the trial court pursuant to a suppression hearing:

> [A] defendant could unfairly use plain error review to his tactical advantage. For instance, a defendant might determine that his chances of winning a motion to suppress before or at trial are minimal because he thinks that, once all of the facts come out, he will likely lose. But if we were to allow plain error review when no motion to suppress is filed and hence no record is created, that same defendant might wait to raise a Fourth Amendment issue until appeal and take advantage of the undeveloped record—a record in which some or all of the important facts may never have been adduced—to claim plain error. *Cf. United States v. Chavez–Valencia*, 116 F.3d 127, 132 (5th Cir.) ("If, at trial, the government assumes that a defendant will not seek to suppress certain evidence, the government may justifiably conclude that it need not introduce the quality or quantity of evidence needed otherwise to prevail.").

Id. at __, 814 S.E.2d at 84–85 (citation omitted). Applying the reasoning in *Miller*, the *potential* that a defendant will seek direct appeal for an IAC claim like the one before us, based on the failure of Defendant's counsel to properly move to suppress evidence, could prompt the State to attempt to introduce evidence at trial "that the defendant may

or may not later challenge on appeal. On the other hand, if the State [chooses] not to present evidence supporting [the voluntariness of] an unchallenged [inculpatory statement], it could risk reversal on an undeveloped record under the [IAC] standard." *Id.* at __, 814 S.E.2d at 85 (citation omitted).

The Court in *Miller* held that "the Court of Appeals should not have conducted plain error review in the first place," and that our Supreme Court did "not need to address (and, based on our analysis, it would not be possible for us to address) the other issue before us—namely, whether the Court of Appeals reached the right conclusion in its plain error analysis." *Id.* Prior to *Miller*, this Court has decided whether the record was sufficient for direct review of defendants' IAC claims based on failure to properly move for suppression of evidence on a case-by-case basis.[6] However, we have shown reluctance to conduct direct review of an IAC claim when the claim is based on evidence admitted at trial after counsel's failure to obtain a suppression hearing due to violations of Article 53. In a recent unpublished opinion, we discussed this Court's reluctance:

> [T]his Court repeatedly has held that when the trial court denies a defendant's motion to suppress as untimely, "we cannot properly evaluate defendant's claim of ineffective assistance of counsel on direct appeal because no evidentiary hearing was held on defendant's motion to suppress." *State v. Johnson*, 203 N.C. App. 718, 722, 693 S.E.2d 145, 147 (2010). Likewise, here, we cannot determine whether counsel's conduct—even assuming it was deficient—prejudiced Otto because the trial court did not conduct an evidentiary hearing on the motion to suppress, and the court had no occasion, during trial, to make findings concerning the admission of the challenged evidence. As we explained in *Johnson*, "[b]ased upon this record, it is simply not possible for this Court to adjudge whether defendant was prejudiced by counsel's failure to file the motion to suppress within the allotted time." *Id.*

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6. *See, e.g.*, *State v. Canty*, 224 N.C. App. 514, 516-17, 736 S.E.2d 532, 535 (2012) (conducting direct review of IAC claim when trial testimony and video evidence sufficient to demonstrate officer lacked reasonable suspicion for a traffic stop); *State v. Johnson*, 203 N.C. App. 718, 721–23, 693 S.E.2d 145, 146–47 (2010) (no review where there was no suppression hearing and there was conflict in the relevant trial testimony such that prejudice review was not possible).

State v. Otto, __ N.C. App. __, 822 S.E.2d 792, 2019 WL 438392 *2 (2019) (unpublished); *see also State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) ("Defendant also alleges that his sixth amendment right to effective assistance of counsel at trial was violated. We cannot properly determine this issue on this direct appeal because an evidentiary hearing on this question has not been held."). We agree with the reasoning in *Otto*, and find that it comports with the reasoning discussed above in *Miller*. We believe that *Miller*, as well as precedent in which our appellate courts considered direct appeal of IAC claims based on errors by counsel that denied defendants the opportunity, by *voir dire* hearing, to challenge the admission of evidence, demonstrates that direct review in cases like the present case is not appropriate unless it is clear that an MAR proceeding would not result in additional evidence that could influence our decision on appellate review.

Therefore, we hold that the current record is insufficient for direct review of Defendant's IAC claim, and we dismiss the claim "without prejudice to defendant's right to file a motion for appropriate relief in the superior court based upon an allegation of ineffective assistance of counsel. N.C. Gen. Stat. § 15A–1415(b)(3)[.]" *Kinch*, 314 N.C. at 106, 331 S.E.2d at 669; *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001).

DISMISSED.

Judges HUNTER, JR. and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
BRADY LORENZO SHACKELFORD

No. COA18-273

Filed 19 March 2019

1. Constitutional Law—First Amendment—felony stalking—social media posts—whether speech integral to criminal conduct

In a felony stalking case arising from defendant's social media posts about a woman he met at church, the Court of Appeals rejected the State's argument that defendant's posts constituted speech integral to criminal conduct, which would have removed them from First Amendment protection, where the speech itself was violative of the criminal statute defendant was charged under (section 14-277.3A).

2. Constitutional Law—First Amendment—felony stalking—social media posts—as-applied challenge

In a prosecution for felony stalking arising from defendant's social media posts about a woman he met at church, application of the stalking statute (N.C.G.S. § 14-277.3A) was unconstitutional as applied to defendant because it constituted a content-based restriction on his speech that could not survive strict scrutiny based on being overly broad and not the least restrictive means to prevent defendant from committing a criminal act against the prosecuting witness.

3. Constitutional Law—First Amendment—felony stalking—social media posts—unconstitutional as applied—relief from convictions

In an appeal from multiple convictions for felony stalking—arising from defendant's social media posts about a woman he met at church—in which the Court of Appeals found the stalking statute as applied to defendant unconstitutional, defendant's convictions for felony stalking were vacated where they were either based solely on defendant's social media posts, or could have been based on those posts. Further, two of the convictions that were also premised on non-expressive conduct—of defendant delivering cupcakes to the prosecuting witness—could not stand, since a single act does not suffice to support a stalking conviction under section 14-277.3A.

Judge MURPHY concurring by separate opinion.

Appeal by defendant from judgment entered 18 August 2017 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2018.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak and Assistant Solicitor General Kenzie M. Rakes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

DAVIS, Judge.

In this appeal, we address the question of whether a defendant's criminal prosecution for violations of North Carolina's stalking statute infringed upon his constitutional right to free speech. Brady Lorenzo Shackelford ("Defendant") was convicted of four counts of felony stalking based primarily upon the content of posts made by him on his Google Plus account. Because we conclude that the application of the statute to Defendant's posts amounts to a violation of his right to free speech under both the First Amendment to the United States Constitution and Article 1, Section 14 of the North Carolina Constitution, we vacate his convictions.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: Defendant met "Mary"[1] on 3 April 2015 at a church in Charlotte, North Carolina prior to the start of a Good Friday worship service. Mary was employed in the church's communications department. The two of them were seated at the same table and briefly made small talk in a group setting before separating at the beginning of the service. Upon leaving church that day, Mary did not give any further thought to her encounter with Defendant.

On 22 April 2015, Mary received an email from Defendant on her work email account that referenced their 3 April meeting and asked "for help with a company communications plan." Mary replied to his email later that day, informing him that she would be happy to assist him and

1. A pseudonym is used throughout this opinion to protect the identity of the subject of Defendant's posts.

suggesting a time for them to meet. Defendant responded shortly thereafter, agreeing to meet Mary on the date she had suggested.

Later that same night, Defendant sent another email to Mary "to give [her] some information about [his] business[.]" In the email, Defendant detailed his plan to create a new business based in the British Virgin Islands. In the final paragraph of his email, Defendant wrote that he would pay Mary "100K out of the convertible note proceeds AND take [her] out to dinner at any restaurant in Charlotte."

Defendant's email "set off a lot of red flags" for Mary. On 27 April 2015 she emailed Defendant to "cancel[ ] the meeting, thinking that his intentions were not really professional, and informed [her] boss" about the exchange. Later that day and again on 5 May 2015, Defendant emailed Mary in an attempt to reschedule their meeting. On 5 May 2015, Mary replied with links to online resources and wrote: "I won't be able to meet. If you have further questions, you can contact my boss[.]"

On 19 May 2015, Defendant mailed a five-page handwritten letter to Mary's work address. At trial, Mary testified as follows with regard to this letter:

> The gist of it was that when [Defendant] first saw me at the Good Friday service he thought he had found his soul mate, and that the feelings he felt were so intense he couldn't talk to me. And then he goes on to say that he used the communications plan to talk to me, to ask me out, rather than for professional reasons[.]

Defendant ended the letter by writing that he was "highly attracted" to Mary and asking her to go on a date with him. The following day, Mary gave the letter to her work supervisors and asked them to intervene on her behalf, and they agreed to do so. She did not respond to Defendant's letter.

On 26 May 2015, Defendant sent Mary a second handwritten letter, which was seven pages long and mailed to her home address. At trial, Mary provided a summary of the second letter:

> He starts by apologizing for sending this to me without me giving him my address. He says he found it on a website. And he also says that he would not harass or stalk me, and that if I felt uncomfortable to notify him and he would cease communication. Then he goes on to talk about some of his personal history, and the last line says that I need to go on a date with him or tell him to leave me alone.

Mary showed Defendant's letter to her supervisors, who once again told her that they would handle the situation.

On 9 June 2015, Reverend Bill Roth, the Minister of Pastoral Care at the church, spoke to Defendant over the phone about his communications with Mary. During this phone call, Reverend Roth told Defendant "to stop making any contact [with Mary] and [that] there could be legal actions if he did, and that the contacts were unwanted." Following this conversation, Defendant did not send Mary any further emails or letters.

In June of 2015, Mary logged into an account she had created on the social media service Google Plus. Upon doing so, she discovered that Defendant had "followed" her account sometime in late April of 2015 and had made four separate posts on his own Google Plus account in early June that referred to her by name. The posts on Defendant's Google Plus account were not specifically directed to Mary but were shared publicly on his account where any user of the service could read them.

The first post, dated 2 June 2015, stated that "God chose [Mary]" to be Defendant's "soul mate." In the other three posts, Defendant wrote, among other things, that he "freely chose [Mary] as [his] wife" and wanted God to "please make [Mary]" his wife. After viewing these posts, Mary immediately blocked Defendant's account. Shortly thereafter, she deleted her own Google Plus account. Mary continued, however, to monitor Defendant's publicly shared posts by checking his Google Plus page "[a]t least once a week."

Following his 9 June 2015 phone call with Reverend Roth, Defendant continued to post about Mary. None of his posts after that date referenced Mary by name, although one used her initials and another referred to her by a shortened version of her first name.

On 19 June 2015, Defendant wrote the following post on his Google Plus account:

> There is a woman from my church that is turning me bat crazy. She is the first thing I see when I wake up in the morning and the last thing I see before I lay down at night. I strongly believe that she is an angel in disguise, that she is the girl that God sent down from heaven for me. I strongly believe that she is my soul mate, that she is my destiny. My heart aches for her.

He posted as follows on 28 June 2015:

> I'm feeling depressed. There's a woman at my church that I want really, really bad, but she doesn't want me. I've prayed to God asking him to relieve this pain in my heart by allowing me to view just a small glimpse of her angelic face while in church, but God won't even give me that.

On 19 July 2015, Defendant wrote the following post:

> I've changed my relationship status because too many single & looking women are adding me to their circles. There is only one woman that I want, and her initials are [Mary's initials]. Even though we aren't dating yet, you might as well mark me down as being in a relationship because I am not interested in other women.

He also posted a message on 2 August 2015 stating that "I believe the woman who introduced me to my soul mate at my church's Good Friday service is jealous and envious of my love for my soul mate and would rather me be with her instead of my soul mate."

On 13 August 2015, a box of cupcakes was delivered to Mary's office at her work. Attached to the box was a typed, unsigned note that read: "[Mary], I never properly thanked you for the help you gave me regarding my company's communication plan, so, with these cupcakes, please accept my thanks."

Upon receiving the cupcakes, Mary filed a police report with Detective Stephen Todd, an off-duty Charlotte-Mecklenburg Police Department officer who worked at the church, because she "felt like she was being stalked." Based upon Mary's report, Detective Todd applied for an arrest warrant against Defendant on a charge of misdemeanor stalking. Defendant was arrested on 14 August 2015 and subsequently released on bail.

The same day that he was arrested, Defendant posted the following message on his Google Plus account:

> A woman I was interested in really, really bad has let it be known in no uncertain terms that she is not interested in me. Therefore, with a much heavy heart, I announce that I am officially single. :(
>
> The pain hurts because I dreamt about this woman and believed that she was my soul mate. How could God be so wrong???

On 16 August 2015, Defendant posted another message:

> I study all religions, and I have been searching them all for the past day trying to find something, some quote, that would console me in my time of heartbreak. I just read something by Buddha that, instead of consoling me, actually made me angry. He said, "In the end, only three things matter: how much you loved, how gently you lived, and how gracefully you let go of things not meant for you."
>
> My question for Buddha is this: How do you know when something is not meant for you if you give up at the first sign of difficulty? Sometimes, God places difficulties in our lives because he wants us to be persistent in the face of those difficulties. For example, if a boy really wanted a girl, and the girl turned him down the first time he asked her out on a date, should he take Buddha's advice and gracefully let go of something not meant for him or should he continue courting the girl with the hope that she will one day say yes? If every guy let go of the girl who turned him down the first time, then there would be lots of marriages that never took place because he wasn't persistent. Had he been persistent, his persistence would have won her over by proving to her just how much he loved her. . . .

Later that same day, Defendant posted as follows on his Google Plus account:

> I have courted three Venus in Scorpios over the years, so I decided earlier this summer to learn everything that I could about Scorpios and Venus in Scorpios. I was reading this website about Scorpios this evening when I read a sentence that made me break out laughing so hard from the truth that I nearly died. The author was talking about their obsessiveness and stated, "Don't run away (you'll only be stalked)." I LMAO because I saw the behavior in all three women. Moreover, the Scorpio Ascendant in me completely understood where they were coming from.

On 21 August 2015, Mary filed a petition for a no-contact order against Defendant in Mecklenburg County District Court. On 1 September 2015, the Honorable Becky Tin issued an order prohibiting Defendant from contacting Mary or "posting any information about [her] on social media."

Later that month, Defendant authored the following post on his Google Plus account on the same date that Mary attended a Carolina Panthers football game: "Who is your favorite Carolina Panthers cheerleader? Mine is . . . I'm not telling, least [sic] I upset my Venus in Scorpio future wife. . . ." On 28 September 2015, Defendant posted: "OK, I've teased my Venus in Scorpio long enough. My favorite Carolina Panthers cheerleader is Emily. If she shows up missing, [shortened form of Mary's name], I'll know who to blame."

Several weeks later, following a heavy rainstorm in South Carolina – where Mary's family lives – Defendant posted: "South Carolina got pummeled with rain. I pray my future wife's family is OK." On 4 October 2015, Defendant posed the following question on his account: "If you really loved someone and wanted to be with them forever, would you fly down to the Caribbean and secretly elope with them on a deserted island?"

In an undated Google Plus post that was introduced as evidence at his trial, Defendant wrote, in relevant part, as follows:

> I would love to learn more about the dynamic between me and my future wife, but I don't know her personality type. I do know that she is either an INFJ or an INFP because of a pin on her Pinterest board. Unfortunately, her pin is confusing because she says that she is an INFP while the image she pinned is that of an INFJ. I guess I will just have to study both of them.

On 24 November 2015, Defendant sent an email to a close friend of Mary's. The email began as follows:

> I know that you are best friends with [Mary]. In fact, I knew that you were best friends with Mary before you even added me to your circles on Google+. My question for you is this: You were present in the courtroom when [Mary] obtained a protective order against me, so why would you even add me to your circles if I am supposedly stalking [Mary]?

Later in the email, Defendant wrote that Mary had a "moral responsibility to tell the full truth as to why she really charged me when we show up in court" and that the friend should "encourage [Mary] to tell the truth when we show up in court[.]"

On Monday, 14 December 2015, Defendant posted the following on his Google Plus account:

> I'm going to send a personal email on Friday using my corporate email account, which doesn't have tracking software, instead of my Gmail account, which does have tracking software, because the final recipient knows that I have tracking software on my Gmail account, and I want her to share the email with as many people as possible without fear of me knowing who she is forwarding the email to.

Two days later, he wrote: "I am so eager to marry my future wife that I would rather elope with her now than marry her in our church seven months from now."

On Friday, 18 December 2015, Defendant sent another email to Mary's friend. In this email, he detailed his plans to issue a $500 million note as part of a viral marketing campaign that would ultimately result in him taking a polygraph test on CNN to prove that he had "talked to God over 20 times and seen his face 5 times[.]" According to Defendant, his televised polygraph test would provide Mary with an opportunity to save face and "tell the judge that I am obviously a righteous man and was in no way a threat towards her." Three days after sending this email, Defendant posted the following on his Google Plus account: "I just realized that I forgot my wife's birthday last week. I'm sorry, Babe[.]"

Mary's friend forwarded both of the emails she had received from Defendant to Detective Todd. Based on these emails along with Defendant's Google Plus posts, Detective Todd obtained an arrest warrant against Defendant on 24 December 2015 for felony stalking. Defendant was subsequently indicted by a grand jury on eight additional counts of felony stalking on 4 April 2016. On 4 August 2017, Defendant filed a motion to dismiss all charges against him on the ground that the Google Plus posts giving rise to his charges were protected under the First Amendment.

Defendant's jury trial began on 15 August 2017 in Mecklenburg County Superior Court before the Honorable Yvonne Mims Evans. Prior to the beginning of trial, the court denied the State's motion to amend the date on one of Defendant's indictments, and the State dismissed that charge. At the close of the State's evidence, the trial court granted Defendant's motion to dismiss the four stalking charges premised upon violations of the 1 September 2015 no-contact order. The court stated that it was doing so based upon its concern that the language in the no-contact order prohibiting Defendant from posting about Mary on social media "may be unconstitutional."

On 18 August 2017, Defendant was convicted of each of the four remaining stalking offenses that were submitted to the jury. All of these convictions were based upon conduct that occurred after his 9 June 2015 phone call with Reverend Roth during which he was directed to cease his attempts to communicate directly with Mary. The trial court consolidated Defendant's convictions in 16 CRS 10028 and 16 CRS 10029 and sentenced him to a term of 17 to 30 months imprisonment. The court also imposed a consecutive sentence of 15 to 27 months imprisonment for his conviction in 16 CRS 10030. With regard to Defendant's conviction in 16 CRS 10034, the court sentenced Defendant to a term of 15 to 27 months imprisonment, suspended the sentence, and placed him on 36 months of supervised probation. Defendant gave notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the four stalking charges for which he was ultimately convicted. He contends that because all of these charges were based — either in whole or in part — upon the content of his Google Plus posts, he could not constitutionally be convicted of stalking due to the resulting infringement of his right to free speech under the First Amendment to the United States Constitution and Article 1, Section 14 of the North Carolina Constitution. As such, he is asserting an as-applied challenge to North Carolina's stalking statute, N.C. Gen. Stat. § 14-277.3A.

I. As-Applied Challenge to N.C. Gen. Stat. § 14-277.3A

A. As-Applied Challenges Generally

With regard to the distinction between facial and as-applied constitutional challenges, this Court has stated the following:

> [T]here is a difference between a challenge to the facial validity of [a statute] as opposed to a challenge to the [statute] as applied to a specific party. The basic distinction is that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context. . . . Only in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant.

Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (internal citations,

quotation marks, and brackets omitted), *aff'd per curiam*, 369 N.C. 722, 799 S.E.2d 611 (2017).

Here, Defendant's constitutional challenge is strictly an as-applied one. Thus, this case does not require us to consider the facial validity of N.C. Gen. Stat. § 14-277.3A.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Roberts*, 237 N.C. App. 551, 556, 767 S.E.2d 543, 548 (2014) (citation and quotation marks omitted), *disc. review denied*, 368 N.C. 258, 771 S.E.2d 324 (2015). Under the *de novo* standard, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

B. Overview of N.C. Gen. Stat. § 14-277.3A

N.C. Gen. Stat. § 14-277.3A provides, in pertinent part, as follows:

> (c) **Offense**. — A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
>
> . . . .
>
> > (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

N.C. Gen. Stat. § 14-277.3A (2017).

"Course of conduct" is defined in the statute as "[t]wo or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means . . . communicates to or about a person[.]" *Id.* N.C. Gen. Stat. § 14-277.3A defines "harassment" as "[k]nowing conduct, including written or printed communication or transmission . . . and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.* In this appeal, the State argues that Defendant's convictions were proper based on the theory that he engaged in an illegal "course of conduct" directed at Mary as that phrase is statutorily defined.

C. First Amendment Principles

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws abridging the freedom of speech." *Reed v. Town of Gilbert, Ariz.*, __ U.S. __, __, 192 L. Ed. 2d 236, 245 (2015) (citation and quotation marks omitted). Article 1, Section 14 of the North Carolina Constitution provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art. I, § 14. Our appellate courts have held that the free speech protections contained in the federal and North Carolina constitutions are "parallel and has addressed them as if their protections were equivalent." *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (citation omitted).

"Posting information on the Internet — whatever the subject matter — can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby — activities long protected by the First Amendment." *State v. Bishop*, 368 N.C. 869, 873, 787 S.E.2d 814, 817 (2016) (citation omitted). Indeed, "the protections of the First Amendment extend in full not just to the Internet, but to all new media and forms of communication that progress might make available[.]" *Id.* at 874, 787 S.E.2d at 818 (internal citation omitted).

The United States Supreme Court has stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 216 (1972) (citation omitted). As a result, "[c]ontent-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, __ U.S. at __, 192 L. Ed. 2d. at 245 (citation omitted). Conversely, "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d. 661, 675 (citation and quotation marks omitted).

In *Bishop*, our Supreme Court recently addressed a constitutional challenge to North Carolina's cyberbullying statute. *Bishop*, 368 N.C. at 872, 787 S.E.2d at 817. Although *Bishop* involved a facial — rather than an as-applied — challenge, we nevertheless find the Supreme Court's decision instructive in guiding our analysis in the present case.

The provision of the cyberbullying statute being challenged in *Bishop* provided, in relevant part, as follows:

> (a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network to do any of the following:
>
> (1) With the intent to intimidate or torment a minor:
>
> . . . .
>
> d. Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor.

N.C. Gen. Stat. §14-458.1(a)(1)(d) (2015).

In assessing the constitutionality of that provision, our Supreme Court first analyzed whether the regulation implicated the First Amendment by restricting protected speech. *Bishop*, 368 N.C. at 872, 787 S.E.2d at 817. After determining that the statute did, in fact, regulate protected speech because it "outlawed posting particular subject matter, on the internet, with certain intent[,]" the Court proceeded to its "second threshold inquiry" — whether N.C. Gen. Stat. § 14-458.1(a)(1)(d) was a content-based or content-neutral restriction. *Id.* at 873, 874, 787 S.E.2d at 817, 818. The Court explained the importance of this distinction as follows:

> This central inquiry determines the level of scrutiny we apply here. Content based speech regulations must satisfy strict scrutiny. Such restrictions are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. In contrast, content neutral measures . . . are subjected to a less demanding but still rigorous form of intermediate scrutiny. The government must prove that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Id. at 874-75, 787 S.E.2d at 818 (internal citations and quotation marks omitted). The Supreme Court ultimately concluded that the cyberbullying statute was content-based because it "defines regulated speech by its particular subject matter" in "criminaliz[ing] some messages but not others, and makes it impossible to determine whether the accused has

committed a crime without examining the content of his communication." *Id.* at 876, 787 S.E.2d at 819 (citation, quotation marks, and brackets omitted).

The Court then proceeded to examine whether the challenged provision of the cyberbullying statute survived strict scrutiny. After determining that the protection of minors from online bullying represented a compelling governmental interest, it analyzed whether N.C. Gen. Stat. § 14-458.1(a)(1)(d) "embodies the least restrictive means of advancing the State's compelling interest in protecting minors from this potential harm." *Id.* at 878, 787 S.E.2d at 820. The Court ultimately held that the provision failed the strict scrutiny test and therefore violated the First Amendment, concluding as follows:

> Were we to adopt the State's position, it could be unlawful to post on the Internet any information relating to a particular minor. Such an interpretation would essentially criminalize posting *any* information about *any* specific minor if done with the requisite intent.
>
> . . . N.C. Gen. Stat. § 14-458.1(a)(1)(d) could criminalize behavior that a robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior. . . .
>
> In sum, however laudable the State's interest in protecting minors from the dangers of online bullying may be, North Carolina's cyberbullying statute creates a criminal prohibition of alarming breadth.

Id. at 879, 787 S.E.2d at 821 (citations, quotation marks, and brackets omitted).

1. "Speech Integral to Criminal Conduct" Exception

[1] Having reviewed the pertinent legal principles implicated by Defendant's arguments on appeal, we now turn our attention to Defendant's constitutional argument itself. Before we apply the analysis applicable to challenges brought under the First Amendment, however, we must first address the threshold issue raised by the State that Defendant's Google Plus posts are excluded from First Amendment protection. Specifically, the State contends that Defendant's posts constitute "speech that is integral to criminal conduct" — a category of speech that falls outside of the protection provided by the First Amendment. We disagree.

Although it is well established that content-based speech restrictions are presumptively invalid, certain categories of expression are wholly excluded from First Amendment protection. *See U.S. v. Stevens*, 559 U.S. 460, 468-69, 176 L. Ed. 2d 435, 444 (2010) (listing obscenity, defamation, fraud, and "speech integral to criminal conduct" as examples of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (internal citations and quotation marks omitted)). "[I]t rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *New York v. Ferber*, 458 U.S. 747, 761-62, 73 L. Ed. 2d 1113, 1125-26 (1982) (citation and quotation marks omitted); *see id.* at 758-59, 73 L. Ed. 2d at 1124 (holding ban on distribution of child pornography "passes muster under the First Amendment" because speech at issue was "intrinsically related to the sexual abuse of children").

In evaluating the State's argument on this issue, we find the decision from the Illinois Supreme Court in *People v. Relerford*, 2017 IL 121094, ¶1, 104 N.E.3d 341 to be helpful.[2] In *Relerford*, the court invalidated certain provisions of Illinois' stalking and cyberstalking statutes as facially violative of the First Amendment. *Id.* at ¶63, 104 N.E.3d at 356. The challenged provision of the stalking statute — which was very similar to the pertinent language from N.C. Gen. Stat. § 14-277.3A — stated that "two or more nonconsensual communications to or about a person that the defendant knows or should know would cause a reasonable person to suffer emotional distress constitute a course of conduct sufficient to establish the offense of stalking." *Id.* at ¶29, 104 N.E.3d at 349. In determining that the above-quoted provision was constitutionally invalid, the Illinois court rejected the state's argument that the statutory provision merely regulated speech integral to criminal conduct:

> In light of the fact that a course of conduct can be premised exclusively on two communications to or about a person, this . . . is a direct limitation on speech that does not require any relationship — integral or otherwise — to

2. Although it is axiomatic that we are not bound by decisions from the appellate courts of another state unless we are applying the law of that jurisdiction, we are permitted to consider them as persuasive authority. *See State v. Williams*, 232 N.C. App. 152, 157, 754 S.E.2d 418, 422 ("While we recognize that decisions from other jurisdictions are, of course, not binding on the courts of this State, we are free to review such decisions for guidance." (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

> unlawful conduct. Under [the statute], the speech *is* the criminal act.

Id. at ¶45, 104 N.E.3d at 352.

As noted above, N.C. Gen. Stat. § 14-277.3A provides, in pertinent part, as follows:

> (c) **Offense**. — A defendant is guilty of stalking if the defendant willfully on more than one occasion . . . engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the . . . course of conduct would cause a reasonable person to do any of the following:
>
> . . . .
>
> > (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

N.C. Gen. Stat. § 14-277.3A. Moreover, "[c]ourse of conduct" is defined in the statute as "[t]wo or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means . . . communicates to *or about* a person[.]" N.C. Gen. Stat. § 14-277.3A(b)(1) (emphasis added).

Thus, the pertinent statutory language at issue here is virtually identical to the statutory provision declared to be unconstitutional in *Relerford* in that two or more communications by a defendant to or about another person can constitute a course of conduct sufficient to support a stalking conviction. Here, all four of Defendant's indictments were premised either entirely or in part upon social media posts referencing Mary — posts that he wrote *about* Mary but did not send directly *to* her (or, for that matter, to anyone else). Pursuant to the language of N.C. Gen. Stat. § 14-277.3A, no additional conduct on his part was needed to support his stalking convictions. Rather, his speech itself was the crime.

For this reason, the First Amendment is directly implicated by Defendant's prosecution under N.C. Gen. Stat. § 14-277.3A. We therefore reject the State's argument that Defendant's posts fall within the "speech integral to criminal conduct" exception. *See United Food & Commer. Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1208 (D. Ariz. 2013)

("[The statute] does not incidentally punish speech that is integral to a criminal violation; the speech itself is the criminal violation.")[3].

2. Analysis Under First Amendment

[2] Having concluded that the First Amendment is, in fact, triggered by Defendant's convictions, we next proceed to analyze Defendant's free speech argument within the framework adopted by the United States Supreme Court. As an initial matter, in order to determine the appropriate level of scrutiny to apply, we must first decide whether the application of N.C. Gen. Stat. § 14-277.3A to Defendant's posts represented a content-based or content-neutral restriction on speech.

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. . . . Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech[.]

Reed, __ U.S. at __, 192 L. Ed. 2d. at 245 (internal citations and quotation marks omitted). Restrictions are also content-based if they are "concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." *McCullen v. Coakley*, __ U.S. __, __, 189 L. Ed. 2d 502, 517 (2014) (citation and quotation marks omitted).

Once again, we find *Relerford* to be helpful to our analysis of this issue. There, the court concluded that the challenged provision of the Illinois stalking statute was a content-based restriction because the prohibition contained in the statutory language against "communications to or about a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient." *Relerford*, 2017 IL 121094 at ¶34, 104 N.E.3d at 351.

> Under the relevant statutory language, communications that are pleasing to the recipient due to their nature or

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3. While threats also constitute a type of speech that does not receive First Amendment protection, *see Virginia v. Black*, 538 U.S. 343, 359, 155 L. Ed. 2d 535, 552 (2003) ("[T]he First Amendment also permits a [s]tate to ban a true threat." (citation and quotation marks omitted)), the State conceded at oral argument that none of Defendant's Google Plus posts constituted threats against Mary.

> substance are not prohibited, but communications that the speaker knows or should know are distressing due to their nature or substance are prohibited. Therefore, it is clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications.

Id. (citation omitted). Similarly, in *Bishop* our Supreme Court determined that N.C. Gen. Stat. § 14-458.1(a)(1)(d) was a content-based restriction because the language of North Carolina's cyberbullying statute made it "impossible to determine whether the accused has committed a crime without examining the content of his communication." *Bishop*, 368 N.C. at 876, 787 S.E.2d at 819.

In the present case, based on the text of N.C. Gen. Stat. § 14-277.3A Defendant was subject to prosecution if he knew or should have known that his Google Plus posts "would cause a reasonable person to . . . [s]uffer substantial emotional distress[.]" N.C. Gen. Stat. § 14-277.3A(c)(2). Such a determination simply could not be made without reference to the content of his posts. *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134, 120 L. Ed. 2d 101, 114 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation." (citation omitted)).

Therefore, we hold that as applied to Defendant N.C. Gen. Stat. § 14-277.3A constituted a content-based restriction on speech. As a result, our final step in the analysis is to determine whether the application of N.C. Gen. Stat. § 14-277.3A to the messages contained in Defendant's social media posts satisfies strict scrutiny review. We conclude that it does not.

In order to survive a strict scrutiny analysis, "the State must show that the statute serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest." *Bishop*, 368 N.C. at 876, 787 S.E.2d at 819. As our Supreme Court has explained, "[t]he State must show not only that a challenged content based measure addresses the identified harm, but that the enactment provides the least restrictive means of doing so. Given this exacting scrutiny, it is perhaps unsurprising that few content based restrictions have survived this inquiry." *Id.* at 877-78, 787 S.E.2d at 820 (internal citations and quotation marks omitted).

In *Bishop*, the Supreme Court held that the challenged statute failed strict scrutiny because it did not "embod[y] the least restrictive means of advancing the State's compelling interest in protecting minors

from [cyberbullying]." *Id.* at 878, 787 S.E.2d at 820. As discussed above, that statute criminalized "[p]ost[ing] or encourag[ing] others to post on the Internet private, personal, or sexual information pertaining to a minor" with the intent "to intimidate or torment a minor." N.C. Gen. Stat. § 14-458.1. In concluding that the statute failed strict scrutiny, the Supreme Court reasoned that "as to both the motive of the poster and the content of the posting, the statute sweeps far beyond the State's legitimate interest in protecting the psychological health of minors." *Bishop*, 368 N.C. at 878, 787 S.E.2d at 821. The Court was particularly troubled by the scope of the statutory language prohibiting the posting of "private, personal, or sexual information pertaining to a minor," which "would essentially criminalize posting *any* information about *any* specific minor if done with the requisite intent." *Id.* at 879, 787 S.E.2d at 821.

The Illinois Supreme Court invalidated the challenged provision of the stalking statute at issue in *Relerford* due to similar concerns about overbreadth. In concluding that the provision was unconstitutional, the court stated as follows:

> [S]ubsection (a) embraces a vast array of circumstances that limit speech far beyond the generally understood meaning of stalking. Indeed, the amended provision criminalizes any number of commonplace situations in which an individual engages in expressive activity that he or she should know will cause another person to suffer emotional distress. The broad sweep of subsection (a) reaches a host of social interactions that a person would find distressing but are clearly understood to fall within the protections of the first amendment.

Relerford, 2017 IL 121094 at ¶52, 104 N.E.3d at 353-54.

Here, the State contends that the application of N.C. Gen. Stat. § 14-277.3A to Defendant's Google Plus posts is sufficient to withstand strict scrutiny because (1) the prevention of stalking "before it escalates into more harmful or lethal criminal behavior" is a compelling state interest; and (2) the statute is the least restrictive means of accomplishing this goal in that it "is limited to willful or knowing conduct, directed at a specific person, that would cause a reasonable person to suffer fear or substantial emotional distress." However, even assuming *arguendo* that the statute serves a compelling governmental interest in preventing the escalation of stalking into more dangerous behavior, we are not persuaded that the application of N.C. Gen. Stat. § 14-277.3A to Defendant's posts represented the least restrictive means of accomplishing that goal.

Prior to Defendant's indictments, Mary had already sought and received a no-contact order in district court that prohibited him from approaching or contacting her. Given the existence of a no-contact order against Defendant, strict enforcement of the terms of that order clearly represented a less restrictive means by which the State could have pursued its interest in preventing Defendant from engaging in a criminal act against her.[4]

The pertinent language of N.C. Gen. Stat. § 14-277.3A that formed the basis for Defendant's convictions is virtually identical to the provision in the Illinois stalking statute struck down as overbroad in *Relerford*. We believe the reasoning of the Illinois Supreme Court on this issue is both sound and equally applicable to the present case. As in *Bishop*, Defendant was convicted pursuant to a "criminal prohibition of alarming breadth" that "could criminalize behavior that a robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior." *Bishop*, 368 N.C. at 879, 787 S.E.2d at 821 (citation and quotation marks omitted). For these reasons, we hold that the application of N.C. Gen. Stat. § 14-277.3A to Defendant's social media posts constitutes a violation of his First Amendment rights in that applying the statute to him under these circumstances amounts to a content-based restriction on his speech that fails to satisfy strict scrutiny.

II. Remedy

[3] Having determined that Defendant's Google Plus posts could not constitutionally form the basis for his convictions, we must separately examine the conduct giving rise to each of his four convictions to determine the extent to which each conviction was impermissibly premised upon his social media activity.

A. 16 CRS 10028-30

Defendant's conviction in 16 CRS 10028 was premised entirely upon five Google Plus posts that he made to his account between 27 September and 4 October 2015. Therefore, because the State did not rely on any other acts by him during this time period to support this charge, we vacate the conviction.

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4. The trial court dismissed Defendant's stalking charges premised upon his violation of the portion of the no-contact order that prohibited him from "posting any information about [Mary] on social media" due to constitutional concerns. However, as counsel for Defendant acknowledged at oral argument, no similar concerns would have existed with regard to the provisions of the order requiring Defendant to refrain from approaching or directly contacting Mary.

With regard to 16 CRS 10029 and 10030, the date ranges on their respective indictments overlap. 16 CRS 10029 includes conduct that occurred between 13 August 2015 and 16 August 2015 while 16 CRS 10030 covers the time period from 2 June 2015 to 28 August 2015. Both charges are premised upon multiple Google Plus posts made by Defendant as well as the 13 August 2015 delivery of cupcakes to Mary's workplace — an act that fell within the date ranges of both indictments.

Defendant's delivery of cupcakes to Mary — unlike his Google Plus posts — constituted non-expressive conduct rather than speech and therefore was not protected under the First Amendment. *See id.* at 872, 787 S.E.2d at 817 ("We must first determine whether [the statute] restricts protected speech or expressive conduct, or whether the statute affects only nonexpressive conduct. Answering this question determines whether the First Amendment is implicated." (citation omitted)). However, under the definition of the phrase "course of conduct" contained in N.C. Gen. Stat. § 14-277.3A, a single act is not enough to support a stalking conviction. Rather, "two or more acts" are required. N.C. Gen. Stat. § 14-277.3A(b)(1). Therefore, Defendant's convictions in 16 CRS 10029 and 10030 must also be vacated.

B. 16 CRS 10034

Defendant's indictment in 16 CRS 10034 encompassed the time period between 11 November 2015 and 22 December 2015. His indictment on that charge was premised upon three of his Google Plus posts along with the two emails that Defendant sent to Mary's friend.

Even assuming — without deciding — that Defendant's emails to her friend are not entitled to First Amendment protection, this conviction must likewise be vacated. It is well established that where a defendant's conviction may have rested on a constitutional ground or an unconstitutional ground and it cannot be determined which ground the jury relied upon, the conviction must be vacated. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 53, 116 L. Ed. 2d 371, 379 (1991) ("[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."); *Bachellar v. Maryland*, 397 U.S. 564, 569-70, 25 L. Ed. 2d 570, 575 (1970) ("[T]he jury could have rested its verdict on any of a number of grounds. . . . [P]etitioners may have been found guilty . . . because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions.").

In the present case, the jury returned general verdicts that did not state the specific acts forming the basis for each conviction. For this reason, based on the record before us we cannot determine whether Defendant's conviction in 16 CRS 10034 was premised upon his social media posts, the emails to Mary's friend, or a combination of the two. Therefore, because this conviction may have likewise rested upon an unconstitutional ground, it must be vacated as well. *See Stromberg v. California*, 283 U.S. 359, 369-70, 75 L. Ed. 1117, 1123 (1931) ("The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside.").

* * *

As this case aptly demonstrates, difficult issues arise in attempting to balance, on the one hand, society's laudable desire to protect individuals from emotional injury resulting from unwanted and intrusive comments with, on the other hand, the free speech rights of persons seeking to express themselves on social media. Our courts will no doubt continue to grapple with these issues going forward. In the present case, however, it is clear that Defendant's convictions violated his constitutional right to free speech. His Google Plus posts about Mary — while understandably offensive to her — constituted protected speech that cannot constitutionally be prohibited by the State. As such, we are compelled to vacate his convictions.[5]

Conclusion

For the reasons stated above, we vacate Defendant's convictions for felony stalking.

VACATED.

Judge HUNTER, JR. concurs.

Judge MURPHY concurring by separate opinion.

MURPHY, Judge, concurring by separate opinion.

I concur with the Majority that Defendant's convictions under N.C. Gen. Stat. § 14-277.3A should be vacated. I write separately to

5. Based on our ruling, we need not address the additional arguments Defendant has raised in this appeal.

express additional thoughts regarding the inapplicability of the First Amendment's speech integral to criminal conduct exception to Defendant's convictions.

The U.S. Supreme Court, as the Majority notes, has long made clear that First Amendment protections of freedom of speech do not extend to "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 93 L. Ed. 834, 841 (1949). It has been noted that the "boundaries and underlying rationale [of the speech integral to criminal conduct exception] have not been clearly defined, leaving the precise scope of the exception unsettled." *U.S. v. Osinger*, 753 F.3d 939, 950 (9th Cir. 2014) (Watford, J., concurring). The difficulties of applying this nebulous exception are compounded in the context of stalking crimes, where the lines between speech and non-speech conduct are often blurred. Thus, it is necessary to return to the basic tenet of the exception and carefully analyze the actions of a defendant to determine the exception's applicability, lest all speech be relabeled conduct and stripped of its First Amendment protections.[1]

The State contends that this exception necessarily applies to the crime of stalking. It argues, "Stalking harasses and intimidates its victims. When these harms flow from any expressive aspect of stalking, that expressive aspect is integral to the crime." This is an oversimplification of the exception. "[S]peech or writing used as an *integral part* of conduct in violation of a valid criminal statute" falls within the exception and is unprotected by the First Amendment. *Giboney*, 336 U.S. at 498, 93 L. Ed. at 841 (emphasis added). Thus, the speech itself must be proximately linked to a criminal act and cannot serve as the basis for the criminal act itself. *See Relerford*, 2017 IL 121094 at ¶ 45, 104 N.E.3d at 352 (2017). Stated differently, there must be non-speech conduct to which the speech is integral.

Here, the Majority notes that each indictment was "premised either entirely or in part upon social media posts referencing Mary – posts that he wrote *about* Mary but did not send directly *to* her (or, for that matter, to anyone else)." Section I(C)(1), *supra*. I believe this is a critical distinction in this case, as the nature of these posts cannot be conduct that serves as the basis for a stalking conviction. As our Supreme Court has noted, "[p]osting information on the Internet – whatever the subject matter – can constitute speech as surely as stapling flyers to bulletin

1. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1039-40 (2016).

boards or distributing pamphlets to passersby – activities long protected by the First Amendment." *State v. Bishop*, 368 N.C. 869, 873, 787 S.E.2d 814, 817 (2016). This is of significant import under a First Amendment analysis, as one court has noted in an as-applied challenge to the federal statute, "[o]ne does not have to walk over and look at another person's bulletin board; nor does one Blog or Twitter user have to see what is posted on another person's Blog or Twitter account. This is in sharp contrast to a telephone call, letter or e-mail specifically addressed to and directed at another person . . . ." *See U.S. v. Cassidy*, 814 F. Supp. 2d 574, 578 (D. Md. 2011). In the latter situation, there is speech *to* a person individually, whereas the former is merely speech *about* a person.[2]

This is a key distinction because in cases where speech is made, such as through telephone harassment or unwanted contact through mailings, to a single recipient repeatedly, First Amendment considerations of protecting the communication of ideas is diminished when the recipient is an unwilling listener. The expressive value is diminished. *See Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 164 L. Ed. 2d 156, 175 (2006) ("Instead, we have extended First Amendment protection only to conduct that is inherently expressive[, such as flag burning]."). Yet, a public posting that is not aimed or directed at a single person retains its expressive value (assuming no other exceptions, such as true threats, is applicable to the speech). Of course, the ubiquitous nature of social media in modern society and the ability of posters to "tag" or "direct message" other users may impact this analysis; however, that is not the case with Defendant's Google+ postings. These postings, while numerous, cannot themselves constitute "conduct." *See Bishop*, 368 N.C. at 874, 787 S.E.2d at 818 ("Such communication does not lose protection merely because it involves the 'act' of posting information online, for much speech requires an 'act' of some variety – whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket.")

To be clear, there was action taken by Defendant that constituted non-speech conduct – sending cupcakes to Mary. However, N.C. Gen.

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2. *See* Eugene Volokh, *One–to–One Speech vs. One–to–Many Speech, Criminal Harassment Laws, and "Cyberstalking*," 107 Nw. U. L. Rev. 731, 742 (2013) ("[Laws addressing telephone harassment, stalking, and unwanted mailings] have one thing in common: In the great bulk of their applications, they restrict what one may call 'unwanted one-to-one' speech – speech said to a particular person in a context where the recipient appears not to want to hear it, whether because the recipient has expressly demanded that the speech stop or because the speaker intends to annoy or offend the recipient. The laws are aimed at restricting speech *to* a person, not speech *about a* person. And that is the context in which they have generally been upheld against First Amendment challenge.")

Stat. § 14-277.3A permitted the jury to base their conviction in each indictment on the social media posts made to the public alone. *See* N.C. Gen. Stat. § 14-277.3A(b)(1) (defining course of conduct as "[t]wo or more acts . . . in which the stalker . . . communicates to or *about* a person . . . ") (emphasis added). As the Majority notes, this impermissibly allowed "the speech itself [to be] the crime" and did not require speech to be integral to separate conduct. *See* Section I(C)(1) *supra*.

I also wish to address the State's citation of *Osinger* in support of its argument that Defendant's posts were speech integral to criminal conduct and explain why such a case upholding the constitutionality of the federal interstate stalking statute is distinguishable from the case and the statute before us. In *Osinger*, while analyzing the defendant's as-applied challenge to the federal interstate stalking statute, the Ninth Circuit held that "[a]ny expressive aspects of Osinger's speech were not protected under the First Amendment because they were 'integral to criminal conduct' in intentionally harassing, intimidating or causing substantial emotional distress." *Osinger*, 753 F.3d at 947. The *Osinger* case is fully distinguishable on two bases. First, Congress defined "course of conduct" as "a pattern of *conduct* composed of 2 or more acts, evidencing a continuity of purpose." *Id*. at 944 (citing 18 U.S.C. § 2266(2)) (emphasis added). Congress included no language indicating that a course of conduct could be established solely by two communications about a person, as is the case with N.C. Gen. Stat. § 14-277.3A. Moreover, as the *Osinger* concurrence noted, that case did not present the court with the question of whether a stalking prosecution would be constitutional in situations where "the defendant caused someone substantial emotional distress by engaging only in otherwise protected speech." *Osinger*, 753 F.3d at 954 (Watford, J., concurring). Accordingly, our as-applied analysis differs from that in *Osinger*.

In conclusion, I recognize the challenges that modern social media present in the context of stalking crimes. These challenges will continue to produce difficult questions of how to apply First Amendment principles, such as the speech integral to criminal conduct exception, in these increasingly complex situations. While many of these questions go beyond the scope of this concurrence or our Majority opinion, I concur in the case before us, as the First Amendment requires us to vacate Defendant's convictions.

STATE v. STEEN

[264 N.C. App. 566 (2019)]

STATE OF NORTH CAROLINA
v.
JEFF DAVID STEEN

No. COA18-233

Filed 19 March 2019

1. Evidence—expert testimony—confabulation and false memories—permissible scope

In a prosecution for first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon, there was no abuse of discretion in limiting the scope of testimony by defendant's expert in general and forensic psychiatry who was qualified to testify about confabulation—the risk of inducing someone to create false memories based on suggestive language. The expert was permitted to define the concept but was not allowed to link the specific questions asked by law enforcement of the main prosecution witness (defendant's mother) and the potential for confabulation when she eventually identified defendant as her attacker. Even if the limitation was in error, it was not reversible where the jury was given the opportunity to consider the possibility that defendant's mother was influenced to name him as the perpetrator.

2. Criminal Law—jury instructions—felony murder—underlying felony of attempted murder with deadly weapon—hands and arms as deadly weapons

The trial court did not err in instructing a jury that defendant's hands and arms could be considered deadly weapons for purposes of the felony murder rule based on the predicate felony of attempted murder with a deadly weapon, where there was sufficient evidence from which the jury could conclude that the difference in age, height, and weight between defendant and the victim (his mother), along with the extensive nature of the victim's injuries, demonstrated that defendant used his hands and arms as deadly weapons.

3. Criminal Law—jury instructions—felony murder—two alternatives for deadly weapon used—sufficiency of evidence

The trial court did not err in instructing a jury that defendant could be convicted of first-degree murder under the felony murder rule based on the predicate felony of attempted murder with a deadly weapon, even though there were two alternatives identified regarding the deadly weapons used—defendant's hands and arms

and a garden hoe. Even if the mention of the garden hoe was in error where there was no evidence specifically linking that implement to the nonfatal attack on defendant's mother (which gave rise to the attempted murder charge), any error was harmless where there was substantial evidence supporting the other theory, particularly given the mother's identification of defendant as her attacker.

Judge BERGER concurring in separate opinion.

Judge HUNTER, JR. concurring in part and dissenting in part by separate opinion.

Appeal by defendant from judgment entered 1 February 2017 by Judge Nathaniel J. Poovey in Rowan County Superior Court. Heard in the Court of Appeals 28 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

DAVIS, Judge.

In this case, we address several issues arising under the felony murder rule. Jeff David Steen ("Defendant") appeals from his convictions for first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon. On appeal, Defendant argues that the trial court erred by (1) limiting the scope of his expert witness's testimony regarding the reliability of the victim's identification of him as the perpetrator of an assault upon her; (2) instructing the jury that hands and arms can constitute deadly weapons in connection with the crime of attempted murder under the felony murder rule; and (3) referencing a garden hoe as a deadly weapon possibly used by the victim's assailant in its jury instructions despite the absence of evidence that a hoe was actually used in assaulting the victim. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

In 2013, J.D. Furr, Defendant's 87-year-old grandfather, and Sandra Steen ("Sandra"), Defendant's 62-year-old mother, lived on a farm in

Rowan County. Defendant was forty years old and lived twenty minutes away from the farm in Stanly County.

In January 2013, Defendant borrowed $1,000 from Furr to pay for repairs to his car and promised to pay the money back within two weeks. By June 2013, he had paid back approximately $550 and had reached an agreement with Furr to perform work on the farm as a means of satisfying the remaining portion of the debt.

In the fall of 2013, Sandra took out a $3,084.64 loan, in part, to assist Defendant with making his car payments. Defendant agreed to make monthly loan payments to Sandra beginning in October 2013 and promised to pay off the entirety of the loan by January 2014. He had been borrowing money from his mother since he was a teenager and owed her a total amount of between $4,000 and $6,000. Sandra testified that "right before" 5 November 2013 both she and Furr separately informed Defendant that they would not loan him any more money. As of 5 November 2013, Defendant's checking account contained a balance of only $3.64.

On the evening of 5 November 2013, Defendant was at the farm fixing a ceiling fan for his grandfather. After completing his work on the fan, Sandra gave him the bill for that month's loan payment, and Defendant told her he would "take care of it." Sandra then went to her car to retrieve some items that she intended to store in a nearby outbuilding. While she was doing so, Defendant came out of the house and told her that he had to go to work. Sandra later testified that she did not recall either hearing Defendant get into his vehicle or hearing his car drive away.

Upon retrieving the items intended for storage from her vehicle, Sandra went inside the outbuilding. After remaining there for five to ten minutes, she thought she heard raised voices and believed that Furr might be calling for her. She had begun walking in the direction of the house when she felt someone place their right arm around her neck.

At trial, Sandra testified that she initially believed that Defendant had wrapped his arm around her neck as a joke to "play a trick on [her]." As the assailant began tightening his grip around her neck, however, she realized the person was "trying to kill [her]." Her attacker was wearing a dark-colored ski mask, and Sandra could not see his face except for his eyes. The assailant then placed his left hand over her nose and mouth. Sandra testified that at that point she "started trying to punch or grab whatever [she] could, and then everything went black."

Defendant testified on his own behalf at trial. He stated that on the night of 5 November 2013, he clocked in at his workplace at approximately 10:30 p.m. and worked from 11:00 p.m. until 7:00 a.m. Following the conclusion of his shift, he went back to his home to change clothes and then drove to his grandfather's farm to work on a fence. Defendant reached the farm at approximately 8:00 a.m.

Upon arrival, Defendant saw his mother lying near the driveway close to the storage building. He approached her and saw that her face was swollen, one of her eyes was shut, and there was "blood all around" her. Defendant asked her what had happened, and she responded that she needed help. As he was speaking to Sandra, he noticed his grandfather "laying down at the foot of the steps" of the house. He called 911, and after he explained the circumstances the dispatcher told him to check on his grandfather.

Defendant found Furr lying by the back door of the farmhouse. There was a lot of blood "pooled up" by his head area. Defendant shook Furr and realized that he was dead. Defendant also picked up his grandfather's wallet and then placed it back on the ground without removing any of its contents. At that point, Defendant returned to his mother. It was a cold morning, and he observed that she was shaking and that "her whole body was freezing" cold. After unsuccessfully searching for blankets with which to cover his mother in order to keep her warm, Defendant lay down next to Sandra and held her until EMS personnel arrived.

Paramedics transported Sandra to Stanly Regional Medical Center, and she was subsequently airlifted from that location to Carolinas Medical Center ("CMC") in Charlotte. At CMC, she was diagnosed with a skull fracture, multiple rib fractures, a collapsed lung, and hypothermia. The treating physician noted that Sandra had suffered an "assault [by] unspecified means."

It was determined by autopsy that Furr died from blunt force injuries to his head and neck. An officer responding to the 911 call testified that Furr's body was within "eyesight of where [Sandra] was assaulted[.]" A garden hoe containing Furr's blood on it was found near his body. The medical examiner testified that the possibility Furr had been beaten with the garden hoe was "consistent with most, if not all, of [Furr's] injuries." Furr's wallet was found near his body with his blood on it. The money that the wallet normally contained had been removed. Other than the money taken from Furr's wallet, nothing else was taken or missing from the farm or its outbuildings. No unfamiliar

vehicles or individuals were seen by neighbors in the area of the farm on the night of 5 November 2013.

Defendant cooperated with law enforcement officers during their investigation and consistently denied any involvement in the assault of his mother or the murder of his grandfather. Officers responding to the scene observed that he had multiple scratches on both of his arms as well as an injury to his upper lip. No blood was found in Defendant's vehicles. His clothing was not examined for the presence of blood.

With regard to the scratches on his arm, Defendant told officers at the crime scene that Sandra had scratched him that morning while he was holding her as he waited for the arrival of paramedics. The day after the attacks, he told a cousin that he thought he could have gotten the scratches at work. During a subsequent interview with law enforcement officers, Defendant stated that he might have scratched his arms on a door frame while fixing Furr's ceiling fan.

The North Carolina State Crime Laboratory performed both fingerprint and DNA testing on the garden hoe. No latent fingerprints were found on the hoe. The DNA taken from both the hoe and Furr's wallet matched Furr but did not match Defendant. Testing performed on scrapings taken from Sandra's fingernails indicated that the DNA contained therein matched Sandra and excluded Defendant. In addition, a hair contained in the fingernail scrapings belonged to Sandra.

Sandra was interviewed by law enforcement officers on multiple occasions while she was hospitalized. Her first interview occurred on 6 November 2013 in the emergency room at Stanly Regional Medical Center. She told the officers that she was attacked from behind about ten minutes after Defendant had left the farm by someone wearing a dark-colored ski mask and dark clothing and that she blacked out after being hit on the head with "something hard." Sandra further stated that her attacker was muscular, had dark eyes, and could have been either white or "Mexican." She also told officers that the assailant could not have been Defendant because he was taller than the person who attacked her.

Later that same day, after being transferred to CMC, Sandra gave another interview. During her second interview, officers asked her if she thought that it could have been Defendant who assaulted her. She responded that it could not have been him because Defendant was too tall and he was "tore all to pieces" upon discovering her and Furr's body the morning after the attacks. Also during this interview, one of the officers asked Sandra: "What would you think if I told you that Jeff had a whole lot of scratches on his arm? Would you think that maybe Jeff done it again like you did at first?" In response, she reiterated that her attacker

could not have been Defendant and stated that he might have scratched his arm while working on the ceiling fan earlier that day.

Officers conducted a third interview with Sandra the following day. She told them that if they were considering Defendant as a suspect they were "barking down the wrong tree." She also stated that she thought she remembered hearing Defendant's car leave the farm on the night of the attacks and that she might have scratched him the morning after the attack while he was holding onto her.

Sandra gave her final recorded statement to law enforcement officers on 21 November 2013. Her recollection of the assault on this occasion was markedly different from the prior occasions on which she was interviewed. During this interview, she stated that she saw Defendant's face when her attacker opened her eye to see whether she was dead or alive. She further told the officers that she had previously been in denial but now believed that her son was, in fact, her attacker.

On 9 December 2013, Defendant was indicted on charges of first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon. His trial began on 9 January 2017 in Rowan County Superior Court before the Honorable Nathaniel J. Poovey.

At trial, Sandra testified that she had seen Defendant's face during the attack and that a traumatic brain injury counselor at CMC had assisted her in coming to this realization. The following exchange occurred on cross-examination between Sandra and counsel for Defendant with regard to inconsistencies between her pre-trial statements to law enforcement officers and her testimony at trial:

> [DEFENSE COUNSEL]: When the detective asked you about where you saw the mask or the face, you told him it was one of these pull over masks . . . didn't you?
>
> [SANDRA]: There was no mask. There was no mask.
>
> [DEFENSE COUNSEL]: The kind of -- the kind of mask where you wear when you go rob somebody. Isn't that what you said?
>
> [SANDRA]: There was no mask. I had been dreaming all kind of crazy dreams laying up there in ICU.
>
> [DEFENSE COUNSEL]: You stayed consistent from the first statement to this statement the next day that the individual had a mask. You stayed consist[ent] with [the] fact that he was larger than you, taller than you and muscular.

> [SANDRA]: I was trying my best to figure it out.
>
> [DEFENSE COUNSEL]: Well, why didn't you tell them you didn't -- you don't know?
>
> [SANDRA]: Because they was wanting something, and I was just making up stuff. Just -- whatever was in my head, I thought it was real.
>
> [DEFENSE COUNSEL]: Well, you --
>
> [SANDRA]: I thought it was real until that lady said what she did. And when she said what she did about traumatic brain injuries, that you don't know when they happen, but you know before and after and that's when I was able to put into place that was [Defendant's] arm coming around my neck, that was [Defendant] choking me, and then it was [Defendant] knocking me out.
>
> And then when my left eyelid was raised up, that was [Defendant's] face in front of me. And because we have two really bright yard lights, I was able to see his [face] very clearly. And I thought he was there to help me.

Defendant offered testimony from Dr. George Corvin as an expert witness in general and forensic psychiatry who was qualified to testify with regard to "a psychiatric symptom" known as "confabulation." A *voir dire* hearing took place outside the presence of the jury concerning the permissible scope of his testimony.

On *voir dire*, Dr. Corvin defined confabulation as "the spontaneous production of false memories or distorted memories in patients who have . . . sustained closed head injuries or other medical trauma resulting in periods of amnesia." He further explained that "induced confabulation" can occur where a person in a position of authority or trust tells or implies to an individual suffering from amnesia what actually occurred during a period of time for which the individual has no genuine memories. At the conclusion of the *voir dire* hearing, the trial court ruled that Dr. Corvin would be permitted to testify generally about "those who are susceptible and the risk factors for confabulation," but would not be permitted to testify as to whether specific questions that officers had asked Sandra could have caused confabulation to actually occur.

Dr. Corvin subsequently testified before the jury, explaining what confabulation is and how it can occur. Although he did not testify with regard to the specific manner in which Sandra was questioned by law

enforcement officers, he stated that she would "have an elevated propensity for both the experience of amnesia but also to experience confabulation as a result of that amnesia. Both from her psychological and physical trauma."

Defendant testified on his own behalf. He denied attacking his mother or grandfather and stated that he was either at home or at work when the crimes occurred. He testified that he had been unaware that he had scratches on his arms at the time when officers first brought the scratches to his attention and that he told them his mother had scratched him because it "was the first thing that popped in [his] mind." He explained that he later told officers that he scratched himself while working on his grandfather's fan because he was trying to retrace his steps and "figure anything that might have happened that could have caused . . . a scratch on [his] arm." Defendant also testified that he had a cat that "liked to scratch [him] sometimes" but that he likely received the majority of the scratches performing "activities around the house or working." On cross-examination, he acknowledged that he did not know the actual origin of the scratches.

At the charge conference, the trial court informed counsel that it intended to instruct the jury on first-degree murder based upon theories of premeditation and deliberation, lying in wait, and felony murder predicated on the underlying felony of robbery with a dangerous weapon. The State requested that the court also instruct the jury on the theory of felony murder based on the underlying felony of attempted murder with a deadly weapon. The prosecutor asserted that — for purposes of her requested instruction — either Defendant's hands and arms or the garden hoe constituted deadly weapons. Counsel for Defendant objected on the ground that the State had presented insufficient evidence that a deadly weapon was used in the attempted murder of Sandra so as to warrant the instruction. After hearing the arguments of counsel, the trial court stated its intention to give the State's requested instruction.

On 1 February 2017, the jury convicted Defendant of first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon. The jury specified on the verdict sheet that the first-degree murder conviction was based solely upon the felony murder rule predicated on the underlying felony of attempted first-degree murder.[1] The trial court arrested judgment on the attempted murder conviction and

1. The jury specifically rejected the State's alternative theories of first-degree murder based upon (1) premeditation and deliberation; (2) lying in wait; and (3) felony murder with the underlying felony being robbery with a dangerous weapon.

sentenced Defendant to life imprisonment without the possibility of parole for the first-degree murder conviction. Defendant was also sentenced to a term of 64 to 89 months imprisonment for the robbery with a dangerous weapon conviction. Defendant gave timely notice of appeal to this court.

Analysis

In this appeal, Defendant makes three primary arguments. First, he contends that the trial court erred by prohibiting Dr. Corvin from testifying concerning the impact of specific leading questions asked by law enforcement officers during their interviews with Sandra. Second, he argues that instructing the jury that hands and arms can constitute deadly weapons for purposes of the felony murder rule constituted error. Finally, he asserts that the court improperly instructed the jury that it could convict him of first-degree murder under the felony murder rule if it found that he attempted to murder Sandra with a garden hoe because no evidence was introduced that a hoe was used in the attack on Sandra. We address each argument in turn.

I. Testimony of Dr. Corvin

[1] Defendant first contends that the trial court abused its discretion by improperly limiting the scope of the testimony of his expert witness, Dr. Corvin. He argues that had Dr. Corvin been permitted to testify about the possible impact upon Sandra's memory of specific leading questions posed to her by law enforcement officers there exists "a reasonable possibility Dr. Corvin's testimony may have impacted the outcome of the trial[.]" We disagree.

The admissibility of expert witness testimony is governed by Rule 702 of the North Carolina Rules of Evidence. Rule 702 provides, in pertinent part, as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.

> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

A trial court's ruling on "whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability . . . will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation and quotation marks omitted). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citation, quotation marks, and brackets omitted). Moreover, an evidentiary error "is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Mason*, 144 N.C. App. 20, 27, 550 S.E.2d 10, 16 (2001) (citation, quotation marks, and brackets omitted).

At trial, Dr. Corvin was permitted to define confabulation for the jury and to explain the manner in which it could affect the memories of persons afflicted with periods of amnesia following a traumatic injury. He further testified that based on his review of Sandra's medical records[2] a risk of confabulation existed due to the nature and location of the traumatic brain injury that she suffered as a result of the attack. Dr. Corvin also explained the concept of "induced confabulation":

> [A]s human beings, we always look for cues. And -- so if somebody is talking to us, they may say things or ask things that imply what -- what the answer is about what happened during the time in question. And in induced confabulation, what happens is you pick up these cues. You pick up the positive, sort of, feedback that you get from giving the right answer.
>
> And what happens is that those things that you're hearing in your environment, suddenly will be -- not suddenly -- gradually will become your memory. And -- so you might talk to -- let's say you have amnesia for a period of time after an accident and your wife or husband was there. And

2. Dr. Corvin did not personally meet with Sandra. His testimony was based entirely on his review of her medical records and the statements she gave to law enforcement officers.

> they tell you, kind of, what they say happened. You don't know what happened.
>
> Well, after a time of talking to him about it, you may . . . remember it yourself. Not -- you don't remember it such that your husband or wife told you, you remember it and that's called induced confabulation. You get help filling in the gaps, but you're unaware of it as it's happening.

Although the trial court prohibited Dr. Corvin from proceeding to testify as to the relationship between any specific questions that officers asked Sandra and the potential for confabulation to have occurred regarding her identification of Defendant as her attacker, Defendant's counsel made the following statements during his closing argument to the jury:

> On November 6th at CMC, [Sandra] talked to [law enforcement officers], and when she gave those statements she said, "I didn't see who it was. He had a mask on, a ski mask. He was too tall -- or was too short to be Jeff. Jeff's taller. He had dark eyes. I couldn't see his face. I saw his beady eyes." That's what you heard, and that didn't match the theory of the police officers.
>
> So what did they do? They went back up there November 7th, and I think one of them, either Detective Loflin or Detective Allen, said, "You know, Sandra, we hope this is the last time we got to come up here, and they spent the next how many ever minutes, hour trying to get her to tell them it was [Defendant]. How did they do that? Well, you know, "Hey, Detective Allen, aren't you going to tell them about [Defendant's] scratches? Tell her -- well, tell her about those.["] ["]Well -- well, Sandra, what do you think if I told you [Defendant] had some? Would you think it's him then?["]
>
> . . . .
>
> You know, Dr. Corvin came in here and testified, "You know, when you have a traumatic brain injury . . . you're more susceptible to being" -- to what he called "confabulated." That's a word I had never heard before this case. But essentially it means you're more susceptible to agreeing with what they want you to say, and that's exactly what happened.

Even assuming, without deciding, that the limitation on Dr. Corvin's testimony by the trial court constituted error, we are unable to agree with Defendant that any such error rose to the level of reversible error. As noted above, in his testimony Dr. Corvin defined the concept of induced confabulation for the jury and explained why Sandra's injury placed her at risk of creating memories that were not genuine. Furthermore, in his closing argument Defendant's counsel made clear to the jury the defense's theory that the manner in which Sandra was questioned by law enforcement officers caused her to create false memories of the attack.

As a result, jurors were expressly given the opportunity to consider the possibility that Sandra's identification of Defendant was the result of confabulation. Therefore, Defendant has failed to show a reasonable possibility that a different result would have been reached had Dr. Corvin been permitted to testify without restriction. *See In re Chasse*, 116 N.C. App. 52, 60, 446 S.E.2d 855, 860 (1994) (exclusion of expert testimony was harmless error where error was not prejudicial).

II. Jury Instructions

A. Hands and Arms as Deadly Weapons for Purposes of Felony Murder Rule

[2] Defendant next argues that the trial court erred by charging the jury that his hands and arms could constitute deadly weapons for purposes of the felony murder rule based upon the underlying felony of attempted murder with a deadly weapon. He contends that "[a]llowing hands and arms to be a deadly weapon when an adult is killed vastly and improperly expands the felonies which could support a conviction for felony murder." We disagree.

In the present case, the trial court instructed the jury, in pertinent part, as follows:

> I further charge that for you to find the defendant guilty of first-degree murder under the first-degree felony murder rule based upon the underlying felony of attempted first-degree murder, the State must prove four things beyond a reasonable doubt:
>
> . . . .
>
> And fourth, that the attempted first-degree murder was committed with the use of a deadly weapon. The State contends and the defendant denies that the defendant used his hands and/or arms, and or a garden hoe as a deadly weapon.

> A deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether the instrument is a deadly weapon, you should consider its nature, the manner in which it was used and the size and strength of the defendant as compared to the victim.

"Our Court reviews a trial court's decisions regarding jury instructions *de novo*." *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105 (citation omitted), *disc. review denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). "First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993) (citation omitted), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994); *see also* N.C. Gen. Stat. § 14-17(a) (2017) (a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon" constitutes first-degree murder).

This Court has repeatedly held that hands, arms, and feet can constitute deadly weapons in certain circumstances "depending upon the manner in which they were used and the relative size and condition of the parties." *State v. Allen*, 193 N.C. App. 375, 378, 667 S.E.2d 295, 298 (2008) (citation omitted); *see also State v. Harris*, 189 N.C. App. 49, 60, 657 S.E.2d 701, 709 (2008) (jury was "properly allowed to determine whether Defendant's hands and feet constituted deadly weapons" where male defendant outweighed female victim by 65 pounds); *State v. Jacobs*, 61 N.C. App. 610, 611, 301 S.E.2d 429, 430 (fists could have constituted deadly weapons where defendant was 39 year-old male and victim was 60 year-old female), *disc. review denied*, 309 N.C. 463, 307 S.E.2d 368 (1983).

Although our appellate courts have not specifically addressed whether hands and arms may constitute deadly weapons for purposes of the crime of attempted murder under the felony murder rule, our Supreme Court has held that the offense of felony child abuse could serve as the predicate felony for felony murder where the defendant used his hands as a deadly weapon in the course of committing the abuse. In *State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576 (1997), the defendant was an adult male who violently shook his two-and-a-half year-old niece, resulting in the child's death. *Id.* at 493, 488 S.E.2d at 589. The Court stated that "[w]hen a strong or mature person makes an attack

by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Id.* Consequently, the Supreme Court concluded that the evidence "was sufficient to permit the jury to conclude that defendant committed felonious child abuse and that he used his hands as deadly weapons. Thus, the trial court did not err by refusing to grant defendant's motion to dismiss the charge of first-degree murder under the felony murder rule." *Id.*

Defendant argues that the Supreme Court's holding in *Pierce* should be confined to the child abuse context. In his brief, he contends that "[h]ands may be a deadly weapon for purposes of felony assault and felony murder based on felony child abuse depending on the circumstances, but not for purposes of felony murder when the predicate felony is the attempted murder of an adult." However, he presents no compelling argument as to why children should be treated differently from vulnerable adults in this context or why jurors should not be permitted to make such a determination for themselves.

Here, Defendant was 40 years old and Sandra was 62 years old. He was 5 feet, 11 inches tall and weighed 210 pounds while she was 5 feet, four inches tall and weighed 145 pounds. During the assault, Sandra's assailant engaged in a violent attack on her while using his hands and arms that resulted in extensive injuries to her, including multiple rib fractures and a collapsed lung. Thus, we are of the view that the question of whether Defendant's hands and arms constituted deadly weapons was a matter for determination by the jurors and that the trial court therefore did not err by submitting this issue to the jury. *See State v. Grumbles*, 104 N.C. App. 766, 770, 411 S.E.2d 407, 410 (1991) (issue of whether defendant's hands were deadly weapons was properly submitted to jury where evidence showed "the great disparity in the size of the victim and defendant").

Nor are we persuaded by Defendant's alternative argument that a weapon must be "external" in order to constitute a deadly weapon for purposes of the felony murder rule. In support of this proposition, he directs our attention to *State v. Hinton*, 361 N.C. 207, 639 S.E.2d 437 (2007). In *Hinton*, our Supreme Court held that the defendant's hands and feet could not constitute dangerous weapons under N.C. Gen. Stat. § 14-87(a), the statute criminalizing robbery with a dangerous weapon. *Id.* at 211-12, 639 S.E.2d at 440. In reaching this determination, the Court noted that N.C. Gen. Stat. § 14-87(a) "prohibits the use or threatened use of any *firearms or other dangerous weapon, implement or means*" in the course of a robbery. *Id.* at 211, 639 S.E.2d at 440 (emphasis added and quotation marks omitted). As a result, the Supreme Court concluded

that "the General Assembly intended to require the State to prove that a defendant used an *external* dangerous weapon before conviction under the statute is proper." *Id.* at 211-12, 639 S.E.2d at 440 (emphasis added).

We decline Defendant's invitation to extend the holding of *Hinton* beyond the parameters of the particular context in which it was decided. Unlike N.C. Gen. Stat. § 14-87, N.C. Gen. Stat. § 14-17 (the statute governing felony murder) contains no language suggesting any intent by the General Assembly to limit the possible types of weapons that can qualify as "deadly weapons" for purposes of the felony murder rule to external weapons. Therefore, this argument is overruled.

B. Sufficiency of Evidence to Support Reference to Garden Hoe in Jury Instructions

[3] Finally, Defendant argues that the trial court erred by instructing the jury that it could convict him of first-degree murder if it found that he attempted to murder Sandra with a garden hoe — as an alternative type of deadly weapon — because insufficient evidence existed that the hoe was used in the attack on his mother. He contends that "[i]t was pure speculation that the hoe was used in [Sandra's] attempted murder" and that, for this reason, the reference to the hoe in the instruction constituted reversible error given prior decisions from North Carolina courts prohibiting jury instructions on theories of guilt not supported by the evidence presented at trial.

The State, conversely, contends that (1) the weapons identified in the challenged portion of the jury instructions were merely "evidentiary components" rather than distinct theories of the crime of attempted murder such that any error in mentioning the garden hoe was not prejudicial; (2) the reference to the garden hoe was, in fact, sufficiently supported by the evidence; and (3) even assuming *arguendo* that the reference to the garden hoe was erroneous, Defendant cannot demonstrate that he was prejudiced by the instruction.

As noted above, the specific portion of the jury instruction referencing the garden hoe stated as follows:

> [T]hat the attempted first-degree murder was committed with the use of a deadly weapon. The State contends and the defendant denies that the defendant used his hands and/or arms, *and or a garden hoe* as a deadly weapon.

(Emphasis added.)

It is well established that "[a] trial judge should not give instructions which present to the jury possible theories of conviction not supported

by the evidence." *State v. Odom*, 99 N.C. App. 265, 272, 393 S.E.2d 146, 150 (citations omitted), *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990). However, "[i]f a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance." *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citation omitted).

Our Supreme Court has recently addressed the scenario in which a trial court instructs the jury disjunctively as to two distinct theories of a crime where one of the theories was unsupported by the evidence. In *State v. Malachi*, __ N.C. __, 821 S.E.2d 407 (2018), the defendant was charged with possession of a firearm by a felon and carrying a concealed weapon after officers discovered a handgun in the waistband of his pants. *Id.* at __, 821 S.E.2d at 410. With regard to the possession of a firearm by a felon charge, the trial court instructed the jury on the principles of both actual and constructive possession. *Id.* On appeal, this Court held that the trial court committed reversible error by instructing the jury on the theory of constructive possession where "the State's evidence supported an instruction only for actual possession[.]" *State v. Malachi*, __ N.C. App. __, __, 799 S.E.2d 645, 649 (2017), *reversed*, __ N.C. __, 821 S.E.2d 407 (2018).

The Supreme Court reversed the decision of this Court, holding that although the trial court did, in fact, err by instructing the jury on constructive possession, the error was not prejudicial to the defendant. *Malachi*, __ N.C. at __, 821 S.E.2d at 422. In holding that a defendant's challenge to a jury instruction that permitted conviction under a theory unsupported by the evidence is subject to "traditional harmless error analysis," the Court explained its reasoning as follows:

> As a general proposition, a defendant seeking to obtain appellate relief on the basis of an error to which he or she lodged an appropriate contemporaneous objection at trial must establish that 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. However, the history of this Court's decisions in cases involving the submission of similar erroneous instructions and our consistent insistence that jury verdicts concerning a defendant's guilt or innocence have an adequate evidentiary foundation persuade us that instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure

> that there is no reasonable possibility that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

Id. at __, 821 S.E.2d at 421 (internal citation and quotation marks omitted).

Defendant argues that the challenged instruction was both erroneous and prejudicial under the standard set out by the Supreme Court in *Malachi*. He contends that absent the reference to the garden hoe "there is a reasonable possibility that . . . the jury would have returned a different verdict[.]" For the reasons set out below, however, we hold that any error resulting from this instruction was harmless even assuming that (1) the weapons listed in the challenged instruction did, in fact, constitute separate and distinct theories of the crime of attempted murder; and (2) the reference to the garden hoe was unsupported by the evidence.

Sandra testified that her attacker grabbed her from behind and tightly wrapped his right arm around her neck before placing his left hand over her nose and mouth. A struggle then ensued between Sandra and her attacker until she lost consciousness. The injuries Sandra sustained included a skull fracture, multiple rib fractures, and a collapsed lung. Such testimony clearly constitutes substantial evidence to support an instruction that hands and arms were used as weapons during the attack on her. Conversely, although the evidence plainly established that the garden hoe was used to murder Furr, no evidence was presented specifically linking the garden hoe to Sandra's attack. Thus, evidence was presented in support of only one of the deadly weapon theories instructed on by the trial court — that is, the theory that Defendant attempted to murder Sandra with his hands and arms. Based on our application of the principles articulated by the Supreme Court in *Malachi*, however, we conclude the error in referencing the hoe was harmless.

First, the most critical piece of evidence for the State was Sandra's identification of Defendant as her attacker. The jury had a full and fair opportunity to evaluate the reliability of her testimony in light of the conflicting pre-trial statements she made to law enforcement officers on this subject and the testimony of Dr. Corvin regarding confabulation.

In finding Defendant guilty, the jury clearly determined that her identification of Defendant was reliable. It cannot reasonably be argued that the brief reference to the hoe in the jury instructions impacted the jury's decision to accept her trial testimony regarding Defendant's guilt as true.[3]

We are unable to construe *Malachi* as requiring a finding of reversible error under these circumstances. While the circumstances at issue in *Malachi* were somewhat different than those existing here, the essence of the Supreme Court's decision was that errors by a trial court in instructing the jury on a theory of guilt unsupported by the evidence are subject to a harmless error analysis. In the present case — for the reasons set out above — we cannot see how the brief reference to the garden hoe in the jury instructions could have affected the jury's determination as to the credibility of Sandra's identification of Defendant and, therefore, its verdict. Accordingly, we hold that the trial court did not commit reversible error in its instructions to the jury.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judge BERGER concurring in separate opinion.

Judge HUNTER, JR. concurring in part, dissenting in part by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion, but would conclude that the instruction provided by the trial court regarding the garden hoe was supported by the evidence.

Even though Ms. Steen lost consciousness during the attack, she told investigators that she had been hit in the head with something hard. She testified that

> [t]he first time, I was hit on the side of my head. I had – I had fractures on my skull. That's what knocked me out

3. We note that the State's closing argument did not even mention the hoe as having been used in the attack on Sandra.

> the first time and put me on the ground. And then that's when I seen [Defendant] when he raised my left eyelid up, and then I was blacked out again. That would have been the second blow to my head that put the hole in the back of my head.

Ms. Steen also testified that Defendant "knock[ed] me out," that she had been "beaten in the head," and that she "did not want to believe that my son would knock a hole in my head."

Evidence presented at trial showed, in addition to a collapsed lung, that Ms. Steen also suffered multiple rib fractures, a fracture to her skull, brain hemorrhaging, and traumatic brain injury. These are not the types of injuries that would customarily be associated with an assault in which the perpetrator simply choked the victim. The jury could reasonably infer that Ms. Steen's injuries were inflicted with a blunt force object.

There was a blunt force object within eyesight of the area where Ms. Steen had been assaulted: the garden hoe which had been used to murder Mr. Furr. This blunt force object was used by the same perpetrator who attacked Ms. Steen. The garden hoe was used in the same time period as the assault on Ms. Steen, and it was used in close proximity to Ms. Steen.

The evidence presented supported the jury instruction regarding the garden hoe, and I would conclude that the trial court's instruction was not in error.

HUNTER, Judge, concurring in part, dissenting in part.

While I concur with the majority's analysis on the remaining issues, I respectfully dissent on the issue of whether Defendant has demonstrated reversible error from the trial court's erroneous jury instruction referencing the hoe as a weapon used in the attack on Sandra. In *State v. Malachi*, __ N.C. __ 821 S.E.2d 407 (2018) our Supreme Court expressly noted that harmless error was most likely to exist in cases where the State presents strong evidence of guilt that is not "subject to serious credibility-related questions[.]" *Id.* at __, 821 S.E.2d at 421.

In the present case, the majority rests its conclusion on the fact that the jury's verdict must mean that it found Sandra's identification of Defendant as her attacker to be credible. However, given the various widely conflicting pre-trial statements that she gave –all but one of

which flatly denied that Defendant was her assailant – her testimony clearly raised, in my view, the sort of serious credibility questions contemplated by the Supreme Court in *Malachi*.

Moreover, the remaining evidence presented by the State was far from conclusive as to Defendant's guilt. No fingerprints were found on the garden hoe. The DNA profile obtained from the hoe did not match Defendant, nor did the DNA obtained from Furr's wallet. Likewise, testing performed on scrapings taken from Sandra's fingernails excluded Defendant as a contributor. Indeed, the DNA sample taken from these scrapings not only excluded Defendant but also contained an allele from an unknown third party that was neither Defendant nor Sandra. Law enforcement also found no blood in Defendant's vehicles and did not test his clothes for the presence of blood. In short, no physical evidence of any kind linked Defendant to the crimes.

For these reasons, I believe Defendant has shown that he is entitled to a new trial. Accordingly, I respectfully dissent.

LORA ANN STERN, PLAINTIFF
v.
GARY ROSS STERN, DEFENDANT

No. COA18-523

Filed 19 March 2019

1. Appeal and Error—denial of motion to modify custody—other matters pending—appellate review per N.C.G.S. § 50-19.1

A trial court's order denying a motion to modify custody was immediately appealable even though other matters between the parties remained pending (alimony, equitable distribution, and post separation support) because the order would otherwise be a final order within the meaning of Civil Procedure Rule 54(b) and was therefore reviewable pursuant to N.C.G.S. § 50-19.1.

2. Child Custody and Support—motion to modify custody—substantial change in circumstances—sufficiency of allegations

The trial court erred by denying a father's motion to modify custody without a hearing, because the motion contained allegations that, if taken as true, showed a substantial change in circumstances which would directly affect the welfare of the child, since the father

no longer had to travel for employment and was available to care for the child on a regular basis. The trial court's reliance on an outside discussion with a prior judge in the case to determine the credibility and weight of the allegations was in error since trial courts must rule upon evidence and arguments presented before them at a hearing.

Appeal by defendant from order entered 22 September 2017 by Judge Sean P. Smith in District Court, Mecklenburg County. Heard in the Court of Appeals 14 November 2018.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit, and Haley E. White, for plaintiff-appellee.

Weaver & Budd, Attorneys at Law, PLLC, by Jennifer L. Fleet, for defendant-appellant.

STROUD, Judge.

Father appeals from an order granting Mother's "motion to deny" his motion to modify custody. Because the trial court must consider the allegations of Father's motion for modification of custody as true, it erred by dismissing Father's motion for failure to state a claim upon which relief could be granted. The trial court considered matters outside of the pleadings, evidence, and record to make a determination that it would deny Father's motion if a hearing were held. We therefore must reverse the trial court's order and remand for a hearing on Father's motion.

I. Background

This case arises out of a prolonged dispute between Mother and Father. They have one child, and custody of that child is the subject of this appeal. A permanent custody trial was held in January 2017[1] before the Honorable Alicia D. Brooks. Judge Brooks announced her ruling at the end of the trial, but the Permanent Custody Order was not entered until 29 March 2017; the findings were necessarily based upon the evidence presented and circumstances existing in January 2017. One of the primary factual issues in the trial was the parties' difficulties in sharing physical custody of the child. In particular, Father was employed by

1. The transcript of the custody hearing states the hearing was held on 16 January 2017. The Permanent Custody Order and parties' briefs state the hearing was held on 6 January 2017. The date of the hearing does not make a difference for this appeal, but the trial court should base its determination of the change of circumstances from the actual date of the January custody hearing.

Skechers, and his work required him to travel out of town frequently—over 100 nights per year in 2015, and approximately 40 nights in 2016, and Father anticipated traveling the same amount in 2017. Because his travel schedule was irregular, he often requested to change existing plans for visitation, while Mother wanted to keep a regular visitation schedule. The parties' communications about the schedule changes were often acrimonious. The Permanent Custody Order awarded Mother primary physical and legal custody and set out a detailed secondary custodial schedule for Father.

Father filed a motion to modify the Permanent Custody Order on 18 April 2017 and Mother filed a "motion to deny" and for Rule 11 sanctions on 5 May 2017. Father filed a reply on 26 May 2017 and also requested sanctions and attorney's fees. On 19 June 2017, the Honorable Sean P. Smith held a hearing on several pending motions, including a motion for a Temporary Parenting Arrangement.[2] Father presented testimony during this portion of the hearing. After Father's testimony, near the end of the hearing, the trial court took up the issue of the "motion to deny" Father's motion for modification of custody. Without hearing further evidence regarding the allegations of the motion to modify, the trial court considered the motion based upon the pleadings and arguments of counsel. Judge Smith did not rule on the motion to deny during the hearing but indicated that he wanted to talk to Judge Brooks before making his ruling. Later on 19 June 2017, the trial court indicated via email that he was granting Mother's "motion to dismiss." The trial court's order granting Mother's motion was entered on 22 September 2017, and Father timely appealed.

II. Jurisdiction

[1] Father's brief states that the ground for appellate review is:

> Judge Smith's 20 September 2017 Order, granting Plaintiff's Motion to Deny Defendant's Motion for Modification of Child Custody is a final judgment. Appeal therefore lies with the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)(2).

Mother argues Father's appeal should be dismissed as interlocutory because "claims for PSS, alimony, and equitable distribution indisputably remain pending for resolution below." Mother is correct that there

2. The parties also had pending issues of equitable distribution, post separation support, and alimony.

are other pending claims in the same action, but N.C. Gen. Stat. § 50-19.1 permits this appeal:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, *child custody*, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

N.C. Gen. Stat. § 50-19.1 (2017) (emphasis added). The trial court's order "would otherwise be a final order . . . within the meaning of G.S. 1A-1, Rule 54(b)" because it is a final determination of the custody claim. Accordingly, the trial court's 22 September 2017 order is reviewable.

III. Standard of Review

The parties disagree on whether Mother's "motion to deny" was a motion to dismiss or a motion for summary judgment. The "motion to deny" did not cite to any Rule of Civil Procedure and did not identify any specific legal basis for denial of the motion to modify. The trial court did not indicate that it considered matters outside the pleadings, so it did not treat the motion as a motion for summary judgment. *See Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 427, 651 S.E.2d 386, 388 (2007). This Court has stated that "[d]ismissal of a motion to modify child support when only the allegations in the motion and the court file are considered by the trial court is a summary procedure similar to judgment on the pleadings." *Devaney v. Miller*, 191 N.C. App. 208, 212, 662 S.E.2d 672, 675 (2008). "A trial court's ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal." *Samost v. Duke Univ.*, 226 N.C. App. 514, 517, 742 S.E.2d 257, 259 (2013), *aff'd*, 367 N.C. 185, 751 S.E.2d 611 (2013).

> [T]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id.

Here, Wife's "motion to deny" simply denied the allegations of Father's motion and alleged that there had been no substantial change of circumstances since entry of the Permanent Custody Order. At the end of the hearing, the trial court stated it was considering the motion as a motion to dismiss "for essentially failing to state a claim upon which relief may be granted" which refers to the standard set by N.C. Gen. Stat. §1A-1, Rule 12(b)(6). The trial court's order on appeal did not include any findings of fact but states as the basis for its ruling as follows:

> Defendant/Father's Motion for Modification of Child Custody fails to allege any substantial change in circumstance affecting the welfare of the minor child as required by N.C.G.S. § 50-13.7, fails to show a genuine issue as to any material fact, and should be denied.

Since the parties treated the "motion to deny" as a motion to dismiss under Rule 12(b)(6), and the trial court also treated it as such, we will treat the trial court's order on the "motion to deny" as an order dismissing Father's motion under N.C. Gen. Stat. §1A-1, Rule 12(b)(6). But whether considered as a motion for judgment on the pleadings or as a motion to dismiss under Rule 12(b)(6), our standard of review is the same: we review the ruling *de novo* and we consider Father's allegations in the motion to modify "as true" and determine whether the allegations "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).

IV. Substantial Change of Circumstances

[2] "It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (quotation marks omitted).

> 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 at 253.

Father's motion for modification of child custody alleged that his work schedule was a significant factor in the prior order's determination of custody and visitation. The evidence at the January 2017 hearing showed that Father traveled over 100 nights per year in 2015 and approximately 40 nights in 2016 and Father anticipated traveling the same amount in 2017, and, as a result, the parties had great difficulty in communicating and arranging changes to the custody schedule. Judge Brooks announced her ruling at the end of the January hearing and as to Father's travel schedule, she stated:

> That because of his work schedule, the ·father has -- does -- had limited -- had limitations on his contact because of his work schedule; that he was -- did travel -- does continue to travel quite a bit as a ·result of his position; that it was the decision ·throughout the decision that mom would be a stay-at-home mom and therefore that was an agreement that the parties had.

The written order was not entered until 29 March 2017. Based upon the evidence presented in January 2017, the trial court made the following findings regarding Father's work schedule and availability of both parents to care for the child:

> 8. During the marriage, Defendant/Father regularly travelled for work.
>
> 9. Because of his travel schedule, Defendant/father had some limitations on his contact with the minor child during the marriage.
>
> 10. After the date of separation, Defendant/Father obtained a new position with his employer that allowed him to travel less frequently. However, Defendant/Father continues to travel on a somewhat varying schedule.
>
> 11. Since the date of separation, the parties have had extreme difficulty agreeing on a physical custody schedule.

> Plaintiff/Mother desired a set schedule that would provide stability and structure for the minor child. Defendant/Father refused to agree to a set schedule and demanded a flexible, month-to-month custody schedule in accordance with his travel schedule.
>
> 12. The parties have been unable to effectively co-parent and communicate with one another since the date of separation on a myriad of issues pertaining to the minor child.
>
> 13. To avoid conflict, Plaintiff/Mother often acquiesced to Defendant/Father's demands for a month-to-month, joint custody schedule.
>
> 14. Prior to the date of separation, Plaintiff/Mother enrolled the minor child in therapy in anticipation of the issues that arise with separation and custodial transitions. Plaintiff/Mother had concerns due to particular behavior exhibited by the minor child which suggested she may be struggling to adjust to the schedule.
>
> . . . .
>
> 17. The minor child thrives on structure and consistency and it is in her best interests to have a set custodial schedule and a primary residence with limited custodial transitions.
>
> 18. Plaintiff/Mother has been the minor child's primary caregiver and the parent primarily responsible for attending to the minor child's physical, emotional, psychological, and educational needs for the majority of the minor child's life.

The Primary Custody Order's decree set forth a detailed schedule of regular alternate weekend and holiday visitation for Father and also included provisions to address his potential unavailability due to his travel schedule:

> 6. If changes are needed in the regular schedule, arrangements will be made in advance and will be mutually agreed upon by both parties. In the event that both parties cannot agree to a proposed change, the schedule set forth herein will remain in effect.
>
> 7. In the event Defendant/Father must travel or be otherwise unavailable for more than twenty four (24) hours

> during his custodial time, he shall first offer Plaintiff/Mother the right of first refusal to care for the minor child with advance notice to Plaintiff/Mother as soon as possible before allowing a third-party to care for the minor child.

In his motion for modification of custody, Father alleged several factors as substantial changes of circumstances affecting the best interests of the child which would justify modification of the order, but the most salient factor he alleged was the change in his employment status and thus availability to care for the child:

> 11. Since Her Honor's Ruling on January 6, 2017, granting Mother primary physical and legal custody of the minor child, there has been a substantial and material change in circumstances affecting the welfare of the minor child, so as to authorize this Court to modify the Order. Specifically, but not limited to the following, Father shows unto the Court as follows:
>
> a. Since Her Honor's Ruling, Father's position with Skechers U.S.A., Inc., has been dissolved, thereby terminating Father's employment with Skechers U.S.A., Inc. As such, Father is no longer required to travel. Father is therefore available and able to care for the minor child on an equal basis with Mother.

Father also alleged Mother was having difficulty in getting off work to care for the child, and she was struggling with her role as primary custodian:

> f. Upon information and belief, Mother has, and will continue to struggle with being the minor child's primary custodian. Father shows unto the Court as follows:
>
> i. Rather than Mother caring for the minor child while the minor child is in her care, Mother has asked Father on numerous occasions since Her Honor's Ruling to take the minor child to various appointments, care for the minor child when she was sick, and the like. While Father has been more than happy and willing to assist in caring for the minor child's every need, on the rare occasion when Father could not accommodate Mother's requests, Mother has expressed her frustration to Father when he was unable to care for the minor child during Mother's custodial time.

> ii. Further, Mother has already utilized the majority of her paid time off (PTO). In short, Mother has complained to Father that once her PTO is exhausted, Mother will lose approximately Two-Hundred Dollars ($200.00 USD) per day, which will ultimately trickle down and have a potentially negative impact on the minor child. Upon information and belief, and as a result of said financial consequence, Mother has expressed her frustration to Father on the rare occasion when Father was unable to oblige Mother's request(s).
>
> 12. As a result of Father's unemployment, many of the factual circumstances existing at the time of the Court's Ruling are no longer applicable.

In response to Father's motion for modification, Mother filed a "Motion to Deny and Motion for Sanctions." She alleged that Father's motion was filed "just twenty (20) days after" the Permanent Custody Order was entered. She also alleged Father's Motion "fails to allege any substantial change in circumstances affecting the welfare of the child warranting the modification of the Order," and that his motion was not grounded in fact or warranted by existing law. She requested denial of Father's motion and sanctions under Rule 11.

Mother emphasizes the brief time since the custody order was entered, as she did below, arguing that Father's motion to modify was filed only 20 days after entry of the Permanent Custody Order and that it was simply too soon for there to have been any substantial change in circumstances. Essentially, she argues that the date of entry of the order controls. But Mother's argument ignores the fact that the Permanent Custody Order was based upon the evidence and circumstances existing as of January 2017. It is unfortunately not unusual for there to be a substantial delay between a hearing and the entry of a written order based on that hearing. Since the trial court can consider only the evidence presented at the hearing, it is impossible for the trial court to consider changes in circumstances after the close of the hearing but before the entry of the written order. *Crews v. Paysour*, ___ N.C. App. ___, ___, 821 S.E.2d 469, 472 (2018) ("The order . . . can address only the facts as of the last date of the evidentiary hearing because that is the only evidence in the record."). Thus, the relevant dates for determining whether a change of circumstances has occurred is from the date of the hearing in January 2017, to the date the motion to modify was filed, 18 April 2017.

Further, the length of time that has passed after entry of a custody order, standing alone, does not control whether there may have been a substantial change of circumstances. *See* N.C. Gen. Stat. § 50-13.7(a) (2017) ("Subject to the provisions of G.S. 50A-201, 50A-202, and 50A-204, an order of a court of this State for custody of a minor child may be modified or vacated *at any time*, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." (emphasis added)). Some major changes in the life of the parents or child may take place very suddenly, such as onset of a serious illness, injury in an accident, or loss of a job. Some changes may happen more slowly. But the *timing* of the change in circumstances does not determine as a matter of law whether it is substantial or whether it has an effect on the welfare of the child. *See id.* In this case, the circumstance in question was Father's job and the effect of his work travel schedule on his availability to care for the child.

Based upon the findings of the Permanent Custody Order, Father's travel schedule was a significant factor in the trial court's decision. We must base our determination upon the record and transcript before us, and the Permanent Custody Order has findings which are the basis for the custody arrangement. But we note that the trial court informed the parties that it would take the ruling under advisement to consult Judge Brooks to see how much impact Father's travel schedule had on her decision in the Permanent Custody Order:

> THE COURT: Right. Okay. Let me make it clear to everyone, this is my decision, okay, I'll be deciding this issue whether to grant this motion to dismiss the motion to modify filed by Mr. Stern. That said, I think it is also appropriate that I confer with Judge Brooks because she's the one who heard this custody case, and she made this decision that two months and 23 days after she announced her decision in court a motion to modify was filed. So I'm going to talk to her. I'm going to hear what she has to say about the case and about this allegation of the move or just I guess granted to be true, that this loss of employment by Mr. Stern and what effect that had, if it were to occur in the future, had upon her analysis of the case. But, ultimately, I'm just going to hear from her, I'm going to talk to her in chambers, and I'm going to make the decision about whether legally this motion to modify should proceed or it should be dismissed for essentially failing to state a claim upon which relief can be granted.

We first note that this Court can review the order only based upon the record before us, and whatever Judge Brooks may have told Judge Smith about her impressions of the case is simply not before us. We also note that the trial court is required to rule upon the evidence and arguments presented at the hearing. The trial court did not take the allegations of Father's motion for modification as true. Instead, the trial court determined the credibility and weight of Father's allegations based upon its outside discussion with Judge Brooks. In deciding a motion to dismiss under Rule 12(b)(6), the trial court does not have the authority to judge the credibility and merits of the allegations, nor does this Court have the authority to conduct *de novo* review based upon any information outside the record. *See Hensey v. Hennessy*, 201 N.C. App. 56, 67-68, 685 S.E.2d 541, 549 (2009) ("Although we appreciate the trial court's concern for judicial economy, a judge's own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must be taken orally in open court must be taken *in the case which is at bar*, not in a separate case which was tried before the same judge." (quotation marks omitted)).

Taking the allegations of Father's motion as true and in conjunction with the findings of fact in the Permanent Custody Order, Father was working for Skechers at the time of the prior hearing and was traveling out of town frequently for his work. His travel schedule was irregular, and he and Mother had serious difficulties in communicating and making arrangements for changes in the child's schedule, to the child's detriment. According to the Permanent Custody Order, Father's work schedule was a significant factor in the custodial schedule. Mother denies this, but the Permanent Custody Order's findings indicate otherwise, and our review is limited to determining whether Father's motion was "sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne*, 359 N.C. at 784, 618 S.E.2d at 203.

We understand that the trial court's motives were good: judicial economy and avoidance of another custody hearing with its inevitable emotional and financial costs to both parties as well as the child. As the trial court stated,

> [L]et's address it now and get to this issue as opposed to a hearing where at the end of your evidence on the motion to modify after a day, two days worth of evidence, I sit there and I say what I could have said here today.

Perhaps the trial court would have made the same decision after a full hearing, and perhaps will make the same decision on remand, but any trier of fact, judge or jury, must keep an open mind and consider the evidence and arguments presented by each party before making a decision. The trial court can dismiss a motion under Rule 12(b)(6) only if the motion to modify has not stated any facts or law which could support the claim, and here, Father's motion to modify did allege at least one substantial change of circumstances which would directly affect the child by entirely changing his availability to care for the child. The trial court may ultimately determine that other factors outweigh the change in Father's availability, but this factual issue cannot be decided on a motion to dismiss under the standards set by Rule 12(b)(6).

Taking all of his allegations as true and considering the findings of fact in the Permanent Custody Order, Father's work schedule was an important factor in the Permanent Custody Order's provisions regarding physical custody and the visitation schedule. In addition, Father's availability to care for the child could certainly affect the welfare of the child. After a hearing on the merits, the trial court may make the same decision, but that decision must be based upon appropriate findings of fact and conclusions of law. We need not address Father's remaining argument since we must reverse on his first issue.

V. Conclusion

For the foregoing reasons we reverse the trial court's order dismissing Father's motion for modification of custody, and we remand to the trial court to hold a hearing on the merits of his motion.

REVERSED AND REMANDED.

Judges DIETZ and MURPHY concur.

TARR v. ZALAZNIK

[264 N.C. App. 597 (2019)]

STEPHEN TARR, PETITIONER
v.
MELISSA ZALAZNIK, RESPONDENT

No. COA18-649

Filed 19 March 2019

Partition—by sale—joint tenant ownership—unequal distribution—equitable principles apply

In an action to partition by sale property owned by an unmarried couple as joint tenants, the trial court's unequal division of the proceeds—in proportion to each person's contribution to the purchase price—properly applied the equitable principles set forth in N.C.G.S. § 46-10, even though that section applies to actual partition and not partition by sale, since trial courts have jurisdiction to adjust all equities between the parties with respect to partition proceedings. Moreover, section 41-2(b) (presuming owners holding property in joint tenancy with right of survivorship have equal interests) did not limit the trial court's equitable powers to order an unequal distribution of the sale proceeds.

Appeal by Respondent from judgment entered 10 January 2018 by Judge James G. Bell in Superior Court, Cumberland County. Heard in the Court of Appeals 14 January 2019.

No brief submitted by Petitioner-Appellee.

McCoy Wiggins PLLC, by Richard M. Wiggins, for Respondent-Appellant.

McGEE, Chief Judge.

I. Facts

Stephen Tarr ("Petitioner") and Melissa Zalaznik ("Respondent") made a $245,000.00 cash purchase of a lot with a house ((the "House") and, together with the lot, (the "Property")) in Fayetteville on 28 October 2013. Petitioner provided $145,000.00 of the purchase price, and Respondent contributed $100,000.00. The deed conveying the Property to Petitioner and Respondent noted that each was unmarried, and that the Property was being conveyed to them "as joint tenants with the right of survivorship[.]" Petitioner and Respondent lived

together in the House as an unmarried couple for a few years. The relationship between Petitioner and Respondent deteriorated, and the record indicates that Petitioner moved out of the House in 2016. Respondent continued to reside in the House for more than a year after Petitioner's departure.

Petitioner filed a "Petition to Partition" (the "petition") with the Clerk of Superior Court, Cumberland County (the "Clerk"), on 10 May 2016. *See* N.C. Gen. Stat. § 46-3 (2017) ("One or more persons claiming real estate as joint tenants or tenants in common . . . may have partition by petition to the superior court."). Petitioner stated that, although he "desire[d] to hold fifty percent . . . interest in [the Property] in severalty," he was requesting a partition by sale, pursuant to N.C. Gen. Stat. § 46-22(a)—arguing that actual partition of the Property could not "be made without injury to the parties . . . and it [wa]s necessary that the court order a sale for partition among the tenants in common." *See* N.C. Gen. Stat. § 46-22(a) (2017).

Respondent answered the petition on 10 June 2016 and, though she did not specifically argue against a partition by sale, Respondent stated:

> [A]lthough the parties to this action are tenants in common to the real estate described in the [p]etition [the Property], it is doubtful that at a public sale of the [Property it] could be sold at its fair market value and Respondent, pursuant to N.C.G.S. § 46-22.1, requests that the [trial court] order the parties mediate before an order is entered requiring a public sale of the [Property].

See N.C. Gen. Stat. § 46-22.1(b) (2017) ("When a partition sale is requested, the court or the clerk may order mediation before considering whether to order a sale."). Respondent further asked "[f]or such equitable relief as the [trial court] might deem proper to protect the interest of Respondent." The record does not include any evidence that mediation was ordered, and the petition was heard by the Clerk, who thereafter entered an order on 17 October 2016. The Clerk found as fact that both Petitioner and Respondent "believe[d] that an actual partition of the [P]roperty [could not] be made without substantial injury to the parties"; and that the Property "should be sold for partition as provided in N.C.G.S. § 46-28 and that a commissioner should be appointed by the [trial court] for that purpose." *See* N.C. Gen. Stat. § 46-28(a) (2017) ("The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes, except as provided herein."). The Clerk appointed a commissioner (the "Commissioner") to conduct

a sale of the Property, and ordered that "the proceeds, after payment of all costs, be distributed [to Petitioner and Respondent] as by law provided[.]" *See* N.C. Gen. Stat. §§ 46-7, 46-28, and 46-33 (2017).[1]

The Commissioner filed a motion on 10 November 2016 to sell the Property, and the Clerk entered an order granting the motion to sell the Property on the same day. Neither the Commissioner's motion nor the Clerk's order specifically addressed how the proceeds of the sale would be divided. The Commissioner conducted a sale of the Property, and the highest offer was for a purchase price of $220,000.00. The Clerk approved and confirmed the sale of the Property on 7 June 2017, and ordered the Commissioner to deliver title to the purchasers upon receipt of the purchase price. Neither party appealed the order of confirmation of sale and, therefore, it became a final order. N.C. Gen. Stat. § 46-28.1(f) (2017). After all costs had been deducted from the sales proceeds, $192,323.87 remained in the Commissioner's account for distribution to Petitioner and Respondent.

For reasons not made clear by the record, the net proceeds of the sale were not disbursed at the time the order of confirmation became final. N.C.G.S. § 46-33 ("At the time that the order of confirmation becomes final, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale."). Approximately four months after the sale of the Property, Petitioner filed a "Supplemental Petition," on 5 October 2017, wherein he noted that "the proceeds received from the sale of the property did not equate for [Petitioner and Respondent] to recover their initial portion of the purchase price[.]" Therefore, Petitioner requested "that [the] net proceeds be divided and apportioned pursuant to [the] initial contribution" amounts provided by Petitioner and Respondent. Specifically, Petitioner requested that he receive fifty-nine percent of the net proceeds and that Respondent receive forty-one percent—in order to correspond with Petitioner's contribution of $145,000.00 to the purchase of the Property compared with Respondent's $100,000.00 contribution.

The Clerk agreed with Petitioner that the net proceeds from the sale of the Property should be divided in proportion to the contributions made by Petitioner and Respondent toward the purchase of the Property. Therefore, the Clerk ordered a fifty-nine percent to forty-one

1. The statutes indicate that three commissioners should be appointed, *see* N.C.G.S. §§ 46-7 and 46-28; however, as there is no record objection by either Petitioner or Respondent, it is presumed they were in agreement with the procedure used, and any objection thereto has been waived.

percent distribution in favor or Petitioner. Respondent appealed, and the matter was heard in superior court. By judgment entered 10 January 2018, the trial court conducted a *de novo* review, agreed with the decision of the Clerk, and ordered the same fifty-nine percent to forty-one percent division of the net proceeds in Petitioner's favor. Respondent appeals.

II. Standard of Review

"An action for partition under [Chapter 46] is a special proceeding. When such action is appealed from the clerk to the superior court 'for any ground whatever . . .,' the trial court has the authority to consider the matter *de novo*." *Jenkins v. Fox*, 98 N.C. App. 224, 226, 390 S.E.2d 683, 685 (1990) (citations omitted); *see also* N.C. Gen. Stat. § 46-1 (2017). When the trial court acts as the trier of fact:

> [T]he standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.
>
> "[W]hether a partition order and sale should issue is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law."

Solesbee v. Brown, __ N.C. App. __, __, 805 S.E.2d 183, 186–87 (2017) (citations omitted).

III. Analysis

Respondent argues the trial court erred in ordering an unequal distribution of the net proceeds from the partition by sale of the Property. We disagree.

A. *Chapter 46. Partition*

Chapter 46 of the North Carolina General Statutes governs the partition of real property held by cotenants—tenants in common and joint tenants—including the partition in the present case. Both Petitioner and Respondent agreed to partition of the Property by sale pursuant to N.C.G.S. § 46-22(a). Respondent does not challenge any part of the *sale* of the Property. Respondent's argument is that the trial court was

without the authority to order that Petitioner receive a greater share of the net proceeds from the sale of the Property.

Respondent's argument does not recognize that a partition proceeding is a proceeding in equity, not law. Concerning the disbursement of the net proceeds pursuant to partition by sale, N.C.G.S. § 46-33 states that, after completion and confirmation of a sale of real property in a partition proceeding, "the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale." N.C.G.S. § 46-33. Equitable principles apply to the decision of the trial court in this regard. "Prior to 1868 courts of equity had jurisdiction of partition proceedings in North Carolina. Since that date partition has been by special proceeding before the clerk of superior court, with right of review by the judge of superior court. Procedure is outlined by statute. G.S., Ch. 46." *Allen v. Allen*, 263 N.C. 496, 498, 139 S.E.2d 585, 587 (1965) (citation omitted). "The superior court still possesses all the powers and functions of a court of equity which it possessed prior to 1868. The method of finding facts has been changed, but none of the powers of the court have been abridged." *McLarty v. Urquhart*, 153 N.C. 339, 340-41, 69 S.E. 245, 246 (1910). In general, the purpose of equitable remedies "is 'the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice.' " *Bank of N.Y. Mellon v. Withers*, 240 N.C. App. 300, 302, 771 S.E.2d 762, 764 (2015) (citation omitted) (case concerning equitable subrogation).

More specifically, even though partition of real property is governed by Chapter 46,

> in this state partition proceedings have been consistently held to be equitable in nature. The statutes are not a strict limitation upon the authority of the court. Since the proceeding is equitable in nature, the court has jurisdiction to adjust all equities in respect to the property. . . . . The court has authority to give directions . . . to the end that justice be done between the parties.

Allen, 263 N.C. at 498–99, 139 S.E.2d at 587–88 (citation omitted); *see also Gray v. Crotts*, 58 N.C. App. 365, 370, 293 S.E.2d 626, 629 (1982). In an opinion affirming the trial court's ruling that, in a partition proceeding, "one tenant in common may set up claim for amounts expended to remove an encumbrance on the common property[,]" *Henson v. Henson*, 236 N.C. 429, 429, 72 S.E.2d 873, 873 (1952), our Supreme Court explained:

> Petitions for partition are equitable in their nature, and the court has jurisdiction to consider the rights of the parties under the principles of equity and to do justice between the parties.
>
> The rule is that in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property to be partitioned. "A tenant in common who has paid or assumed liens or encumbrances on the property ordinarily is entitled on partition to a proportionate reimbursement therefor from the other tenants."
>
> In such case the sale may be ordered and the rights of the parties adjusted from the proceeds of sale.

Id. at 430, 72 S.E.2d at 873–74 (citations omitted); *see also Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 19-20, 149 S.E.2d 553, 556–57 (1966); *Ward v. Ward*, __ N.C. App. __, __, 797 S.E.2d 525, 529, *disc. review denied*, 369 N.C. 753, 800 S.E.2d 65 (2017). In furtherance of its equitable powers, "[p]ending final determination of the proceeding, on application of any of the parties in a proceeding to partition land, the court may make such orders as it considers to be in the best interest of the parties[.]" N.C. Gen. Stat. § 46-3.1 (2017).

In the present case, the trial court, in its 10 January 2018 judgment, concluded "that the net proceeds of sale of the Property should, in accordance with N.C.G.S. § 46-10[,] be in accordance [with] Petitioner['s] and Respondent's initial contribution[s.]" N.C. Gen. Stat. § 46-10 concerns the duties of the commissioners in an actual partition, not the distribution of net proceeds in a partition by sale. *See* N.C. Gen. Stat. § 46-10 (2017). However, there is nothing to prevent the trial court from applying *the equitable principles* found in N.C.G.S. § 46-10 to a partition by sale because, " '[i]n this State partition proceedings have been consistently held to be equitable in nature, and *the court has jurisdiction to adjust all equities in respect to the property*.' " *Ward*, __ N.C. App. at __, 797 S.E.2d at 529 (citation omitted) (emphasis added). N.C.G.S. § 46-10 states in part:

> The commissioners . . . must . . . partition the [real property] among the tenants in common, or joint tenants, *according to their respective rights and interests therein*, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such

> sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition.

N.C.G.S. § 46-10 (emphasis added). *The equitable principle* underlying N.C.G.S. § 46-10 is that partition of real property should be conducted in a manner that best achieves an equitable distribution of the real property between the tenants in common or joint tenants. *Id.* This principle is not incompatible with N.C.G.S. § 46-33, which states that, after confirmation of a partition by sale, "the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale." *Id.* N.C.G.S. § 46-10—by its plain language—does not apply to the present case and, therefore, the trial court's citation to N.C.G.S. § 46-10 in its judgment was unnecessary, and potentially confusing. However, because the trial court " 'has power to adjust all equities between the parties with respect to the property to be partitioned[,]' " *Roberts*, 260 N.C. at 240, 132 S.E.2d at 484 (citation omitted), it committed no error by distributing the net proceeds of the Property "according to [Petitioner's and Respondent's] respective rights and interests therein[.]" N.C.G.S. § 46-10.

In the present case, both the Clerk and the trial judge determined that the equities favored an unequal distribution of the net proceeds of the sale of the Property in order to partially compensate Petitioner for the additional $45,000.00 he had contributed towards the purchase of the Property. We find nothing in Chapter 46 or the associated case law that would prevent the trial court from exercising its equitable powers in this manner.

B. *Chapter 41. Estates*

However, Respondent argues that a statute from Chapter 41 of the North Carolina General Statutes, "Estates," prohibited the trial court from utilizing its equitable powers to order an unequal division of the net proceeds of the sale of the Property. In 1784, the right of survivorship in North Carolina was abolished by statute "where the joint tenancy would otherwise have been created by the law[.]" *Taylor v. Smith*, 116 N.C. 531, 535, 21 S.E. 202, 204 (1895). However, the statute "does not operate to prohibit persons from entering into written contracts as to land . . . such as to make the future rights of the parties depend upon the fact of survivorship." *Id.* The current version of that statute is N.C. Gen. Stat. § 41-2 ("Survivorship in joint tenancy defined; proviso as to partnership; unequal ownership interests"), which states in part: "Nothing in this section prevents the creation of a joint tenancy with right of survivorship in

real . . . property if the instrument creating the joint tenancy expressly provides for a right of survivorship[.]" N.C. Gen. Stat. § 41-2(a) (2017). The statute further states:

> The interests of the grantees holding property in joint tenancy with right of survivorship shall be deemed to be equal unless otherwise specified in the conveyance. Any joint tenancy interest held by a husband and wife, unless otherwise specified, shall be deemed to be held as a single tenancy by the entirety, which shall be treated as a single party when determining interests in the joint tenancy with right of survivorship. Joint tenancy interests among two or more joint tenants holding property in joint tenancy with right of survivorship are subject to the provisions of G.S. 28A-24-3 upon the death of one or more of the joint tenants.

N.C.G.S. § 41-2(b).

1. Purpose of Chapter 41—Law

The articles in Chapter 41 serve to clarify definitions, rights, and obligations associated with the contractual or testamentary transfer of estates. N.C.G.S. § 41-2(b) is found in Article 1 of Chapter 41, entitled: "Survivorship Rights and Future Interests." Much of Article 1 is devoted to the abolition of common law rules related to the transfer of real property, and the promulgation of new rules. *See*, *e.g.*, N.C. Gen. Stat. § 41–6.2 (2017) ("Doctrine of worthier title abolished"); N.C. Gen. Stat. § 41–6.3 (2017) ("Rule in Shelley's case abolished"); N.C. Gen. Stat. § 41–2.1 (2017) ("Right of survivorship in bank deposits created by written agreement"); N.C. Gen. Stat. § 41–2.5 (2017) ("Tenancy by the entirety in mobile homes"). The remaining articles in Chapter 41 have similar purposes: "Article 2. Uniform Statutory Rule Against Perpetuities[;]" "Article 3. Time Limits on Options in Gross and Certain Other Interests in Land[;]" "Article 4. The Uniform Transfer on Death (Tod) Security Registration Act[.]"

As illustrated above, Chapter 41 is primarily concerned with two general issues: (1) the transfer of property upon the death of an owner of that property and, (2) establishing and clarifying limitations on the free use and transfer of property. The enforcement of the provisions set forth in Chapter 41 is a matter of law, not equity—though equitable issues may arise therefrom. *See Clifton v. Owens*, 170 N.C. 607, 87 S.E. 502 (1916); *Simmons v. Waddell*, 241 N.C. App. 512, 526–27, 775 S.E.2d 661, 676 (2015) (citations omitted) (emphasis added) (" 'The interpretation

of a will's language is *a matter of law*." . . . . "[The] intent [of the testator] is to be gathered from a consideration of the will from its four corners, and such intent should be given effect *unless contrary to some rule of law* or at variance with public policy.' ").

2. Purpose of Chapter 46—Equity

Chapter 46, however, is specifically concerned with the partition of jointly owned property among living persons.[2] N.C.G.S. § 46-3 (stating in relevant part that "persons claiming real estate as joint tenants . . . may have partition by petition to the superior court"). Partition pursuant to Chapter 46 is accomplished in a special proceeding, pursuant to the procedures set forth in Chapter 46 and, where not in conflict with Chapter 46, pursuant to Article 33, "Special Proceedings," of Chapter 1. *See* N.C.G.S. § 46-1 ("the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein"). Unfortunately, Chapter 46 does not specifically address the trial court's equitable powers to order an unequal division of the net proceeds of a partition by sale based upon unequal monetary contributions toward the initial purchase of a property by joint tenants with the right of survivorship.

3. Equitable Powers of the Trial Court—Equitable Distribution

Because we can find no statute or precedent directly involving the equitable powers of a trial court to order an unequal division of the net proceeds from a partition by sale of real property held as joint tenants with the right of survivorship, we look to other circumstances where the trial court, acting in equity, is tasked with the division of real property. When married persons hold title to real property as tenants by the entirety, " 'each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof.' " *Carter v. Insurance Co.*, 242 N.C. 578, 579, 89 S.E.2d 122, 123 (1955) (citation omitted). As such, when an estate held as tenants by the entirety is severed by absolute divorce, each former spouse is entitled to a one-half interest in the estate, held as tenants in common. *Id.* at 580, 89 S.E.2d at 124.

Prior to the enactment of the Equitable Distribution Act, " '[t]he general rule [wa]s that upon divorce the two former spouses bec[a]me equal cotenants even though one of the former spouses paid the entire purchase price [for real property purchased during the marriage]. Each spouse [wa]s entitled to an undivided one-half interest in the property[.]' " *Branstetter v. Branstetter*, 36 N.C. App. 532, 536, 245 S.E.2d 87,

2. With certain limited exceptions not relevant to this analysis.

90 (1978) (citations omitted). Even upon separation, the expenditures of one spouse to maintain the property prior to divorce could not be recovered by that spouse. *Id.* However, "[i]n 1981, the General Assembly sought to alleviate the unfairness of the common law rule by enacting our Equitable Distribution Act which is now codified as N.C.G.S. 50–20 and 21." *White v. White*, 312 N.C. 770, 774–75, 324 S.E.2d 829, 831 (1985).[3]

When the trial court makes decisions concerning the distribution of marital property pursuant to the equitable distribution provisions of Chapter 50, it is acting as a court of equity. *See* N.C. Gen. Stat. § 50-20(c) (2017) ("If the court determines that an equal division [of marital property] is not equitable, the court shall divide the marital property and divisible property equitably."); *Stone v. Stone*, 181 N.C. App. 688, 695, 640 S.E.2d 826, 830 (2007); *Barlowe v. Barlowe*, 113 N.C. App. 797, 799, 440 S.E.2d 279, 280 (1994) (citation omitted) ("in an equitable distribution proceeding, the trial court has wide discretion to divide the property unequally"). Pursuant to the Equitable Distribution Act, the trial court, acting in equity, can order the unequal distribution of the net proceeds from the sale of real property purchased by a married couple as tenants by the entirety. N.C.G.S. § 50-20(c) ("There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably."); *Mugno v. Mugno*, 205 N.C. App. 273, 276, 278–79, 695 S.E.2d 495, 497–98, 499 (2010) (award of eighty-six percent of the marital estate—including the marital home—to wife upheld in equitable distribution action). Certainly real property owned by a married couple as joint tenants with the right of survivorship is, pursuant to the equitable powers of the trial court, also subject to unequal division in an equitable distribution action. "The purpose of the Equitable Distribution Act is 'to divide property equitably, based upon the relative positions of the parties at the time of divorce, rather than on what they may have intended when the property was acquired.' " *Mims v. Mims*, 305 N.C. 41, 54, 286 S.E.2d 779, 788 (1982). "The General Assembly has committed the distribution of marital property to the discretion of the trial courts, and the exercise of that discretion will not be disturbed in the absence of clear abuse." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986) (citation omitted).

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3. For a discussion concerning some of the inequities in the law prior to enactment of the Equitable Distribution Act, *see White*, 312 N.C. at 773–74, 324 S.E.2d at 831.

4. Equitable Powers of the Trial Court—Chapter 46 Partition

The General Assembly has also committed the partition and distribution of real property owned by one or more people as tenants in common, or as joint tenants, to the discretion of the trial courts, acting as courts of equity, through the enactment of Chapter 46. *See*, *e.g.*, N.C.G.S. § 46-1; N.C.G.S. § 46-3.1; N.C.G.S. § 46-33; *Solesbee*, __ N.C. App. at __, 805 S.E.2d at 186–87, *Ward*, __ N.C. App. at __, 797 S.E.2d at 529.

> Proceedings for partition are equitable in nature, and in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property to be partitioned. A sale for partition may be ordered and *the rights of the parties adjusted from the proceeds of the sale.*

Roberts v. Barlowe, 260 N.C. 239, 240, 132 S.E.2d 483, 484 (1963) (citations omitted) (emphasis added). The trial court properly decided the petition "before an order of distribution was made." *Id.* at 240, 132 S.E.2d at 484 (citation omitted).

"The statutes are not a strict limitation upon the authority of the court. Since the proceeding is equitable in nature, the court has jurisdiction to adjust all equities in respect to the property." *Allen*, 263 N.C. at 498, 139 S.E.2d at 587 (citation omitted).[4] We hold—similar to an equitable distribution action—that the provisions of N.C.G.S. § 41-2(b) were "not a strict limitation upon the authority of the court" acting pursuant to Chapter 46. *Allen*, 263 N.C. at 498, 139 S.E.2d at 587 (citation omitted). The provisions of N.C.G.S. § 41-2(b) did not deprive the trial court in the present case of its equitable powers to "adjust all equities in respect to the [P]roperty[,]" by ordering that Petitioner be partially compensated for the additional $45,000.00 he paid to purchase the property through an unequal division of the net proceeds from the sale of the Property. *Allen*, 263 N.C. at 498, 139 S.E.2d at 587 (citation omitted). Finding no legal error or abuse of the trial court's discretion in determining the equities in the present case, we affirm.

AFFIRMED.

Judges HUNTER, JR. and HAMPSON concur.

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4. We note that Respondent's attorney, in his argument to the trial court, recognized the equities involved, stating: "And it may be inequitable [for the trial court to order an *equal* division of the net proceeds], it may be not what they intended, but unfortunately, that's what the deed says, and that's what the law dictates to be done."

WATAUGA COUNTY ON BEHALF OF NICOLE R. MCKIERNAN, PLAINTIFF
v.
DAVID DWAYNE SHELL, DEFENDANT

No. COA18-687

Filed 19 March 2019

1. Appeal and Error—interlocutory orders—stay order—Appellate Rule 2—administration of justice

The Court of Appeals invoked its authority under Appellate Rule 2 to review an interlocutory order staying an IV-D child support claim, holding that the trial court's decision produced a manifest injustice where it left the mother without child support for over two years, and that it was in the public interest to clarify the trial court's authority to enter an IV-D child support order while a related Chapter 50 custody appeal was pending.

2. Child Custody and Support—IV-D child support—pending custody action—stay order—misapprehension of the law

The Court of Appeals reversed an order staying an IV-D child support action, holding that the trial court misapprehended the law—and, therefore, abused its discretion—by ruling that it lacked jurisdiction to hear the child support claim while an appeal of the parties' Chapter 50 custody proceeding was pending. Additionally, the child support claim required a rehearing where the trial court erroneously combined the custody and child support actions and then entered a temporary child support order without jurisdiction to do so.

Appeal by plaintiff from order entered 6 February 2018 by Judge Larry Leake in District Court, Watauga County. Heard in the Court of Appeals 13 February 2019.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Chelsea Bell Garrett, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

The Watauga County Child Support Enforcement Agency appeals a trial court order staying a IV-D child support proceeding initiated by

the Avery County Child Support Enforcement Agency to establish "continuing support and maintenance" "as required by the North Carolina Child Support Guidelines, N.C.G.S. 50-13.4[;]" the stay order was based upon a pending appeal in the related Chapter 50 child custody proceeding between the parents of the children.[1] The trial court acted under a misapprehension of the applicable law in determining it had no jurisdiction to consider a Chapter IV-D child support enforcement claim while the Chapter 50 custody appeal was pending. We reverse the stay order and remand for further proceedings in accord with this opinion.

I. Background

Mother Nicole McKieran and Father David D. Shell are the parents of two minor children for whom plaintiff Watauga County Child Support Enforcement Agency sought to establish child support. Mother and Father are also defendants in a child custody proceeding under Chapter 50 of the North Carolina General Statutes brought in 2009 by the children's paternal grandparents as plaintiffs. *See Shell v. Shell*, ___ N.C. App. ___, ___, 819 S.E.2d 566 (2018). An order modifying child custody was appealed to this Court, and we will quote the background as stated in the opinion in the custody case:

> This appeal arises from the modification of a 2012 custody order. Plaintiffs, David and Donna Shell, are the paternal grandparents of the children, Sam and Kim. Defendant David Shell is the son of plaintiffs and father of Sam and Kim. Defendant Nicole Green is the children's mother and has married since the prior order and is now Nicole McKiernan. We will identify all parties by their relation to Sam and Kim. Therefore, plaintiffs will be referred to as the "Grandparents," defendant Shell as "Father" and defendant Green as "Mother." Although both parents are "defendants," the interests of defendant Father are aligned with plaintiff Grandparents and are opposed to the interests of defendant Mother.
>
> The prior custody order was entered in May 2012. Father was granted sole legal and physical custody of the children and Mother had visitation rights. . . .

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1. We have listed the caption of this case as shown in the order on appeal, but we note that Watauga County file number 09 CVD 389 is a Chapter 50 custody claim involving different parties, while the Chapter IV-D child support claim which is the subject of this appeal is file number 17 CVD 116. The actual plaintiffs in Watauga County file number 09 CVD 389, David W. and Donna Shell, did not appear as parties in this appeal.

> On 3 June 2016, Mother moved to modify custody alleging that since the prior custody order there had been a substantial change of circumstances affecting the welfare of the children because she had remained sober for several years, maintained a job for over two years, and gotten remarried. She also alleged that Father had become more difficult to deal with regarding visitation. He refused to send the children's homework so the children could complete it during visits with Mother, and he denied Mother information about the children's school activities and would not allow her to participate.
>
> On 17 and 30 January 2017, the trial court held a hearing on the motion to modify custody. The trial court entered an order modifying custody on 6 February 2017, which determined there had been a substantial change of circumstances affecting the welfare of the children and modified custody, granting Father and Mother joint legal custody, with Mother receiving primary physical custody. Father and Grandparents appeal[ed on 8 March 2017 and 18 July 2017, respectively.]

Id. at ___, 819 S.E.2d at 569-70 (footnotes omitted). The order appealed from in *Shell* is from Watauga County, file number 09 CVD 389.

While the appeal in *Shell* was pending before this Court, on 4 May 2017, the Avery County Child Support Enforcement Agency filed a verified complaint on behalf of Mother against Father for IV-D child support. *See generally* N.C. Gen. Stat. § 110-129(7) (2017) (" 'IV-D' case means a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act as amended and this Article."). The IV-D child support case was filed in Avery County, file number 17 CVD 116. Custody claims are not considered in IV-D child support cases as noted in *Gray v. Peele:*

> We understand that the order failed to address child custody because this case was heard in Wake County Civil IV–D District Court and prosecuted by the Wake County Child Support Enforcement Agency on behalf of Plaintiff. The "Civil IV–D" session of District Court is commonly referred to as "child support court." Chapter 110 of the North Carolina General Statutes sets out a comprehensive statutory scheme for establishment of child support

orders and enforcement of those orders in cases which fall under that Chapter, defined as "a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV–D of the Social Security Act as amended and this Article." N.C. Gen. Stat. § 110–129(7) (2011). N.C. Gen. Stat. § 110–129.1(a)(3) grants to the Department of Health and Human Services the "power and duty" to

> Establish and implement procedures under which in IV–D cases either parent or, in the case of an assignment of support, the State may request that a child support order enforced under this Chapter be reviewed and, if appropriate, adjusted in accordance with the most recently adopted uniform statewide child support guidelines prescribed by the Conference of Chief District Court Judges.

Because of the specialized nature of the IV–D session of court, motions for modification of custody are not heard, nor do Child Support Enforcement agencies represent parents in regard to any custody issues.

235 N.C. App. 554, 559, 761 S.E.2d 739, 743 (2014).

Based upon the trial court's Chapter 50 custody order, as of February 2017, the children were in the primary physical custody of Mother, and Avery County Child Support Enforcement Agency then filed its complaint to establish child support on her behalf:

> (c) Actions or proceedings to establish, enforce, or modify a duty of support or establish paternity as initiated under this Article shall be brought in the name of the county or State agency on behalf of the public assistance recipient or nonrecipient client. *Collateral disputes between a custodial parent and noncustodial parent, involving visitation, custody and similar issues, shall be considered only in separate proceedings from actions initiated under this Article.* The attorney representing the designated representative of programs under Title IV-D of the Social Security Act shall be deemed attorney of record only for proceedings under this Article, and not for the separate proceedings. No 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) (2017) (emphasis added).

On 20 September 2017, the Avery County District Court entered an order transferring venue of the IV-D child support action to Watauga County and ordered that "it shall be combined into Watauga County File No.:09 CVD 389 and set for their 10/2/17 Civil Session." Although the order "combining" the cases is not in our record on appeal, this is an uncontested finding of fact in the stay order on appeal. We also note that "combining" a IV-D child support action with a Chapter 50 custody action is statutorily prohibited by N.C. Gen. Stat. § 110-130.1. *Id.* ("Collateral disputes between a custodial parent and noncustodial parent, involving visitation, custody and similar issues, *shall be considered only in separate proceedings* from actions initiated under this Article. The attorney representing the designated representative of programs under Title IV-D of the Social Security Act shall be deemed attorney of record only for proceedings under this Article, and not for the separate proceedings." (emphasis added)).

On 6 February 2018, after the children had been residing with Mother for nearly a year without entry of a child support order, the trial court entered an order staying the IV-D child support action. The case caption on the stay order is *Watauga County on behalf of Nicole R. McKiernan*, Plaintiff, v. *David Wayne Shell*, Defendant, with a file number of 09-CVD-389 – the Chapter 50 custody file number – based upon the "combination" of the IV-D child support and custody cases. To support entry of the stay order, the trial court made the following pertinent findings:

> 10. The Court finds that the case of *Kanupp v Kanupp*, 148 N.C. App. 716, 562 S.E.2d 117, reported in full at *Kanupp v. Kanupp*, 2002 N.C. App. LEXIS 1705 (N.C. Ct. App., Feb. 19, 2002) would be controlling in this factual setting in that the court does not have at this time authority to hear the action.
>
> 11. The Court also finds that it is in the interest of judicial efficiency for this matter to not be adjudicated until there is a final determination by Court of Appeals as to the underlying custody dispute.
>
> 12. The Court also finds that N.C. Gen. Stat. § 1-294 requires the staying of this action in that the Court

> finds this matter is embraced within that action which is on appeal.

The stay order decreed: "That this matter be stayed until a mandate is issued from the North Carolina Court of Appeals regarding the underlying custody dispute which is currently on appeal and jurisdiction is returned to this Court."

On 6 March 2018, plaintiff appealed the 6 February 2018 stay order. On 21 August 2018, this Court issued its opinion in *Shell*, affirming the trial court order modifying custody. *See Shell*, ___ N.C. App. ___, ___, 819 S.E.2d 566.

On 29 August 2018, the trial court entered a temporary child support order in the IV-D claim. Based upon entry of the temporary child support order, Father filed a motion to dismiss this appeal as moot because the trial court had entered a temporary child support order after this Court's opinion in *Shell*, and that order notes that another hearing would be held in September 2018.[2] This Court previously denied the motion to dismiss as moot by order entered on 3 October 2018.

To summarize, there are at least four orders tangled into the controversy before us:

(1) The order modifying custody which was appealed and affirmed by this Court in *Shell*. *See id*.

(2) An order issued in Avery County which transferred venue of the IV-D claim and "combined" it with the pending Chapter 50 custody action.

(3) The stay order on appeal which stayed the IV-D child support claim, under the Chapter 50 custody case file number, based on the pending Chapter 50 custody appeal.

(4) The temporary child support order entered after this appeal of the stay order was pending before us.

However, *only* the 6 February 2018 stay order is on appeal before this Court.

II. Interlocutory Appeal

[1] The trial court's stay order is not a final order which disposes of all claims, so this appeal is interlocutory. *See Gray v. Peele*, 235 N.C. App.

2. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160 (2005) (citation and quotation marks omitted).

at 556–57, 761 S.E.2d at 741 ("Generally, there is no right of immediate appeal from interlocutory orders and judgments. 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. On the other hand, a final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (citation omitted)). Plaintiff argues that this Court should "sua sponte" hear this appeal because the trial court's error impairs the ability of the Child Support Enforcement Agency to expeditiously obtain a child support order on behalf of the parents and children who need financial assistance. Plaintiff notes that this case presents an "easy-to-abuse process whereby a responsible parent could delay paying their obligation for a long time." Our Supreme Court noted this Court's discretion to consider an appeal for similar reasons,

> Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. However, the appellate courts of this State in their discretion may review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose. Such discretion is not intended to displace the normal procedures of appeal, but inheres to appellate courts under our supervisory power to be used only in those rare cases in which normal rules fail to administer to the exigencies of the situation. When discretionary review is allowed, the question of appealability becomes moot.
>
> Such is the case here. The Court of Appeals determined that a trial on the merits of this protracted controversy would be facilitated by allowing immediate appeal from the pretrial orders. Accordingly, it reviewed the merits of the orders pursuant to its supervisory authority contained in G.S. 7A—32(c). The issue of premature appeal thereupon became moot and arguments on the point were rendered feckless. Hence, we consider the opinion of the Court of Appeals on the merits of this controversy, expressing no opinion on the appealability of the interlocutory orders.

Stanback v. Stanback, 287 N.C. 448, 453–54, 215 S.E.2d 30, 34–35 (1975) (citations omitted).

Based upon the "combination" of the custody and IV-D cases and the stay order, Mother went for over two years with no child support order at all, and since the trial court did not have jurisdiction to enter an order on child support during the pendency of *this* appeal, this is one of "those rare cases in which the normal rules fail to administer to the exigencies of the situation." *Id.* at 454, 215 S.E.2d at 34; *see* N.C. R. App. P. 2 (allowing this Court to "suspend or vary the requirements" of our rules "[t]o prevent manifest injustice"). Further, clarification of the trial court's authority to enter a IV-D child support order while a Chapter 50 custody appeal is pending is also in the public interest. *See generally Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 279, 679 S.E.2d 512, 517 (2009) ("Notwithstanding the foregoing, Rule 2 of the North Carolina Rules of Appellate Procedure allows this Court to suspend its rules to prevent manifest injustice to a party, or to expedite decision in the public interest." (citation and brackets omitted)). There can be no doubt that this case is a "manifest injustice[,]" to the children involved and is of great "public interest" and import. *Id.* Therefore, we elect to invoke our power pursuant to Rule 2 to hear this appeal notwithstanding the fact that the order is interlocutory.

III. Standard of Review

"When evaluating the propriety of a trial court's stay order the appropriate standard of review is abuse of discretion. A trial court may be reversed for abuse of discretion only if the trial court made a patently arbitrary decision, manifestly unsupported by reason." *Meares v. Town of Beaufort*, 193 N.C. App. 49, 64, 667 S.E.2d 244, 254 (2008) (citation and quotation marks omitted). Further, the trial court may also abuse its discretion by making a discretionary decision based upon a misapprehension of the applicable law. *See generally Matter of Skinner*, 370 N.C. 126, 146, 804 S.E.2d 449, 462 (2017) ("It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard.").

IV. Trial Court's Jurisdiction

[2] The trial court based the stay order upon its determination that it did not have jurisdiction to hear the IV-D child support claim for several reasons, though all were based upon the pending appeal in the Chapter 50 custody case. The IV-D child support complaint was filed after the appeal of the custody order, in another county and with different parties. Although the order "combining" the cases is not before us, the Avery County trial court had no authority to "combine" the Chapter 50

custody case, which was at that time on appeal before this Court, with the newly-filed IV-D action. *See* N.C. Gen. Stat. § 110-130.1(c). This erroneous "combination" of the IV-D child support and custody actions led the Watauga County trial court to determine it did not have jurisdiction to consider child support while appeal on custody was pending before this Court.

The trial court gave three reasons for the stay order. First, it relied upon the unpublished case of *Kanupp v. Kanupp*, 148 N.C. App. 716, 562 S.E.2d 117 (2002) (unpublished), which it deemed "controlling," but because *Kanupp* is unpublished, it by definition cannot be "controlling" authority. N.C. R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals *does not constitute controlling legal authority*." (emphasis added)).

Next, the trial court's reliance upon North Carolina General Statute § 1-294 was also mistaken. *See McKyer v. McKyer*, 179 N.C. App. 132, 139, 632 S.E.2d 828, 832 (2006) ("With respect to this issue, N.C. Gen. Stat. § 1–294 (2005) provides: 'When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but *the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from*.' This Court has held, based on N.C. Gen. Stat. § 1–294, that 'once a custody order is appealed, the trial court is divested of jurisdiction over all matters *specifically affecting custody*.' " (citations and parenthetical omitted)).

Finally, the trial court found it was "in the interest of judicial efficiency for this matter to not be adjudicated until there is a final determination by Court of Appeals[.]" But we note that Mother was required to wait approximately a year after the custody order *before* the trial court entered the stay order and another six months because of the stay order before entry of a temporary support order. Even if a long delay in considering child support is somehow "efficient" for the trial court, judicial efficiency must not trump the needs of the children for support, particularly where North Carolina General Statute § 50-19.1 requires the IV-D child support and custody matters to remain separate.

North Carolina General Statute § 50-19.1 clears up any potential confusion of when orders in a domestic case are immediately appealable and the trial court retains jurisdiction to proceed with other claims. *See* N.C. Gen. Stat. § 50-19.1 (2017).[3] In fact, North Carolina General

3. North Carolina General Statute § 50-19.1 has been amended, though the amendment is not relevant to this case. *See* N.C. Gen. Stat. § 50-19.1 (2019).

Statute § 50-19.1 specifically allows a child support claim to proceed while a custody claim is on appeal, even if the claims are in the "same action" from inception:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. *An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action.*

N.C. Gen. Stat. § 50-19.1 (emphasis added). The trial court thus acted under a misapprehension of the law in determining it had no jurisdiction to consider the IV-D child support claim because of the pending Chapter 50 custody appeal. *See id.*

Unfortunately, although the trial court did have jurisdiction to enter a child support order when it entered the stay during the pendency of the appeal of the *custody* claim, it did not have jurisdiction to enter an order in the child support claim during a pending appeal in the *child support* claim. Notice of appeal from the child support stay order was filed on 6 March 2018, so the trial court would have had no jurisdiction to enter the temporary child support order – or any other child support order. Since *this* appeal deals with the child support claim, it is not covered by North Carolina General Statute § 50-19.1. *See generally id.* Thus, the trial court did not have jurisdiction to enter a child support order when the *child support* claim was at issue on appeal. *See id.* (noting the trial court may consider "other pending claims" while a claim in the same action is pending, not the same claim). The trial court had, and still has, no jurisdiction to enter child support orders until this opinion is issued, and the appeal is no longer pending before this Court or any higher Court. *See generally Lowder v. Mills, Inc.*, 301 N.C. 561, 581, 273 S.E.2d 247, 259 (1981) ("[A]ll orders entered by Judge Seay after defendants' notice of appeal on 9 May 1980 are void for want of jurisdiction. Thus the orders entered 15 May 1980 approving the payment of fees and expenses in this case must be vacated.")

V. Conclusion

We reverse the stay order and note that the trial court did not have jurisdiction to enter any further orders regarding child support during the pendency of this appeal. We remand for rehearing of the child support claim. We also note that the IV-D child support claim and the Chapter 50 custody claim should not be "combined" according to North Carolina General Statute § 50-19.1, so on remand they should be severed to avoid future confusion or jurisdictional issues arising from the "combination."

REVERSED and REMANDED.

Judges TYSON and ARROWOOD concur.

PETRA WEISHAUPT-SMITH, PETITIONER
v.
TOWN OF BANNER ELK, TOWN OF BANNER ELK BOARD OF ADJUSTMENT, AND AMERICAN TOWERS, LLC, RESPONDENTS

No. COA18-903

Filed 19 March 2019

Appeal and Error—Rule 38—substitution of a party to an appeal—standing

On appeal from an order affirming a town board's decision to allow construction of a telecommunications tower next to petitioner's property, a non-party who never intervened in the proceedings below could not properly substitute for petitioner as the appellant under N.C. R. App. P. 38(b) and, therefore, lacked standing to pursue the appeal. Rule 38 was not intended to broadly permit non-parties to swap in for existing parties who voluntarily cease litigation.

Appeal by Petitioner from Order entered 18 May 2018 by Judge R. Gregory Horne in Avery County Superior Court. Heard in the Court of Appeals 28 January 2019.

Miller & Johnson, PLLC, by Nathan A. Miller, for petitioner-appellant.

Eggers, Eggers, Eggers & Eggers, PLLC, by Stacy C. Eggers, IV and Kimberly M. Eggers, for respondent-appellee Town of Banner Elk.

Nexsen Pruet, PLLC, by David S. Pokela, for respondent-appellee American Towers, LLC.

HAMPSON, Judge.

Petra Weishaupt-Smith (Petitioner) appealed from an Order affirming the decision of the Town of Banner Elk Board of Adjustment (the Board) to grant a Variance to American Towers, LLC (American Towers) and issue a Conditional Use Permit to American Towers to construct a telecommunications tower. Upon filing Notice of Appeal, Petitioner's counsel also filed a Motion to Substitute Party on behalf of William Stevenson (Stevenson), citing N.C.R. App. P. 38 and seeking to substitute Stevenson for Petitioner. This Motion was granted by the trial court by a consent order. We, however, determine Stevenson is not an aggrieved party with standing to appeal the trial court's Order. Therefore, we dismiss this appeal.

Factual and Procedural Background

On 13 June 2013, American Towers entered into an agreement to lease 14.26 acres of land, including easement rights, (the Property) within the extra-territorial jurisdiction of the Town of Banner Elk (the Town).

On 21 June 2013, American Towers submitted an application for a Conditional Use Permit to construct a 100-foot monopole telecommunications tower on the Property. At its 19 August 2013 meeting, the Board conducted an initial public hearing on the Conditional Use Permit. Petitioner and several others, including Stevenson, sought to intervene as parties in the quasi-judicial proceeding. The Board allowed Petitioner, who owned property adjacent to the Property, to intervene as a party. The Board did not permit Stevenson or other property owners to intervene as parties in the public hearing.[1] During this public hearing, it came to light the advertised notice of the hearing was defective, and the Board declared "a mistrial." The Board subsequently held a full public hearing on 18 November 2013. By written order dated 3 December 2013, the Board granted a Conditional Use Permit to American Towers.

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1. It appears the Board employed a formal intervention process in determining who could participate in the hearing. It does not appear the Board's intervention process was limited to determining solely issues of standing because the Board denied the additional requests to intervene, at least in part, on the basis the evidence would be cumulative to that presented by Petitioner. No party appealed these rulings.

On 4 January 2014, Petitioner filed a Petition for Writ of Certiorari, seeking review of the Board's decision, in Avery County Superior Court, which issued its Writ on the same day. The trial court entered an order on 23 October 2014, remanding the case back to the Board for further proceedings and to hear and receive additional evidence on several issues. This included a determination of whether the Property met the Town's requirements for a right-of-way to access the Property.

Because American Towers only had rights in a 20-foot-wide access easement to the Property, and the Town's zoning ordinance required a 25-foot-wide right-of-way, American Towers filed a Variance request on 3 February 2015 with the Town, seeking a Variance from the 25-foot-wide right-of-way requirement. The Variance request was heard on 16 March 2015 in conjunction with the hearing on the Conditional Use Permit application on remand from the 23 October 2014 order.

At the 16 March 2015 hearing, the Board heard arguments on the threshold issue of whether American Towers's Variance request related back to the original Conditional Use Permit application and whether the Variance request related back to, and was subject to, the zoning ordinance in effect in June 2013 when American Towers first applied for its Conditional Use Permit or to a December 2013 revision of the ordinances governing telecommunications towers passed shortly after the Town initially approved the Conditional Use Permit. By written order dated 10 April 2015, the Board found American Towers's Variance request did not relate back to the original application and was thus "time barred." As a result, the Board also ruled that a sufficient right-of-way did not exist and denied American Towers's application for a Conditional Use Permit.

On 29 April 2015, American Towers filed a Petition for Writ of Certiorari to the Avery County Superior Court, seeking review of the Board's orders denying its Variance request and Conditional Use Permit application. The Writ of Certiorari issued that same day. Following a hearing, the trial court entered an order on 8 March 2016, reversing the Board's orders on the Variance request and Conditional Use Permit application. Further, the trial court remanded the case back to the Board with instructions to consider the merits of the Variance request and to grant the Conditional Use Permit if the Board determined the Variance should be granted.

On 20 June 2016, the Board conducted another public hearing on the Variance request and Conditional Use Permit application, per the trial court's 8 March 2016 order. After receiving evidence and hearing arguments, the Board unanimously voted to grant the Variance request.

In accordance with the 8 March 2016 order, the Board then voted on the Conditional Use Permit, which was also unanimously approved. On 3 October 2016, the Board filed its written order with the Town Clerk, granting both the Variance request and Conditional Use Permit.

On 2 November 2016, Petitioner filed a new Petition for Writ of Certiorari seeking review of the Board's 3 October 2016 decision. This Petition was filed on Petitioner's own behalf, alleging her standing as a neighboring property owner and as a party to the quasi-judicial proceedings before the Board. There is no indication Petitioner filed as a representative party or on behalf of a group or association. Stevenson did not seek to intervene in this proceeding. The trial court issued its Writ, bringing the record of the proceedings before the court. On 18 May 2018, the trial court entered an order affirming the Board's decision to grant the Variance and Conditional Use Permit.

Petitioner timely filed her Notice of Appeal on 15 June 2018. The same day, Stevenson, by and through Petitioner's counsel, filed a Motion to Substitute Party, pursuant to Rule 38 of the North Carolina Rules of Appellate Procedure. Stevenson alleged he owns property immediately adjacent to the Property and requested to be substituted for Petitioner, who had allegedly recently sold her house and now lacked standing to continue this appeal. Stevenson further alleged he was actively involved in the proceedings before the Board and trial court, including attending all hearings before the Board and trial court. With consent of the parties, the trial court entered an order on 10 July 2018, allowing Stevenson to substitute for Petitioner in this appeal.

Appellate Jurisdiction

No party to this case raises the issue of Stevenson's standing to pursue this appeal. Indeed, his substitution is entirely ignored in briefing, with the exception of a single sentence in the procedural history recitation of Appellant's brief. Nevertheless, "standing is a jurisdictional issue and this Court may raise the question of subject matter jurisdiction on its own motion." *Town of Midland v. Morris*, 209 N.C. App. 208, 223, 704 S.E.2d 329, 340 (2011) (citations and quotation marks omitted).

"Standing typically refers to the question of whether a particular litigant is a proper party to assert a legal position. Standing carries with it the connotation that someone has a right; but, quaere, is the party before the court the appropriate one to assert the right in question." *Id.* at 224-25, 704 S.E.2d at 341 (citations and quotation marks omitted). "[I]t is well settled that an appeal may only be taken by an *aggrieved* real party in interest." *Id.* at 224, 704 S.E.2d at 341 (citations omitted);

see also King Fa, LLC v. Ming Xen Chen, ___ N.C. App. ___, ___, 788 S.E.2d 646, 650 (2016).

In *Duke Power Co. v. Board of Adjustment*, this Court addressed an analogous case. 20 N.C. App. 730, 202 S.E.2d 607, *cert. denied*, 285 N.C. 235, 204 S.E.2d 22 (1974). There, Duke Power Company sought a variance to construct a power line in a residential neighborhood, which was denied. *Id.* at 730, 202 S.E.2d at 607. Duke Power Company petitioned for judicial review by certiorari from the superior court, which reversed the decision and ordered the variance be granted and permit issued. *Id.* at 730-31, 202 S.E.2d at 607-08. Neighboring landowners who opposed the variance, but who made no motion to intervene or be made parties in the superior court proceeding, sought to appeal the superior court ruling to this Court. *Id.*

This Court recognized:

> While the persons complaining of the court's ruling may have been aggrieved by the proximity of their land to the proposed power line of the petitioner, it does not necessarily follow that they have the right to appeal. In addition to being aggrieved, they must have been parties to the suit from which they wish to appeal.

Id. at 731, 202 S.E.2d at 608. Our Court reasoned "[s]ince [the property owners] were not parties, they have no right to appeal or otherwise complain of the ruling of the court" and dismissed the appeal. *Id.* at 732, 202 S.E.2d at 608 (citations omitted). Under the holding of *Duke Power Co.*, dismissal of the appeal would be the clear and obvious result in this case.

The question remains, however, whether Stevenson's post-judgment substitution pursuant to N.C.R. App. P. 38 requires a different outcome. Certainly, it appears the parties to the appeal impliedly assume their consent to the substitution resolves any standing issue. However, "[s]ubject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel . . . ." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citations and quotation marks omitted).

N.C.R. App. P. 38, in relevant part, provides:

> **(a) Death of a Party**. No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased

> party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. . . .
>
> . . . .
>
> **(b) Substitution for Other Causes.** If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subsection (a).

N.C.R. App. P. 38(a)-(b).[2] Our Courts have not addressed the scope of Rule 38. However, a plain reading of N.C.R. App. P. 38 demonstrates it is not intended to be a vehicle to broadly permit non-parties to swap-in for existing parties or to automatically vest a non-party with standing to appeal as a party aggrieved. Indeed, such a plain reading calls into question the viability of the parties' consent order allowing Stevenson's substitution in this case.

Stevenson's Motion seems to invoke N.C.R. App. P. 38(b), reciting: "A substitution is needed at this point as the Petitioner . . . has recently sold her property . . . ." Thus, the inquiry becomes whether "substitution of a party to an appeal is necessary for any reason other than death[.]" N.C.R. App. P. 38(b). We find guidance on this question in case law interpreting the analogous federal appellate rule. *See, e.g.*, *Ellison v. Alexander*, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive." (citations and quotation marks omitted)).

Rule 43(b) of the Federal Rules of Appellate Procedure provides: "If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) [applicable to substitution in cases involving death of a party] applies." Fed. R. App. P. 43(b). The previous version of Federal Rule 43(b) tracked the language of our Rule 38(b) and allowed substitution when "necessary for any reason other than death." *Compare* Fed. R. App. P. 43(b) (1986), *with* N.C.R. App. P. 38(b). When Federal Rule 43(b) was amended to its current version, the Advisory Committee Notes indicated that the change in Federal Rule 43(b) was "intended to be stylistic only." Fed. R. App. P. 43(b) advisory committee's notes to 1998 amendments.

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2. Subsection (c) goes on to address substitution with respect to public officers and parties named in official or representative capacities. N.C.R. App. P. 38(c).

In *Alabama Power Co. v. Interstate Commerce Commission*, the District of Columbia Circuit (D.C. Circuit) held the inclusion of the word "necessary" in the 1986 version of Federal Rule 43(b) meant substitution is available only when "a party to the suit is unable to continue to litigate, not . . . [when] an original party has voluntarily chosen to stop litigating." 852 F.2d 1361, 1366 (D.C. Cir. 1988). In reaching this conclusion, the D.C. Circuit examined subsections (a) and (c) of Federal Rule 43, which allow for substitution when a party dies or is removed from office, and thus necessarily cannot continue an appeal, and concluded that the "most natural reading" of Federal Rule 43(b) "is to permit substitution in similar situations where a party is incapable of continuing the suit, such as where a party becomes incompetent or a transfer of interest in the company or property involved in the suit has occurred." *Id.*; *see also* Fed. R. App. P. 43(a), (c).

The posture of *Alabama Power Co.* was similar to the present case. There, two railroad trade associations, among others, brought a petition for judicial review of an agency decision, but later dismissed their petition. On appeal from the judicial review order, Conrail sought to substitute itself for the trade associations despite having not filed a petition for review and having not moved to intervene in the proceedings below. The D.C. Circuit denied Conrail's motion to substitute where the original appellants were fully capable of proceeding, but had voluntarily dropped their case. *Id.*

We find the D.C. Circuit's interpretation of the prior version of Federal Rule 43(b) persuasive and hold that it is equally applicable to N.C.R. App. P. 38(b). Under Rule 38(b) of our Rules of Appellate Procedure, a substitution is appropriate only where "necessary," and " '[n]ecessary' means that a party to the suit is unable to continue to litigate." *See id.* Therefore, substitution is permissible only when "a party to the suit is unable to continue to litigate" and not when "an original party has voluntarily chosen to stop litigating." *See id.* The clear teaching of *Alabama Power Co.* is that a non-party to litigation below cannot be permitted to simply substitute in an appeal where the original party (or their successor) has ceased litigation.

In this case, Stevenson does not allege he is a successor in interest to Petitioner's real property or her personal representative. Petitioner has sold her property, thus abandoning the litigation, and her actual successor in interest in her property has not sought substitution, thus dropping the case. Stevenson, as a non-party to the proceedings in the trial court below, has no right to appeal the trial court's ruling to this Court.

Indeed, the D.C. Circuit made an important point, equally applicable to this case: to allow substitution by a party who failed to timely petition for agency review or timely request intervention under the governing statutes would "condone the impermissible—an evasion of clear jurisdictional requirements ordained by Congress for obtaining judicial review." *Id.* at 1366-67. Here, Stevenson could have timely filed his own Petition for Writ of Certiorari alleging his own standing to challenge the Board's decision. *See* N.C. Gen. Stat. §§ 160A-388, -393 (2017). Stevenson could have also sought to timely intervene in the judicial review proceedings in the trial court. *See* N.C. Gen. Stat. § 160A-393(h)(2). To allow Stevenson's substitution to automatically provide him standing as an aggrieved party on appeal would be to condone evasion of the clear jurisdictional requirements of N.C. Gen. Stat. §§ 160A-388 and -393 governing judicial review of municipal quasi-judicial decisions. *See McCrann v. Vill. of Pinehurst*, 216 N.C. App. 291, 294, 716 S.E.2d 667, 670 (2011) (failure to timely file petition for writ of certiorari for judicial review of the issuance of a special use permit was a jurisdictional defect requiring dismissal).

Consequently, we conclude the trial court's substitution of Stevenson for Petitioner in this appeal does not alter our result under *Duke Power Co. v. Board of Adjustment*. Because Stevenson is not an aggrieved party with standing to appeal, we must dismiss the appeal. *See Duke Power Co.*, 20 N.C. App. at 732, 202 S.E.2d at 608; *see also King Fa, LLC*, ___ N.C. App. at ___, 788 S.E.2d at 650.

Conclusion

Accordingly, for the foregoing reasons, we dismiss the appeal for lack of appellate jurisdiction.

APPEAL DISMISSED.

Chief Judge McGEE and Judge HUNTER concur.

TRISHA WRIGHT, Administratrix of the Estate of CHRISTOPER [sic] WRIGHT, Deceased Employee, Plaintiff

v.

ALLTECH WIRING & CONTROLS, Employer, BUILDERS MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA18-833

Filed 19 March 2019

1. Appeal and Error—jurisdiction—notice of appeal—evidence of timely filing in the record

Plaintiff's appeal in a workers' compensation case did not require dismissal where, before the Court of Appeals heard the case, plaintiff both requested review by certiorari and moved to amend the record on appeal to include proof that she timely filed her notice of appeal.

2. Workers' Compensation—compensable injury—coming and going rule—contractual duty exception

Where an employee died in a car crash while driving home from work in a company-owned work truck, his estate was not entitled to death benefits under the contractual duty exception to the "coming and going" rule. Competent evidence showed that the employer gratuitously provided work trucks to its employees as an accommodation rather than as an incident of the employment contract, particularly where use of the trucks was not part of any written or oral employment contract; the employer had previously revoked employee use of the trucks at will; and the employer did not reimburse employees for their travel expenses whenever they drove their personal vehicles for work.

3. Workers' Compensation—compensable injury—coming and going rule—traveling salesperson exception

Where an employee died in a car crash while driving home from work in a company-owned work truck, his estate was not entitled to death benefits under the traveling salesperson exception to the "coming and going" rule. Apart from a brief phone call with his employer during the drive home, there was no evidence that the employee was acting in the course of his employment at the time of the crash. Although his employment required traveling to job sites to prepare estimates for clients, he had fixed work hours and usually stopped by the office before and after visiting a job site.

Appeal by plaintiff from opinion and award entered 22 June 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 January 2019.

Knott & Boyle, PLLC, by Bruce W. Berger and Ben Van Steinburgh, for plaintiff-appellant.

Goldberg Segalla LLP, by Gregory S. Horner and Alexandra S. Kensinger, for defendants-appellees.

ZACHARY, Judge.

Trisha Wright, Administratrix of the Estate of Christopher Wright ("Plaintiff"), appeals from an Opinion and Award entered 22 June 2018 by the Full Commission of the North Carolina Industrial Commission. Plaintiff argues that the Industrial Commission erred by failing to conclude that Mr. Wright's death occurred in the course and scope of his employment. For the reasons explained below, we affirm.

I. Background

Alltech Wiring & Controls ("the Company") employed Mr. Wright as an Estimator. Mr. Wright's duties required him to visit client job sites to prepare estimates for the installation of security systems. On the vast majority of days, Mr. Wright would leave home in the morning and travel to the office before heading to a client job site. On some mornings, however, Mr. Wright would travel directly from his home to a job site. Similarly, on most days, Mr. Wright would leave a job site and return to the office before going home at the end of the workday. The Company provided Mr. Wright and other employees with company-owned work trucks in order to perform their work obligations. Mr. Wright used the work truck assigned to him for his commute, and for travel to and from job sites.

On 1 February 2016, Mr. Wright left the office at approximately 5:29 p.m. and began driving home in his work truck. Mr. Wright spoke to Jerry Phillips, the owner of the Company, on his work cell phone from 5:27 p.m. to 5:40 p.m. Mr. Wright then stopped at a Target store on his way home, and from 5:43 p.m. to 5:54 p.m., his work truck was stationary with the ignition turned off. From 5:54 p.m. to 5:56 p.m., Mr. Wright spoke with his wife on the phone. At approximately 5:57 p.m., Mr. Wright collided with another vehicle on White Oak Road, a route he frequently used during his commute. At 7:00 p.m., Mr. Wright died as a result of his injuries.

On 14 June 2016, Plaintiff filed a Form 18 claiming that Mr. Wright's dependents were entitled to death benefits. Defendants filed a Form 61 on 6 July 2016, denying that Mr. Wright's death occurred in the course and scope of his employment. Plaintiff filed a Form 33 requesting a hearing, and the matter came before Deputy Commissioner Melanie Wade Goodwin on 12 January 2017. On 22 March 2017, Deputy Commissioner Goodwin filed an Opinion and Award denying Plaintiff's claim for benefits. Plaintiff appealed to the Full Commission. After a hearing, on 22 June 2018, the Full Commission issued an Opinion and Award affirming the Deputy Commissioner's decision denying benefits.

II. Appellate Jurisdiction

[1] Plaintiff filed a notice of appeal to this Court on 26 June 2018. However, on 28 November 2018, Defendants filed a motion to dismiss, arguing that pursuant to this Court's recent opinion in *Bradley v. Cumberland County*, the record on appeal failed to establish that Plaintiff's notice of appeal was timely filed. *See Bradley v. Cumberland Cty.*, ___ N.C. App. ___, ___, 822 S.E.2d 416, 417 (2018) (dismissing an appeal for lack of jurisdiction where the notice of appeal bore neither time nor file stamp, and the record contained no evidence "indicating if or when the Industrial Commission received Plaintiff's notice of appeal"), *petition for disc. review filed*, No. 438P18, ___ N.C. ___, ___ S.E.2d ___ (filed Dec. 14, 2018). Later that same day, Plaintiff filed a Motion to Add Portion to Record on Appeal to include a file-stamped copy of the notice of appeal and a letter from the Industrial Commission acknowledging its receipt. Plaintiff subsequently filed a Conditional Petition for Writ of Certiorari and Motion to Substitute Conditional Petition for Writ of Certiorari requesting review, should we deem the notice of appeal deficient in light of *Bradley*.

Notwithstanding Defendants' arguments for dismissal, this Court's holding in *Bradley* was not exceptional. We merely reaffirmed the well-established rule that failure to timely file notice of appeal is a jurisdictional defect that precludes this Court's ability to review the merits of a case. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (explaining that "the time limits for taking appeal may not be extended by any court" (internal ellipsis omitted)). "[A] jurisdictional default brings a purported appeal to an end before it ever begins." *Id.*

The notice of appeal in *Bradley* was replete with defects; however, the fatal error was the absence of evidence—beyond the "date . . . affixed by Plaintiff's counsel [but] . . . not confirmed by proof of service"—that

appeal was timely taken. *Bradley*, ___ N.C. App. at ___, 822 S.E.2d at 420. The notice was printed on the appellant's law firm's letterhead and addressed to a commissioner of the Industrial Commission, confirmation receipt requested. *Bradley*, ___ N.C. App. at ___, 822 S.E.2d at 417. Despite the inclusion of a statement that the notice was submitted via electronic filing portal, there was no evidence that it was timely filed, and the record was devoid of "any acknowledgement from the Industrial Commission indicating receipt" of the notice. *Bradley*, ___ N.C. App. at ___, 822 S.E.2d at 420; *cf. Jones v. Yates Motor Co.*, 121 N.C. App. 84, 85, 464 S.E.2d 479, 480 (1995) ("On 23 March 1994, the Commission advised plaintiff that it received his notice of appeal to the Court of Appeals."). Given the jurisdictional implications of a party's failure to timely and properly appeal, "[w]e will not assume the notice of appeal was timely filed solely based upon Plaintiff's unverified notice of appeal." *Bradley*, ___ N.C. App. at ___, 822 S.E.2d at 420.

Moreover, although "the time limits for taking appeal may not be extended by any court[,]" *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365 (internal ellipsis omitted), our Court has discretionary authority to issue a writ of certiorari in order "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). Unlike in *Bradley*, here, Plaintiff both requested review by certiorari and moved to amend the record to cure the jurisdictional defect prior to the date on which this case was heard by this Court.

By orders entered 15 January 2019, this Court denied Defendants' Motion to Dismiss and granted Plaintiff's Motion to Add Portion to Record on Appeal. *See Williams v. United Cmty. Bank*, 218 N.C. App. 361, 366-67, 724 S.E.2d 543, 548 (2012) (granting the plaintiff's motion to amend the appellate record to add a notice of appeal and denying the defendant's motion to dismiss). Accordingly, we need not exercise our discretionary authority under Rule 21 in order to reach the merits of Plaintiff's appeal. Therefore, we dismiss as moot Plaintiff's Conditional Petition for Writ of Certiorari and Motion to Substitute Conditional Petition for Writ of Certiorari.

III. Discussion

Plaintiff argues that the Industrial Commission erred by failing to conclude that Mr. Wright's death occurred in the course and scope of his employment. We disagree.

Upon appeal of a decision of the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the

Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "[T]he Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (quotation marks omitted). Unchallenged findings of fact are binding on appeal, and the Industrial Commission's conclusions of law are reviewed *de novo*. *Id.*

For an injury to be compensable under the Workers' Compensation Act, a claimant must prove that: (1) the injury was caused by an accident; (2) the injury arose out of the claimant's employment; and (3) the injury was sustained in the course of that employment. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). " 'Arising out of the employment' refers to the origin or cause of the accidental injury, while 'in the course of the employment' refers to the time, place, and circumstances of the accidental injury." *Roman v. Southland Transp. Co.*, 350 N.C. 549, 552, 515 S.E.2d 214, 216 (1999).

Generally, under the "coming and going" rule, an injury is not deemed to occur "in the course of employment" when sustained in an accident during the employee's travel to or from work. *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). "This is because the risk of injury while traveling to and from work is one common to the public at large . . . ." *Hollin v. Johnston Cty. Council on Aging*, 181 N.C. App. 77, 80, 639 S.E.2d 88, 91 (2007) (quotation marks omitted), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 732 (2008). Nevertheless, such an injury is compensable when

> (1) an employee is going to or coming from work but is on the employer's premises when the accident occurs (premises exception); (2) the employee is acting in the course of his employment and in the performance of some duty, errand, or mission thereto (special errands exception); (3) an employee has no definite time and place of employment, requiring her to make a journey to perform a service on behalf of the employer (traveling salesman exception); or (4) an employer contractually provides transportation or allowances to cover the cost of transportation (contractual duty exception).

Id.

Here, Plaintiff argued that Mr. Wright's accident fell under the contractual duty exception and the traveling salesperson exception to the "coming and going" rule.

A. Contractual Duty Exception

[2] Under the contractual duty exception to the "coming and going" rule, an injury is compensable "where the employer furnishes the means of transportation . . . as an incident to the contract of employment," *Smith v. Gastonia*, 216 N.C. 517, 519, 5 S.E.2d 540, 541 (1939), or where "the cost of transporting the employees to and from their work is made an incident to the contract of employment." *Puett v. Bahnson Co.*, 231 N.C. 711, 713, 58 S.E.2d 633, 634 (1950). "The salient factor is whether provision for transportation is a real incident to the contract of employment." *Tew v. E.B. Davis Elec. Co.*, 142 N.C. App. 120, 123, 541 S.E.2d 764, 767, *appeal dismissed and disc. review denied*, 353 N.C. 532, 548 S.E.2d 741 (2001). "The transportation must be provided as a matter of right; if it is merely permissive, gratuitous, or a mere accommodation, the employee is not in the course of employment." *Robertson v. Constr. Co.*, 44 N.C. App. 335, 337, 261 S.E.2d 16, 18 (1979), *disc. review denied*, 299 N.C. 545, 265 S.E.2d 405 (1980).

In the instant case, the Industrial Commission made the following findings of fact concerning the contractual duty exception, which Plaintiff challenges:

> 4. [The Company] provided Mr. Wright and other employees with a company-owned work truck. There was no written or oral contract entitling Mr. Wright to use the work truck. Use of the work truck was not part of the employment contract.
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> . . . .
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> 6. Company-owned vehicles were available to most employees of [the Company]. Mr. Phillips testified that, in the past, he had ceased allowing employees to use company vehicles because gas prices became too expensive. According to Mr. Phillips, when use of company vehicles was not permitted, employees used their personal vehicles. Mr. Phillips testified that employees were not reimbursed for their mileage commuting to and from home when they drove their personal vehicles. Additionally, when use of company vehicles was not allowed, employees were not

> given any additional compensation for fuel for their personal vehicles to commute to and from home.
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> . . . .
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> 8. According to [the Company's] employee handbook: "An employee who travels in a company vehicle from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he/she works at a fixed location or at different job sites. Normal travel from home to work is not work time."
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> . . . .
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> 13. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Mr. Wright was not entitled, through an express or implied contract, to the work truck provided by [the Company]. The work truck was provided gratuitously by [the Company] as an accommodation.

The Commission concluded as a matter of law that "Mr. Wright and the other employees of the Company were provided work trucks as an accommodation rather than as a matter of right consequent of an express or implied contract. The employee handbook makes clear that commuting to and from work is not considered work time."

The gratuitous provision of transportation to an employee does not by itself expose an employer to liability under the Workers' Compensation Act. *Insurance Co. v. Curry*, 28 N.C. App. 286, 290, 221 S.E.2d 75, 78, *disc. review denied*, 289 N.C. 615, 223 S.E.2d 396 (1976). In *Curry*, the employer permitted the employee to use a company vehicle to transport himself and two other employees to and from work. *Id.* at 287, 221 S.E.2d at 76. While driving the company vehicle to work one day, the employee was involved in a traffic accident and died. *Id.* The trial court found[1] and this Court affirmed that (1) the deceased employee and his passengers were not performing any work for their employer in the company vehicle at the time of the accident; (2) the employees' work day started when they arrived at the employer's place of business;

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1. While this case arose under the Declaratory Judgment Act and not under the Workers' Compensation Act via the Industrial Commission, this Court applied the provisions of the Workers' Compensation Act in determining whether the accident arose out of and in the course of employment.

(3) the employees were not contractually entitled to the transportation provided by the employer; (4) the employees were not required by the employer to use the company vehicle in traveling to and from work; and (5) the transportation provided by the employer "was gratuitous and merely an accommodation." *Id.* at 288, 290, 221 S.E.2d at 77, 78. Based on those findings, this Court determined that the incident did not fall within the contractual duty exception and affirmed the trial court's decision. *Id.* at 290, 221 S.E.2d at 78.

Here, competent evidence exists to support the challenged findings of fact relating to the contractual duty exception. Mr. Phillips, owner of the Company, testified that Mr. Wright had not signed a contract entitling him to daily use of a company vehicle, and that there were times when Mr. Wright drove one of Mr. Phillips's personal cars. Mr. Phillips further testified that due to high gas prices, he once temporarily suspended the use of work vehicles by his employees, but after gas prices dropped, he allowed his employees to use the work trucks again. When asked, "[i]f you wanted to right now, could you take those vehicles away from your employees and say, 'You have to drive your own vehicle home[?]' " Mr. Phillips responded by saying, "I mean, I could." Mr. Phillips explained that he has "pulled trucks away from people on and off[,]" and that when employees use their personal vehicles, he does not reimburse them for their travel expenses. Mr. Phillips also stated that he remembered Mr. Wright driving his personal vehicle to work "maybe once or twice, couple of times."

Mr. Phillips's testimony demonstrates that his employees' use of the company's work trucks was permissive, neither required nor a matter of right. Plaintiff argues that Defendants presented no evidence that Mr. Wright worked for the Company during the time that Mr. Phillips restricted use of the work trucks because of high gas prices. That contention is irrelevant. This testimony simply demonstrated the permissive use of the work trucks, in that Mr. Phillips could revoke the use of company vehicles at will.

Plaintiff also contends that the Industrial Commission erred by basing its decision on an employment handbook that was neither applicable to Mr. Wright nor in effect at the time of his death. We determine that notwithstanding the finding in which the Commission quotes from the employment handbook, there was substantial competent evidence to support the Industrial Commission's conclusion that Mr. Wright's accident did not fall within the contractual duty exception.

As in *Curry*, Defendants did not require that Mr. Wright use the work truck for his commute, and the provision of the truck was a gratuitous accommodation that benefitted both parties. *Id*. A benefit to either or both parties does not give rise to an implied contract. *See Tew*, 142 N.C. App. at 124-25, 541 S.E.2d at 767-68. Accordingly, the Industrial Commission's findings of fact support its conclusion that the facts of Plaintiff's case do not fall within the contractual duty exception to the "coming and going" rule.

B. Traveling Salesperson Exception

[3] Under the traveling salesperson exception, "[i]f travel is contemplated as a part of the work, accident in travel is compensable." *Ross v. Young Supply Co.*, 71 N.C. App. 532, 537, 322 S.E.2d 648, 652 (1984). However, because traveling to and from work is common to most every job, an injured employee who has fixed hours and a fixed place of work does not fall within the traveling salesperson exception. *See Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 269-70, 569 S.E.2d 675, 678, *disc. review denied*, 356 N.C. 436, 572 S.E.2d 784 (2002). The employee's injury must arise during travel connected to the employment. *See id*. at 269, 569 S.E.2d at 678 ("Whether the travel is part of the service performed is also significant." (quotation marks omitted)).

The Industrial Commission made the following findings of fact concerning the traveling salesperson exception:

> 2. [Mr. Wright] would travel from the office to the client job site. Occasionally, he would travel directly from his home to a client job site, but the vast majority of days, he would drive directly from his home to the office. Similarly, Mr. Wright would occasionally drive directly from a job site to his home at the end of the day, but most of the time he drove back to the office after visiting a client job site . . . .
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> 3. Mr. Wright was a salaried employee and he generally worked from 7:30 a.m. to 4:30 p.m. Sometimes Mr. Wright worked outside those hours at night and on weekends, which is documented on his time sheets. Mr. Wright also sometimes worked from home.
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> . . . .
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> 11. . . . Mr. Wright left the office at 5:29 pm and began to drive home in his work truck. He spoke with Mr. Phillips, on the work cell phone from 5:27 p.m. to 5:40 p.m. Mr.

> Wright stopped at Target on his way home, and the GPS logs in evidence show that the ignition was turned off from approximately 5:43 p.m. to 5:54 p.m., although the nature and purpose of the stop is unknown. Mr. Wright spoke with his wife from 5:54 p.m. to 5:56 p.m. At approximately 5:57 p.m., Mr. Wright was involved in a motor vehicle accident on White Oak Road. White Oak Road was on the route Mr. Wright frequently used when commuting between the office and his home. . . .
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> 12. . . . Mr. Wright was fatally injured while he was driving home from [the Company's] fixed place of business, where he had primarily worked most of that day during [the Company's] regular working hours. There is no evidence in the record showing that Mr. Wright was on his way to a job site, or that he was acting in the course of his employment at the time of the accident. Mr. Wright was not utilizing his work cell phone, laptop, or tablet or acting in furtherance of his job duties at the time of the accident.

Based on these facts, the Industrial Commission concluded as a matter of law that Mr. Wright's injuries did not fall within the traveling salesperson exception of the "coming and going" rule.

On appeal, Plaintiff challenges findings of fact numbers 2 and 12. However, in order for the traveling salesperson exception to apply, the employee cannot have a fixed place of work or fixed hours and must be injured while performing work duties for the employer. In *Thornton v. Richardson Company*, the employee was a traveling salesperson who worked from his employer's place of business in Raleigh. 258 N.C. 206, 207, 128 S.E.2d 256, 256 (1962). The employee was driving a station wagon provided by his employer on Highway 17 in South Carolina at 2:40 a.m. when he was involved in a fatal head-on collision. *Id.* at 207-08, 128 S.E.2d at 256-57. Our Supreme Court affirmed the Industrial Commission's decision denying compensation because "[t]here [was] no evidence in the record tending to show that the deceased had any duties to perform for his employer in the vicinity where the fatal accident occurred and at the time of night it occurred." *Id.* at 208, 128 S.E.2d at 257.

In the instant case, competent evidence similarly supports the Industrial Commission's finding that "[t]here is no evidence in the record showing that Mr. Wright was on his way to a job site, or that he was

acting in the course of his employment at the time of the accident." Phone records and Mr. Phillips's testimony established that Mr. Wright called Mr. Phillips at 5:27 p.m. and they spoke for thirteen minutes. GPS logs of Mr. Wright's truck show that on the day of the accident, Mr. Wright left the Company's office around 5:30 p.m. and took his normal route home. The GPS logs also revealed that Mr. Wright's vehicle stopped at 7313 White Oak Road in Garner from 5:43 p.m. to 5:54 p.m. Mrs. Wright testified that Mr. Wright stopped at a Target store. Then at 5:54 p.m., Mr. Wright called her cell phone and they spoke for two minutes. At 5:57 p.m., the work truck's GPS stopped recording further movement.

Plaintiff argues that Mr. Wright was working on his way home because he was talking to Mr. Phillips, but after that phone conversation ended, Mr. Wright stopped at Target and then called his wife. If Mr. Wright was working during the drive home, that work most likely ended upon termination of his phone call with Mr. Phillips.

Furthermore, there was also competent testimony that Mr. Wright had a fixed work location with fixed hours. Mr. Phillips testified that on most days Mr. Wright would come to the office to begin his workday. Mrs. Wright's testimony and Mr. Wright's time sheets established that he generally worked from 7:00 a.m. to 4:30 p.m. every workday. Record evidence, including time sheets and GPS logs, demonstrated that Mr. Wright usually started and ended his work day at the office. This evidence supports the Industrial Commission's finding that on the vast majority of days Plaintiff would travel from his home to the office. Thus, the Industrial Commission's findings support the conclusion that Plaintiff did not fall within the traveling salesperson exception to the "coming and going" rule.

IV. Conclusion

Competent evidence supports the Industrial Commission's findings of fact, and those findings support the Industrial Commission's conclusions that Plaintiff did not fall within either the contractual duty or traveling salesperson exceptions to the "coming and going" rule. Accordingly, we affirm the decision of the Industrial Commission.

AFFIRMED.

Judges TYSON and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MARCH 2019)

ARROYO v. YANEZ No. 18-497	Mecklenburg (15CVD3522)	Affirmed in part; Reversed and Remanded in Part; Vacated in Part.
ARROYO v. YANEZ No. 18-560	Mecklenburg (15CVD3522)	Affirmed in Part; Reversed and Remanded in Part; Vacated in Part.
BRINKLEY-CALDWELL v. BRITTHAVEN, INC. No. 18-400	New Hanover (17CVS3118)	Affirmed
CHALK v. BRAAKMAN No. 18-792	Wake (16CVD13617)	Affirmed
CRONJE v. JOHNSTON No. 18-698	Caldwell (18CVD210)	Affirmed
FED. NAT'L MORTG. ASS'N v. PRICE No. 18-775	Ashe (15CVS424)	APPEAL DISMISSED, MOTION ALLOWED, AND REMANDED.
HELBEIN v. HELBEIN No. 18-383	Mecklenburg (15CVD14984)	Dismissed in part; Affirmed in part
IN RE A.B. No. 18-711	Duplin (17JA23)	Dismissed
IN RE A.D.S. No. 18-1111	Surry (16JT97-105)	Remanded; Affirmed in part.
IN RE A.J.K. No. 18-906	Iredell (16JT83)	Affirmed
IN RE A.X.M. No. 18-758	Greene (15JT28)	Reversed
IN RE B.L. No. 18-881	Pitt (16JT87)	Affirmed
IN RE J.A.C. No. 18-595	Ashe (16JA37)	Vacated and Remanded
IN RE K.N.C.H. No. 18-913	Columbus (16JT26)	Affirmed

IN RE M.F.B. No. 18-848	Guilford (15JT44-46)	Affirmed
IN RE M.R.C-M. No. 18-898	Guilford (15JT263)	Affirmed
IN RE P.L.R. No. 18-782	Buncombe (16JT22)	Affirmed
LEA v. DAVID'S BRIDAL OF GREENSBORO, INC. No. 18-835	N.C. Industrial Commission (15-047470)	Affirmed
MAKAR v. MIMOSA BAY HOMEOWNERS ASS'N, INC. No. 18-547	Onslow (15CVS3483)	REVERSED AND REMANDED WITH INSTRUCTIONS.
MATHIS v. JONES No. 18-262	Union (17CVS1427)	Dismissed
O'BUCKLEY v. O'BUCKLEY No. 18-676	Iredell (16CVD246)	Affirmed
STAMEY v. STAMEY No. 18-397	New Hanover (07CVD4570)	Reversed
STATE v. AL-HAMOOD No. 18-682	Wake (17CRS202127) (17CRS431)	No Error
STATE v. ARDREY No. 18-460	Mecklenburg (16CRS208747) (16CRS208749)	VACATED IN PART AND REMANDED WITH INSTRUCTIONS.
STATE v. BENJAMIN No. 18-751	Mecklenburg (16CRS212178-79)	DISMISSED IN PART; VACATED IN PART, AND REMANDED.
STATE v. BRADSHAW No. 17-1286	Buncombe (14CRS92325)	DISMISSED IN PART; NO ERROR IN PART.
STATE v. CALLAGHAN No. 18-543	Mitchell (16CRS50100) (17CRS127)	No Error
STATE v. CHESTER No. 18-671	Caldwell (17CRS336)	Affirmed

STATE v. COLE No. 18-213	Guilford (16CRS24557) (16CRS24560) (16CRS30067)	No plain error in part; No error in part; Dismissed in part; Vacated and remanded in part.
STATE v. FLETCHER No. 18-371	Forsyth (14CRS37) (14CRS51497) (14CRS52071)	DISMISSED WITHOUT PREJUDICE
STATE v. HIGHT No. 18-555	Cabarrus (17CRS53756)	Affirmed
STATE v. JACKSON No. 18-344	Pitt (17CRS268)	No error in Part; Vacated and Remanded in Part
STATE v. JAIMES No. 18-155	Montgomery (15CRS50797)	Judgment arrested in part and remanded; dismissed in part.
STATE v. KING No. 18-494	Mecklenburg (15CRS15270) (15CRS201075) (15CRS201077)	No Error
STATE v. KOPE No. 18-752	Watauga (03CRS1720) (03CRS50689) (03CRS50694) (03CRS50728)	Affirmed
STATE v. LANE No. 18-444	Edgecombe (16CRS53497-99) (17CRS1200)	No Error
STATE v. LOPES No. 18-161	Union (15CRS51652)	No Error
STATE v. MOORE No. 18-591	Pitt (16CRS56454)	No Error
STATE v. MOORE No. 18-576	Wake (16CRS220563) (17CRS213)	Affirmed
STATE v. MORGAN No. 18-412	Wake (04CRS63525-28)	Affirmed

STATE v. MOSS No. 18-680	Clay (15CRS50267)	Reversed in Part and Remanded; New Trial.
STATE v. PAYLOR No. 18-1038	Alamance (16CRS55632)	No Error
STATE v. RAGLAND No. 18-799	Franklin (17CRS50158) (17CRS50175) (17CRS50176) (17CRS50177)	Appeal Dismissed
STATE v. RICHARDSON No. 18-500	Nash (16CRS51974)	No Error
STATE v. RUFFIN No. 18-645	Alamance (16CRS2481) (16CRS50825)	No prejudicial error
STATE v. SANDERS No. 18-930	Caldwell (17CRS525) (18CRS51160)	Dismissed
STATE v. SCHRICKER No. 18-338	Wake (14CRS209666)	No error in part; vacated and remanded in part
STATE v. SHCHETININ No. 18-236	Mecklenburg (15CRS239890) (15CRS239891) (15CRS239893)	No Error
STATE v. SMITH No. 18-122	Pender (13CRS50467) (13CRS720)	No error in part; dismissed in part
STATE v. SMITH No. 18-789	Caldwell (14CRS50494) (16CRS1620)	No Error
STATE v. SPIKES No. 18-501	Alamance (15CRS54844)	No error in part; Affirmed in part.
STATE v. ZIMMERMAN No. 18-934	Yadkin (16CRS50821-22) (16CRS50836) (17CRS50350)	DISMISSED IN PART; VACATED IN PART AND REMANDED.

TUCKER CHASE, LLC v. TOWN OF MIDLAND No. 18-847	Cabarrus (17CVS1590)	Affirmed
TYSON v. BESS No. 18-879	Union (12CVD1246)	Dismissed
WRIGHT v. N.C. OFFICE OF STATE HUMAN RES. No. 18-276	Office of Admin. Hearings (17OSP721)	Affirmed

JACQUELINE L. GRAY AND MARY STEWART GRAY, PLAINTIFFS
v.
FEDERAL NATIONAL MORTGAGE ASSOCIATION A/K/A FANNIE MAE, AND TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA18-871

Filed 26 March 2019

1. Appeal and Error—interlocutory order—substantial right—applicability of collateral estoppel—colorable claim

In a civil action against a trustee in a non-judicial foreclosure seeking to nullify the foreclosure for lack of notice, the order denying the trustee's motion for summary judgment was immediately appealable where the trustee raised a colorable claim that principles of res judicata and collateral estoppel might act to bar plaintiff's claims challenging the validity of the foreclosure. Such principles potentially apply to situations where a clerk has entered an order authorizing foreclosure.

2. Collateral Estoppel and Res Judicata—non-judicial foreclosure—opportunity to litigate—subsequent civil claims—improper collateral attack

In a civil action challenging the validity of a non-judicial foreclosure, plaintiffs received notice of the foreclosure hearing, including a description of the property secured by the deed of trust upon which the trustee intended to foreclose, and therefore had a full and fair opportunity to litigate whether the trustee had authority to foreclose on the property. Thus, plaintiffs were collaterally estopped from pursuing their claims and damages, all of which were based on issues previously determined by the clerk in its order authorizing foreclosure.

Judge BRYANT concurring in the result only.

Appeal by defendants from order entered 13 March 2018 by Judge Wayland J. Sermons, Jr. in Dare County Superior Court. Heard in the Court of Appeals 29 January 2019.

Nexsen Pruet PLLC, by Norman W. Shearin and George T. Smith III, for plaintiffs-appellees.

Brock & Scott, PLLC, by Alan M. Presel, for defendant-appellant Trustee Services of Carolina, LLC.

DAVIS, Judge.

In this appeal, we consider the applicability of the doctrine of collateral estoppel to an order by a clerk of court authorizing a trustee to conduct a sale in a non-judicial foreclosure proceeding pursuant to a deed of trust. Trustee Services of Carolina, LLC ("TSC") appeals from an order denying its motion for summary judgment as to claims by the debtors for monetary damages stemming from the foreclosure. Because we conclude the debtors' claims are, in fact, barred by collateral estoppel, we reverse the trial court's order and remand for further proceedings.

Factual and Procedural Background

On 24 March 2006, Mary B. Gray and her husband, Jack S. Gray, executed and delivered a promissory note to Wells Fargo Bank in the amount of $300,240 as part of a reverse mortgage loan transaction. As security for the promissory note, the Grays executed a deed of trust (the "Deed of Trust") on property that they owned in Dare County, North Carolina.

The description of the collateral contained in the Deed of Trust described a tract of land that encompassed both the Grays' primary residence as well as the home of Grace Balance Peele, one of their relatives. Following the recordation of the Deed of Trust, the Grays subsequently subdivided the parcel of land containing their primary residence from the parcel containing Peele's home.

Mary Gray and Jack Gray died on 21 March 2012 and 10 December 2013, respectively. Jacqueline L. Gray and Mary Stewart Gray (collectively "Plaintiffs") are the only devisees of Mary and Jack Gray. Peele's residence was devised to Jacqueline Gray pursuant to the terms of Jack Gray's will.

Following Jack Gray's death, Wells Fargo proceeded to accelerate the outstanding balance of the reverse mortgage loan. After providing notice of default on the loan to the Grays' estates, Wells Fargo instructed TSC to initiate non-judicial foreclosure proceedings pursuant to the Deed of Trust.

On 27 March 2015, Plaintiffs were provided with notice of a hearing in connection with the planned foreclosure proceeding. The hearing took place on 16 July 2015. Following the hearing, the Dare County assistant clerk of court entered an order that same day authorizing TSC to proceed with foreclosure. Pursuant to the order, TSC

provided notice to Plaintiffs of the upcoming foreclosure sale, which included a legal description of the property listed in the Deed of Trust.

At the foreclosure sale, Wells Fargo submitted the highest bid and purchased the property for $187,500. Wells Fargo's bid was assigned to Federal National Mortgage Association ("Fannie Mae"), and on 29 September 2015 TSC executed and delivered a deed to Fannie Mae that included the same description of the collateral contained in the Deed of Trust.

On 9 September 2016, Plaintiffs filed a complaint against TSC and Fannie Mae in Dare County Superior Court. In their complaint, they alleged that the description of the property contained in the Deed of Trust erroneously included the land on which Peele's residence was situated. They further contended that they had received no notice of the inclusion of the land containing Peele's home in the description of the property specified in the notice of foreclosure and that these mistakes "render[ed] [the foreclosure sale] a nullity." Plaintiffs' complaint asserted six claims for relief, including (1) a declaration that the foreclosure sale was a nullity; (2) mutual mistake; (3) unjust enrichment; (4) a violation of the North Carolina Reverse Mortgage Act; (5) breach of fiduciary duty; and (6) unfair and deceptive trade practices.

On 31 July 2017, TSC filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on the ground that the order entered by the assistant clerk of court authorizing the foreclosure had constituted a final judgment and that Plaintiffs' claims were therefore barred pursuant to the doctrine of collateral estoppel. TSC's motion was heard on 5 March 2018 before the Honorable Wayland J. Sermons, Jr. On 13 March 2018, the trial court entered an order denying TSC's motion. TSC gave notice of appeal to this Court.

Analysis

I. Appellate Jurisdiction

[1] Plaintiffs have moved to dismiss this appeal on the ground that the trial court's order was interlocutory. Therefore, we must initially determine whether we possess appellate jurisdiction.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final

decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

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

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

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

The trial court's 13 March 2018 order was not a final judgment as it did not fully resolve the claims asserted by the parties. Nor did the trial court purport to certify it for immediate appeal under Rule 54(b). Therefore, TSC's appeal is proper only if it is able to demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." (citation omitted)).

It is well established that the denial of a motion for summary judgment "affects a substantial right when the motion . . . makes a colorable assertion that [a] claim is barred under the doctrine of collateral estoppel." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Id.* (citation, quotation marks, and ellipsis omitted). Thus, we must determine whether TSC has made a colorable

argument that the doctrine of collateral estoppel applies in this context so as to enable us to exercise appellate jurisdiction over this appeal.

Our Supreme Court addressed the applicability of collateral estoppel and res judicata in the foreclosure context in *In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016). In *Lucks*, an acting substitute trustee under a deed of trust initiated a non-judicial foreclosure proceeding after the borrower on the note failed to make payments. *Lucks*, 369 N.C. at 224, 794 S.E.2d at 503. The assistant clerk of court refused to authorize the foreclosure based upon a lack of necessary documentation regarding the appointment of the substitute trustee. *Id.* The following year, a different acting substitute trustee brought another non-judicial foreclosure proceeding. At the second hearing, the assistant clerk determined that "proper documentation established that [the prior acting trustee] was the Trustee at the time of the prior dismissal[.]" *Id.* (quotation marks and brackets omitted). The assistant clerk further ruled that the second acting substitute trustee was in privity with the prior substitute trustee and refused to authorize foreclosure based on the doctrine of res judicata. *Id.*

On appeal, our Supreme Court held that the assistant clerk had erred by applying res judicata principles because "[n]on-judicial foreclosure is not a judicial action." *Id.* at 229, 794 S.E.2d at 507. The Court explained its ruling as follows:

> [T]he Rules of Civil Procedure and traditional doctrines of res judicata and collateral estoppel do not apply. To the extent that prior case law implies otherwise, such cases are hereby overruled. While it is true that [the creditor] is barred from proceeding again with non-judicial foreclosure based on the *same default*, [the creditor] may nonetheless proceed with foreclosure by judicial action. [The creditor] may also proceed with non-judicial foreclosure based upon a *different default*.

Id.

The Supreme Court has not yet had occasion to decide whether the ruling in *Lucks* applies in the converse situation where, as here, a clerk enters an unappealed order *allowing* a non-judicial foreclosure to proceed. We find instructive, however, several federal decisions interpreting *Lucks*. For example, *Vicks v. Ocwen Loan Servicing, LLC*, 3:16-cv-00263, 2017 WL 2490007 (W.D.N.C. June 8, 2017) concerned a non-judicial foreclosure action in which the clerk of court entered an order authorizing a creditor to proceed with foreclosure. The borrower

on the note subsequently filed multiple lawsuits "trying to get [the] loan servicer to stop attempting to complete [the] foreclosure action." *Id.* at *1.

The United States District Court for the Western District of North Carolina held that the borrower's attempts to relitigate the validity of the creditor's right to foreclose were barred by the doctrines of collateral estoppel and res judicata. *Id.* at *2. In explaining its reasoning, the court distinguished the facts of the case from *Lucks*:

> Plaintiffs cite to In re Lucks for the proposition that the doctrines of collateral estoppel and res judicata do not apply to non-judicial foreclosure actions. In that case, however, the North Carolina Supreme Court held that the doctrines do not apply in their "traditional" sense in that once the clerk or trial court denies authorization for a foreclosure sale, a creditor may not seek a non-judicial foreclosure based on the *same default*. The creditor may nonetheless proceed with foreclosure by judicial action or proceed with foreclosure based upon a *different default*. Accordingly, contrary to Plaintiff's assertion, In re Lucks did not hold that res judicata and collateral estoppel do not apply to the circumstances presented in this case.

Id. at *2, n. 3 (internal citations and quotation marks omitted).

The United States Bankruptcy Court for the Eastern District of North Carolina reached a similar result in *In re Burgess*, 575 B.R. 330 (Bankr. E.D.N.C. 2017). In *Burgess*, a debtor brought an action alleging that the creditor was not the actual holder of a deed of trust applicable to a portion of the debtor's real property and therefore not entitled to initiate foreclosure proceedings pursuant to the deed of trust. *Id.* at 334. In response, the creditor filed a motion to dismiss the action under the doctrines of res judicata and collateral estoppel, arguing that it had previously obtained an order from the clerk of court authorizing the foreclosure prior to the debtor's filing of a bankruptcy petition. *Id.* at 335.

The bankruptcy court noted its agreement with the ruling in *Vicks* that the Supreme Court's holding in *Lucks* with regard to the applicability of res judicata and collateral estoppel to non-judicial foreclosure proceedings is limited to situations "where the clerk *denied* authorization for a foreclosure sale[,]" *id.* at 343, concluding as follows:

> [Debtor's] claims all rest on whether or not [the creditor] is the valid holder of the Note and Deed of Trust, and that

> those matters were conclusively established by the clerk in entering the foreclosure order. Accordingly, each of the five claims set out in the Complaint are barred by the doctrines of collateral estoppel and res judicata, and accordingly must be dismissed.

Id. at 344.

Although we are, of course, not bound by federal decisions on issues arising under North Carolina law, the analyses in *Vicks* and *Burgess* are both relevant and helpful in deciding this issue. *See Lackey v. N.C. Dep't of Human Res.*, 306 N.C. 231, 236, 293 S.E.2d 171, 175 (1982) ("These federal decisions . . . are not . . . controlling on this court. However, we do deem them to be persuasive authority on the relevant issues." (internal citation omitted)). We find the logic of *Vicks* and *Burgess* to be compelling and agree that *Lucks* simply stands for the proposition that the doctrines of res judicata and collateral estoppel do not apply in situations where foreclosure *was not authorized* by the clerk of court.

Based on our careful reading of *Lucks*, we do not believe the Supreme Court intended for its holding to apply to the opposite situation — that is, where a clerk enters an order *authorizing* foreclosure. Otherwise, without the applicability of res judicata or collateral estoppel in such circumstances, a lender would potentially be forced to relitigate basic issues relating to the validity of the foreclosure that had already been decided in its favor, which would be inimical to the goal of establishing with finality the rights of the parties under these circumstances. Here, because TSC's right to foreclose *was* authorized by the Dare County assistant clerk, we hold that res judicata and collateral estoppel are, in fact, potentially applicable to Plaintiffs' claims. Thus, we possess jurisdiction over this appeal, and Plaintiffs' motion to dismiss the appeal is denied.

II. Application of Collateral Estoppel to Plaintiffs' Claims

[2] We must next determine whether collateral estoppel actually serves to bar Plaintiffs' claims in the present case. "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial . . . proceeding precludes the relitigation of that

issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). Collateral estoppel "precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Id.* (citation omitted).

Pursuant to N.C. Gen. Stat. § 45-21.16(d), the issues to be determined by the clerk in a non-judicial foreclosure proceeding include "the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, [and] (iv) notice to those entitled[.]" *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 422, 775 S.E.2d 1, 6 (2015) (citation and emphasis omitted).

Plaintiffs first contend that they did not receive an adequate opportunity to litigate the issue giving rise to their present complaint at the foreclosure proceeding before the assistant clerk because they were not put on notice that the foreclosure sale would encompass the land upon which Peele's residence was situated. The record shows, however, that Plaintiffs were notified of the date of the foreclosure hearing by means of a notice that was mailed to them on 27 March 2015. This notice contained the description of the property secured by the Deed of Trust upon which TSC intended to foreclose.

Plaintiffs next argue that the claims asserted in their complaint are not barred by collateral estoppel because they "were not brought in — and could not have been brought in — the non-judicial foreclosure proceeding[.]" We find our decision in *Funderburk* to be instructive in addressing their argument. In that case, the creditor initiated non-judicial foreclosure proceedings on eight of the borrowers' properties and "foreclosure hearings were held in which the clerk entered orders authorizing foreclosure sales of all eight properties." *Id.* at 417, 775 S.E.2d at 3. The borrowers later asserted causes of action for, *inter alia*, breach of contract, promissory estoppel, and negligent misrepresentation. *Id.*

On appeal, this Court stated that "the orders of the clerk . . . allowing foreclosure on the eight properties in the prior foreclosure proceedings are conclusive on the issue of default and other issues required to be determined under N.C. Gen. Stat. § 45-21.16, barring relitigation." *Id.* at 423, 775 S.E.2d at 6. We further noted that "a review of the amended complaint shows that all damages alleged by plaintiffs stem from the foreclosures of the properties." *Id.* at 423, 775 S.E.2d at 7. Consequently,

we held that the borrowers' claims were "barred by the final determinations as to the rights of the parties in the foreclosure proceedings." *Id.* *See also Phil Mech. Constr. Co., Inc. v. Haywood*, 72 N.C. App. 318, 322, 325 S.E.2d 1, 3 (1985) ("Since plaintiffs did not perfect an appeal of the order of the Clerk of Superior Court, the clerk's order is binding and plaintiffs are estopped from arguing those same issues in this case.").

We are also guided by our Supreme Court's decision in *In re Michael Weinman Assocs. Gen. P'Ship*, 333 N.C. 221, 424 S.E.2d 385 (1993), which addressed the issue of "whether evidence that property is no longer or should no longer be secured by a deed of trust qualifies as a defense which can be considered by the Clerk in making the four findings required by N.C. Gen. Stat. § 45-21.16(d)." *Id.* at 226, 424 S.E.2d at 388. The Court concluded that "determining which property is legally secured by a deed of trust is a proper issue and element of proof before the Clerk of Superior Court." *Id.* at 228, 424 S.E.2d at 389.

In the present case, Plaintiffs did not appeal the order of the Dare County assistant clerk authorizing foreclosure under the Deed of Trust despite their ability to have done so. Therefore, we are satisfied that Plaintiffs were properly notified of the proceeding and "enjoyed a full and fair opportunity to litigate" the threshold issue of whether TSC was authorized to foreclose pursuant to the Deed of Trust. *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880. As a result, our final inquiry is whether the assistant clerk's resolution of the issues addressed in its order is fatal to the claims Plaintiffs have asserted in their complaint. In making such a determination, we must consider whether any of the claims in Plaintiffs' complaint raise issues that were not conclusively determined by the clerk.

As noted above, Plaintiffs' complaint asserts six claims for relief: (1) a declaration that the foreclosure sale was a nullity; (2) mutual mistake; (3) unjust enrichment; (4) a violation of the Reverse Mortgage Act; (5) breach of fiduciary duty; and (6) unfair and deceptive trade practices.

Plaintiffs' claims seeking a declaratory judgment that the foreclosure is "a nullity" and asserting mutual mistake and unjust enrichment are all premised upon an alleged mistake in the description of the property in the Deed of Trust. As such, these arguments merely constitute a collateral attack on TSC's right to foreclose upon the property under the Deed of Trust. These issues were all previously determined by the clerk in its 16 July 2015 order. Therefore, we hold that Plaintiffs are collaterally estopped from raising these claims in this lawsuit. Plaintiffs' claims for breach of fiduciary duty and unfair and deceptive

trade practices are likewise barred under principles of collateral estoppel because the conduct upon which these causes of action are based is the foreclosure itself.

Finally, we reach the same conclusion with respect to Plaintiffs' claim under the Reverse Mortgage Act. N.C. Gen. Stat. § 53-271(d) provides that "[a] person damaged by a lender's actions may file an action in civil court to recover actual and punitive damages." N.C. Gen. Stat. § 53-271(d) (2017). As noted above, in *Funderburk* this Court held that damages stemming from issues conclusively established in a foreclosure proceeding could not be recovered in a subsequent lawsuit. *See Funderburk*, 241 N.C. App. at 423, 775 S.E.2d at 7. Here, the damages alleged by Plaintiffs with regard to their claim that Defendants violated the Reverse Mortgage Act are based upon the "loss of use and enjoyment of the property, loss of rents, and physical damage to the property . . . by the actions of the defendants[.]" Thus, it is clear that the damages Plaintiffs seek to recover on this claim — as with their other causes of action — flow directly from the foreclosure itself. For this reason, Plaintiffs are collaterally estopped from asserting this claim.

Conclusion

For the reasons stated above, we reverse the trial court's 13 March 2018 order and remand for the entry of an order granting summary judgment in favor of TSC.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judge INMAN concurs.

Judge BRYANT concurs in the result only.

This opinion was authored by Judge Davis prior to 25 March 2019.

STATE v. LOFTIS

[264 N.C. App. 652 (2019)]

STATE OF NORTH CAROLINA
v.
VIRGINIA LEE LOFTIS

No. COA18-709

Filed 26 March 2019

1. Confessions and Incriminating Statements—incriminating custodial statements—motion to suppress—timeliness—procedural bar—trial court's duty

Where defendant in a methamphetamine case did not bring a timely motion to suppress her incriminating custodial statements, her in-court objection was procedurally barred and the trial court was not required to conduct a hearing on its own motion to ensure that the incriminating statements were knowing and voluntary.

2. Drugs—forensic laboratory report—stipulation to admission—not equivalent to guilty plea

The trial court did not err by admitting a forensic laboratory report, after defendant stipulated to its admission, without first engaging in a personal colloquy with defendant to ensure that she understood the consequences of her stipulation. The stipulation did not amount to an admission of guilt because defendant's theory at trial was that the State had failed to prove that she possessed the methamphetamine found in a mobile home that she and her boyfriend both occupied, so the trial court's colloquy obligation was not triggered.

Appeal by defendant from judgments entered 6 December 2017 by Judge Jeffrey P. Hunt in McDowell County Superior Court. Heard in the Court of Appeals 26 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kevin G. Mahoney, for the State.

Joseph P. Lattimore for defendant.

DIETZ, Judge.

Defendant Virginia Lee Loftis appeals her convictions for trafficking in methamphetamine, possession of methamphetamine, and maintaining a dwelling place for keeping and selling controlled substances. Her

two arguments share a common theme—an effort to shift the responsibility to preserve arguments and build an appellate record away from defense counsel and onto the trial court.

We reject these arguments. Loftis first contends that the trial court erred by failing, on its own initiative, to conduct a voir dire hearing to confirm that Loftis's incriminating in-custody statements to law enforcement were knowing and voluntary. But Loftis did not move to suppress those statements—either before or during trial. Thus, the trial court properly overruled her objection to the admission of those statements without conducting a hearing (which Loftis never requested) because her constitutional challenge to admissibility was procedurally barred.

Loftis next contends that the trial court failed to personally discuss with her the consequences of stipulating to the admissibility of a forensic laboratory report, which waived her right to confront the forensic expert who performed the analysis. As explained below, when a stipulation to the admissibility of evidence is, in effect, a confession of guilt, the trial court must address the defendant directly. But where, as here, the stipulation was not an admission of guilt, and left the defendant free to assert that the State had not met its burden of proof on other grounds, the obligation to inform the defendant of the consequences of waiving Confrontation Clause rights rests with defense counsel. Accordingly, the trial court did not err by accepting the stipulation—made by Loftis's counsel in her presence in open court—without first addressing Loftis directly and discussing the consequences of that stipulation.

Facts and Procedural History

On 7 April 2016, law enforcement executed a search warrant at a mobile home in McDowell County where Defendant Virginia Loftis was present with her boyfriend, Franklin Barlow. An officer placed Loftis in handcuffs and read Loftis her *Miranda* rights.

Officer Shane Vance then asked Loftis where the drugs were in the house and Loftis responded that she would tell him in exchange for a cigarette. Officer Vance gave Loftis a cigarette and she showed officers where to find the drugs. Based on the information from Loftis, officers recovered plastic bags containing a "crystal white substance" from inside a camera bag, along with drug paraphernalia, including plastic baggies and a smoking device. Officers also found a pink diary containing what appeared to be a ledger of drug transactions.

While Loftis was being held in detention following the search, she asked to speak with law enforcement. Lieutenant Chris Taylor and Agent

Jackie Turner responded to her request. The officers again read Loftis her *Miranda* rights. Loftis waived her *Miranda* rights. Loftis then told the officers that the names in the pink diary "were the names of the people that owed her money for methamphetamine." Loftis also described traveling to Asheville to "meet with her source of methamphetamine" and purchasing "at least two to three ounces of methamphetamine every three days."

Law enforcement submitted the seized substance to the SBI laboratory for forensic chemical analysis. An SBI analyst determined that the substances recovered during the search contained methamphetamine and weighed 40.81 grams.

On 18 June 2016, the State indicted Loftis for trafficking in methamphetamine, possession of methamphetamine with intent to sell or deliver, and maintaining a dwelling for keeping and selling methamphetamine. Loftis did not make a pretrial motion to suppress any evidence and her case went to trial on 4 December 2017.

At trial, Loftis's counsel stipulated to the admission of the forensic laboratory report in open court, in Loftis's presence, which meant the State would not need to call the forensic expert who performed the analysis.

On 6 December 2017, the jury convicted Loftis of trafficking in methamphetamine, maintaining a dwelling place for keeping and selling controlled substances, and the lesser-included offense of possession of methamphetamine. The trial court sentenced Loftis to 70 to 93 months in prison and a $50,000 fine for the trafficking charge. The trial court consolidated the two remaining charges and imposed a consecutive sentence of 120 days. Loftis gave oral notice of appeal.

On 7 December 2017, the trial court resentenced Loftis on the two consolidated charges to correct its judgment to reflect that possession of methamphetamine is a Class I felony carrying a sentence of 6 to 17 months in prison. Loftis did not give notice of appeal following resentencing.

Analysis

I. Petition for a Writ of Certiorari

Loftis petitions this Court for a writ of certiorari in connection with this appeal because, although she gave timely notice of appeal after her initial sentencing, she failed to give notice of appeal following her resentencing and the entry of the corrected judgment the following day. This Court has discretion to issue a writ of certiorari to review issues for which the right to appeal was lost by failure to take timely action.

State v. Bishop, __ N.C. App. __, __, 805 S.E.2d 367, 369 (2017). Because Loftis's actions indicate an unmistakable intent to appeal that was lost solely because of the failure to timely act, we exercise our discretion and allow the petition for a writ of certiorari. N.C. R. App. P. 21.

II. Challenge to Admission of Custodial Statements

[1] Loftis first argues that the trial court violated her Fifth, Sixth, and Fourteenth Amendment rights by admitting incriminating custodial statements she made to law enforcement without first conducting a hearing outside the presence of the jury to ensure that Loftis knowingly and voluntarily waived those rights.

Loftis acknowledges that she did not move to suppress the statements at any time in the trial court. Likewise, she acknowledges that she never asked for a hearing from the trial court—her counsel said the word "objection" when the State first asked about those statements and, when the trial court immediately overruled the objection, counsel said nothing more.

Nevertheless, Loftis argues on appeal that the trial judge "abdicated his constitutional duty to ensure that improperly obtained statements do not reach the jury" by failing, on the court's own initiative, to stop the trial, excuse the jury, and conduct a hearing on the voluntariness issue. We reject this argument.

Loftis relies on a series of cases from the early 1970s holding that a defendant's incriminating statements while in custody "when offered by the State as substantive evidence and objected to by defendant are not admissible until after a voir dire hearing in the absence of the jury" where the court addresses the voluntariness issue on the record. *State v. Gregory*, 16 N.C. App. 745, 748, 193 S.E.2d 443, 446 (1972). But this line of cases arose before the Criminal Procedure Act in 1973, which requires these constitutional challenges to be pursued in a timely motion to suppress. *See* N.C. Gen. Stat. § 15A-979(d). Although some of the cases cited by Loftis came after the General Assembly enacted Section 15A-979(d), those cases did not acknowledge the procedural requirement to move to suppress or the language in Section 15A-979(d) making the motion to suppress "the exclusive method of challenging the admissibility" of this type of evidence.

Then, in the early 1980s, this Court again addressed a defendant's argument that the trial court "committed prejudicial error in admitting [an incriminating in-custody] statement without establishing that he understood and waived his constitutional rights." *State v. Conard*, 54

N.C. App. 243, 244, 282 S.E.2d 501, 503 (1981). We held that this argument was procedurally barred because the defendant failed to move to suppress the statement. We explained that "defendant made no motion to suppress, and his general objection was not accompanied by any allegation of a legal basis for suppressing the evidence. It follows therefore that the trial judge had statutory authority to summarily deny defendant's objection." *Id.* at 245, 282 S.E.2d at 503.

Since *Conard*, this Court repeatedly has held that objections to use of a defendant's in-custody statements were procedurally barred because the defendant failed to make a timely motion to suppress. *See*, *e.g.*, *State v. Armstrong*, 165 N.C. App. 544, 600 S.E.2d 899 (2004) (unpublished); *State v. Wilkins*, 203 N.C. App. 741, 693 S.E.2d 281 (2010) (unpublished); *State v. Reavis*, 207 N.C. App. 218, 223, 700 S.E.2d 33, 37 (2010). In *Reavis*, for example, this Court held that a defendant who objected at trial but did not show that "the State failed to disclose the evidence of his interview or statement in a timely manner" had waived this constitutional challenge because the defendant "failed to bring himself within any of the exceptions to the general rule. . . . Thus, defendant's objection at trial to the admissibility of the evidence is without merit because the objection, treated as a motion to suppress, was not timely made." *Id.*

This line of cases is consistent with our Supreme Court's precedent, which also repeatedly has held that these types of constitutional challenges must be brought in a timely motion to suppress. *See*, *e.g.*, *State v. Miller*, __ N.C. __, __, 814 S.E.2d 81, 83 (2018). Here, Loftis did not move to suppress before trial and does not assert on appeal that any exception applied to permit her to move to suppress during trial. "When no exception to making the motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds." *State v. Detter*, 298 N.C. 604, 616, 260 S.E.2d 567, 577 (1979). Accordingly, the trial court properly overruled Loftis's objection as procedurally barred.

III. Stipulated Admission of Forensic Laboratory Report

[2] Loftis next argues that the trial court committed plain error by admitting a forensic laboratory report, after Loftis stipulated to its admission, because the trial court failed to engage in a personal colloquy with Loftis "ensuring that Ms. Loftis personally waived her 6th amendment right to confront the chemist" whose testimony otherwise would be necessary to admit that report.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 516–17, 723 S.E.2d at 333. As explained below, the trial court did not err, and certainly did not plainly err, by admitting the lab report.

This Court has held that "the waiver of Confrontation Clause rights does not require the sort of extensive colloquy needed to waive the right to counsel or enter a guilty plea." *State v. Perez*, __ N.C. App. __, __, 817 S.E.2d 612, 615 (2018). In *Perez*, the defendant and his counsel "signed written stipulations to admit the lab reports without the requirement that they be accompanied by witness testimony." *Id.* Perez argued "that the trial court erred by permitting him to stipulate to the admission of the forensic laboratory reports without engaging in a colloquy to ensure he understood the consequences of that decision." *Id.* at __, 817 S.E.2d at 614. This Court rejected Perez's argument and found no error, expressly declining Perez's "request to impose on the trial courts an obligation to personally address a defendant whose attorney seeks to waive any of his constitutional rights via stipulation with the State." *Id.* We further noted that if a defendant "did not understand the implications of stipulating to the admission of the lab reports at trial, his recourse is to pursue a motion for appropriate relief asserting ineffective assistance of counsel." *Id.* at __, 817 S.E.2d at 615.

Loftis attempts to distinguish *Perez* by arguing that the case involved a written stipulation personally signed by the defendant, while this case involves an oral stipulation by defense counsel made in the defendant's presence. This is a distinction without a difference. The *Perez* holding is based not on the form of the stipulation (oral versus written) but on the subject matter of the stipulation. As this Court has held (in a case, somewhat confusingly, also captioned *State v. Perez*), a stipulation that amounts to a "concession of guilt" requires the trial court to confirm with the defendant that "he had discussed the concession with his counsel and had authorized it, and the defendant thereafter acknowledged that his counsel had made the argument desired by him." *State v. Perez*, 135 N.C. App. 543, 548, 522 S.E.2d 102, 106 (1999). The reason for this rule, as *Perez* explains, is that this type of stipulation during trial "has the same practical effect as a guilty plea, because it deprives the defendant of his right against self-incrimination, the right of confrontation and the right to trial by jury." *Id.* at 547, 522 S.E.2d at 106.

By contrast, in the more recent *Perez* decision, and in this case, the stipulation is to the admissibility of a piece of incriminating evidence that does *not* amount to an admission of guilt. Here, for example, Loftis's central theory of the case was that the State failed to prove she possessed the illegal drugs, which were found in a mobile home occupied by both Loftis and her boyfriend. Thus, stipulating to the admission of the report was not the equivalent of a guilty plea; Loftis continued to present her case and contend, at oral argument, that the State had not met its burden of proof. And, as we observed in *Perez*, there are many strategic reasons why a defendant like Loftis might benefit from stipulating to a forensic report confirming a seized substance was illegal drugs—most obviously to avoid having the State call a credible forensic expert to discuss the testing in detail and potentially distract the jury from the key points of the defense case. *Perez*, __ N.C. App. at __, 817 S.E.2d at 615.

Accordingly, we once again decline to impose on the trial courts a categorical obligation "to personally address a defendant" whose counsel stipulates to admission of a forensic report and corresponding waiver of Confrontation Clause rights. That advice is part of the role of the defendant's counsel. The trial court's obligation to engage in a separate, on-the-record colloquy is triggered only when the stipulation "has the same practical effect as a guilty plea." *Perez*, 135 N.C. App. at 547, 522 S.E.2d at 106. Accordingly, we find no error, and certainly no plain error, in the trial court's admission of the forensic laboratory report upon the oral stipulation of Loftis's counsel, in her presence, in open court.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

Judge Davis concurred in this opinion prior to 25 March 2019.

STATE OF NORTH CAROLINA
v.
MATTHEW CHRISTOPHER NEWSOME, DEFENDANT

No. COA18-707

Filed 26 March 2019

Probation and Parole—probation—revocation—willfully absconding —failure to report and avoidance of supervision

The trial court did not abuse its discretion by revoking defendant's probation for willfully absconding where defendant failed to report within 72 hours of his release from custody (for a violation based on absconding) and thereafter avoided supervision and made his whereabouts unknown for approximately one month. This was not a case of a probationer simply missing scheduled appointments with his probation officer.

Judge DAVIS concurring in the result only.

Appeal by defendant from judgment entered 8 February 2018 by Judge Albert D. Kirby in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien and Assistant Attorney General Amy Bircher, for the State.

Lisa A. Bakale-Wise for defendant-appellant.

BERGER, Judge.

Matthew Christopher Newsome ("Defendant") appeals from a judgment revoking his probation and activating his suspended sentence. On appeal he argues that the trial court abused its discretion when it revoked his probation. We affirm in part and remand in part.

Factual and Procedural Background

On April 15, 2015, Defendant was arrested for felony possession of cocaine and misdemeanor open container of alcohol. Pursuant to a plea arrangement with the State on May 21, 2015, Defendant pleaded guilty to possession of cocaine. The State agreed not to pursue an habitual

felon indictment and dismissed the open container charge. Defendant received a ten to twenty-one month suspended sentence and was placed on probation for eighteen months.

Defendant's probation officers filed multiple violation reports due to Defendant's willful failure to comply with the terms and conditions of his probation. On October 28, 2016, Defendant's probation officer filed a violation report, alleging that Defendant had been charged with driving while impaired on June 11, 2015, and resisting a public officer and intoxicated and disruptive on October 1, 2016. The violation report also alleged that Defendant had failed to pay over $2,000.00 in court-ordered fees. In April 2017, Defendant's probation was modified and extended for an additional twelve months only for his failure to comply with the monetary terms of his probation.

On July 7, 2017, Defendant's probation officer filed a second violation report, alleging that Defendant had absconded by willfully avoiding supervision or willfully making his whereabouts unknown on July 5. The report also alleged that Defendant had refused to make himself available for supervision "after numerous attempts to contact the Defendant at the last known address;" had tested positive for PCP on May 10; had failed to report for office visits as instructed on May 9 and June 6; and had failed to pay his monetary obligation. Defendant was arrested after the July 7 violation report was filed, and he remained in custody until he posted bond on August 30.

Defendant had been instructed to make contact with the probation office within 72 hours of his release from custody. Defendant had failed to contact his probation officer or the probation office after his release from custody. The probation officer had attempted to locate Defendant by calling him and visiting his residence. After observing Defendant enter his residence in September 2017, the probation officer went to Defendant's door, introduced herself as Defendant's probation officer, and spoke with Defendant's mother. Defendant's mother informed the probation officer that Defendant was not at home.

On September 22, 2017, his probation officer filed an Addendum that alleged Defendant had absconded when he failed to report to the probation office within 72 hours of his release from custody on August 30. Defendant testified at his probation hearing that he did in fact go to the probation office as instructed and that he was not the person the probation officer had seen enter his residence. However, the trial court found that Defendant's testimony was not credible. In fact, the trial court found that "there is such a disparity – in the testimony – I mean,

it's almost – almost – you're reciting something that's complete opposite from what [the probation officer] testified to."

On February 8, 2018, the trial court found that Defendant had willfully violated the terms and conditions of his probation set forth in both the July 7 and September 22, 2017 violation reports, and that Defendant's probation could be revoked pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a) for willfully absconding. The trial court activated Defendant's suspended sentence.

Defendant appeals, but failed to comply with the requirements of Rule 4 of the Rules of Appellate Procedure. Defendant filed a petition for writ of certiorari to address his defective notice of appeal. In our discretion, we grant certiorari and review the merits of his appeal.

Standard of Review

On appeal, Defendant argues that the trial court abused its discretion when it revoked Defendant's probation. We disagree.

"[I]n a probation revocation, the standard is that the evidence be such as to reasonably satisfy the [trial court] in the exercise of [its] sound discretion that the defendant has willfully violated a valid condition [upon which probation can be revoked]." *State v. Harris*, 361 N.C. 400, 404, 646 S.E.2d 526, 529 (2007) (citation and quotation marks omitted). We review a trial court's decision to revoke a defendant's probation for an abuse of discretion. *State v. Miller*, 205 N.C. App. 291, 293, 695 S.E.2d 149, 150 (2010) (citation omitted). Abuse of discretion "occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citation and quotation marks omitted).

Analysis

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Murchison*, 367 N.C. 461, 463, 758 S.E.2d 356, 358 (2014) (citations and quotation marks omitted). "A probation revocation proceeding is not a formal criminal prosecution," and an "alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 464, 758 S.E.2d at 358 (citations and quotation marks omitted).

A trial court "may only revoke probation for [committing a criminal offense] or [absconding], except as provided in G.S. 15A-1344(d2)." N.C. Gen. Stat. § 15A-1344(a) (2017). A probationer absconds when he

willfully avoids supervision or willfully makes his whereabouts unknown to his probation officer. N.C. Gen. Stat. § 15A-1343(b)(3a) (2017). It is a "defendant's responsibility to keep his probation officer apprised of his whereabouts." *State v. Trent*, ___ N.C. App. ___, ___, 803 S.E.2d 224, 232 (2017), *review denied*, 370 N.C. 576, 809 S.E.2d 599 (2018).

Merely failing to report for an office visit,

> does not, *without more*, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these exact actions violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence. . . .
>
> To hold otherwise would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Allowing actions which explicitly violate a regular or special condition of probation other than those found in N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) to also serve, *without the State showing more*, as a violation of N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1344(d2).

State v. Johnson, 246 N.C. App. 139, 146, 783 S.E.2d 21, 26 (2016) (emphasis added). "[O]nce the State present[s] competent evidence establishing defendant's failure to comply with the terms of his probation, the burden [is] on *defendant* to demonstrate through competent evidence his inability to comply with those terms." *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 231.

In the present case, the second violation report was filed against Defendant for absconding, testing positive for PCP, failing to report for two office visits, and failing to comply with certain monetary conditions. The allegation regarding absconding specifically states that Defendant willfully violated the

> Regular Condition of Probation General Statue 15A-1343(b)(3a) 'Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer[']' in that, on or about 7/5/2017, and after numerous attempts to contact the Defendant at the last known address . . . the said Defendant has refused to make himself available for

> supervision as instructed by the probation officer, thereby absconding probation supervision.

Defendant was subsequently served with the violation report and taken into custody. Defendant knew or should have known upon being served with the violation report that he was considered to be an absconder by his probation officer.

Upon his release from custody on August 30, 2017, Defendant was then instructed to make contact with his probation officer within 72 hours of his release. This was more than a regular office visit. It was a special requirement imposed upon Defendant because he was considered to be an absconder, and it was his "responsibility to keep his probation officer apprised of his whereabouts." *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 232.

While in custody, the probation officer knew Defendant's whereabouts and how to contact him. Once Defendant had posted bond, Defendant never made his probation officer aware of his whereabouts as instructed. The requirement for Defendant to contact the probation officer within 72 hours of release from custody alerted Defendant that his probation officer was attempting to actively monitor him. Had Defendant complied, he would have enabled the probation officer to attempt appropriate monitoring of Defendant.

However, because Defendant failed to contact his probation officer or the probation office after his release from custody, the probation officer was forced to locate Defendant. She then made multiple phone calls to Defendant's phone number that were not returned. When she had finally tracked him down and observed him enter his residence, she was informed by Defendant's mother that he was not there.

On September 22, 2017, Defendant's probation officer filed an Addendum to the July 7 violation report because Defendant had failed to report to his probation officer or the probation office upon his release from custody, failed to contact his probation officer or the probation office for nearly one month, and willfully made his whereabouts unknown to his probation officer. The probation officer alleged in the Addendum that Defendant violated a

> Regular Condition of Probation General Statue 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, on or about 08-30-2017, the offender bonded out

> of custody, offender is a returned absconder[.] Offender failed to report the probation office within 72 hours of release, and has made no contact attempts despite several attempts to contact the offender, his whereabouts remain unknown[.] The offender is actively avoiding supervision, thereby absconding.

The State presented sufficient evidence that Defendant willfully absconded by failing to report within 72 hours of his release from custody and thereafter avoiding supervision and making his whereabouts unknown from August 20 through the filing of the violation report on September 22.

The burden was then on Defendant to "demonstrate through competent evidence his inability to comply with these terms" of his probation upon release from custody. *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 231. Defendant admitted during the hearing that he knew he had to report to the probation office within 72 hours of his release, that his mother had informed him that a probation officer had stopped by their home, and that his mother had given him a business card with a probation officer's information on it. Moreover, the trial court determined that Defendant was not credible. In fact, the trial court went as far as to find that the evidence offered by Defendant was completely opposite of the testimony provided by the probation officer.

Defendant, however, argues that the trial court abused its discretion because missing scheduled appointments cannot constitute absconding pursuant to *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015) and *State v. Krider*, ___ N.C. App. ___, 810 S.E.2d 828 (2018), *aff'd in part per curiam*, ___ N.C. ___, 818 S.E.2d 102 (2018). Here, however, Defendant did not simply miss an appointment or phone call with his probation officer. Defendant had willfully failed to comply with probation leading up to the July 7 violation report by making himself unavailable for supervision "after numerous attempts to contact Defendant at the last known address," and then again for almost one month following his release from custody on August 30.

In *Williams*, the allegations in the violation report that the probationer had failed to remain within the jurisdiction and had failed to report for regular office visits could not be bootstrapped into a finding of absconding. *Williams*, 243 N.C. App. at 200, 776 S.E.2d at 743. In *Williams*, this Court specifically noted that "the State does not argue that Defendant absconded" in its brief and the violation "report did not include reference to N.C. Gen. Stat. § 15A-1343(b)(3a)." *Id.* at 200, 205,

776 S.E.2d at 743, 745. Similarly, this Court in *Krider* stated that evidence of Section 15A-1343(b)(2) and (3) violations could not be considered absconding, and, as in *Williams*, the violation report in *Krider* had not referenced Section 15A-1343(b)(3a). *Krider*, ___ N.C. App. at ___, 810 S.E.2d at 831.

Here, however, the violation report and Addendum specifically alleged that Defendant had violated Section 15A-1343(b)(3a) by failing to make himself available for supervision and actively avoiding supervision. Defendant had not simply missed appointments or phone calls. After he was taken into custody for a violation based on absconding, Defendant had knowingly failed to notify his probation officer of his release from custody. Thereafter, Defendant actively avoided supervision each day after the initial 72-hour time period through and until September 22, 2017. This was a willful course of conduct by Defendant that thwarted supervision. Defendant's actions were a persistent avoidance of supervision and a continual effort to make his whereabouts unknown.

Because the trial court had not abused its discretion when it found Defendant had absconded, we affirm the revocation of Defendant's probation and activation of the suspended sentence.

However, we remand this matter for correction of a clerical error in the trial court's judgment. "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted). As stated above, a trial court "may only revoke probation for [committing a criminal offense] or [absconding]." N.C. Gen. Stat. § 15A-1344(a). Thus, the judgment form must clearly indicate that probation was revoked because Defendant had committed a criminal offense or absconded. When the trial court incorrectly checks a box on a judgment form that contradicts its findings and the mistake is supported by the evidence in the record, we may remand for correction of this clerical error in the judgment. *See State v. Jones*, 225 N.C. App. 181, 186, 736 S.E.2d 634, 638 (2013) (affirming the trial court's revocation of defendant's probation, but remanding for the sole purpose of correcting a clerical error on the judgment form).

Here, the trial court found on Defendant's judgment form that Defendant had violated the conditions of probation as set forth in paragraphs 1 through 5 of the July 7, 2017 violation report, and paragraph 1

of the September 22, 2017 Addendum. The trial court had checked the box indicating that Defendant's probation could only be revoked for committing a criminal offense or absconding. However, because violations 2 through 5 in the July 7, 2017 violation report are neither criminal offenses nor do they constitute absconding, the trial court should not have selected the box that "[e]ach violation is in and of itself was sufficient basis upon which this Court should revoke probation and activate the suspended sentence." Accordingly, we remand to the trial court to correct this clerical error on the judgment.

Conclusion

For the reasons stated above, we affirm the trial court's judgment. However, we remand for the limited purpose of correcting the clerical error described above.

AFFIRMED IN PART; REMANDED IN PART.

Judge HUNTER, JR. concurs.

Judge DAVIS concurred in result only in this opinion prior to 25 March 2019.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 26 MARCH 2019)

BALL v. BAYADA HOME HEALTH CARE No. 18-918	N.C. Industrial Commission (X48418) (X92876)	Affirmed
CLAUDIO v. SELLERS No. 18-636	Wake (16CVS7491)	Reversed and Remanded
CLIFTON v. GOODYEAR TIRE & RUBBER CO. No. 18-987	N.C. Industrial Commission (X62826)	Affirmed
HALIFAX CTY. v. EMPIRE FOODS, INC. No. 18-531	Halifax (15CVS752)	Affirmed
IN RE A.A.J. No. 18-697	Buncombe (15JA278)	Affirmed
IN RE J.C.-B. No. 18-922	Wayne (17JA62) (18CVD1105)	Vacated and Remanded
IN RE K.A.G. No. 18-829	Guilford (16JT521-522)	Affirmed
RMAH v. USAA CAS. INS. CO. No. 18-623	Wake (16CVD2057)	AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.
STATE v. FRANKLIN No. 18-777	Gaston (15CRS62832)	Vacated
STATE v. GIBSON No. 18-448	Vance (14CRS50497)	Dismissed
STATE v. HOLMES No. 18-1023	Onslow (12CRS55550) (14CRS54860) (14CRS54862-63) (14CRS54866-67)	Vacated and Remanded

STATE v. HOWARD No. 18-660	Wake (16CRS221930)	VACATED IN PART AND REMANDED WITH INSTRUCTIONS.
STATE v. THOMAS No. 18-959	Forsyth (16CRS2455) (16CRS59699) (16CRS59700)	NO PLAIN ERROR.

BRADSHAW v. BRADSHAW

[264 N.C. App. 669 (2019)]

DEBORAH C. BRADSHAW, PLAINTIFF
v.
RONALD D. BRADSHAW, DEFENDANT

No. COA18-432

Filed 2 April 2019

Divorce—separation agreement—out-of-state—effect of reconciliation on enforceability—public policy—severability of separation and property settlement provisions

The reconciliation provision in a Virginia separation agreement—which provided that the agreement's property settlement provisions (including waivers by both parties to any rights of equitable distribution or spousal support) would continue in full force and effect if the parties resumed their marital relationship—did not violate North Carolina public policy and therefore remained enforceable after the parties reconciled and separated a second time. Applying Virginia law—under which separation agreements must be interpreted as contracts—the plain language of the agreement controlled, and the inclusion of a severability provision served to keep intact the property settlement provisions even if the reconciliation provision were to be invalidated.

Appeal by defendant from declaratory judgment entered 6 February 2018 by Judge Meader W. Harriss, III, in District Court, Camden County. Heard in the Court of Appeals 17 October 2018.

Shilling, Pass & Barlow, by Andrew T. Shilling, and The Twiford Law Firm, by Lauren Arizaga-Womble, for plaintiff-appellee.

Ward and Smith, P.A., by John M. Martin; and Darlene Gill Chambers, P.C., Attorney at Law, by Darlene Gill Chambers, for defendant-appellant.

STROUD, Judge.

Defendant-husband appeals from a declaratory judgment rendering void for public policy reasons a 1993 Virginia separation agreement and property settlement agreement. The parties reconciled after signing the agreement, moved to North Carolina, and separated again in 2013. North Carolina's public policy allows property settlement agreements to

survive reconciliation, so the Virginia Agreement is enforceable in North Carolina. We reverse the trial court's order and remand.

I. Background

Husband and Wife married in 1987 in Virginia and separated in 1991. In October 1993, the parties entered into a *Stipulation and Agreement* in Virginia governed by Virginia law ("the Agreement"). The Agreement was a comprehensive agreement with provisions addressing separation, spousal support, and property division. As relevant to this appeal, the Agreement made "full and complete settlement of all property rights between them and their right to equitable distribution pursuant to Virginia Code Annotated §20-107.3" and provided that "from the time of execution of this Agreement neither Husband nor Wife shall have any interest of any kind or nature whatsoever in or to any of the marital property of the parties or the property of the other except as provided in this Agreement and Stipulation." The parties waived "any and all rights to equitable distribution or any monetary award pursuant to Virginia Code Annotated §20-107.3." The Agreement divided the parties' property and also provided that "each party hereafter may own, have and enjoy, independently of any claim or right of the other party, all items of real and personal property *now or hereafter belonging to him or her[.]*" (Emphasis added.) Each party "forever waive[d], now and forever" any rights to "spousal support and maintenance or alimony" (original in all caps) from the other, except that Husband agreed to "immediately pay directly to Wife the sum of $25,000.00" as a "one time lump sum spousal support payment."

The reconciliation provision of the Agreement is the primary subject of the issues on appeal:

> RECONCILIATION
>
> 20. In the event of reconciliation and resumption of the marital relationship between the parties, the provisions of this Agreement for settlement of property rights, spousal support, debt payments and all other provisions shall nevertheless continue in full force and effect without abatement of any term or provisions hereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of the reconciliation.

In 1994, the parties reconciled, and, in 1997, they moved to North Carolina. In 2013, the parties separated for the second time. They never entered into any written agreement modifying or revoking the Agreement.

On 30 January 2017, Wife filed a complaint seeking absolute divorce and equitable distribution, but not postseparation support or alimony. Husband filed an answer admitting the allegations relevant to absolute divorce but denying those relevant to equitable distribution, and he counterclaimed for a declaratory judgment that the Agreement "remains in full force and effect" and bars Wife's claim for equitable distribution. Regarding the Agreement, Husband alleged:

> 6. On October 19, 1993, the parties entered into a *Stipulation and Agreement* ***(Attached as Exhibit A)*** which in pertinent part:
>
> a. provided for the distribution between the parties of all marital and separate property of the parties
>
> b. accepted the division as fair and reasonable and waived equitable distribution, postseparation support, and alimony claims
>
> c. stated that in the event of reconciliation this settlement shall continue in full force and effect unless decided otherwise and by a new written agreement formally entered
>
> d. at the time the parties executed said *Agreement* Defendant paid Plaintiff the required $25,000 lump sum postseparation support payment and each party initialed the amount paid[.]

Wife replied to Husband's counterclaim and admitted the allegations of Paragraph 6 "to the extent that the parties entered into a Separation Agreement on October 19, 1993." She responded to the sub-parts of Paragraph 6, admitting that "the Separation Agreement provided for the distribution of all marital and separate property between the parties owned at the time of the Agreement" but alleging that the Agreement did not apply to "property acquired after the date of reconciliation, including active appreciation of the Defendant's separate property . . . ." Wife also admitted that Husband had paid her the $25,000.00 lump sum postseparation support payment. Wife also cross-claimed for a declaratory judgment that "the Separation Agreement entered into between the parties on October 19, 1993, does not bar future claims of equitable distribution and spousal support after reconciliation of the parties." She alleged that

> 11. The Defendant through counsel is alleging that the property acquired after the date of reconciliation is not marital property and the Separation Agreement

> applies to after reconciliation acquired property which is contrary to our Equitable Distribution Statutes.
>
> 12. The Plaintiff's position, supported by the law of this state, that the separation agreement divided the property that was in the parties' possession at the time of the entry of the agreement and that at any property acquired after date of reconciliation, including active appreciation, is subject to equitable distribution.

Wife filed a motion to sever the equitable distribution claim from the absolute divorce claim, which was granted by the trial court. The trial court granted Wife's motion for summary judgment for absolute divorce and reserved the pending claims for equitable distribution and declaratory judgment. The material facts were not in dispute before the trial court, and the declaratory judgment claims presented only the legal question of the enforceability of the Agreement. The trial court requested the parties to submit briefs addressing these issues:

> (1) Whether the Stipulation and Agreement is still valid and enforceable under Virginia Law; if yes, then:
>
> (2) Whether paragraph 20 of the Stipulation and Agreement titled "Reconciliation" violates North Carolina Public Policy; if no, then:
>
> (3) Whether the Stipulation and Agreement completely bars further Equitable Distribution under Virginia law.

After considering the arguments presented by both parties in their briefs, the trial court concluded in relevant part that: (1) the Agreement is valid under Virginia law; (2) application of Virginia law would be contrary to North Carolina's public policy; (3) the Agreement's reconciliation provision violates North Carolina public policy; and, (4) the Agreement does not apply to Wife's claim for equitable distribution. Upon motion by Husband, the trial court certified the declaratory judgment for immediate appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b), and Husband timely appealed.

II. Standard of Review

The material facts are not contested, and the order on appeal presents only questions of law.[1]

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1. Although Husband's brief challenges several paragraphs of the order labeled as "findings of fact" as "not supported by competent evidence," the findings are actually conclusions of law, and we will review them 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. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. We review the trial court's conclusions of law *de novo*." We will therefore review the order's legal conclusion of the enforceability of the agreement *de novo*.

Raymond v. Raymond, ___ N.C. App. ___, ___, 811 S.E.2d 168, 174 (2018) (citation and brackets omitted).

III. Choice of Law

The parties lived in Virginia in 1993 when they executed the Agreement, and the Agreement contained a choice of law provision:

> APPLICABLE LAW
>
> 17. This Agreement shall be construed and governed in accordance with the laws of the Commonwealth of Virginia[.]

The parties essentially agree that Virginia law governs the validity and interpretation of the Agreement, although Wife argues that the "Agreement is neither valid nor enforceable under Virginia law[,]" because North Carolina and Virginia law agree that "a choice of law provision in a contract will not be honored if the substantive law of the selected jurisdiction is contrary to the established public policy of the state where the contract is to be enforced." Thus, Wife concludes, "because enforcement of the Agreement in North Carolina is contrary to the established public policy of North Carolina, Virginia law will not permit the Agreement to be enforced here." But the question is not as complicated as Wife contends.

> The general rule is that things done in one sovereignty in pursuance of the laws of that sovereignty are regarded as valid and binding everywhere. North Carolina has long adhered to the general rule that *lex loci contractus*, the law of the place where the contract is executed governs the validity of the contract. . . . However, foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum.

Muchmore v. Trask, 192 N.C. App. 635, 639-40, 666 S.E.2d 667, 669-70 (2008) (citations, ellipsis, brackets, and quotation marks omitted).

Virginia law governs the validity of the Agreement, which was the first question addressed in the briefs before the trial court. Virginia law also controls the interpretation of the Agreement, but the Agreement is enforceable in North Carolina only if it is not "opposed to the settled public policy" of this State. *Id.* at 640, 666 S.E.2d at 670.

IV. Public Policy

Although Husband's brief breaks the questions presented by this appeal into various issues, there is only one question of law presented: whether the Agreement is unenforceable because the reconciliation provision is against the public policy of North Carolina. The trial court concluded that "[t]he agreement is valid under Virginia law." In addition to addressing the public policy issue, Wife argues that "[t]he Agreement is neither valid nor enforceable under Virginia law." But the *validity* of the Agreement under Virginia law is not at issue in this appeal. Husband did not challenge the trial court's conclusion that the Agreement was valid under Virginia law, and Wife has not cross-appealed. *See McLeod v. Wal-Mart Stores, Inc.*, 208 N.C. App. 555, 562, 703 S.E.2d 471, 476 (2010) (finding failure to cross-appeal to preclude this Court from considering one of plaintiff's arguments). In addition, Wife has never denied that the Agreement was a valid and enforceable agreement under Virginia law in 1993 when it was executed, and her own pleadings acknowledge as much.[2] Therefore, whether this Agreement is valid under Virginia law is not before this Court, and we need consider only whether the Agreement is "opposed to the settled public policy of [North Carolina]." *Muchmore*, 192 N.C. App. at 640, 666 S.E.2d at 670.

The trial court's order made the following findings of fact:

> 15. The Agreement contemplated the parties would forever live separate and apart due to the "irreconcilability of their differences."
>
> 16. The Agreement is integrated in that the separation of the parties was reciprocal consideration for the property provisions.

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2. Wife's pleadings below also did not raise the issue of unenforceability based upon violation of North Carolina's public policy or the validity of the Agreement, but instead alleged that the Agreement did not apply to property acquired after the reconciliation of the parties. Her defense in her answer was based upon interpretation of the Agreement. But when the trial court heard the declaratory judgment claims, both parties addressed the public policy argument, and Wife abandoned her contention based upon her interpretation of the Agreement as not applying to property acquired after the date of the Agreement.

17. The Reconciliation provision contained in Paragraph 20 is void as it violates North Carolina public policy in that separation and property settlement agreements are void unless the parties are living apart. Reconciliation voids the entire agreement. *Stegall v. Stegall*, 100 N.C. App. 398 (1990).

18. The Reconciliation provision contained in Paragraph 20 is void as it violates public policy in that it discourages the reconciliation of the marital relationship. *Patterson v. Patterson*, 774 S.E.2d 860 (2015).

19. The terms of the Agreement are void. *Stegall v. Stegall*, 100 N.C. App. 398 (1990), *Morrison v. Morrison*, 102 N.C. App. 514, (1991).

20. The choice of law provision with the Agreement states, "This Agreement shall be construed with the law of the Commonwealth of Virginia."

21. Application of Virginia law would be contrary to the established public policy of North Carolina and should not be applied.

22. The agreement is valid under Virginia law in the Commonwealth of Virginia recognizes that Separation and Property Settlement Agreements can remain intact even upon reconciliation of the parties.

. . . .

24. The Agreement has no application to Plaintiff's claim for Equitable Distribution.

The trial court went on to conclude that "[a]pplication of Virginia law would be contrary to the established public policy of North Carolina[,]" and decreed that the Agreement "is an integrated agreement and the Reconciliation provision in paragraph 20 providing for survival past reconciliation is void as it violates North Carolina Public Policy, and is not binding in the State of North Carolina." Husband challenges findings of fact 15 through 19, 21, and 24, and conclusion of law 3 which is identical to finding of fact 21.

Only finding 15 could be considered as a finding of fact, and it is supported by the evidence as it is based upon the language of the Agreement: "WHEREAS, marital difficulties have arisen between the parties, and the parties are now and have been separated, living separate and apart, with

no possible chance of reconciliation since May 24, 1991[.]" The remainder of the "findings" are actually conclusions of law, and we therefore review the challenged "findings" *de novo*. *See Barnette v. Lowe's Home Ctrs., Inc.*, 247 N.C. App. 1, 6, 785 S.E.2d 161, 165 (2016) ("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.").

Husband argues that the trial court erred by holding the Agreement is void under North Carolina's public policy. Wife argues that the Agreement was an integrated separation agreement and property settlement agreement, and since it would violate North Carolina's public policy if reconciliation did not void the separation provisions of the Agreement, the reconciliation provision is also unenforceable; since the separation provisions were reciprocal consideration for the property settlement provisions, the entire Agreement is then void. The trial court agreed with Wife that the Agreement was an integrated agreement, based upon the language of the preamble, finding as follows:

> 14. The First Paragraph of Page 3 of the Agreement specifically states
>
> "NOW, THEREFORE, for and in consideration of the promises and in consideration of the mutual covenants and agreements hereinafter contained, and other good and valuable consideration deemed adequate and sufficient at law . . . without in any way attempting to facilitate divorce or separation, but rather in recognition of the prior existing separation of the parties, the irreconcilability of their differences, and in order to determine finally and settle their property rights . . . the parties do hereby covenant and agree as follows:
>
> SEPARATE LIVES
>
> 1. The parties hereafter shall live separate and apart from each other . . . ."

We first note that the parties' briefs rely primarily upon North Carolina law for the distinction between a property settlement agreement and a pure separation agreement how to determine if an agreement with both types of provisions is an integrated agreement. *See Morrison v. Morrison*, 102 N.C. App. 514, 519, 402 S.E.2d 855, 858 (1991) ("Whether the executory provisions of a property settlement agreement are rescinded upon resumption of marital relations depends on whether the property settlement is negotiated in reciprocal consideration for the separation agreement. This is so whether the

property settlement and the separation agreement are contained in a single document or separate documents. If the property settlement is negotiated as reciprocal consideration for the separation agreement, the agreements are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. If not in reciprocal consideration, the provisions of the property settlement are deemed separate and the resumption of marital relations will not affect either the executed or executory provisions of the property settlement agreement." (quotation marks omitted)). But in accord with the choice of law provision of the Agreement, we must interpret the Agreement under Virginia law, and Virginia law does not have case law addressing the concepts of "integrated" separation and property settlement agreements in exactly the same way as North Carolina. Under Virginia law, we must interpret the Agreement as a contract:

> Property settlement agreements are contracts; therefore, we must apply the same rules of interpretation applicable to contracts generally. We state at the outset our belief that the property settlement agreement is unambiguous; thus, its meaning and effect are questions of law to be determined by the court. On review we are not bound by the trial court's construction of the contract provisions here in issue.
>
> In construing contracts, ordinary words are to be given their ordinary meaning. The Supreme Court of Virginia restated the applicable principles in *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983):
>
> > We adhere to the plain meaning rule in Virginia: Where an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself. This is so because the writing is the repository of the final agreement of the parties.
> >
> > The court must give effect to all of the language of a contract if its parts can be read together without conflict. Where possible, meaning must be given to every clause. The contract must be read as a single document. Its meaning is to be gathered from all its associated parts assembled as the unitary expression of the agreement of the parties. However inartfully it may have been drawn, the court cannot make a new contract for the parties, but must construe its language as written.

Tiffany v. Tiffany, 332 S.E.2d 796, 799 (Va. Ct. App. 1985) (citations, quotation marks, brackets, ellipsis and parentheticals omitted).

The trial court's order focused on the language of the Preamble, as quoted above in finding 14. But the Agreement includes other relevant provisions which must be given effect "if its parts can be read together without conflict." *Id*. The Agreement includes specific provisions regarding severability of invalid provisions:

SEVERABILITY OF PROVISIONS

> 12. If any provision of this Agreement shall be deemed by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall remain in full force and effect.

Under Virginia law, we must give "meaning . . . to every clause. The contract must be read as a single document." *Id*. The trial court's order focused on general language from the Preamble but ignored the far more specific provision of severability. The Preamble simply states the consideration for the Agreement and even notes that the Agreement is not "in any way attempting to facilitate divorce or separation[.]" The Preamble language in finding 14 and the Severability provision are not in conflict. Even if the reconciliation provision is "invalid" because it is against North Carolina public policy as applied to the "pure separation" provisions of the Agreement, the remainder of the Agreement regarding property settlement is still enforceable, according to the Severability of Provisions language in the Agreement. And even under North Carolina law—which the trial court used instead of Virginia law—the agreement to separate was not "reciprocal consideration" for the property settlement, since the Agreement has a specific provision that the Agreement's provisions are severable. *See Hayes v. Hayes*, 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990) ("[W]here the parties include unequivocal integration or non-integration clauses in the agreement, this language governs.").

After *de novo* review of the challenged conclusions of law, including the cases cited by the trial court to support its conclusions, the conclusions are not supported by law. The trial court's order included references to several specific cases, so we will address those. We first note that the parties were separated when they signed the Agreement, so the Agreement would not violate North Carolina's public policy as to entering into a separation agreement without physical separation, which is one of the issues discussed in *Stegall*, 100 N.C. App. 398, 403, 397 S.E.2d 306, 309 (1990), and cited as support for finding 17. In finding 17, the trial court concluded that "[t]he Reconciliation provision contained in

Paragraph 20 is void as it violates North Carolina public policy in that separation and property settlement agreements are void unless the parties are living apart. Reconciliation voids the entire agreement. *Stegall v. Stegall*, 100 N.C. App. 398 (1990)." But *Stegall* does not hold that *reconciliation* necessarily voids a property settlement agreement, and it does not address the effect of a reconciliation provision in an agreement at all, since the agreement in *Stegall* did not have this provision. *See id.* at 411, 397 S.E.2d at 313.

The relevance of the second case noted in the findings is also unclear. In *Patterson*, this Court held that the alimony provisions of a separation agreement which did not provide for termination of alimony payments upon the wife's cohabitation were not against public policy and were enforceable. 242 N.C. App. 114, 774 S.E.2d 860 (2015). Although N.C. Gen. Stat. § 50-16.9 provides for termination of *court-ordered* alimony upon cohabitation by the dependent spouse, parties are free to enter into a contract providing otherwise. *Patterson* notes that a provision is against public policy only if the agreement by its own terms promotes an objection against public policy:

> Moreover, as this Court pointed out in *Sethness*, the clear implication of cases where separation agreements were found to be void as against public policy and N.C. Gen. Stat. § 52-10.1 is that such agreements may not by their own terms promote objectives (i.e.: divorce, termination of parental rights) which are offensive to public policy.

Patterson, 242 N.C. App. at 118, 774 S.E.2d at 862-63 (brackets, ellipsis, and quotation marks omitted).

The trial court cites to *Morrison v. Morrison*, 102 N.C. App. 514, 402 S.E.2d 855, in finding 19, and concluded, "The terms of the Agreement are void." The primary focus of *Morrison* is the distinction between a separation agreement and a property settlement agreement, and where an agreement includes both types of provisions, how to determine if the agreement is integrated. *Id.* As noted above, we must construe the Agreement under Virginia law, but as to North Carolina's public policy, *Morrison* also notes that reconciliation provisions in agreements with provisions regarding both separation and property rights are *not* against public policy:

> We therefore reject the suggestion that all agreements, whether in one document or two, relating to support and property rights are reciprocal as a matter of law. To so hold would prohibit the parties from entering

> into contracts which do not violate law or public policy. *Because contracts providing that a reconciliation will not affect the terms of a property settlement are not contrary to law or public policy, adopting the rule that all agreements relating to support and property rights are reciprocal as a matter of law would impermissibly interfere with the parties' freedom of contract rights.* On the other hand, contracts which provide that reconciliation will not affect the terms of a separation agreement violate the policy behind separation agreements and are therefore void.

Id. at 519–20, 402 S.E.2d at 858-59 (emphasis added) (citations omitted).

In *Porter v. Porter*, this Court analyzed a North Carolina separation agreement that contained a reconciliation provision similar to the one at issue in the Agreement:

> 13. In the event of the reconciliation and resumption of the marital relationship between the parties, the provisions of this agreement for settlement of property rights shall nevertheless continue in full force and effect without abatement of any term or provision thereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of reconciliation.

> Thus, according to the express terms of the Agreement, and with full information as to the legal rights of equitable distribution and distributive award contained in North Carolina General Statute Section 50 20, husband and wife agreed that each would relinquish any and all claims to any and all real or personal property owned by the other party or that said party may hereafter own. In other words, the parties exercised the broad contractual freedom afforded them under North Carolina law by entering into their 1988 Agreement and foregoing their right to seek equitable distribution of the marital estate. Additionally, the parties specifically contemplated and agreed that, were they to reconcile and resume the marital relationship after entering into the Agreement in 1988, the provisions of the Agreement regarding settlement of property rights shall continue in full force and effect without abatement of any

> term or provision thereof. Thus, the Agreement makes the parties' intent clear that the provisions regarding ownership of property acquired after husband and wife entered into the 1988 Agreement were to remain unaffected by any later reconciliation and resumption of the marital relationship. Accordingly, we conclude that the trial court erred by ordering equitable distribution of the property in contravention of the express terms of the now-court-ordered Agreement. Therefore, we vacate the trial court's order for equitable distribution and remand with instructions to distribute the property in accordance with the terms of the parties' Agreement, which provided that any property not specifically provided for under this Agreement shall be deemed to be separate property to be solely owned by the party holding title to the same.

Porter v. Porter, 217 N.C. App. 629, 633-34, 720 S.E.2d 778, 780-81 (2011) (citations, quotation marks, brackets, and ellipsis omitted).

Here, even the reconciliation provision of the Agreement would offend North Carolina's public policy if applied to the "pure separation" provisions of the Agreement; the "pure separation" provisions were not reciprocal consideration for the property settlement provisions. The parties agreed that the provisions of the Agreement are severable, and enforcement of the property settlement provisions of the Agreement does not conflict with North Carolina's public policy. Therefore, the trial court's finding and conclusion stating that "[a]pplication of Virginia law would be contrary to the established public policy of North Carolina and should not be applied" is in error.

V. Conclusion

The reconciliation provision of the Agreement does not violate North Carolina's public policy as applied to the property settlement provisions of the Agreement. Both parties waived any rights to equitable distribution in the Agreement, so the trial court erred by concluding that Wife's equitable distribution claim is not affected by the Agreement. We reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges DILLON and BERGER concur.

DENNIS T. BROWN AND RAQUEL HERNANDEZ, PLAINTIFFS
v.
LATTIMORE LIVING TRUST DATED AUGUST 3, 2011, BY AND THROUGH ITS TRUSTEES, WILLIAM TIMOTHY LATTIMORE AND PAX MILLER LATTIMORE; AND PROLAND DEVELOPMENT, INC., DEFENDANTS

No. COA18-941

Filed 2 April 2019

1. Statutes of Limitation and Repose—trespass—damage to adjacent property—promise to repair and partial performance—no tolling of limitations period

In a dispute between adjacent landowners, where defendants allegedly damaged plaintiffs' property while installing a brick wall and metal fence along the dividing property line, plaintiffs' trespass claim was untimely because they filed their complaint more than three years after the original trespass (N.C.G.S. § 1-52(3)) and because neither defendants' promises to repair the damage nor their partial performance on that promise tolled the limitations period.

2. Statutes of Limitation and Repose—breach of contract—identifying when the claim accrued—identifying time of breach

In a dispute between adjacent landowners, where defendants allegedly breached their promise to restore plaintiffs' damaged property, the trial court properly granted summary judgment in favor of defendants on plaintiffs' breach of contract claim because the claim was untimely. Where the parties' contract required performance within a reasonable time, plaintiffs were not entitled to determine on summary judgment when the breach occurred for purposes of identifying when the statute of limitations began to run. Moreover, evidence showed that the breach occurred at an earlier date than what plaintiffs had claimed.

3. Waters and Adjoining Lands—nuisance—reasonable use of surface water drainage—balancing test—inappropriate on summary judgment

In a dispute between adjacent landowners, where defendant allegedly damaged plaintiffs' property by causing the redirection of water in a drainage ditch running across their properties, the trial court erred in granting summary judgment in defendants' favor on plaintiffs' nuisance claim because the balancing test for determining reasonable use of surface water drainage cannot be completed on summary judgment. Whether defendants' conduct was reasonable was a question for the fact finder.

Appeal by plaintiffs from order entered 16 May 2018 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 13 March 2019.

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

Burns, Day & Presnell, P.A., by James J. Mills, for defendant-appellees.

ARROWOOD, Judge.

Dennis T. Brown ("Brown") and Raquel Hernandez ("Hernandez") (together "plaintiffs") appeal from order granting summary judgment in favor of the Lattimore Living Trust (the "trust"), trustees William Timothy Lattimore and Pax Miller Lattimore (the "trustees"), and Proland Development, Inc. ("Proland") (together "defendants"). For the following reasons, we affirm in part and reverse in part.

I. Background

Plaintiffs initiated this action against defendants with the filing of a summons and a complaint in Wake County District Court on 17 May 2017. The complaint alleged that plaintiffs and the trust own adjacent property along Eton Road in Raleigh. Beginning in 2013, the trust made improvements to its property, "including installation of a brick wall and a metal fence along the property line separating the [properties]." Proland was hired by the trustees as the contractor for the wall. Plaintiffs alleged that during the installation of the brick wall, Proland came onto and damaged their property, and then failed to restore their property to its original condition as was agreed upon. Plaintiffs further alleged that the metal fence crosses a drainage ditch and, during heavy rains, causes debris to accumulate in the ditch and divert water, causing erosion on plaintiffs' property. Based on these allegations, plaintiffs asserted claims against defendants for (1) trespass, (2) breach of contract, and (3) nuisance.

After Proland filed its initial response on 12 June 2017 denying the material allegations, on 7 July 2017, plaintiffs filed a motion for summary judgment as to Proland with an attached affidavit of Brown. Proland filed an amended answer on 20 July 2017, in which it asserted various affirmative defenses. The trust and the trustees filed an answer with affirmative defenses and counterclaims on 27 July 2017. On 14 August 2017, Proland's president filed an affidavit.

Plaintiffs' motion for summary judgment was set to be heard on 17 August 2017; but when no one appeared for the hearing, the trial court

dismissed the motion without prejudice. Later that afternoon, plaintiffs filed a withdrawal of their motion for summary judgment as to Proland, which appears to have been signed two days prior. Plaintiffs subsequently filed a response to the trust's counterclaims on 25 August 2017.

On 20 March 2018, defendants filed a motion for summary judgment asserting that summary judgment was proper because "(a) [p]laintiffs' claims are barred, as a matter of law, by the applicable statutes of limitations, and/or (b) there is no genuine issue of material fact as to [p]laintiffs' claims and [d]efendants are entitled to summary judgment as a matter of law." A second affidavit of Brown was filed with exhibits on 7 May 2018 and defendants filed plaintiffs' depositions for the trial court's consideration.

Defendants' motion for summary judgment was heard in Wake County District Court before the Honorable Ned W. Mangum on 10 May 2018. On 16 May 2018, the trial court entered an order granting defendants' motion for summary judgment. Defendants then filed a notice of voluntary dismissal dismissing their counterclaims against plaintiffs without prejudice on 27 June 2018. Plaintiffs filed notice of appeal from the 16 May 2018 summary judgment order on 16 July 2018.

II. Discussion

On appeal, plaintiffs contend the trial court erred by entering summary judgment on each of their three claims: trespass, breach of contract, and nuisance.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). The moving party may meet that burden by showing "either that (1) an essential element of the non-movant's claim is nonexistent; (2) the nonmovant is unable to produce evidence which supports an essential element of its claim; or, (3) the non-movant cannot overcome affirmative defenses raised in contravention of its claims." *Anderson v. Demolition*

Dynamics, Inc., 136 N.C. App. 603, 605, 525 S.E.2d 471, 472, *disc. review denied*, 352 N.C. 356, 544 S.E.2d 546 (2000).

> Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate. Further, when the party moving for summary judgment pleads the statute of limitations, the burden is then placed upon the [nonmovant] to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.

Pharmaresearch Corp. v. Mash, 163 N.C. App. 419, 424, 594 S.E.2d 148, 151-52 (quotation marks and citations omitted), *disc. review denied*, 358 N.C. 733, 601 S.E.2d 858 (2004).

1. Trespass

[1] Plaintiffs first take issue with the trial court's grant of summary judgment on their trespass claim. Plaintiffs' trespass claim sought $1,100.00 from defendants, jointly and severally, for damages to plaintiffs' property resulting from Proland's alleged entry onto, and grading of plaintiffs' property to facilitate installation of the wall without plaintiffs' consent.

Plaintiffs contend that the evidence, viewed in the light most favorable to them, is sufficient to support a claim for trespass. However, plaintiffs acknowledge that N.C. Gen. Stat. § 1-52(3) provides a three year statute of limitations for trespass running from the original trespass, and plaintiffs admit in their brief that "Proland's initial trespass occurred no later than April 25, 2014, which is more than three (3) years prior to May 17, 2017 (the date [p]laintiffs filed the [c]omplaint commencing this action)." In fact, Brown's own deposition testimony was that Proland first came onto his property without permission in August 2013. Brown further testified that Proland last came onto his property without permission in February 2014; but then contradicted himself by stating Proland returned to dump dirt at a later time that he was unable to specify.

Despite conceding the complaint was filed more than three years after the original trespass, plaintiffs argue the statute of limitations was tolled to a later date because Proland promised to repair the damage caused by the trespass, began restoration work, and continued to promise additional restoration work until 2 June 2014. Thus, because the complaint was filed within three years of 2 June 2014 on 12 May 2017,

plaintiffs contend the complaint was timely. Plaintiffs, however, acknowledge that they cannot find a case to support their tolling argument. Plaintiffs instead simply assert "there is no case saying that such tolling is not appropriate; and there are cases with respect to other claims where promises to perform, and partial performance, have been held to toll the applicable statute of limitations."

We are not persuaded the tolling of the statutes of limitations for other types of claims applies to the tolling of the statute of limitations for a continuing trespass. We also could not find any case providing for the tolling of the limitations period for trespass. Instead, we are guided by the plain language of the statute, which provides a three year statute of limitations for trespass upon real property and explicitly states, "[w]hen the trespass is a continuing one, the action shall be commenced within three years from the original trespass, not thereafter." N.C. Gen. Stat. § 1-52(3) (2017).

Because plaintiffs' trespass claim was filed more than three years after Proland's first unauthorized entry and grading of plaintiffs' property, the trespass claim was time barred. Consequently, the trial court did not err in granting summary judgment in favor of defendants on plaintiffs' trespass claim.

2. Breach of Contract

[2] Plaintiffs also challenge the trial court's entry of summary judgment on count two for breach of contract. Plaintiffs presented their breach of contract claim for $1,100.00 in damages in the alternative to their trespass claim. Plaintiffs specifically alleged that "[they] permitted Proland to finish their work [on the wall] on the promise to repair [their property]; Proland breached their promise; and [p]laintiffs are entitled to recover damages for Proland's breach of contract."

Although not explicitly alleged in the complaint, plaintiffs now clearly assert that a contract was formed when they allowed Proland to continue its work on the wall from their property in exchange for Proland's promise to restore their property after completion of the wall. Plaintiffs acknowledge that the contract did not specify a date for the completion of Proland's restorative work, but rely on *International Minerals & Metals Corp. v. Weinstein*, 236 N.C. 558, 561, 73 S.E.2d 472, 474 (1952), for the proposition that the law requires performance of an obligation within a reasonable time in the absence of a specified time.

Plaintiffs' argument on appeal is that there is sufficient evidence, when viewed in the light most favorable to them, that "Proland breached

its contractual obligations by failing to restore [their property] within a reasonable amount of time, and by never proposing a scope of work that would, in fact, have restored [their property]."

Like with their trespass claim, plaintiffs acknowledge that their breach of contract claim is limited by a three year statute of limitations provided in N.C. Gen. Stat. § 1-52(1). Plaintiffs, however, again contend the time to bring the claim did not begin to run until 2 June 2014, when they determined a reasonable amount of time had ended. Specifically, plaintiffs argue "the reasonable time for Proland to perform its contractual obligations ended on June 2, 2014; the date that Plaintiffs determined that a reasonable amount of time had passed; and that Proland had breached its contractual obligations." Based on their determination that a reasonable amount of time expired for Proland's performance on 2 June 2014, plaintiffs contend that the complaint filed on 17 May 2017 was timely. However, even if the breach occurred prior to 2 June 2014, plaintiffs contend the statute of limitations was tolled because Proland continued to promise restorative work.

This Court has made clear that, pursuant to N.C. Gen. Stat. § 1-52(1), "[t]he statute of limitations for a breach of contract action is three years. The claim accrues at the time of notice of the breach." *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002); *see also Harrold v. Dowd*, 149 N.C. App. 777, 781, 561 S.E.2d 914, 918 (2002) ("The statute of limitations for a breach of contract claim begins to run on the date the promise is broken."). The question here is when the breach occurred to commence the running of the statute of limitations.

We are not persuaded by plaintiffs' assertion that they are entitled to determine what constitutes a reasonable amount of time and thereby independently determine when a breach of contract occurs. If the issue came down to reasonableness, it would be an issue of fact that precludes summary judgment. However, email correspondence between plaintiffs and Proland entered into evidence in this case shows that the breach occurred at an earlier time.

That email correspondence shows that Proland had begun, and continued restoration efforts to appease plaintiffs. However, an email from 24 April 2014 shows that plaintiffs were pondering legal action if Proland did not return their property to its original condition; and Proland's response shows that it was unable to return the property to its original condition. Specifically, plaintiffs wrote to Proland, in pertinent part, as follows:

> Do you intend to comply with our demand that our property be restored to its original contours.. [Sic] It seems clear that when you took this job that you knew you would have to remove part of our property to build the brick wall on the property line . . . . You made no attempt to discuss this with us or to try to make an arrangement with us that would have been acceptable to us. You just did it. We need to know your intent to determine if we need to take legal action.

Proland responded, in pertinent part, as follows:

> After we took the large tree down at the front corner of the property, you and I met at the site and I explained how I wanted to slope the severe cut back to make it look right but I didn't want to grade your property without your consent. You were in agreement at that time. . . . I am not sure what you mean by original condition because I can't replant the 60ft. tree that we removed. Even though the tree was on [the trust's property], the root ball of the tree was what disturbed your property when the tree was removed.

Even though the email correspondence shows that Proland intended to continue restoration efforts until plaintiffs wrote them on 2 June 2014, "[d]on't bother we have hired a landscaper and we will take care of it[,]" it is clear from the email exchange on 24 April 2014 that Proland was not able to meet plaintiffs' demands. The breach of any agreement for Proland to restore the property to the original condition occurred at that time, and it is from that day, 24 April 2014, that the statute of limitations began to run. Accordingly, the claim for breach of contract in the complaint filed on 17 May 2017, more than three years after the cause of action accrued, was not timely. Therefore, the trial court did not err by entering summary judgment in favor of defendants on the breach of contract claim.

3. Nuisance

[3] In plaintiffs' final claim for nuisance, plaintiffs alleged that the metal fence installed on the property line causes debris to accumulate and obstructs the flow of water in a drainage ditch that runs across the properties, resulting in unwanted erosion on plaintiffs' property. Plaintiffs further alleged that the accumulation of debris and redirection of the water "causes an unreasonable interference with [their] enjoyment and use of their property[.]" Plaintiffs sought damages or, alternatively, an injunction requiring the trust to move the fence.

Plaintiffs now contend summary judgment on the nuisance claim was improper because, when the facts are construed in their favor, genuine issues of material fact exist. Defendants simply respond that there are no material issues of fact.[1] We agree with plaintiffs that material issues of fact preclude summary judgment on this claim.

Our Supreme Court addressed the required showing for a nuisance claim brought by a private property owner against an adjacent private property owner who improperly diverted surface waters onto the plaintiff's property causing damage in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977). In that case, the Court adopted "the rule of reasonable use with respect to surface water drainage" and expressed the rule as follows: "[e]ach possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage." *Id.* at 216, 236 S.E.2d at 796. The Court further explained the rule in *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180 (1980):

> the doctrine of reasonable use adopted in *Pendergrast* defines the extent to which a private landowner may interfere with the flow of surface water on the property of another. This doctrine presupposes that all private landowners must accept a reasonable amount of interference with the flow of surface water by other private landowners if a fair and economical allocation of water resources is to be achieved. The conclusion reached in *Pendergrast* is that a rule of reasonable use with respect to water rights is the best way to promote the orderly utilization of water resources by private landowners.

Id. at 705, 268 S.E.2d at 184.

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1. Although our courts have held the statute of limitations for nuisance is the same as for trespass under N.C. Gen. Stat. § 1-52(3), *see James v. Clark*, 118 N.C. App. 178, 184, 454 S.E.2d 826, 830, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995), our courts have also long held that the diversion onto, or the pooling of water onto another's property is a recurring or renewing trespass, as opposed to a continuing trespass; therefore, the three year statute of limitations does not begin to run from the initial trespass. *See Id.* at 184-85, 454 S.E.2d at 830-31; *Roberts v. Baldwi*n, 151 N.C. 407, 66 S.E. 346 (1909); *Duval v. Atlantic Coast Line R. Co.*, 161 N.C. 448, 77 S.E. 311 (1913); *Whitfield v. Winslow*, 48 N.C. App. 206, 268 S.E.2d 245, *disc. rev denied*, 301 N.C. 405, 273 S.E.2d 451 (1980), *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). Thus, there is no statute of limitations argument with respect to the nuisance claim in this case based on the recurring trespass alleged in the complaint.

In addition to announcing the reasonable use rule, the Court in *Pendergrast* described the inquiry that must be made, explaining that

> a cause of action for unreasonable interference with the flow of surface water causing substantial damage is a private nuisance action, with liability arising where the conduct of the landowner making the alterations in the flow of surface water is either (1) intentional and unreasonable or (2) negligent, reckless or in the course of an abnormally dangerous activity.
>
> . . . .
>
> Regardless of the category into which the defendant's actions fall, the reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, requires a finding that the conduct of the defendant was unreasonable. This is the essential inquiry in any nuisance action.

Pendergrast, 293 N.C. at 216-17, 236 S.E.2d at 796-97 (citations omitted).

Most importantly to this case when reviewing a grant of summary judgment, the Court explained that "*[r]easonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant*." *Id.* at 217, 236 S.E.2d at 797 (emphasis added). The court listed considerations in determining the gravity of the harm to the plaintiff and the utility of the conduct of the defendant, and then emphasized that,

> even should alteration of the water flow by the defendant be "reasonable" in the sense that the social utility arising from the alteration outweighs the harm to the plaintiff, defendant may nevertheless be liable for damages for a private nuisance if the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation. The gravity of the harm may be found to be so significant that it requires compensation regardless of the utility of the conduct of the defendant.

Id. at 217-18, 236 S.E.2d at 797 (quotation marks and citations omitted).

Plaintiffs argue the proper balancing could not be accomplished on defendants' motion for summary judgment. Defendants, however, contend plaintiffs have not established a substantial interference and point

to evidence that Hernandez never used the portion of plaintiffs' property in question, Brown continues to enjoy his property, and the water diversion and erosion is only an issue during those infrequent times when there is lots of rain. Citing *Whiteside Estates Inc. v. Highlands Cove, LLC*, 146 N.C. App. 449, 553 S.E.2d 431 (2001), *Duffy v. Meadows*, 131 N.C. 31, 42 S.E. 460 (1902), and N.C.P.I. -- Civil 805.25, defendants contend plaintiffs have only shown a slight inconvenience or petty annoyance, which is insufficient to support the nuisance claim. Defendants further contend there is nothing unreasonable about their construction of a fence along their property line.

We disagree with defendants' argument. Defendant has essentially performed the fact finder's role by weighing and balancing the evidence. Where the evidence must be weighed and balanced, an issue of fact exists. We note that defendant has even cited the pattern jury instruction for "private nuisance" which puts to the jury the question of whether an interference is substantial, or merely a slight inconvenience or a petty annoyance. *See* N.C.P.I. -- Civil 805.25. This lends support to plaintiffs' argument that the reasonableness inquiry is ordinarily a question for the fact finder.

Construing the evidence in this case in the light most favorable to plaintiffs, the balancing of the gravity of harm to plaintiffs with the utility of the fence to the trust that must be conducted under the reasonable use test adopted in *Pendergrast* was not appropriate for summary judgment. There was sufficient evidence to raise material issues of fact and, therefore, we reverse the trial court's grant of summary judgment in favor of defendants on plaintiffs' nuisance claim.

III. Conclusion

For the reasons discussed, we affirm the trial court's grant of summary judgment in favor of defendants on plaintiffs' trespass and breach of contract claims. However, we reverse the trial court's grant of summary judgment in favor of defendants on plaintiffs' nuisance claim, which presents material issues of fact to be determined under the reasonable use test set forth in *Pendergrast*.

AFFIRMED IN PART, REVERSED IN PART.

Judges BRYANT and DILLON concur.

JANE DOE, PLAINTIFF
v.
WAKE COUNTY, ET AL., DEFENDANTS

No. COA18-109

Filed 2 April 2019

1. Immunity—governmental—tort claims—necessary allegations—waiver of government entity

A plaintiff's tort claims against a county, county agency, and the agency's employees (in their official capacities) for failure to protect her from a dangerous and abusive household were properly dismissed where plaintiff failed to allege in her complaint that the county waived its immunity.

2. Immunity—public officials—tort claims—necessary allegations—malicious conduct

Plaintiff's failure to allege that county employees (in their individual capacities) acted maliciously or outside the scope of their duties—so as to overcome the employees' public official immunity—rendered her tort claims subject to dismissal.

3. Civil Rights—section 1983—state actor—tort allegations—failure to state a claim

Pursuant to the reasoning stated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), plaintiff's claim that the county department of social services failed to protect her from a dangerous home environment did not implicate a constitutional violation under the Due Process Clause or the Equal Protection Clause, because the agency did not have a constitutional duty to protect her. Further, even if plaintiff's equal protection claim was not barred by *DeShaney*, she neither stated a 'class of one' claim, nor did she allege that public officials acted with malice or corruption.

4. Pleadings—motion to amend—denial—futility of amendment

In a case involving tort and civil rights claims against government entities, there was no abuse of discretion in denying plaintiff's motion to amend her complaint to clarify defendants' names because her failure to state a claim upon which relief could be granted rendered any subsequent amendment futile.

5. Abatement—prior pending action doctrine—two suits—substantially similar—dismissal of second suit

Where plaintiff's second complaint was filed during the pendency of her first complaint and was substantially similar to the first one—including the subject matter, claims, factual allegations, relief requested, and parties—the trial court properly dismissed the second complaint under the prior pending action doctrine.

Appeal by Plaintiff from judgment entered 14 July 2017 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

John Locke Milholland IV, Attorney at Law PLLC, by J. Locke Milholland IV, for plaintiff-appellant.

Deputy County Attorney Roger A. Askew, Senior Assistant County Attorney Mary Boyce Wells and Assistant County Attorney Brian K. Kettmer, for defendants-appellees Wake County, et al.

MURPHY, Judge.

Plaintiff, Jane Doe, brought claims against Wake County, Wake County Health Services ("WCHS"), and a number of individual WCHS employees for failing to take action to protect her from a dangerous and abusive household. The Wake County Superior Court dismissed all of Plaintiff's claims under North Carolina Rules of Civil Procedure 12(b)(1), (4), (5), (6), the statute of limitations, and the prior pending action doctrine. After careful review, we affirm the trial court's dismissal of Plaintiff's claims.

BACKGROUND

Plaintiff was born in Wake County in 1996 to a mother who had previously been reported to WCHS for neglecting her first-born child. At birth, Plaintiff tested positive for cocaine, and her mother admitted to using cocaine during her pregnancy. Throughout Plaintiff's youth, WCHS received and investigated at least eight reports indicating her household was a potentially dangerous environment for a child. WCHS investigated the reports and, at various times, referred Plaintiff's mother for counseling, examined Plaintiff for signs of abuse, and provided in-home services to Plaintiff's family.[1]

1. In resolving this appeal, which is comprised solely of procedural issues, we need not describe the specifics of each incident but nevertheless note that the facts of Plaintiff's complaint paint the picture of a tragic and frightening childhood.

Plaintiff sued WCHS and its employees—identified as "John Doe 1, John Doe 2, . . . John Doe N"—in tort and under 42 U.S.C. § 1983 for failing to remove her from the care of her mother at eight different points in time. In response, Defendants asserted a number of affirmative defenses and moved to dismiss the complaint on various grounds. Plaintiff moved for leave to amend her complaint to add parties and three days later filed a second complaint, which named Wake County, WCHS, and a number of WCHS employees in both their individual and official capacities. Defendants moved to dismiss this second complaint on the same grounds as the first and also raised the prior pending action doctrine. The trial court dismissed both of Plaintiff's complaints and denied her motion for leave to amend as futile. Plaintiff appeals.

ANALYSIS

"We review a trial court's decision to dismiss a complaint de novo." *Robert K. Ward Living Trust ex rel. Schulz v. Peck*, 229 N.C. App. 550, 552, 748 S.E.2d 606, 608 (2013). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotations omitted). The trial court dismissed Plaintiff's claims "pursuant to North Carolina Rules of Civil Procedure 12(b)(1), [(4), (5), and (6)], the statute of limitations, and the prior pending action doctrine," but did not delineate which claims were being dismissed on which grounds. Nevertheless, we affirm both of the trial court's dismissal orders.

A. 16 CVS 15483

In her first complaint, Plaintiff alleged forty causes of action: thirty-two tort claims against Wake County, WCHS, and their employees (both in their official and individual capacities), and eight claims under 42 U.S.C. § 1983 alleging constitutional violations. Additionally, Plaintiff moved to amend her complaint and the trial court denied her motion. In subsections 1 and 2 below, we address Plaintiff's tort claims. In subsections 3 and 4, we analyze her federal claims and motion to amend, respectively. In all four subsections, we affirm the trial court's decisions.

1. Tort Claims against Wake County, WCHS, and Employees in their Official Capacity

[1] Plaintiffs bringing claims otherwise barred by governmental immunity must allege a waiver of immunity in their complaint for the trial court to have subject matter jurisdiction over those claims. *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 62-63, 730

S.E.2d 254, 257 (2012). "[A] county normally would be immune from liability for injuries caused by negligent social services employees working in the course of their duties." *Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 340, 694 S.E.2d 405, 408 (2010). Here, Plaintiff "agrees that [her] claims in tort cannot proceed against the County and defendants in their official capacity[,]" but argues "[a]ll tort claims against defendants in their individual capacity should proceed."

Plaintiff correctly recognizes her failure to allege that Wake County waived immunity is fatal to her complaint to the extent it asserts tort claims against the county and its officials. *Clark v. Burke Cnty.*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994) ("When suing a county or its officers, agents or employees, the complainant must allege [a] waiver in order to recover."). The trial court was correct to dismiss all thirty-two of Plaintiff's tort claims against Wake County and WCHS, and those against individual Defendants in their official capacities.

2. "Individual Capacity" Tort Claims

[2] We next address Plaintiff's tort claims against county employees in their individual capacities. *See Wright v. Gaston Cty.*, 205 N.C. App. 600, 602, 698 S.E.2d 83, 86 (2010) ("Plaintiff's complaint also alleges claims against the [defendants] in their individual capacities, for which governmental immunity is not applicable."). The individual Defendants argue they are entitled to dismissal based upon public official immunity because Plaintiff's claims against them in their individual capacities fail "to sufficiently 'pierce the cloak' of public official [immunity] . . . ." We agree.

"Public official immunity is a derivative form of governmental immunity." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012) (internal citations omitted). The doctrine distinguishes between public officials, who are entitled to immunity, and public employees, who are not. *Id.* Social workers are generally considered public officials, or state employees who exercise some amount of sovereign power through acts "requiring personal deliberation, decision and judgment." *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 421, 520 S.E.2d 595, 602 (1999); *Meyer v. Walls*, 347 N.C. 97, 113-14, 489 S.E.2d 880, 889 (1997).

To rebut a claim of public official immunity and hold a public official liable in her individual capacity, a plaintiff's complaint must allege "that [the official's] act, or failure to act, was corrupt or malicious, or that [the official] acted outside of and beyond the scope of his duties." *Hobbs*, 135 N.C. App. at 422, 520 S.E.2d at 603. Additionally, our Supreme Court has

noted, "a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." *Meyer*, 347 N.C. at 114, 489 S.E.2d at 890.

The facts alleged in Plaintiff's complaint do not support a conclusion the individual workers acted corruptly, maliciously, or outside the scope of their duties. Plaintiff does not offer any facts or forecast any evidence that any individually named defendant took actions that went beyond—at worst—simple negligence such that her complaint pierces the cloak of public official immunity. "Because we presume [the] defendant[s] discharged [their] duties in good faith and exercised [their] power in accordance with the spirit and purpose of the law and plaintiffs have not shown any evidence to the contrary," we hold Plaintiff's complaint "fail[s] to allege facts which would support a legal conclusion that defendant[s] acted with malice." *Mitchell v. Pruden*, ___ N.C. App. ___, ___, 796 S.E.2d 77, 83 (2017).

The allegations in Plaintiff's complaint do not overcome Defendants' public official immunity, and the trial court did not err in granting the Defendants' motion to dismiss under the doctrine of public official immunity.

3. 42 U.S.C. § 1983 Claims

[3] Plaintiff argues the trial court's dismissal of her 42 U.S.C. § 1983 claims for failure to state a claim under Rule 12(b)(6) was improper. We disagree. Dismissal under 12(b)(6) is appropriate where "the complaint on its face reveals that no law supports the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). "The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Here, Plaintiff has not alleged any claim entitling her to relief under 42 U.S.C. § 1983.

a. Due Process Clause

Plaintiff's suit is almost identical to that in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249 (1989). In *DeShaney*, the Department of Social Services ("DSS") suspected a child had been abused by his father, but nevertheless allowed him to return home with his father. *Id.* at 192, 103 L. Ed. 2d at 256-57. Shortly thereafter, the child was beaten nearly to death by his father and sued DSS under 42 U.S.C. § 1983. *Id.* at 193, 103 L. Ed. 2d at 257. The U.S.

Supreme Court stated that the Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202, 103 L. Ed. 2d at 263. "Because . . . the State had no constitutional duty to protect [the child] against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause." *Id.*

Under *DeShaney*, a state actor's failure to take affirmative action to protect a private individual is not actionable under the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* As such, Plaintiff may not recover under 42 U.S.C. § 1983 and the Due Process Clause. We affirm the trial court's dismissal of those claims.

b. Equal Protection Clause

Plaintiff also argues the trial court erred in dismissing her 42 U.S.C. § 1983 claims to the extent they allege violations of her rights under the Equal Protection Clause. We disagree.

Plaintiff's "class of one" equal protection argument is largely premised upon an incorrect interpretation of two footnotes in *DeShaney*. Footnote two denies the plaintiff's argument that his equal protection rights were violated because he had an "entitlement" to receive protective services. *Id.* at 195, 103 L. Ed. 2d at 258, note 2. Similarly, footnote three makes the common-sense statement that "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 197, 103 L. Ed. 2d at 259, note 3. Both footnotes are, of course, dicta, and neither dilutes the case's central holding that a state social worker's failure to take affirmative action to protect a private individual does not amount to a constitutional violation. *Id.* at 202, 103 L. Ed. 2d at 263. Plaintiff does not cite any authority in our jurisdiction or elsewhere that states otherwise.

Assuming *arguendo* Plaintiff's equal protection claim is not barred by *DeShaney*, Plaintiff nevertheless fails to state a "class of one" equal protection claim upon which relief may be granted. "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (2000). On its face, this pleading requirement is similar to that of a plaintiff attempting to pierce the cloak of public official immunity. As we stated in Section A-2, *infra*, Plaintiff's complaint fails to adequately allege facts that the public officials acted

with malice or corruption, and for the same reason she has failed to state a class of one equal protection claim.

WCHS's failure to take affirmative actions to protect Plaintiff from a dangerous household is not a constitutional violation and therefore does not render Wake County or its agents liable in the manner Plaintiff's complaint alleges. The trial court's dismissal of Plaintiff's 42 U.S.C. § 1983 claims is affirmed.

4. Plaintiff's Motion to Amend

[4] Plaintiff additionally argues the Superior Court abused its discretion by denying Plaintiff's *Motion for Leave to Amend* her first suit. "A trial court abuses its discretion only where no reason for the ruling is apparent from the record. Our Courts have held that reasons justifying denial of leave to amend [include] . . . futility of amendment." *Rabon v. Hopkins*, 208 N.C. App. 351, 353-54, 703 S.E.2d 181, 184 (2010) (internal citation omitted). Here, it is apparent from the record that the trial court's reason for denying Plaintiff's motion was that such an amendment would be futile.

Plaintiff sought leave to amend her first complaint in order to replace defendants "John Doe 1, John Doe 2, etc." with named defendants. However, for the reasons discussed above, Plaintiff failed to state a claim upon which relief could be granted. Therefore, any further amendment would be futile and the Superior Court's denial of Plaintiff's *Motion for Leave to Amend* was not an abuse of discretion.

B. 17 CVS 3821

[5] For the reasons stated in Section A, *infra*, the trial court did not err in dismissing Plaintiff's second complaint. Additionally, the prior pending action doctrine serves as an independent bar to Plaintiff's second suit.

When "the parties and subject matter of the two suits are substantially similar, the first action will abate the subsequent action if the prior action is determined to be pending in a court within the state having like jurisdiction." *Eways v. Governor's Island*, 326 N.C. 552, 559, 391 S.E.2d 182, 186 (1990). "This is so because the court can dispose of the entire controversy in the prior action" and, by doing so, render the subsequent action moot. *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990). "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues

involved, and relief demanded?" *Cameron v. Cameron*, 235 N.C. 82, 85, 68 S.E.2d 796, 798 (1952).

Plaintiff brought her second suit against Wake County and WCHS during the pendency of her first suit. Both were filed in the Wake County Superior Court, the first on 22 December 2016 and the second on 27 March 2017. The subject matter of both cases is identical; Plaintiff asserted exactly the same claims, made virtually identical factual allegations, and demanded the same relief in both complaints. Additionally, Plaintiff's suits presented substantially identical parties, the only difference being that the first suit listed "John Doe 1, John Doe 2, . . . John Doe N," and the second suit listed named Defendants previously identified as John Doe. Both cases are between Plaintiff and Wake County, WCHS, and employees thereof. The trial court did not err in dismissing Plaintiff's second suit, 17 CVS 3821, under the prior pending action doctrine.

CONCLUSION

We affirm the trial court's orders granting Defendants' motions to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), in 16 CVS 15483, and the prior pending action doctrine, in 17 CVS 3821. Likewise, we affirm the trial court's denial of Plaintiff's *Motion for Leave to Amend*.

AFFIRMED.

Judges STROUD and ZACHARY concur.

ERIC ERICKSON, PETITIONER
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA18-820

Filed 2 April 2019

1. Appeal and Error—contested case—Office of Administrative Hearings—notice of appeal—file stamp requirement—Rule 2

Although petitioner's notice of appeal from a final decision of the Office of Administrative Hearings was neither file-stamped nor time-stamped—and, therefore, bore a jurisdictional defect under Appellate Rules 3 and 18—the Court of Appeals invoked Appellate Rule 2 to hear the appeal and prevent manifest injustice.

2. Public Officers and Employees—contested case—dismissal—internal grievance procedure—inadequate notice

Where a state agency failed to meet its burden under the State Human Resources Manual of informing petitioner, a dismissed employee, of the timeframe for challenging his dismissal through the agency's internal grievance process, the Office of Administrative Hearings erred by dismissing petitioner's contested case for lack of subject matter jurisdiction for failure to exhaust administrative remedies. The agency had provided petitioner with a form containing contradictory instructions for initiating the internal grievance process.

Appeal by petitioner from final decision entered 8 May 2018 by Administrative Law Judge Selina Malherbe in the Office of Administrative Hearings. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for the State.

Humphrey S. Cummings for petitioner-appellant.

TYSON, Judge.

Eric Erickson ("Petitioner") appeals a final decision from the Office of Administrative Hearings ("OAH"), which dismissed his contested case petition for the lack of subject-matter jurisdiction. We reverse and remand.

I. Background

Petitioner worked for the North Carolina Department of Public Safety ("DPS") as a probation and parole officer in Charlotte. On 8 January 2018, Petitioner was dismissed for cause from DPS. Petitioner initiated a challenge to his dismissal through DPS' internal grievance process on 23 January 2018.

"Step 1" of the grievance process consists of a mediation conference. Mediation between Petitioner and DPS personnel was conducted on 21 February 2018. The mediation conference ended in an impasse. Petitioner was provided with a copy of DPS Form HR 556, which provides notice of an employee's appeal to "Step 2" of DPS' grievance process, if an impasse occurs at "Step 1." The heading of the Form HR 556 provided to Petitioner states, in relevant part: "To appeal to Step 2 of the grievance process, this form must be *filed* within **five (5) calendar days** following an impasse in mediation. If this form is not *received* within this timeframe, it will not be accepted." (First and third emphasis supplied). Above the signature line for employees, Form HR 556 states:

> I understand that it is my responsibility *to mail*, email, or hand deliver my Step 2 Appeal to the Grievance Intake Coordinator to *initiate* the appeal process within five (5) calendar days of the mediation impasse.
>
> I understand that my signature acknowledges that I have been advised of Step 2 appeal rights and timeframes. (Emphasis supplied).

The Employee Grievance Policy section of the State Human Resources Manual, included within the record on appeal, states, in relevant part: "At the end of the mediation session, *the agency shall inform the grievant of the Step 2 grievance process and that the filing must be received by the agency within 5 calendar days of the date of mediation*." (Emphasis supplied). State Human Resources Manual, Employee Grievance Policy, § 7, at 38.

Petitioner's evidence tends to show he signed and dated DPS Form HR 556 on Wednesday, 21 February 2018, but did not file, submit, or mail it on that date. Petitioner purportedly mailed the form on Friday, 23 February 2018. DPS received the form on Tuesday, 27 February 2018, allegedly one day too late to effectuate Step 2. In a letter dated 27 February 2018, DPS advised Petitioner that his Form HR 556 was "untimely received" and that he had "no further appeal rights through the Formal Internal Grievance Process." In response to correspondence

from Petitioner's counsel, DPS sent two subsequent letters re-stating that his Step 2 request was untimely and that he had no further appeal rights through DPS' internal grievance process.

On 23 March 2018, Petitioner filed a petition for a contested case hearing with OAH. DPS filed a motion to dismiss based upon N.C. Gen. Stat. § 126-34.02; the doctrine of sovereign immunity; and Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(3). DPS attached to its motion to dismiss the affidavit of Tracy Perry, the DPS Grievance Intake Coordinator. Included as an exhibit to the affidavit was, among other things, a photocopy of the front of the envelope inside which Petitioner had mailed the completed, dated, and signed Form HR 556.

On 8 May 2018, an administrative law judge (the "ALJ") issued a final decision granting DPS' motion to dismiss Petitioner's contested case petition based upon a lack of subject matter jurisdiction. The ALJ's final decision concluded Petitioner had failed to exhaust administrative remedies. Petitioner filed notice of appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court from a final decision of OAH pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 126-34.02(a) (2017).

III. Notice of Appeal

[1] Petitioner's notice of appeal contained in the record on appeal has neither been file-stamped nor time-stamped to indicate when Petitioner filed it with OAH. DPS has not raised an argument regarding this deficiency in the notice of appeal nor filed a motion to dismiss. Rule of Appellate Procedure 18 governs appeals from OAH and does not specifically state whether the notice of appeal has to be filed with OAH, as Rule 3 requires with notices of appeal in civil cases from superior or district court. *See* N.C. R. App. P. 18.

However, Rule 18(b)(1) provides: "The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise[.]" N.C. R. App. Proc. 18(b). Rule 18(c)(9) requires that the record on appeal contain: "a copy of the notice of appeal from the administrative tribunal[,]" and Rule 18(e) provides: "Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions." N.C. R. App. P. 18(c) and (e)

N.C. Gen. Stat. § 126-34.02(a) specifically provides that a notice of appeal from a contested case "shall be filed with [OAH] and served on all parties to the contested case hearing." N.C. Gen. Stat. § 126-34.02(a).

In appeals from the trial court division and other administrative tribunals, this Court has held the appellant's failure to include a file-stamped copy of the notice of appeal in the record on appeal is a jurisdictional defect, because this Court cannot determine if the notice of appeal was timely filed. *See, e.g.*, *Bradley v. Cumberland Cty.*, __ N.C. App. __, 822 S.E.2d 416, 420 (2018) (dismissing appeal from Industrial Commission where notice of appeal did not have "a time stamp, file stamp, or any other designation" showing the Commission had received notice of appeal); " *Brooks*, *Comm'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) ("Without proper notice of appeal, this Court acquires no jurisdiction." (citations omitted)).

No prior case deals with the absence of a file stamped notice of appeal from OAH under Rule 18. However, because lack of a file-stamped notice of appeal is a jurisdictional defect in civil appeals under Rule 3 and the statute requires that notices of appeal be filed with OAH within "30 days of receipt of the written notice of final decision[,]" we discern no reason why notices of appeal from OAH should not be required to bear a filed and stamped verification confirming the date and time the notice of appeal was filed with OAH. N.C. Gen. Stat. § 126-34.02(a).

In response to an inquiry regarding OAH's policy and procedures on notices of appeal, OAH indicated that when a party emails OAH a notice of appeal, the party does not receive any confirmation, file-stamp, or notation from OAH. OAH considers the sent date and time on the email to be the file-stamp for purposes of noting when the notice of appeal is filed.

When a party files a notice of appeal through OAH's electronic filing portal, an electronic date and time stamp will be affixed to the filing. OAH provided this Court a copy of Petitioner's notice of appeal, which included the email through which Petitioner had sent the notice of appeal as an attachment.

Petitioner failed to include a copy of this accompanying email in the record. "It is well established that the appellant bears the burden of showing to this Court that the appeal is proper." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). At oral argument before this Court, Petitioner made a motion to treat his notice and record on appeal as a petition for a writ of *certiorari*.

Due to Petitioner's lack of knowledge regarding OAH's policy of not adding a file-stamp to emailed notices of appeal, and DPS' failure to file a motion to dismiss or to argue the notice of appeal was not timely filed,

we find Petitioner would suffer manifest injustice were we to dismiss Petitioner's appeal.

"Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to suspend or vary the requirements of the Rules to prevent manifest injustice to a party, or to expedite decision in the public interest." *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (2005) (quotation marks and brackets omitted). To prevent manifest injustice, we invoke Rule 2 to treat Petitioner's appeal as a petition for a writ of *certiorari* and review Petitioner's arguments on the merits. *See Sarno v. Sarno*, __ N.C. App. __, __, 804 S.E.2d 819, 823 (2017) (treating appeal as petition for writ of *certiorari* despite defect in notice of appeal); *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) ("This Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari and grant it in our discretion." (citations and quotation marks omitted)).

IV. Standard of Review

" 'Our standard of review of a motion to dismiss for lack of [subject matter] jurisdiction . . . is *de novo*.' " *Hunt v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 817 S.E.2d 257, 260 (2018) (quoting *Brown v. N.C. Dep't of Pub. Safety*, __ N.C. App.__, __, 808 S.E.2d 322, 324 (2017)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

V. Analysis

[2] Petitioner argues OAH erroneously dismissed his contested case for lack of subject matter jurisdiction due to his failure to exhaust available administrative remedies. We agree.

Under the North Carolina Human Resources Act:

> Any State employee having a grievance arising out of or due to the employee's employment shall first discuss the problem . . . with the employee's supervisor . . . . *Then the employee shall follow the grievance procedure approved by the State Human Resources Commission.* The proposed agency final decision shall not be issued nor become final until reviewed and approved by the Office of State Human Resources. The agency grievance procedure

> . . . and review shall be completed within 90 days from the date the grievance is filed.

N.C. Gen. Stat. § 126-34.01 (2017) (emphasis supplied).

With regards to the "grievance procedure approved by the State Human Resources Commission," *id.*, the "Employee Grievance Policy," included within the State Human Resources Manual, states "Each agency shall adopt the Employee Grievance Policy as approved by the State Human Resources Commission." State Human Resources Manual, Employee Grievance Policy, § 7, at 26.

Specifically, with regards to grievance appeal rights, the Employee Grievance Policy provides: "At the end of the [Step 1] mediation session, the agency *shall inform* the grievant of the Step 2 grievance process *and* that the filing must be received by the agency within 5 calendar days of the date of mediation." *Id.* at 34. (emphasis supplied).

The Employee Grievance Policy clearly places the burden upon agencies, including DPS, to inform employees of the Step 2 grievance process *and* the timeframe for when Step 2 filings must be received.

At the conclusion of the Step 1 mediation conference, DPS provided Petitioner their standard Form HR 556 to appeal to Step 2 of the grievance process. DPS Form HR 556 contains contradictory and ambiguous language regarding the timeframe an employee has to submit the form. A black-bordered box at the top of the form states: "To appeal to Step 2 of the grievance process, this form *must be filed* within five (5) calendar days following an impasse in mediation. If this form is not *received* within this timeframe, it will not be accepted." (Emphasis supplied).

In the signature section of Form HR 556, the form reads: "I understand that it is my responsibility to *mail*, email, or hand deliver my Step 2 Appeal to the Grievance Intake Coordinator to *initiate* the appeal process *within five (5) calendar days* of the meditation impasse." The discrepancies and inconsistencies between "filed," "received," "mail," and "initiate" within Form HR 556 are insufficient to inform an employee of whether the form has to be *mailed*, *filed*, or *received* within five days of a mediation impasse. DPS Form HR 556 fails to satisfy DPS' burden to inform Petitioner "of the Step 2 grievance process and that the filing must be received by the agency within 5 calendar days of the date of mediation[,]" as required by the State Human Resources Commission's Employee Grievance Policy.

In other contexts, this Court has construed ambiguous language against the drafting party, and in favor of the non-drafting party. *See*, *e.g.*,

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)). Defendant had no role in drafting Form HR 556, and the Employee Grievance Policy places an affirmative duty on state agencies to inform employees of their Step 2 appeal rights and the applicable timeframes. We construe the ambiguities and discrepancies contained within Form HR 556 against DPS and in favor of Petitioner.

Viewed in the light most favorable to him, Petitioner complied with DPS' instructions to "mail" or "file" Form HR 556 within "five calendar days" of the impasse of Step 1 mediation. Petitioner stated in his affidavit, submitted to OAH, that he had mailed Form HR 556 "to the designated address in Raleigh on February 23, 2018." This act occurred within five calendar days of the mediation impasse on 21 February.

DPS contends they received Petitioner's Form HR 556 a day late, on 27 February. At oral argument before this Court, DPS' counsel conceded Petitioner would have had to have mailed Form HR 556 before 27 February for DPS to have received it by that date. DPS Grievance Intake Coordinator Perry noted on the envelope in which Petitioner had mailed his Form HR 556, that the envelope has "No postal markings." While the envelope does not bear a cancellation or post mark, it does bear an electronically printed barcode and nine-digit ZIP code. The envelope also shows Petitioner correctly labeled the mailing address of the Grievance Intake Coordinator, as was listed on Form HR 556, and affixed proper postage.

Petitioner substantially complied with the instructions on Form HR 556, and initiated Step 2 of DPS' grievance procedure by mailing Form HR 556 within five calendar days of the impasse at Step 1 mediation. Petitioner was entitled to proceed to Step 2 of DPS' grievance procedure. We reverse OAH's order granting DPS' motion to dismiss for lack of subject matter jurisdiction for failure to exhaust administrative remedies.

By refusing Petitioner's timely mailed Form HR 556, DPS prevented Petitioner from obtaining a "final agency decision" "reviewed and approved by the Office of State Human Resources" to vest OAH with jurisdiction to hear Petitioner's contested case. N.C. Gen. Stat. §§ 126-34.01, 126-34.02. We reverse and remand the matter to OAH, with instructions to order DPS to permit Petitioner to proceed to Step 2 of DPS' internal grievance process. We express no opinion on the relative merits of the parties' claims or assertions regarding Petitioner's dismissal.

VI. Conclusion

Petitioner timely mailed a completed and signed Form HR 556 to "initiate" Step 2 of DPS' internal grievance procedure. The ALJ erred in concluding Petitioner had failed to exhaust his administrative remedies and in granting DPS' motion to dismiss. We reverse the ALJ's order and remand with instructions for OAH to order DPS to allow Petitioner to proceed to Step 2 of DPS' internal grievance process. *It is so ordered.*

REVERSED AND REMANDED.

Judges STROUD and ARROWOOD concur.

RABO AGRIFINANCE, LLC FKA RABO AGRIFINANCE, INC.,
PLAINTIFF-JUDGMENT CREDITOR
v.
ANGELA SILLS, DEFENDANT-JUDGMENT DEBTOR

No. COA18-846

Filed 2 April 2019

Enforcement of Judgments—loan contract—foreign default judgment—enforceable in North Carolina

Where a North Carolina farmer defaulted on a loan she received from an Iowa company, and where the loan contract included a clause providing that the farmer consented to personal jurisdiction in Iowa, the default judgment that the company obtained against the farmer in an Iowa court was enforceable in North Carolina. Iowa law governed the loan contract because the parties entered into the contract in Iowa; therefore, where the consent to jurisdiction clause was valid under Iowa law, the Iowa court properly exercised jurisdiction over the farmer.

Appeal by plaintiff from order entered 24 April 2018 by Judge Mark E. Klass in Harnett County Superior Court. Heard in the Court of Appeals 30 January 2019.

Womble Bond Dickinson (US) LLP, by Michael Montecalvo, for plaintiff-appellant.

No appellee brief filed.

DIETZ, Judge.

Angela Sills, a farmer in Sampson County, applied for a loan from Rabo Agrifinance, LLC, an Iowa company that offers financing to farmers and other agricultural businesses. The loan contract included a clause providing that Sills consented to personal jurisdiction in the Iowa courts.

Sills later defaulted on the loan and Rabo obtained a default judgment against Sills in an Iowa state court. When Rabo sought to enforce that judgment in North Carolina, Sills sought relief from the judgment under Rule 60(b)(4), arguing that the Iowa court did not have personal jurisdiction over her. The trial court agreed and granted relief from the Iowa judgment.

As explained below, we reverse the trial court's order. The parties' contract is governed by Iowa law and the consent to jurisdiction clause is valid under Iowa law. Accordingly, the Iowa court properly exercised jurisdiction over Sills and the judgment is enforceable in our State courts.

Facts and Procedural History

On 17 December 2007, Angela Sills, a resident of Sampson County, entered into an account agreement with Rabo Agrifinance, LLC, an Iowa business, to secure financing for a farming operation. The agreement contained a clause stating that Sills "knowingly and voluntarily consent[s] to be subject to the jurisdiction in the State of Iowa for purposes of adjudicating any rights and liabilities of the parties." After Sills defaulted on the loan, Rabo obtained a default judgment of $61,113.78 plus interest from a state trial court in Iowa.

Rabo then sought to enforce the Iowa judgment against Sills in North Carolina. Sills moved for relief from the Iowa judgment, asserting that the judgment should be set aside because she had never been in Iowa, had no contacts with Iowa, and was unaware of the consent to jurisdiction clause in the contract. After a hearing, the trial court granted Sills's motion for relief from the judgment under Rule 60(b)(4) based on lack of personal jurisdiction. Rabo timely appealed.

Analysis

This case is governed by the Uniform Enforcement of Foreign Judgments Act, which addresses recognition and enforcement of other states' judgments in the North Carolina court system. N.C. Gen. Stat. §§ 1C-1701–1C-1708. The Act provides that a judgment debtor may seek relief from a foreign judgment on any ground "for which relief from a judgment of this State would be allowed." N.C. Gen. Stat. § 1C-1705(a).

Although this language is broad, it is limited by the Full Faith and Credit Clause of the United States Constitution. As our Supreme Court has explained, "the defenses preserved under North Carolina's UEFJA are limited by the Full Faith and Credit Clause to those defenses which are directed to the validity and enforcement of a foreign judgment . . . such as . . . that the rendering state lacked personal or subject matter jurisdiction." *DOCRX, Inc. v. EMI Servs. of North Carolina, LLC*, 367 N.C. 371, 382, 758 S.E.2d 390, 397 (2014).

Here, the trial court granted relief from the judgment after concluding that the Iowa court lacked personal jurisdiction over Sills. The trial court's order is focused primarily on Sills's contacts with the State of Iowa but we need not address that question because, on appeal, Rabo does not dispute Sills's lack of contact with Iowa generally. Instead, Rabo focuses on the fact that the parties entered into the contract in Iowa and that the contract contains a consent to jurisdiction clause that is enforceable under Iowa law.

We agree with Rabo that the parties entered into this contract in Iowa. The "interpretation of a contract is governed by the law of the place where the contract was made." *Schwarz v. St. Jude Med., Inc.*, __ N.C. App. __, __, 802 S.E.2d 783, 788 (2017). Under both North Carolina and Iowa law, a contract is made in the place where the last act necessary to a complete meeting of the minds of the parties is performed, usually the place of acceptance. *Id.* at __, 802 S.E.2d at 790–91; *Burch Mfg. Co. v. McKee*, 2 N.W.2d 98, 101 (Iowa 1942).

The record indicates that the place of acceptance of this contract was Iowa. The contract, entitled "Account Agreement" is, in essence, a credit application. It provides expressly that when the credit application is "approved by [Rabo] in writing, [Rabo] shall then notify you of its approval," that there is no agreement until "a written commitment [is] signed by [Rabo]," and that "the acceptance and approval of the Application and this Agreement occurred in Cedar Falls, Iowa and that performance of this Agreement by you involves payment to [Rabo] in Cedar Falls, Iowa." Thus, under both Iowa and North Carolina law, acceptance of this contract occurred in Iowa and Iowa law applies to the contract. *Schwarz*, __ N.C. App. at __, 802 S.E.2d at 790–91; *Burch*, 2 N.W.2d at 101.

The contract contains a consent to jurisdiction clause providing that Sills consents to personal jurisdiction in the Iowa courts:

> **Consent to Jurisdiction**: . . . You knowingly and voluntarily consent to be subject to the jurisdiction in the State of

> Iowa for purposes of adjudicating any rights and liabilities of the parties pursuant to this Agreement, with venue to be in the Iowa District Court for Black Hawk County, Iowa, or the United States Federal District Court for the Northern District of Iowa.

Iowa Courts have repeatedly held that this type of consent to jurisdiction clause is "*prima facie* valid and should be enforced." *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W.2d 312, 315 (Iowa Ct. App. 2007). To invalidate the clause, the contesting party must show "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* Applying this reasoning, the Iowa courts have rejected arguments that a consent to jurisdiction clause should be invalidated because the clause was not prominently displayed or the party challenging it claimed not to have read or understood it when agreeing to the contract terms. *Id.*; *EFCO Corp. v. Norman Highway Constructors, Inc.*, 606 N.W.2d 297, 300 (Iowa 2000).

We find nothing in the record suggesting that the clause is invalid under Iowa law. Although Rabo unquestionably is a more sophisticated party than Sills, the contract language is clear, Sills understood that Rabo was an Iowa business, and Sills had a full opportunity to review the contract before agreeing to its terms. Accordingly, the trial court erred when it found that Sills "did not consent to personal jurisdiction in Iowa." She did so by agreeing to be bound by the terms of the contract. We therefore reverse the trial court's order granting relief from the Iowa judgment under Rule 60(b)(4) on the ground that "Iowa lacked personal jurisdiction" over Sills.

Conclusion

For the reasons stated above, we reverse the trial court's order.

REVERSED.

Judges STROUD and BERGER concur.

STATE OF NORTH CAROLINA
v.
XAVIER LAMAR HORTON, DEFENDANT

No. COA18-997

Filed 2 April 2019

Search and Seizure—reasonable suspicion—traffic stop—vague anonymous tip—car in parking lot of closed business—no trespass or traffic infraction

A police officer lacked reasonable suspicion to stop defendant's vehicle where there was a vague anonymous report of a suspicious male walking around the parking lot of a closed business at 8:40 pm, the officer was familiar with the area and knew there had been break-ins, defendant ignored the officer and continued exiting the parking lot in his vehicle when the officer spoke to him, and defendant did not commit any traffic infractions to justify a traffic stop. The officer had nothing more than a hunch that a crime might be underway, and the trial court erred by denying defendant's motion to suppress.

Appeal by Defendant from Judgment entered 10 April 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashish K. Sharda, for the State.

Grace Tisdale & Clifton, PA, by Michael A. Grace, Greer B. Taylor, and Christopher R. Clifton, for Defendant-Appellant.

INMAN, Judge.

Defendant Xavier Lamar Horton ("Defendant") appeals his convictions for possession with intent to sell or deliver cocaine, possession of a stolen firearm, possession of a firearm by a felon, and attaining habitual felon status. Defendant argues that his motion to suppress evidence obtained in a traffic stop was erroneously denied, contending that the police officer who conducted the stop lacked reasonable suspicion that he was committing, or about to commit, a crime. After thorough review of the record and applicable law, we reverse the trial court's order denying the motion to suppress and vacate Defendant's convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant pled guilty to all charges following the trial court's denial of his motion to suppress. The record and the evidence introduced at trial, consisting of the suppression hearing and Defendant's plea colloquy, tended to show the following:

Sometime after 8:40 pm on 25 November 2016, Officer Nathan Judge ("Officer Judge") of the Graham Police Department in Alamance County received a dispatch call relaying an anonymous report concerning a "suspicious white male," with a "gold or silver vehicle" in the parking lot, walking around a closed business, Graham Feed & Seed.[1] Officer Judge knew that another business across the street experienced a break-in in the past and that there were previous residential break-ins and vandalism in the area.[2]

When Officer Judge arrived at Graham Feed & Seed, he discovered a silver Nissan Altima in the parking lot in front of the business. He saw no one walking in the parking lot. After parking near the southern area exit of the parking lot, Officer Judge stepped out of his patrol vehicle and walked toward the silver car "as [it] was approaching" the exit.[3] When Officer Judge was "within arm's length" of the vehicle, he shined his flashlight toward the closed window of the driver's side of the vehicle and saw Defendant, a black male, in the driver's seat. Defendant did not lower the vehicle window. Officer Judge asked Defendant, "What's up boss man?" Defendant "made no acknowledgement," but merely displayed a "blank expression on his face," and continued to exit the parking lot.

Officer Judge considered Defendant's behavior to be a "little odd," and decided to follow Defendant because he "didn't know what [he] had." After catching up to Defendant's vehicle onto the main road, without "observ[ing] any bad driving, traffic violations, criminal offenses, or furtive movements," Officer Judge activated his patrol lights and siren to initiate a traffic stop.

After Defendant pulled over and stopped his vehicle and lowered the driver's side window, Officer Judge approached, "immediately smelled a

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1. No evidence was introduced for when Officer Judge received the call or when he arrived at the business' parking lot.

2. No evidence was introduced as to when these alleged crimes occurred.

3. The trial court's findings of fact are unclear as to whether the vehicle was already in motion on or before Officer Judge's arrival.

strong odor of marijuana and air fresheners," noticed a female passenger in the vehicle, and called for officer assistance. Officer Judge asked Defendant for his license and registration. Defendant admitted that he did not have his license and provided his name and date of birth. The front seat passenger stated that the vehicle was registered in her name.[4]

After Officer Judge began searching the vehicle, Defendant admitted marijuana would be found in the center console. Officer Judge found marijuana in the console. He also found several plastic baggies containing a "white powder[y] substance" and large amounts of cash in an open purse on the front passenger floorboard, additional baggies with white powdery substance and the top of a scale with white powder residue in the center console, and a stolen black Sig Sauer 9 millimeter firearm in the glove compartment. Officer Judge then arrested Defendant and took him to the police station. Defendant eventually admitted possessing the firearm and admitted that the cash found in the vehicle—totaling $1,292—came from drug sales.

On 31 July 2017, Defendant was indicted for possession of a stolen firearm, possession of a firearm by a felon, possession with intent to sell or deliver cocaine, possession of less than one-half ounce of marijuana, maintaining a vehicle used to keep and sell cocaine and marijuana, and attaining habitual felon status. On 15 March 2018, Defendant filed a motion to suppress evidence seized as a result of the stop. The motion came on for hearing on 19 March 2018 and Officer Judge was the only testifying witness. After the parties concluded their arguments, the trial court orally denied Defendant's motion, concluding that Officer Judge had formed a reasonable articulable suspicion to justify stopping Defendant. The trial court entered this ruling in a written order on 10 April 2018.

After the trial court denied his motion to suppress, Defendant pled guilty to all charges except those for maintaining a vehicle to keep and sell cocaine and marijuana and possession of less than one-half ounce of marijuana, which were dismissed pursuant to a plea agreement. The trial court consolidated the cocaine and firearms charges into one judgment and sentenced Defendant to the presumptive range of 77 to 105 months' imprisonment, with credit given for 1 day spent in confinement; and ordered him to pay a total of $1,627.50 in restitution and court costs. Defendant filed written notice of appeal on 23 April 2018.[5]

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4. The trial court's findings of fact do not mention that there was a passenger.

5. Defendant did not give oral notice of appeal, as his counsel stipulated to the trial court that, "once the [State] and I have worked out the findings of fact, once [the trial judge]

II. ANALYSIS

A. Jurisdiction

As a preliminary matter, we address whether this Court has jurisdiction to hear Defendant's appeal from the superior court's order denying his motion to suppress.

Upon a guilty plea, a defendant has the right to appeal an order denying a motion to suppress evidence so long as it is "an appeal from a judgment of conviction." N.C. Gen. Stat. § 15A-979(b) (2017). If the defendant merely appeals the denial of his motion, rather than the final judgment, this Court lacks jurisdiction over the appeal. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010) ("Although Defendant preserved his right to appeal by filing his written notice of intent to appeal from the denial of his motion to suppress, he failed to appeal from his final judgment, as required by [Section] 15A-979(b).").

Here, though Defendant timely filed written notice of appeal, the notice, much like in *Miller*, attempts to appeal the trial court's "Order denying his Motion to Suppress Evidence" instead of the judgment underlying his convictions. We thus conclude that Defendant's notice was deficient and he failed to properly preserve his right to appeal.

Nonetheless, we have "the option 'to exercise our discretion to treat [D]efendant's appeal as a petition for certiorari' in order to reach the merits" of his argument. *State v. McNeil*, __ N.C. App. __, __, 822 S.E.2d 317, 321 (2018) (quoting *State v. Phillips*, 149 N.C. App. 310, 314, 560 S.E.2d 852, 855 (2002)) (alterations in original). Therefore, pursuant to N.C. Gen. Stat. § 7A-32(c), we will "treat [D]efendant's appeal as a petition for certiorari and grant the writ to address the merits of this appeal." *Phillips*, 149 N.C. App. at 314, 560 S.E.2d at 855.

B. Reasonable Suspicion for the Traffic Stop

The sole issue on appeal is whether the trial court erred in denying Defendant's motion to suppress evidence resulting from the traffic stop. In reviewing the denial of a defendant's motion to suppress, we "determine whether there was competent evidence to support the trial court's underlying findings of fact" and "whether the findings of fact support the trial court's ultimate conclusions of law." *State v. Fleming*, 106 N.C. App. 165, 168, 415 S.E.2d 782, 784 (1992). We review the trial

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sign[s] it, then we'll give notice of appeal at that time." Defendant only reserved his right to appeal in open court, and the trial court's judgment stated as such.

court's conclusions of law *de novo*, "consider[ing] the matter anew and freely substitut[ing] [our] own judgment for that of the trial court." *State v. Knudsen*, 229 N.C. App. 271, 281, 747 S.E.2d 641, 649 (2013).

Generally, "the United States and North Carolina Constitutions protect an individual against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). In analyzing what constitutes a "reasonable seizure," the United States Supreme Court has consistently held that "a police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968)). Traffic stops are considered seizures " 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Murray*, 192 N.C. App. 684, 687, 666 S.E.2d 205, 207 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979)).

Reasonable suspicion is "based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training."[6] *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). "A court must consider the totality of the circumstances—the whole picture—in determining whether a reasonable suspicion to make an investigatory stop exist[ed]." *State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (quotations and citation omitted). While reasonable suspicion is easier than proving probable cause, "and requires a showing considerably less than preponderance of the evidence," *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (citation and quotation marks omitted), there must be enough suspicion "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).

Because Defendant does not challenge the trial court's findings of fact, they "are deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d

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6. Our Supreme Court in *State v. Nicholson*, 371 N.C. 284, 293, 813 S.E.2d 840, 846 (2018), recently reemphasized the principle that a police officer's subjective thoughts are irrelevant when reviewing whether reasonable suspicion objectively existed. "Accordingly, we do not consider [Officer Judge's] subjective analysis of the facts as probative of whether those facts—viewed objectively—satisfy the reasonable suspicion standard necessary to support [D]efendant's seizure." *Id.*

733, 735-36 (2004). We need only determine whether the trial court's findings support its conclusion of law that Officer Judge had reasonable suspicion to stop Defendant.

The trial court made the following relevant findings of fact:

> 1. On or about November 25, 2016, Officer Nathan Judge with the Graham Police Department received a call from Communications that a tip came in of a suspicious white male walking around the business of Graham Feed & Seed . . . ;
>
> 2. That the tip also included a suspicious gold or silver vehicle in the parking lot of the business;
>
> 3. That there was no description of what the suspicious activity was and no timeframe as to how long the caller observed this suspicious activity;
>
> 4. That the tip came in around 8:40p.m. at night;
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> 5. That before Officer Judge arrived to the business, he was familiar with the area and knew that there had been residential break-ins in the area, the business across the street had been broken into, and there had been vandalism in the area;
>
> 6. That the officer did not testify to a specific time frame when the previous break-ins had occurred;
>
> 7. That when Officer Judge arrived, he saw a silver car in the parking lot in front of the business;
>
> 8. That the business was closed and there were no other cars in the parking lot;
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> 9. That Officer Judge did not see anyone walking around the business and did not see anyone outside of the vehicle;
>
> 10. That the business does not a have a "no trespassing" sign on its premises;
>
> 11. That Officer Judge pulled his vehicle onto the southern part of the parking lot of the Graham Feed & Seed, exited his patrol car, retrieved his flashlight and approached the silver car as the silver car was approaching the roadway, near the exit of the parking lot;
>
> 12. That Officer Judge approached the silver car, shone [sic] a flashlight into the face of the driver, and said "What's up boss man"?;

13. That the windows on the silver car were closed;

14. That Officer Judge could not see inside the silver car except when he shined his flashlight into the face of the driver;

15. That the driver made no acknowledgment of the officer, and left the parking lot of the business;

16. That Officer Judge acknowledged that [Defendant] was not required to stop when the officer approached [D]efendant's vehicle;

17. That Officer Judge was within arm's length of the silver vehicle at this time;

18. That Defendant is a black male;

19. That Officer Judge then followed the silver vehicle because he didn't know what he had;

20. That Officer Judge knew that other officers park their patrol cars in the gravel parking lot after hours for various reasons;

21. That Officer Judge did not know if this vehicle was in the process of turning around in the parking lot;

22. That between the time of following the silver vehicle and before effectuating the stop, Officer Judge did not observe any bad driving, traffic violations, criminal offenses, or furtive movements;

23. That Defendant stopped appropriately when Officer Judge activated his blue lights.

We hold that Officer Judge's justification for conducting the traffic stop of Defendant was nothing more than an "inchoate and unparticularized suspicion or 'hunch.' " *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 7 (1989) (quotation and citations omitted).

"Where the justification for a warrantless stop is information provided by an anonymous informant, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability to support the police intrusion on a detainee's constitutional rights." *State v. Johnson*, 204 N.C. App. 259, 263, 693 S.E.2d 711, 715 (2010) (citing *Illinois v. Gates*, 462 U.S. 213, 76 L. E. 2d 527 (1983)). Indices of reliability can come in two forms: (1) the tip itself provides enough detail and information to establish reasonable suspicion, or (2) though the tip lacks independent reliability, it is "buttressed by sufficient police corroboration." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 630 (2000).

Absent corroboration, an anonymous tip rarely supports reasonable suspicion because, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if [the] allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000) (quotations and citations omitted). As stated by our Supreme Court in *Hughes*:

> [A]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Hughes, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *J.L.*, 529 U.S. at 272, 146 L. E. 2d at 261). Consequently:

> The type of detail provided in the [anonymous] tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip.

Johnson, 204 N.C. App. at 264, 693 S.E.2d at 715.

In *Hughes*, police officers received an anonymous tip that a person named "Markie" would be arriving in Jacksonville from New York City by bus around 5:30 pm, possessing marijuana and cocaine. 353 N.C. at 201, 539 S.E.2d at 627. The tip described Markie as a "dark-skinned Jamaican from New York who weighs over three hundred pounds," about "six foot, one inch tall or taller," about 20-30 years old, and would be "clean cut with a short haircut and wearing baggy pants." *Id.* at 201-02, 539 S.E.2d at 627. The informant stated that Markie "sometimes" travelled to Jacksonville on weekends before it got dark, "sometimes" took a taxi from the bus station, "sometimes" had an overnight bag, and "would be headed to North Topsail Beach." *Id.* at 202, 539 S.E.2d at 627. When the officers reached the bus station, they saw a bus from Rocky Mount, rather than New York City, arrive around 3:50 pm. *Id.* The officers saw the defendant, who "matched the exact description [they] had been given and was carrying an overnight bag," not exiting the bus but entering a taxi. The taxi traveled toward a highway intersection where, depending

on which way the taxi turned, would lead to either Wilmington or Topsail Beach. *Id.* at 202, 539 S.E.2d at 628. The officers stopped the taxi before it reached the intersection. *Id.* The *Hughes* court concluded that, "[w]ithout more, these details [were] insufficient corroboration because they could apply to many individuals," as the information was "peppered with uncertainties and generalities." *Id.* at 209, 539 S.E.2d at 632.

In *Johnson*, officers received an anonymous tip that a "black male wearing a white t-shirt and blue shorts was selling illegal narcotics and guns" out of a blue Mitsubishi on a street corner in a local housing community. 204 N.C. App. at 260-61, 693 S.E.2d at 713. The tipster provided a vehicle license plate number, WT 3456, but did not provide a name of the suspect. *Id.* Before the officers arrived at the described location, the tipster called back and informed the officers that the suspect left the area, "but would return shortly." *Id.* at 261, 693 S.E.2d at 713. The officers then stationed themselves near one of the only two entryways into the neighborhood and waited. *Id.* Soon thereafter, the officers saw a blue Mitsubishi, with license plate number WTH 3453, being driven by a black male wearing a white T-shirt. *Id.* Through a plate check, the officers discovered that it was registered to a black male whose driver's license had been suspended. *Id.* An officer stopped the defendant about "100 yards from the original area mentioned in the tip." *Id.* at 261, 693 S.E.2d at 714. We held that the stop was not based on reasonable suspicion because the tip "offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator." *Id.* at 263, 693 S.E.2d at 714-15. Thus, because of "the failure of the officers to corroborate the tip's allegations," it lacked sufficient indicia of reliability to justify the stop. *Id.* at 263, 693 S.E.2d at 715.

The anonymous tip that led Officer Judge to stop Defendant reported no crime and was only partially correct. Although there was in fact a silver car in the business' parking lot around 8:40 pm, the tip also said it could have been gold and there was no white male in the parking lot or in the vehicle. Additionally, not only did the tip provide substantially less detail than the tips in *Hughes* and *Johnson*, it merely described the individual as "suspicious" without any indication as to why, and no information existed as to who the tipster was and what made the tipster reliable. Like in *Hughes* and *Johnson*, "there [is] nothing inherent in the tip itself to allow a court to deem it reliable and to provide [Officer Judge] with the reasonable suspicion necessary to effectuate a stop." *Johnson*, 204 N.C. App. at 264-65, 693 S.E.2d at 716.

The vague tip that led Officer Judge to stop Defendant and the other circumstances in this case are similar to those this Court has previously held were insufficient to support reasonable suspicion for a traffic stop. *Murray*, 192 N.C. App. at 684, 666 S.E.2d at 205; *State v. Chlopek*, 209 N.C. App. 358, 704 S.E.2d 563 (2011). *Murray* arose from the following facts: At around 3:40 am, an officer was performing a property check of an industrial park "as part of a 'problem oriented policing project' . . . following reports of break-ins of vehicles and businesses." 192 N.C. App. at 684, 666 S.E.2d at 206. When the officer rounded one of the buildings, he saw the defendant's car leave an area the officer had already checked. *Id.* at 684-85, 666 S.E.2d at 206. The officer followed the vehicle and made a traffic stop without observing any illegal activity or traffic violation. *Id.* at 685, 666 S.E.2d at 206. Similarly in *Chlopek*, at 12:05 am, officers were in a partially-developed subdivision conducting a separate traffic stop when they noticed the defendant's vehicle heading from the subdivision entrance in the direction of undeveloped lots. 209 N.C. App. at 358-59, 704 S.E.2d at 564. One of the officers thought that the defendant "seemed a little nervous in his manner [in] observing" the officers. *Id.* at 359, 704 S.E.2d at 564. Prior to the unrelated stop, the officers "had been put on notice that there had been a large number of copper thefts from" undeveloped portions of other subdivisions, but had received no such reports for that subdivision. *Id.* When the defendant's vehicle returned to the subdivision entrance, the officers stopped the defendant's car. *Id.*

In both *Murray* and *Chlopek*, we held that officers lacked reasonable suspicion to stop defendants because the majority, if not all, of the trial court's findings related to the mere generalized description of the area. *See Murray*, 192 N.C. App. at 689, 666 S.E.2d at 208 ("Officer Arthur never articulated any specific facts about the vehicle itself . . .; instead, all of the facts relied on by the trial court . . . were general to the area . . . and would justify the stop of *any* vehicle there." (emphasis in original)); *Chlopek*, 209 N.C. App. at 363, 704 S.E.2d at 567 ("[A]s in *Murray*, the facts relied upon by the trial court in concluding that reasonable suspicion existed were general to the area[.]").

Here, much like in *Murray* and *Chlopek*, the trial court's findings of fact concerning Officer Judge's knowledge about criminal activity refer to the area in general and refer to no particularized facts. Officer Judge did not articulate how he was "familiar with the area," how he "knew that there had been residential break-ins," or how much "vandalism" and other crimes had been occurring. The findings also stipulated that there was no "specific time frame [given for] when the previous break-ins had occurred."

Nor can we agree with the State's argument that Officer Judge either corroborated the tip or formed reasonable suspicion of his own accord when he arrived at the parking lot. The State points to factors noted in the trial court's findings that have historically been cited in the totality of the circumstances analysis to support establishment of reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. E. 2d 570, 576 (2000) (high-crime area); *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (2009) (unusual hour of the day); *Watkins*, 337 N.C. at 443, 446 S.E.2d at 71 (businesses in vicinity were closed). Although these factors, in other contexts, can help establish reasonable suspicion, they are insufficient given the other circumstances in this case.

The State asserts that Defendant's "nervous conduct" and "unprovoked flight" supported Officer Judge's reasonable suspicion. But the trial court did not make either of those findings, and it is not within the authority of this Court to do so. In resolving a motion to suppress, the trial court "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982). We consider only the "cold, written record" before us. *Id.* at 135, 291 S.E.2d at 620 (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971)). The trial court's findings speak nothing of Defendant's demeanor—other than his lack of acknowledgement of Officer Judge—or the manner in which Defendant drove and exited the parking lot. The State's argument in this respect is unconvincing.

The State also relies on prior decisions for the general proposition that reasonable suspicion can be based on a suspect's suspicious activities in an area known for criminal activity at an unusual hour. In *State v. Blackstock*, officers were patrolling in an unmarked vehicle as part of a "Crime Abatement Team" in an area where "statistical data indicated [the] area had a problem with robberies and break-in enterings." 165 N.C. App. 50, 53, 598 S.E.2d 412, 414 (2004). Around 11:45 pm, the officers found two men walking along the front of closed businesses in a strip mall. *Id.* The men walked very slowly and kept looking in and out of the businesses' windows. *Id.* at 53, 598 S.E.2d at 415. When a clearly marked police cruiser arrived at the scene, the two men "immediately turned around" and "immediately began to walk hurriedly backward." *Id.* The two men eventually entered a vehicle which was concealed from public view along the perimeter of the strip mall. *Id.* As the officers followed the two men, the vehicle drove slowly through a gas station and a fast-food restaurant parking lot without stopping, while the man in the passenger seat kept looking back at the officers following them. *Id.*

We concluded, based on a litany of factors including that the strip mall had been "targeted by law enforcement officers as a high crime area," the officers had reasonable suspicion to stop the two men. *Id.* at 59, 598 S.E.2d at 418.

In *State v. Butler*, a detective saw the defendant "in the midst of a group of people congregated on a corner known as a 'drug hole,' " where the detective had been conducting "daily surveillance for several months." 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992). The detective had made four to six drug-related arrests on the same corner in the previous six months. *Id.* After the detective and the defendant made eye contact, the defendant "immediately moved away," which the detective construed to indicate flight. *Id.* The detective then stopped the defendant and asked him for his identification. Our Supreme Court concluded that the criminal activity in the area, taken together with the detective's experience and observation of the defendant's reaction to police presence, rendered the stop constitutional. *Id.* at 232, 415 S.E.2d at 721.

In *State v. Fox*, at about 12:50 am, an officer observed the defendant's vehicle travelling down a dead-end street "where several padlocked businesses were located." 58 N.C. App. 692, 692, 294 S.E.2d 410, 411 (1982). The officer knew several break-ins had occurred in the area and had taken a report of a break-in from one of the businesses that evening. *Id.* The officer watched the vehicle stop and turn around, and, when the vehicle was passing the officer's patrol car, the defendant "cocked" his head away. *Id.* The officer stopped the defendant's vehicle absent any observed traffic violations. We held that the officer had reasonable suspicion for the stop. *Id.* at 695, 294 S.E.2d at 413.

In *State v. Tillett*, at approximately 9:40 pm, an officer was patrolling alone in a " 'heavily wooded' area containing summer cottages," with only one of which being occupied at the time. 50 N.C. App. 520, 521, 274 S.E.2d 361, 362 (1981). The officer was aware of frequents reports of "firelighting" deer at that time of year. *Id.* That night, it was raining and the officer was driving down a narrow, one-way dirt road that made it difficult for two vehicles to pass each other. *Id.* The officer spotted a car carrying the defendant and a passenger and "did not observe an inspection sticker on the vehicle." *Id.* The officer did not stop the defendant's car, as it was "his intention [] to allow the vehicle to go to the [lone] occupied dwelling" in the area. *Id.* After the officer continued on for about "fix or six miles," he spotted the defendant's car coming out of the wooded area. The officer then stopped his patrol vehicle in front of the car and put his lights on. *Id.* at 521-22, 274 S.E.2d at 362. We concluded

that, based on the facts found by the trial court, the officer would not have been unreasonable in thinking that the defendant and his passenger were "firelighting" deer or burglarizing the unoccupied homes. *Id.* at 524, 274 S.E.2d at 364.

Unlike the facts in *Blackstock*, *Butler*, *Fox*, and *Tillett*—where the officers were already in areas because they were *specifically* known and had detailed instances of criminal activity—Officer Judge arrived at the parking lot because of a vague tip about an undescribed white male engaged in undescribed suspicious activity in a generalized area known for "residential break-ins" and "vandalism."

The trial court made no findings as to what suspicious activity by Defendant warranted Officer Judge's suspicion. The trial court found that when Officer Judge approached Defendant's car and called out to him, Defendant made "no acknowledgement." Officer Judge admitted at trial that "[D]efendant was not required to stop" when he approached him. While it might seem socially peculiar—possibly uncouth—that someone, like Defendant here, would ignore a police officer's confrontation, such an attempt by Officer Judge at a "consensual encounter" provided Defendant the "liberty 'to disregard [Officer Judge] and go about his business.' " *State v. Sinclair*, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L.Ed.2d 389, 398 (1991)).

Accordingly, we are unpersuaded by the State's argument and agree with Defendant that the trial court erred in concluding that Officer Judge had reasonable suspicion to stop him. Though the tip did bring Officer Judge to the Graham Feed & Seed parking lot, where he indeed found a silver car in front of the then-closed business with no one else in its vicinity at 8:40 pm, and although Defendant did not stop for or acknowledge Officer Judge, we do not believe these circumstances, taken in their totality, were sufficient to support reasonable suspicion necessary to allow a lawful traffic stop. When coupled with the facts that (1) Defendant was in a parking lot that did "not have a 'no trespassing' sign on its premises"—making it lawful for Defendant to be there; (2) Defendant was not a white male as described in the tip; (3) Defendant's car was possibly in motion when Officer Judge arrived in the parking lot; (4) Defendant had the constitutional freedom to avoid Officer Judge; and (5) Defendant did not commit any traffic violations or act irrationally prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, any criminal activity.

Concluding otherwise would give undue weight to, not only vague anonymous tips, but broad, simplistic descriptions of areas absent specific and articulable detail surrounding a suspect's actions.

REVERSED AND VACATED.

Judges DILLON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
KEITH ALLEN SALTER

No. COA18-747

Filed 2 April 2019

1. Appeal and Error—mootness—sentencing issue

Defendant's appeal from an alleged sentencing error was not moot where, because his probation sentence was automatically stayed pending the appeal, he had not already completed his sentence.

2. Sentencing—prior record level—calculation—stipulation

In a prosecution for misdemeanor stalking, the trial court did not err in sentencing defendant as a Level II offender where he stipulated to his previous conviction of a Class 2 misdemeanor. In effect, defendant stipulated that the facts underlying his prior conviction justified that particular classification; therefore, defendant did not improperly stipulate to a conclusion of law reserved for the trial court, and the trial court was not required to pursue further factual inquiry on the matter.

3. Contempt—criminal—pro se defendant—willfulness—improper closing argument

The trial court properly held a pro se defendant in criminal contempt where defendant willfully behaved in a contemptuous manner by repeatedly raising matters outside the record during his closing argument, contrary to the trial court's multiple warnings over a two-day period.

Appeal by Defendant from Judgment and Order entered 9 August 2017 by Judge Angela B. Puckett in Forsyth County Superior Court. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Keith Allen Salter (Defendant) appeals from (1) his conviction for Misdemeanor Stalking and (2) an Order finding him in criminal contempt. The evidence presented at trial tends to show the following:

On 1 March 2016, Defendant was charged with one count of Misdemeanor Stalking. On 1 April 2016, Forsyth County District Court found Defendant guilty of this offense and entered a suspended sentence. On 5 April 2016, Defendant gave Notice of Appeal to Forsyth County Superior Court, requesting a jury trial.

Defendant was tried *de novo* on the Misdemeanor Stalking charge during the 7 August 2017 Criminal Session of Forsyth County Superior Court. Defendant represented himself *pro se* and did not testify. Throughout the trial, the trial court warned Defendant that he would be held to the same standards as an attorney, given he represented himself *pro se*. On 8 August 2017, the trial court reviewed the closing argument procedures for the next day with Defendant and the State, and the following exchange occurred:

> THE COURT: Okay. All right. Let me talk about the closing arguments. . . .
>
> This will be very important, Mr. Salter, directed mainly to you because you are also the defendant who will be making the closing argument.
>
> THE DEFENDANT: Yes.
>
> THE COURT: You may not -- you chose not to testify. You may not testify, then, through your closing argument. That means you cannot tell the jury, "Here's what I say happened." You can make an argument as to what the evidence showed happened, but you may not testify as you're making that closing argument; does that make sense?
>
> THE DEFENDANT: Yes.

. . . .

THE COURT: So when you are -- I will tell the jury very clearly that you may argue, you may characterize the evidence and attempt to persuade them to a particular verdict, but it would be improper for either side to become abusive, to inject personal experience, to express a personal belief as to the guilt or innocence of the defendant.

Mr. Salter, that makes it tricky for you because you're now not acting as the defendant, you're making a closing argument as a lawyer. So you may argue what the evidence indicates, but again, you may not testify as to what -- to anything outside of what has actually been heard on this witness stand; does that make sense?

THE DEFENDANT: Yes.

THE COURT: Do you understand what I'm saying?

THE DEFENDANT: Yes.

THE COURT: I'm telling you this so that you may prepare your arguments tomorrow. I do not want you to get up here and then me send the jury out and tell you "I'm not going to let you argue that," and you have no idea what you're going to say then. So I'm trying to give you a chance to prepare tonight so that you're able to make an argument tomorrow.

You may, however, give your analysis of the evidence and argue any position or conclusion with respect to any matter at issue.

All right. Do you have any questions, Mr. Salter, about what would be allowed in a closing argument or not allowed.

THE DEFENDANT: No, ma'am. Evidence is allowed, correct?

THE COURT: Anything that has been put into evidence you may refer to, or anything that has been testified to from the witness stand that was admitted into evidence, okay?

Now, something I sustained an objection to, that means it was not admitted into evidence and you cannot argue that; does that make sense?

THE DEFENDANT: Yes.

THE COURT: Any other questions that you wish to ask me about what you will and will not be allowed to argue?

THE DEFENDANT: No, ma'am.

Despite these explicit instructions, Defendant began his closing argument the following day by stating, "Every time you guys left out and went back into that room, I wasn't given an opportunity to present evidence. You haven't seen all the evidence. Every piece of evidence that had, I have on file, is on file but inadmissible." The trial court interrupted Defendant, excused the jury, and gave the following admonishment:

THE COURT: Mr. Salter, I was very clear with you yesterday, that you were not to talk about anything that was not in evidence. You may not then tell the jury that there are things that you didn't get to put in. That is completely improper. If I have to stop you for doing that kind of thing again, I will assume you have nothing left to say to the jury, and we will stop right there.

You may argue -- and I took my time to be very clear so that you could prepare. You may argue anything that is in evidence, what you believe your contention is, but what you may not argue is what took place in this courtroom when the jury was not present; do you understand?

THE DEFENDANT: I understand.

After the jury returned, Defendant again attempted to discuss matters not in evidence, such as his lack of a history of domestic violence, his personal background as a father of three children, and his educational background. The trial court excused the jury for a second time and gave Defendant a final warning.

THE COURT: I will note the jury is outside the presence of the courtroom. Mr. Salter, my patience is wearing thin because I went over this with you repeatedly yesterday. You decided not the [sic] testify, and I indicated to you that you may not testify about things outside of the record in front of the jury. The next time -- listen to me carefully -- that I tell you, I will hold you in contempt, and I will begin contempt proceedings; do you understand me?

THE DEFENDANT: Yes.

> THE COURT: I have indicated to you repeatedly you may not get up and say things outside of the record. You did not testify, so you may not say what your background or what your education is. That's not in record. You may not argue that that letter you didn't write. You may argue that there -- that there may not be evidence, but if there is a letter, you did not testify. You may not avoid cross-examination by testifying in the closing argument. I have been very, very clear, and I took a lot of time yesterday to explain to you what you could not do, and you said you understood; and so far, I have sent the jury out repeatedly because you're doing exactly what I told you not to do. If you violate that again, I will begin contempt proceedings. You may argue any matter that is in the record or any matter that's in evidence. You may not avoid testifying by trying to testify in your closing argument; do you understand what I'm saying to you?
>
> THE DEFENDANT: I can testify -- I can only talk about evidence.
>
> THE COURT: You can talk about -- you may argue that -- you may argue any contention that you have regarding the evidence that was admitted yesterday; anything that was said on the stand, any lack of evidence that you believe wasn't presented, that the State has not met their burden of proof, but you may not testify about things outside of the record; do you understand that?
>
> THE DEFENDANT: Yes.

Upon the jury reentering, Defendant continued his closing argument and stated, "I went to Family Dollar and tried to get the video of us standing in line. They said that is a corporate matter." The trial court *sua sponte* objected to and sustained its objection to this statement, as it concerned matters not in evidence. Defendant's statement served as the basis for the trial court's finding of criminal contempt.

On 9 August 2017, the jury found Defendant guilty of Misdemeanor Stalking. The trial court entered Judgment on the Misdemeanor Stalking charge, imposed a sentence of 75 days imprisonment, suspended that sentence, and placed Defendant on supervised probation for 18 months. In calculating Defendant's prior record level for sentencing, Defendant stipulated both that he had a prior conviction of "No Operator's License" and that this conviction was a Class 2 Misdemeanor.

The same day, the trial court also entered a "Direct Criminal Contempt/Summary Proceedings/Findings and Order" (Criminal Contempt Order), holding Defendant in direct criminal contempt for his testimonial statements made during his closing argument and ordering him to pay a $300.00 fine within 30 days. Specifically, the trial court made the following finding of fact in its Criminal Contempt Order:

> The Court finds beyond a reasonable doubt that during the proceeding the above contemnor willfully behaved in a contemptuous manner, in that the above named contemnor did repeatedly argue to jury matters outside the record and attempt to testify to the jury through his closing argument after choosing not to testify at trial. The court repeatedly told him not to do so both on 8/8/17 and on 8/9/17. The court warned him if he did so again contempt proceedings would begin. The defendant then stated to jury "I went to the Family Dollar and tried to get the video but corporate . . . ." That statement was his testimony attempt again and not in evid[ence].

Appellate Jurisdiction

We note at the outset Defendant's Notices of Appeal from both the Misdemeanor Stalking Judgment and Criminal Contempt Order do not comply with the requirements of Rule 4 of our Rules of Appellate Procedure. On 9 November 2018, Defendant filed a Petition for Writ of *Certiorari* with this Court, seeking review of the Misdemeanor Stalking Judgment and Criminal Contempt Order.

Pursuant to Rule 21(a)(1) of our Appellate Rules, this Court possesses the authority to grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1). This Court has allowed for the issuance of a writ of *certiorari* despite technical defects in a notice of appeal by a *pro se* defendant in a variety of circumstances, especially where the State has not been misled by the mistake. *See, e.g.*, *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." (citations, quotation marks, and ellipsis omitted)). Here, the State does not contend it has been misled by Defendant's faulty Notices of Appeal; therefore, in our discretion, we grant Defendant's Petition for Writ of *Certiorari* to review both the Misdemeanor Stalking Judgment and Criminal Contempt Order.

Issues

Defendant raises two issues on appeal. First, Defendant contends the trial court erred in sentencing Defendant as a Level II Offender based on his stipulation that he was previously convicted of a Class 2 Misdemeanor. Second, Defendant asserts the trial court erred in holding Defendant in direct criminal contempt because his statements made during closing arguments were not in willful violation of the trial court's admonishments.

Analysis

I. Sentencing Stipulation

[1] Defendant contends the trial court erred in sentencing Defendant as a Level II Offender based on his stipulation that he was previously convicted of a Class 2 Misdemeanor. We first note the State argues this issue is moot because Defendant could have already completed his sentence, given that over 18 months have passed since Judgment was entered.[1] However, N.C. Gen. Stat. § 15A-1451 provides, "When a defendant has given notice of appeal . . . [p]robation . . . is stayed." N.C. Gen. Stat. § 15A-1451(a)(4) (2017). Because Defendant's sentence of probation was automatically stayed pending appeal, we determine this issue is not moot and therefore address the merits.

[2] A misdemeanor offender's prior record level is "determined by calculating the number of the offender's prior convictions that the court finds to have been proven . . . ." N.C. Gen. Stat. § 15A-1340.21(a) (2017). "In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor at the time the offense for which the offender is being sentenced is committed." *Id.* § 15A-1340.21(b). A defendant's prior convictions can be proven, *inter alia*, by stipulation of the parties. *Id.* § 15A-1340.21(c)(1).

"While such convictions often effectively constitute a prior record level, a defendant is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating that level." *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013) (citations omitted). Our Supreme Court recently addressed whether a defendant can stipulate on his sentencing worksheet that a prior conviction justifies a certain sentencing classification or whether this is a

1. The State concedes it "has been unable to determine whether defendant has completed his sentence of 18 months of supervised probation."

conclusion of law properly left to the trial court. *See State v. Arrington*, 371 N.C. 518, 819 S.E.2d 329 (2018).

In *Arrington*, the defendant entered a plea agreement and stipulated to a sentencing worksheet showing his prior offenses, including a second-degree murder conviction designated as a B1 offense. *Id.* at 519, 819 S.E.2d at 330. The defendant's second-degree murder conviction stemmed from acts committed prior to 1994; however, the Legislature did not divide this crime into two classifications, B1 and B2, until after the defendant's 1994 conviction. *Id.* at 522-25, 819 S.E.2d at 332-34. Thus, the defendant's second-degree murder conviction could have been classified as a B1 or B2 offense, depending on certain factual circumstances existing at the time of the murder; however, the defendant did not explain the factual underpinnings of his conviction and merely stipulated to the B1 classification. *Id.* at 520-21, 819 S.E.2d at 330-31. This Court vacated the trial court's judgment and held that this determination—whether the second-degree murder conviction should be classified as a B1 or B2 offense for sentencing purposes—constituted a legal question to which the defendant could not stipulate. *Id.* at 521, 819 S.E.2d at 331 (citation omitted).

Our Supreme Court reversed this Court, reasoning that "[e]very criminal conviction involves facts (i.e., what actually occurred) and the application of the law to the facts, thus making the conviction a mixed question of fact and law." *Id.* "Consequently, when a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a stated criminal offense." *Id.* at 522, 819 S.E.2d at 331. "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification." *Id.* at 522, 819 S.E.2d at 332. "Thus, like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification." *Id.* at 524, 819 S.E.2d at 333. Our Supreme Court further acknowledged that "[s]tipulations of prior convictions, including the facts underlying a prior offense and the identity of the prior offense itself, are routine[,]" and that because a defendant is "the person most familiar with the facts surrounding his offense, . . . this Court need not require a trial court to pursue further inquiry or make defendant recount the facts during the hearing." *Id.* at 526, 819 S.E.2d at 334 (citation omitted).

Here, Defendant stipulated that his "No Operator's License" conviction was classified as a Class 2 Misdemeanor. However, Defendant contends this stipulation was error because on the date of the current offense, "driving with an expired operator's license was either a Class 3 misdemeanor or an infraction," per N.C. Gen. Stat. § 20-35(a1), (a2). *Compare* N.C. Gen. Stat. § 20-35(a1)(1) (2015) (listing failure to obtain a license before driving a motor vehicle as a Class 3 misdemeanor), *with* N.C. Gen. Stat. § 20-35(a2) (2015) (listing (1) failure to carry a valid license while driving and (2) operating a motor vehicle with an expired license as infractions). However, N.C. Gen. Stat. § 20-35(a) expressly provides that unless another statute controls, "a violation of this Article is a Class 2 misdemeanor . . . ." *Id.* § 20-35(a). For instance, section 20-30 of Article 2[2] sets out a number of acts that could fall within the ambit of "No Operator's License" and would be classified as Class 2 misdemeanors. *See* N.C. Gen. Stat. § 20-30(1)-(5) (2015); *see also* N.C. Gen. Stat. §§ 20-32; -34 (2015).

Defendant, as "the person most familiar with the facts surrounding his offense," stipulated that his "No Operator's License" conviction was a Class 2 Misdemeanor. *Arrington*, 371 N.C. at 526, 819 S.E.2d at 334 (citation omitted). As such, he was "stipulating that the facts underlying his conviction justify that classification." *Id.* at 524, 819 S.E.2d at 333. Further, the trial court was under no duty to "pursue further inquiry or make defendant recount the facts during the hearing." *Id.* at 526, 819 S.E.2d at 334 (citation omitted). Therefore, under *Arrington*, we conclude there was no error in the trial court's sentencing calculation.

II. Criminal Contempt Order

A. Standard of Review

[3] In criminal contempt proceedings, our standard of review is limited to determining

> 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. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. The trial court's conclusions of law drawn from the findings of fact are reviewable de novo.

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2. Article 2 of Chapter 20 of our General Statutes is the Uniform Driver's License Act. *See* N.C. Gen. Stat. § 20-5 (2017).

State v. Simon, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007) (citations and quotation marks omitted).

B. Willfulness

N.C. Gen. Stat. § 5A-11 provides a list of conduct that constitutes criminal contempt. N.C. Gen. Stat. § 5A-11(a)(1)-(10) (2017). The trial court did not specify which subsection applies; however, based on the trial court's oral rendering of criminal contempt, it is evident the trial court based its Criminal Contempt Order on sections 5A-11(a)(1), (2), and (3), which state that criminal contempt is

> [w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings[, w]illful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority[, and w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

Id. § 5A-11(a)(1)-(3).

Direct criminal contempt occurs when the act "(1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13(a) (2017). Section 5A-14 of our General Statutes allows a judge to "summarily impose measures in response to direct criminal contempt[.]" N.C. Gen. Stat. § 5A-14(a) (2017).

Defendant challenges the trial court's factual finding that he "willfully behaved in a contemptuous manner" by arguing matters outside the record and attempting to testify during his closing argument. Specifically, Defendant contends his actions were not willful within the meaning of the criminal contempt statute and willfulness must be considered in the context of Defendant's lack of legal knowledge or training.

As used in the criminal contempt statute, "willfulness" means an act "done deliberately and purposefully in violation of law, and without authority, justification or excuse." *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987) (citations omitted). The term implies the act is done knowingly and of stubborn purpose or resistance. *McKillop v. Onslow Cty.*, 139 N.C. App. 53, 61-62, 532 S.E.2d 594, 600 (2000) (citations omitted). Willfulness also connotes a "bad faith disregard for

authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted).

Here, the Record shows the trial court repeatedly instructed Defendant that he could not testify to matters outside the record during his closing arguments, given that Defendant chose not to testify at trial. On 8 August 2017, the trial court reviewed the closing argument procedures for the following day with Defendant and stressed to Defendant that he could not testify during his closing argument, explaining "[t]hat means you cannot tell the jury, 'Here's what I say happened.' " Defendant stated he understood the trial court's instruction five separate times during the course of the instructions.

However, the next day, Defendant began his closing argument by attempting to tell the jury about evidence he acknowledged was "inadmissible." Upon hearing Defendant attempting to testify during his closing argument, the trial court excused the jury and admonished Defendant "not to talk about anything that was not in evidence." After the trial court explained to Defendant what he could and could not discuss, Defendant told the trial court he understood its instructions.

Once the jury returned, however, Defendant again attempted to discuss matters not in evidence. With the trial court's patience "wearing thin," the trial court excused the jury for a second time and gave Defendant a final warning. The trial court stressed it would not allow Defendant to "avoid cross-examination by testifying in the closing argument" and warned Defendant if he attempted to testify to matters outside of the record, the trial court would begin criminal contempt proceedings. Once again, Defendant informed the trial court he understood its warnings.

Thereafter, the jury returned, and Defendant continued his closing argument by stating, "I went to Family Dollar and tried to get the video of us standing in line. They said that is a corporate matter." This statement by Defendant concerned matters not in evidence and served as the basis for the trial court's finding of criminal contempt.

The transcript of Defendant's closing argument constitutes competent evidence to support the trial court's finding that Defendant acted willfully in repeatedly violating the trial court's instructions. Although Defendant claims the evidence suggests his testimony was the product of ignorance rather than willfulness, we are bound by the trial court's finding of fact. *See Simon*, 185 N.C. App. at 250, 648 S.E.2d at 855 ("Findings of fact are binding on appeal if there is competent evidence to support them, *even if there is evidence to the contrary*." (emphasis added)

(citation and quotation marks omitted)). Therefore, the trial court's conclusion of law that Defendant was "in [direct criminal] contempt of court" is likewise supported by this finding of fact that Defendant repeatedly argued matters outside the record during closing argument, despite the trial court's repeated instructions and admonishments over a two day period. Consequently, we affirm the Criminal Contempt Order.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in the trial court's Misdemeanor Stalking Judgment. We also affirm the trial court's Criminal Contempt Order.

NO ERROR IN PART; AFFIRMED IN PART.

Judges ZACHARY and BERGER concur.

LEANNE MICHELLE WISE, PLAINTIFF
v.
ROBERT JOHN WISE, DEFENDANT

No. COA18-858

Filed 2 April 2019

1. Divorce—alimony—net income—mandatory retirement deduction—differential treatment of health insurance premiums

The trial court abused its discretion in calculating a husband's net income for determining alimony where it failed to account for a mandatory retirement deduction from defendant's paycheck. The trial court further abused its discretion by treating the wife's health insurance premium as a reasonable living expensive but failing to treat the husband's in the same way.

2. Divorce—alimony—child support—business income—prior years—sufficiency of findings

The trial court's findings regarding a husband's reported business income—that he reported a monthly loss of approximately $2,500 and that this report was not credible—supported the trial court's decision to use income from the business's prior years to calculate the husband's gross income for the determinations of alimony and child support. However, on remand, the trial court was

instructed to make additional findings to support its decision to use the average income from the most recent two years.

3. Divorce—alimony—net income—living expenses—categorized as business expenses—double dipping

The trial court did not err by excluding a husband's personal expenses from his living expenses where the husband categorized those personal expenses as business expenses. To do otherwise would result in "double dipping."

4. Divorce—alimony—amount and duration—sufficiency of findings—speculation as to rationale

The trial court erred by failing to make sufficient findings to support the amount and duration of an alimony award to plaintiff-wife. The Court of Appeals rejected as mere speculation the wife's argument that the trial court's rationale was apparent from the parties' agreement that she would stay home with the children until they were enrolled in school and from the range of defendant's excess income and plaintiff's income shortfall.

5. Attorney Fees—alimony and child support action—sufficiency of findings—reasonableness determination

An award of attorney fees in an alimony and child support action was remanded for additional findings where the trial court failed to make findings regarding the nature and scope of legal services rendered from which to base a reasonableness determination and whether the fees actually incurred were reasonable.

Appeal by defendant from order entered 5 February 2018 by Judge Meredith A. Shuford in Lincoln County District Court. Heard in the Court of Appeals 30 January 2019.

Horn, Pack, Brown & Dow, P.A., by Carol Walsburger Dow, for plaintiff-appellee.

The Jonas Law Firm, P.L.L.C., by Rebecca J. Yoder, for defendant-appellant.

ARROWOOD, Judge.

Robert John Wise ("defendant") appeals from child support and alimony order in favor of his ex-wife, LeAnne Michelle Wise ("plaintiff"). For the following reasons, we reverse and remand to the trial court.

I. Background

Plaintiff and defendant were married on 19 September 2009 and had two children during their marriage in November 2010 and September 2015. The parties separated on 6 June 2017. On 12 July 2017, plaintiff filed a complaint seeking child custody, child support, equitable distribution, divorce from bed and board, and post-separation support and alimony. Both plaintiff and defendant filed financial affidavits subsequent to the filing of the complaint. On 7 September 2017, defendant filed an answer, defenses, and counterclaims seeking child custody and equitable distribution.

For the benefit of their children, the parties entered into a parenting agreement, which was signed by defendant on 7 September 2017 and by plaintiff on 18 September 2017. The parties then entered into a consent order that was filed 18 October 2017. The consent order resolved child custody in accordance with the terms of the parenting agreement and required defendant to pay temporary child support in the amount of $1,376.07 per month and post-separation support in the amount of $300.00 per month. The consent order also appointed a mediator to address issues of alimony, permanent child support, and equitable distribution. During a mediation on 1 November 2017, the parties came to an agreement on equitable distribution and a mediated settlement agreement was filed on 2 November 2017. The parties were unable to reach an agreement on alimony and permanent child support.

In December 2017 and early January 2018, the parties filed amended financial affidavits. On 10 January 2018, plaintiff's attorney filed an affidavit of attorney fees and court costs.

The issues of alimony and child support were heard by Judge Meredith A. Shuford in Lincoln County District Court on 10 and 11 February 2018. The trial court took the matter under advisement, and later filed an order on 5 February 2018. The trial court ordered defendant to pay child support in the amount of $1,551.24 per month and ordered defendant to pay alimony until 1 September 2021 in the amount of $1,850.00 per month. Defendant filed notice of appeal from the order on 28 February 2018.

II. Discussion

On appeal, defendant challenges the trial court's award of alimony, child support, and attorney's fees. We address the issues in the order they are raised.

1. Alimony and Child Support

"The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in the absence of an abuse of discretion." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982) (citing *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966)).

> In determining the amount of alimony the trial judge must follow the requirements of the applicable statutes. Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. "It is a question of fairness and justice to all parties."

Id. (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)).

> A trial court's award of alimony is addressed in N.C. Gen. Stat. § 50-16.3A . . . , which provides in pertinent part that in "determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors" including, *inter alia*, the following: marital misconduct of either spouse; the relative earnings and earning capacities of the spouses; the ages of the spouses; the amount and sources of earned and unearned income of both spouses; the duration of the marriage; the extent to which the earning power, expenses, or financial obligations of a spouse are affected by the spouse's serving as custodian of a minor child; the standard of living of the spouses during the marriage; the assets, liabilities, and debt service requirements of the spouses, including legal obligations of support; and the relative needs of the spouses.

Hartsell v. Hartsell, 189 N.C. App. 65, 69, 657 S.E.2d 724, 727 (2008) (quoting N.C. Gen. Stat. § 50-16.3A (2017)).

Child support is governed by N.C. Gen. Stat. § 50-13.4. This Court has explained that "[t]he ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the [obligor] to meet the needs." *Smith v. Smith*, 247 N.C. App. 135, 150, 786 S.E.2d 12, 25 (2016) (quotation marks and citations omitted). Like the determination of the amount of alimony, "[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002).

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Moreover, for both alimony and child support, the trial court is required to make findings of fact and conclusions of law. *See* N.C. Gen. Stat. § 50-16.3A; N.C. Gen. Stat. § 50-13.4 (2017). To support the trial court's award of alimony and child support, the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award. *See Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) ("The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award. In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings.") (quotation marks and citations omitted); *Plott v. Plott*, 313 N.C. 63, 68-69, 326 S.E.2d 863, 867 (1985) (Explaining that for an award of child support pursuant to N.C. Gen. Stat. § 50-13.4, specific findings are necessary to allow an appellate court to determine if the trial court's order is sufficiently supported by competent evidence.)

Gross and Net Income Calculations

Defendant makes various arguments that the trial court erred in awarding child support and alimony because it erred in calculating his gross and net incomes.

In the order, the trial court made the following findings showing its considerations in calculating defendant's gross and net incomes:

> 25. The defendant's total gross income for calculation of child support should include his salary from CMPD ($7,171.97), his average off duty wages ($1[,]870.00) and his average income from his business, Wiseguys ($212.00) for a total of $9[,]253.97.
>
> . . . .
>
> 33. For calculation of alimony, the court finds the defendant's gross income from his employment with CMPD, off duty work and Wiseguys is $9,253.97. The court

> considered the defendant's withholdings for his taxes in the amount of $1[,]452.00 and his monthly child support obligation of $1,551.24, where he received credit for the medical insurance withheld for the children. The 401(k) loan is related to his business. The defendant has approximate net income of $5,690.00 and approximate monthly living expenses of $3,600.00. He has the ability to provide support for the plaintiff.

Based on these findings, the trial court concluded in conclusions of law numbers 2 and 7 that defendant "has the present financial ability and duty to contribute to the support and maintenance of the children" and "has the ability to provide spousal support to . . . [p]laintiff." The trial court ordered defendant to make child support payments in the amount of $1,551.24 per month, to continue to provide hospital and health insurance for the children and pay 100% of uninsured health costs, and to pay alimony in the amount of $1,850.00 per month, beginning 15 February 2018 and continuing until 1 September 2021.

[1] The first issue raised by defendant concerns the trial court's calculation of net income for purposes of determining alimony. Defendant contends the trial court erred in calculating net income by disregarding mandatory deductions from his CMPD paycheck totaling over $900.00 per month. Those alleged mandatory monthly deductions not included in the trial court's calculation are $429.97 for law enforcement officer retirement ("LEO retirement") and $509.35 for defendant's portion of the health insurance premium.

Defendant asserts, and the record shows, that he brought these deductions to the trial judge's attention when the court sought comment on a proposed order. In response to defendant's request that the trial court correct finding of fact number 33 to account for the deductions for LEO retirement and his portion of the health insurance premium, the trial court replied that, "[a]s to #33, the court 'considered' the deductions totaling $1[,]452[.00] (all of the taxes). I addressed the health insurance. I did not consider the LEO deduction or any other voluntary deductions."

It is evident from a review of finding of fact number 33 that the trial court did not account for the LEO retirement or defendant's portion of the health insurance premium in the calculations of defendant's net income. Defendant now asserts that the trial court's disregard for these mandatory deductions was an abuse of discretion that resulted in the overstatement of his net income, which in turn influences the determination of his ability to pay alimony.

Plaintiff responds to defendant's assertion by arguing the trial court did not disregard the alleged mandatory deductions. Plaintiff contends the trial court considered the deductions, chose not to factor them into the net income calculation, and it was within the trial court's discretion to do so because "the trial judge is not bound by the financial assertions of the parties and may resort to common sense and every-day experiences." *Bookholt v. Bookholt*, 136 N.C. App. 247, 251, 523 S.E.2d 729, 732 (1999). Furthermore, plaintiff notes that the trial court "is not required to make findings about the weight and credibility it assigns to the evidence before it." *Hartsell*, 189 N.C. App. at 75, 657 S.E.2d at 730.

Plaintiff is correct that "[t]he 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 he 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, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982). However, in regards to the LEO retirement, the issue is not whether it was a reasonable need or expense, but whether it was a mandatory deduction from defendant's CMPD income. The undisputed evidence in the record is that the LEO retirement was a mandatory deduction. Specifically, in response to plaintiff's counsel's examination of defendant concerning deductions listed in defendant's financial affidavit, defendant testified, "[t]he LEO is a mandatory retirement that's taken out of my check that's not voluntary." Upon further questioning, defendant again reiterated that the LEO retirement was mandatory and plaintiff's counsel, seeming to accept defendant's testimony, responded, "[m]andatory, okay, don't give me that one." Although it is the trial court's role to weigh the evidence, the undisputed evidence in this case is that the LEO retirement was a mandatory deduction from defendant's CMPD income.

It is not clear from the trial court's response to defendant, "I did not consider the LEO deduction or any other voluntary deductions[,]" whether the trial court was aware the LEO retirement was a mandatory deduction and did not factor it into the net income calculations, or whether the trial court mistakenly believed it was voluntary and determined it was improper to factor into the calculations. Regardless, we hold either was an abuse of discretion where the record evidence was that the LEO was a mandatory deduction from defendant's CMPD income, making that portion of defendant's CMPD income unavailable to defendant to pay towards alimony. The trial court should have accounted for this mandatory deduction it its calculation of defendant's net income.

The evidence regarding defendant's portion of the medical insurance premium is not as straight forward as the evidence of the LEO retirement. In defendant's financial affidavit, defendant claimed a deduction from his income of $710.85 for medical insurance. Defendant testified that this deduction for medical insurance included the cost of health insurance for himself, plaintiff, their children, and his older daughter from a previous marriage. The evidence was that the insurance premium to cover children was the same whether there was one child or 50 children. Defendant specifically identified, both in his testimony and in his financial affidavit, that the portion of the claimed deduction to cover the cost of health insurance for the children was $201.50. The trial court accepted the evidence of the cost of health insurance attributed to the children and found in finding of fact number 27 that "defendant pays health insurance for the children in the amount of $201.50 per month." The trial court additionally found in finding of fact number 33 regarding net income that it "considered . . . [defendant's] monthly child support obligation of $1,551.24, where he received credit for the medical insurance withheld for the children."

The evidence was that the remaining $509.35 claimed by defendant as a deduction for medical insurance covered the health insurance premium for plaintiff and defendant. Defendant testified that he had the monthly total for the health insurance deduction, but did not "have the breakdown for spouse or employee, children." The reason the portion of the health insurance premium attributed to the children was designated was because defendant calculated it for child support purposes. Despite the evidence that plaintiff was covered by defendant's health insurance, defendant acknowledged that plaintiff would not be covered by defendant's health insurance after the divorce. The trial court specifically found in finding of fact number 17 that "[o]nce the divorce is final, [plaintiff] will have no health insurance."

As noted above, in response to defendant's request that the trial court correct finding of fact number 33 to account for his portion of the health insurance premium, the trial court responded, "I addressed the health insurance." However, there are no findings of fact regarding the remaining $509.35 that defendant claimed as a deduction for medical insurance, and there is no indication that the trial court accounted for the cost of defendant's health insurance premium either as a deduction from his income or as a personal expense.

The trial court did, however, find in finding of fact number 17 that "[plaintiff] plans to obtain coverage through Blue Cross in the approximate amount of $630[.00] per month." The trial court additionally found

in finding of fact number 20 that "[w]hile [plaintiff] is residing with her parents and included under defendant's insurance, her actual living expenses are approximately $1[,]100.00. She anticipates incurring living expenses of $5,350.00 per month to live independently and provide herself with health insurance."

In *Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230 (2000), this Court addressed the trial court's characterization of investment income as a reasonable expense. This Court acknowledged that " '[t]he 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 he is not required to accept at face value the assertion of living expenses offered by the litigants themselves[.]' " 139 N.C. App. at 618-19, 534 S.E.2d at 232 (quoting *Whedon*, 58 N.C. App. at 529, 294 S.E.2d at 32). Nevertheless, this Court found "the trial court's inclusion of this investment income amount as an expense for the plaintiff but not for the defendant constituted an abuse of discretion." *Id.* at 619, 534 S.E.2d at 233. This court explained that "[i]t [was] not logical that the trial court could properly characterize [the] investment income, earned and reinvested during the course of the marriage, as an expense for one spouse but not for the other." *Id.*

The same reasoning applies to the consideration of expenses for health insurance. Ordinarily, if the trial court considers the cost of health insurance for one party as a reasonable living expense, it would be an abuse of the trial court's discretion not to consider the other party's cost for health insurance similarly. Here, the trial court should have considered defendant's portion of the health insurance premium as a reasonable living expense, just as the court did with plaintiff's health insurance expense. We do not, however, hold that the entire $509.35 difference between the $710.85 deduction for medical insurance claimed by defendant and the $201.50 portion of that deduction attributed to the children's health insurance premium should be considered by the trial court. Although defendant testified that he did not calculate his own portion of the health insurance premium, the documentary exhibits in the record include the 2018 medical insurance rates that were used to calculate the children's portion of the health insurance premium in a plan covering only defendant and his children. Those 2018 rates show that defendant's portion of the health insurance premium would be approximately $59.06 per month. The trial court abused its discretion in not accounting for defendant's portion of the health insurance premium in calculating his net income.

Because the deduction for the LEO retirement was mandatory and those funds were not available to defendant to pay alimony, we hold the trial court's failure to account for the mandatory deduction was not supported by reason and amounted to an abuse of discretion. At the very least, the trial court must make further findings setting forth the reasons why the LEO retirement was not factored into its calculations. Without such findings, this Court is unable to think of any reason why the LEO retirement should not be included in the net income calculations. Additionally, the differential treatment of plaintiff's and defendant's health insurance costs amounted to an abuse of discretion. Upon remand, the trial court should make additional findings as to defendant's portion of the health insurance premium and account for those reasonable expenses in the calculation of defendant's net income.

[2] The second issue raised regarding the trial court's calculations of defendant's gross income and net income concerns the trial court's calculation of defendant's income from his business, Wiseguys. In finding of fact number 25, the trial court included $212.00 as defendant's average income from Wiseguys in the calculation of defendant's total gross income. That total gross income, including the Wiseguys income, was then referenced in the calculations of net income in finding of fact number 33. The trial court explained how it calculated defendant's income from Wiseguys in the following relevant findings:

> 7. The defendant also owns a business, Wiseguys Used Emergency Equipment. He is a sole owner. The business has been in operation since 2001. The defendant's account [sic] testified regarding the tax returns he has prepared for the business and the parties individual returns.
>
> 8. The defendant reports a monthly loss for the business of $2,479.85 on his financial affidavit. This is not credible. The court reviewed the business tax returns for 2015 and 2016. The returns include reported gains and losses for [years] since 2001. There have been large fluctuations from year to year based upon the nature of the business. The average gains and losses since 2001 equal a gain of $1,419.27 per year ($118.27 per month). The average for 2015 and 2016 is $2,538.00 per year ($211.50 per month).

It is evident from these findings and finding of fact number 25 that the trial court considered the average monthly income from 2015 and 2016,

rounded up to the dollar, in determining defendant's average income from Wiseguys.

Defendant takes issue with the trial court's calculations of his income from Wiseguys based on income from previous years instead of evidence of present income. Defendant acknowledges that past income can be considered in certain circumstances, but contends the trial court failed to make the necessary findings explaining why the evidence of present income from Wiseguys was not reliable.

This court has explained that " '[a]limony is ordinarily determined by a party's *actual* income, from all sources, at the time of the order.' " *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (quoting *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998)). "Similarly, in general, 'a party's ability to pay child support is determined by that party's actual income at the time the award is made.' " *Burger v. Burger*, 249 N.C. App. 1, 5, 790 S.E.2d 683, 686 (2016) (quoting *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006)). Yet, there are exceptions to these rules. The trial court may base an alimony or child support obligation on earning capacity rather than actual income if the trial court finds that the party has depressed income in bad faith. *Id.* at 5, 790 S.E.2d at 686 (citing *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219; *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836. This Court has also allowed the trial court to average prior years' incomes in cases where the trial court found the evidence of actual income is unreliable or otherwise insufficient. *See Diehl v. Diehl*, 177 N.C. App. 642, 649-50, 630 S.E.2d 25, 30 (2006); *Zurosky v. Shaffer*, 236 N.C. App. 219, 242-43, 763 S.E.2d 755, 769-70 (2014).

In *Diehl*, the plaintiff "challenge[d] the trial court's use of an average of his monthly gross incomes in 2001 and 2002 as a basis for finding his monthly gross income from 2003 . . . ." 177 N.C. App. at 649, 630 S.E.2d at 30. This Court noted the trial court's findings that the evidence presented of actual income was unreliable were supported by the evidence and held that, "[g]iven the unreliability of [the plaintiff's] documentation, we cannot conclude . . . that the trial court abused its discretion by averaging . . . income from . . . two prior tax returns to arrive at his 2003 income." *Id.* at 650, 630 S.E.2d at 30. This Court also disagreed with the plaintiff's characterization of the trial court's methodology of averaging prior years' incomes as "imputation" of income and held the law of imputation of income was inapplicable. *Id.* Thus, the trial court did not need to find bad faith. *Id.*

In *Zurosky*, this Court noted the difference between those cases where the trial court may impute income when a party acts in bad faith

to depress their income and cases where the reported income was unreliable, explaining that "[i]n *Diehl* . . ., the trial court did not make a finding of bad faith or have evidence that the spouse deliberately depressed his income; the trial court used prior years' incomes because the trial court did not have sufficient evidence regarding his actual income." 236 N.C. App. at 243, 763 S.E.2d at 769. This Court held *Zurosky* was analogous to *Diehl* in that there were concerns over the reliability of the reported income; thus, this Court held the trial court did not abuse its discretion in using prior years' income to determine alimony and child support. *Id.* at 243-44, 763 S.E.2d at 769-70.

Defendant acknowledges *Diehl* and *Zurosky*, but contends the trial court did not make the necessary findings in this case. Defendant relies on *Green v. Green*, 255 N.C. App. 719, 806 S.E.2d 45 (2017), in which this Court distinguished *Diehl* and *Zurosky*, explaining that "the trial court did not make findings of fact as to whether [the d]efendant's professed actual income at the time of the order was reliable or unreliable before basing its decision regarding [the d]efendant's ability to pay alimony on an average of prior years' income." 255 N.C. App. at 734, 806 S.E.2d at 55. This Court held "the trial court abused its discretion in basing its decision regarding [the d]efendant's ability to pay alimony on an average of [the d]efendant's monthly gross income from prior years without first determining [the d]efendant's current monthly income, and whether that reported current income was credible." *Id.* at 734-35, 806 S.E.2d at 55-56.

As stated above, in this case the trial court found in finding of fact number 8 that "[t]he defendant reports a monthly loss for the business of $2,479.85 on his financial affidavit." The trial court then additionally found in finding of fact number 8 that defendant's reported income "is not credible." These are the precise findings that this Court stated were necessary in *Green*. Nevertheless, defendant contends the trial court's bare statement that defendant's evidence is not credible is inadequate absent additional findings explaining the court's concerns over the reliability of defendant's evidence. Although we do not think such additional findings are required, we note that the trial court additionally found in finding of fact number 8 that it was concerned with defendant's evidence of actual income because "[t]here have been large fluctuations form year to year based upon the nature of the business." Thus, the trial court questioned whether the defendant's reported income accurately represented his income from Wiseguys. The evidence in the record supports the trial court's findings; therefore, we cannot say the trial court abused its discretion. Like in *Diehl* and *Zurosky*, we hold the trial court's findings in this case support its decision to use prior years' income from Wiseguys

in the calculation of gross income for the determinations of alimony and child support.

Furthermore, this Court has afforded the trial court discretion in selecting the number of prior years' income it considers. For example, the trial court considered the most recent two years in *Diehl*, 177 N.C. App. at 650-51, 630 S.E.2d at 30-31, and considered prior income over a longer span in *Zurosky*, 236 N.C. App. at 243, 763 S.E.2d at 770. In both instances, this Court held the trial court's decision to consider prior income was rational and the trial court did not abuse its discretion in doing so.

The trial court's decision in this case to consider only the income from the most recent two years, for which the business tax returns of Wiseguys were introduced into evidence, may be a proper exercise of the trial court's discretion. This Court, however, cannot make that determination without additional findings setting forth the trial court's reasons for choosing two years as its measure of time as opposed to the longer period for which it also calculated average income. Given the difference in the average income for the different time spans in finding of fact number 8, upon remand, the trial court should make additional findings to support its decision to use the average income from Wiseguys from the most recent two years in its determination of business income.

[3] Defendant's third challenge to the trial court's calculation of net income is the trial court's alleged disregard for approximately $1,000.00 of personal expenses that defendant included as business expenses for Wiseguys. Defendant asserts that those personal expenses include, *inter alia*, uninsured medical expenses, a cell phone, and vehicle expenses. Defendant contends that those personal expenses were included in the reported business loss from Wiseguys, but when the trial court used the prior years' income instead of the reported business loss to determine his income from Wiseguys, the trial court failed to account for these personal expenses elsewhere in the net income calculations. Defendant argues the trial court should have considered the expenses separately in the calculation of business income as a deduction, or in the calculation of defendant's individual monthly expenses. We are not convinced the trial court erred.

It is evident that the trial court considered these personal expenses. The trial court explicitly acknowledged the expenses in finding of fact number 9, when it found as follows:

> 9. The defendant pays multiple personal expenses from the business such as uninsured health expenses such

> as co-pays and prescriptions, his cellular phone, automobile expenses, and meals. He receives a benefit of approximately $1,000[.00] per month for these personal expenses.

Defendant's testimony was that he did not include these expenses in his financial affidavit because they were included as business expenses for Wiseguys and included in the reported business loss. Defendant contends that he purposefully did not include them in both the reported business loss and as personal expenses to avoid "double dipping."

While taking no position on the correct classification of these expenses, we agree with defendant that it was proper not to include them as both business expenses and personal expenses. However, we disagree that the trial court erred by not accounting for these expenses as living expenses in finding of fact number 23, in which the trial court found "defendant has living expenses of approximately $3,600.00 per month[,]" after the trial court refused to accept defendant's reported business loss for Wiseguys.

As stated above, the trial court calculated defendant's monthly income from Wiseguys based on prior years' income. The prior years' income was calculated from information included in the business tax returns for Wiseguys for 2015 and 2016. Those tax returns include as business deductions expenses similar to those defendant now claims the trial court failed to address separately. Because the personal expenses were included as business deductions and accounted for in the business tax returns used to determine defendant's income from Wiseguys, the trial court did not err in excluding them from the living expenses considered in finding of fact number 23. Including them as separate living expenses after they were considered in determining income from Wiseguys would result in "double dipping."

Defendant's final argument regarding the trial court's calculation of gross income and net income is that the trial court erred in the amount of alimony it awarded. Defendant contends the trial court's alimony award renders him unable to pay child support and reasonable monthly expenses. While we do not agree with all of defendant's adjustments for the errors alleged on appeal, we hold the trial court must revisit its calculations of gross income and net income used to determine child support and alimony. In summary, trial court should make additional findings to support its determination of defendant's business income from Wiseguys, which is used to calculate gross income and determine defendant's child support obligation. The trial court should also make

additional findings to account for defendant's mandatory LEO retirement deduction and defendant's reasonable health insurance expenses in the calculation of defendant's net income for purposes of determining alimony.

Amount and Duration of Alimony

[4] Defendant also contends the trial court erred in its award of alimony because it did not make sufficient findings of fact to support the amount and duration of the award. Specifically, defendant argues "[t]he order on appeal lacks any findings setting forth the reasons alimony was awarded at a rate of $1,850.00 per month for a term of forty-four months." Defendant asserts that this deficiency illustrates the lack of detailed findings throughout the order.

N.C. Gen. Stat. § 50-16.3A requires the trial court to make findings of fact supporting an award of alimony and specifically mandates that "[t]he court shall set forth . . ., if making an award, the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c). "It is well-established by this Court that 'a trial court's failure to make *any* findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c).' " *Ellis v. Ellis*, 238 N.C. App. 239, 242, 767 S.E.2d 413, 415-16 (2014) (quoting *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522-23 (2003)) (emphasis in original). This Court has explained that "the findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case." *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794 (footnote omitted), *affirmed per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).

It is telling that plaintiff does not point to findings clearly setting forth the reasons for the amount or duration of the trial court's alimony award. A review of the order reveals that the trial court did not make any such findings.

Despite the plain language of N.C. Gen. Stat. § 50-16.3A(c), plaintiff contends that it is sufficient that the trial court's reasoning can be derived from its findings. In support of her argument, plaintiff cites this Court's unpublished opinion in *Dorwani v. Dorwani*, 214 N.C. App. 560, 714 S.E.2d 868 (2011) (unpub.), which is not controlling legal authority. *See* N.C.R. App. P. 30(e)(3) (2019) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.") In *Dorwani*, this Court upheld the trial court's award of

alimony for the life of the plaintiff because "the trial court's rationale for awarding alimony for an indefinite term [was] obvious" from consideration of the unchallenged findings. *Id.* at *3.

Here, although plaintiff identifies the trial court's findings that plaintiff was a homemaker and the primary caretaker of their seven-year-old and sixteen-month-old children, the parties agreed plaintiff would stay home with the children until at least the time they were both in school in 2020, plaintiff is enrolled in school to obtain a degree in Business Administrative that she expects to complete in 2019, plaintiff has been out of the workforce for nine years, plaintiff anticipates living expenses of $5,350.00, and defendant has net income of approximately $5,690.00 and living expenses of approximately $3,600.00, these findings do not set forth the reasons for the precise amount or duration of the trial court's alimony award. Plaintiff asserts the trial court's rationale is apparent because the forty four month duration is within the timeframe that allows plaintiff to seek employment once the children are both enrolled in school and because the amount of $1,850.00 per month is within the range of defendant's excess income and plaintiff's income shortfall. Plaintiff's assertions, however feasible, are merely conjecture.

This Court does not rely on speculation. The trial court must make sufficient findings to allow this Court to perform a meaningful review. Because the trial court did not set forth its reasons for the amount and duration of its alimony award, we must remand for further findings. *See Hartsell*, 189 N.C. App. at 75-76, 657 S.E.2d at 730-31 (citing *Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000), *Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003), and *Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006)).

2. Attorney's Fees

[5] Lastly, defendant challenges the trial court's award of attorney's fees in favor of plaintiff on the basis that the trial court failed to make sufficient findings of fact to support the award. We agree additional findings are necessary.

Plaintiff requested attorney's fees and costs in the complaint and, on 10 January 2018, plaintiff's attorney filed an affidavit of fees and court costs.

After plaintiff and defendant presented arguments on attorney's fees, the trial court issued the following pertinent findings of fact:

> 34. In the Equitable Distribution Order, the defendant was ordered to pay a distributive award to the plaintiff in excess of $4,000.00. The [p]laintiff has used the

award and her share of the marital assets she previously withdrew from joint accounts to pay her living expenses and attorney's fees. It has been necessary for the plaintiff to depend on support from her parents and deplete her share of the marital estate to meet her monthly living expenses.

35. The plaintiff has insufficient means to subsist during the prosecution of this action and to defray the necessary legal expenses thereof. She relied on her parents to pay her legal fees as well as a monetary award from the equitable distribution of the marital estate.

. . . .

37. The [p]laintiff has incurred attorney's fees to pursue her claim for alimony in an amount exceeding $3,500.00.

The trial court then issued conclusion of law number 9, in which the court concluded "[a]n award of attorney's fees is appropriate because the [p]laintiff is dependent, is entitled to an award of alimony and she had insufficient means [to] subsist during the prosecution of her claim and to defray the necessary legal expenses thereof." Based on these findings and conclusion, the trial court ordered that "[d]efendant shall reimburse the [p]laintiff for attorney's fees in the amount of $3,500.00 by July 1, 2018."

"As with [an] analysis for alimony, an analysis for attorney's fees requires a two-part determination: entitlement and amount." *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000). This Court explained that "[a] spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Id.* "Once a spouse is entitled to attorney's fees, our focus then shifts to the amount of fees awarded. The amount awarded will not be overturned on appeal absent an abuse of discretion." *Id.* at 375, 536 S.E.2d at 647. However, as with any award of attorney's fees, the trial court is required to make findings of fact as to the reasonableness of the fees based on the nature and scope of the legal services and the skill and time required. *See Williamson*, 140 N.C. App. at 365, 536 S.E.2d at 339.

Here, the trial court's findings of fact numbers 34, 35, and 37 establish that plaintiff was entitled to attorney's fees. The trial court, however, did not make any findings on which to base a reasonableness determination;

nor did the court find that the fees incurred by plaintiff were reasonable. The trial court simply awarded plaintiff $3,500.00 in attorney's fees based on its finding that "[p]laintiff has incurred attorney's fees to pursue her claim for alimony in an amount exceeding $3,500.00." Additional findings of fact are necessary to support the trial court's attorney's fee award in this case. *See Id.* ("[T]he trial court failed to make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based. This failure effectively precludes this Court from determining whether the trial court abused its discretion in setting the amount of the award.") (quotation marks and citations omitted).

Plaintiff asserts additional findings are not required in this case because the amount of attorney's fees awarded was within the range requested and supported by the affidavit submitted by her attorney. In support of her argument, plaintiff cites *Barrett*, in which this Court upheld an award of $3,100.00 in attorney's fees based on affidavits showing plaintiff incurred $5,446.55 in attorney's fees. 140 N.C. App. at 375, 536 S.E.2d at 647. In *Barrett*, however, in addition to recognizing the attorney's fee award was within the range sought, this Court explained that "[t]he trial court also found that the hourly rates charged were reasonable and customary for that type of work[]" and "[the d]efendant ha[d] not contested this specific finding or otherwise suggested that plaintiff's counsel ha[d] charged excessively." *Id.* There are no such findings in the present case, and the lack of findings prevents this court from determining whether the trial court abused its discretion in awarding attorney's fees. The attorney's fees award must be remanded for additional findings.

III. Conclusion

For the reasons discussed, we vacate and remand for further proceedings and additional findings of fact to support the awards of child support, alimony, and attorney's fees.

VACATED AND REMANDED.

Judges DILLON and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 APRIL 2019)

IN RE A.M.A.T. No. 18-753	Wake (17JT21)	Reversed in Part; Remanded
IN RE A.T. No. 18-886	Wayne (16JA166)	Affirmed in part, Vacated in part and Remanded
IN RE D.L.B. No. 18-912	Wake (16JT38)	Affirmed
IN RE H.R.J. No. 18-995	Pamlico (13JT12) (13JT13) (13JT14)	Affirmed
IN RE K.S.K. No. 18-814	Alexander (16JT16) (16JT17) (16JT18)	16 JT 16: ORDER AFFIRMED. 16 JT 17-18: ORDERS AFFIRMED IN PART; VACATED AND REMANDED IN PART.
IN RE K.W. No. 18-816	Guilford (16JA527)	Affirmed in part, Vacated in part and Remanded
IN RE M.N.P. No. 18-824	Wake (16JT289-291)	Affirmed
IN RE N.T. No. 18-849	Martin (15JA44-52)	Affirmed in part and Remanded in part
IN RE N.T. No. 18-996	Martin (15JA44-51)	Affirmed in part and Remanded in part
IN RE T.M.L.E. No. 18-804	Guilford (16JT55) (16JT56) (17JT1)	Affirmed
LaMARRE v. MARTINEZ No. 18-224	Union (16CVS1013)	Affirmed
PALMER v. CLINE No. 18-924	Surry (16CVD1416)	Affirmed, As Modified

STATE v. DUFF No. 18-874	Guilford (14CRS92098-99)	Affirmed in part and remanded for correction of clerical errors.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Effective assistance of counsel—propriety of review on direct appeal—In a prosecution for taking indecent liberties with a child, the record was insufficient to permit appellate review of defendant's ineffective assistance of counsel claim where his trial counsel did not properly move to suppress evidence. The trial court did not conduct a suppression hearing on defendant's purported motion, and without knowing what evidence might have been produced at such a hearing, it was impossible to determine on direct appeal whether trial counsel's error prejudiced the defense. **State v. Rivera, 525.**

Interlocutory appeal—res judicata defense—substantial right—required factual showing—An appeal from a partial summary judgment order rejecting some of defendant construction company's res judicata defenses was dismissed as interlocutory where defendant did not include in the statement of grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of the case. Although defendant contended that a ruling by the trial court on a res judicata defense affects a substantial right as a matter of law, the cases cited by defendant did not examine and reject the notion that the appellants must show that the appeal is permissible based on the particular facts of the case. The Court of Appeals found controlling a separate line of cases requiring an individualized factual showing. **Denney v. Wardson Constr., Inc., 15.**

Interlocutory appeal—substantial right—statutory duties of public entities—state budget—In an action challenging amendments to the State Health Plan (SHP) that removed premium-free options for retired state employees, the Court of Appeals elected to hear an appeal from an order granting partial summary judgment, even though the appeal was interlocutory. The order affected a substantial right by preventing public entities from enforcing statutory provisions related to premiums for health coverage and had the potential to affect the financial stability of the state budget. **Lake v. State Health Plan for Teachers & State Emps., 174.**

Interlocutory appeal—validity of separation agreement—An appeal was dismissed as interlocutory where the only substantive issue was the validity of a separation agreement, the order on appeal did not fall within those set forth in N.C.G.S. § 50-19.1 for which an interlocutory appeal may be taken, the trial court did not certify the claim for immediate appeal, and the wife made no claim of a substantial right that would be lost without immediate appeal. The Court of Appeals chose not to issue a writ of certiorari on its own motion. **Bezzek v. Bezzek, 1.**

Interlocutory order—discovery and sanctions orders—affecting a substantial right—Defendant's appeal from two interlocutory orders—one compelling discovery and one imposing sanctions—affected a substantial right where the trial court struck defendant's answer and entered judgment for plaintiffs as to liability in a contract dispute concerning commissions. **Feeassco, LLC v. Steel Network, Inc., 327.**

Interlocutory order—order denying motion to compel discovery—information essential to proof of claim—Defendant's appeal from an interlocutory order denying his motion to compel discovery was dismissed where the information sought was not highly material to a determination of the critical question to be resolved in a contract dispute involving commissions. Any inability or refusal by plaintiff to provide the requested calculation of damages would not have precluded defendant from defending against plaintiff's claims because defendant already possessed the information needed to make such calculations and it was in as good or

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

on multiple counts of possession of a gun on educational property, where defendant failed to preserve the argument by presenting it at trial. The court declined to invoke Appellate Rule 2 to reach the merits of the argument because, even assuming error, defendant's sentence would be within the range authorized by the General Statutes. **State v. Conley, 85.**

Preservation of issues—partition by sale—appellant limited to stated exceptions—In an action to partition real property that had been distributed to eleven children in equal shares, respondent waived an argument on appeal that the superior court failed to conduct a proper inquiry to support a partition by sale, a ground that he did not state when he excepted to the commissioners' report on dividing the property. Although respondent was not required to state specific grounds for his exception, he alleged an unequal allocation of the value of the property or timber, but he argued a different basis in the hearing before the clerk. **Donnell-Smith v. McLean, 164.**

Preservation of issues—satellite-based monitoring—reasonableness of search—Defendant's constitutional challenge to the imposition of lifetime satellite-based monitoring (SBM) following his conviction of second-degree rape was preserved for appellate review even though he failed to lodge an objection at the SBM hearing, where the State initiated the discussion of the reasonableness of the Fourth Amendment search pursuant to *Grady v. North Carolina*, 575 U.S. __ (2015), and the trial court addressed the issue. **State v. Lopez, 496.**

Preservation of issues—satellite-based monitoring—reasonableness—automatic preservation by statute—Defendant's challenge to the imposition of lifetime satellite-based monitoring (SBM) after he was convicted of second-degree rape was not automatically preserved for appellate review pursuant to N.C.G.S. § 15A-1446(d)(18), because the issue raised—whether the imposition was reasonable under the Fourth Amendment—was outside the purview of the statute. **State v. Lopez, 496.**

Preservation of issues—specific grounds—adequacy of service—A medical malpractice plaintiff failed to preserve her argument that defendants should be estopped from asserting insufficiency of process as a defense. While plaintiff's trial counsel argued that defendants knew of the existence of the lawsuit because they filed motions for extension of time, trial counsel failed to further argue that these motions led plaintiff to rely to her detriment on the belief that defendants would not challenge the adequacy of service. **Stewart v. Shipley, 241.**

Preservation of issues—waiver—constitutional challenge to evidence—untimely motion to suppress—In a prosecution for taking indecent liberties with a child, defendant waived his right to appeal the admission of his videotaped police interview on constitutional grounds where his counsel did not properly move to suppress the videotape. Defense counsel neither filed a motion to suppress before trial nor met the procedural requirements of the various statutory exceptions allowing motions to suppress to be made during trial. **State v. Rivera, 525.**

Rule 38—substitution of a party to an appeal—standing—On appeal from an order affirming a town board's decision to allow construction of a telecommunications tower next to petitioner's property, a non-party who never intervened in the proceedings below could not properly substitute for petitioner as the appellant under N.C. R. App. P. 38(b) and, therefore, lacked standing to pursue the appeal. Rule 38 was not intended to broadly permit non-parties to swap in for existing parties who voluntarily cease litigation. **Weishaupt-Smith v. Town of Banner Elk, 618.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Fitness of parent—sufficiency of order—application of clear and convincing evidence standard—The trial court erred in an order declaring a mother unfit and as having acted against her constitutionally protected status as a parent by failing to indicate that it had applied the clear and convincing evidence standard. Because the trial court also did not state the appropriate standard of proof in open court on the record, the matter was remanded for findings consistent with the appropriate standard. **In re J.L., 408.**

Foster parents—participation in proceedings—limited—The trial court did not abuse its discretion in a permanency planning hearing by allowing a child's foster parents and their counsel to participate to a limited extent in the proceedings. The trial court did not allow the foster parents to intervene as parties, but it did hear their testimony, as required by section 7B-906.1(c), and it did allow their counsel to ask questions of an expert who was testifying about the impact of removing the child from their home. **In re J.L., 408.**

Standing—mother—appeal of permanency planning order—declined request to place child with different family—A mother had standing to appeal a permanency planning order that awarded guardianship of her child to a foster family where both statutory requirements for appeal were satisfied (N.C.G.S. § 7B-1001(a)(4) and § 7B-1002(4)). The order changed legal custody of the child from a county department of social services to a foster family, and the mother was a nonprevailing party because the trial court declined her request to place the child with a different foster family. **In re J.L., 408.**

Visitation—consistency of order—The Court of Appeals rejected a mother's argument that the trial court's permanency planning order contained inconsistent provisions regarding visitation. The trial court's conclusion that the mother was a parent whose status conveyed a right to visitation was not inconsistent with its determination that it would be in the child's best interest for the mother to have no visitation with him. **In re J.L., 408.**

Visitation—inconsistent with child's best interest—sufficiency of findings—The trial court did not abuse its discretion in concluding that visitation with his mother was not in a 13-month-old's best interest consistent with his health and safety, where the trial court's findings included the mother's long history with child protective services that resulted in the removal of her three older children and her minimal progress in addressing issues related to substance abuse, domestic violence, mental health, parenting, and stable housing and employment. **In re J.L., 408.**

Visitation—right to file motion to review visitation plan—failure to inform—In entering an order denying a mother visitation with her child who had been adjudicated neglected and dependent, the trial court committed reversible error in violation of N.C.G.S. § 7B-905.1(d) by failing to inform the mother of her right to file a motion to review the visitation plan. **In re J.L., 408.**

CHILD CUSTODY AND SUPPORT

Arrearages—use of past income—The trial court erred in calculating defendant-father's arrearage owed in child support by using defendant's income for each past year rather than by using defendant's current income at the time of the hearing, without making any finding to support the use of such a method. **Simms v. Bolger, 456.**

CHILD CUSTODY AND SUPPORT—Continued

Attorney fees—reasonableness and amount—The trial court did not abuse its discretion in a child support action by ordering defendant-father to pay plaintiff-mother attorney fees awards of $16,240 and $25,000 where the evidence supported the trial court's determinations as to the reasonableness and amount of the awards. **Simms v. Bolger, 456.**

Civil contempt—failure to pay attorney fees during pendency of appeal—subject matter jurisdiction—In an action concerning child support, the trial court had subject matter jurisdiction to hold defendant-father in civil contempt for failure to pay an award of attorney fees during the pendency of his appeal of the child support order. **Simms v. Bolger, 442.**

Custodial savings account—surplus funds to child upon emancipation—The trial court erred by ordering defendant-father to pay a lump sum child support payment to establish a custodial savings account for the benefit of his child, which would result in surplus funds being directed to the child upon emancipation. The purpose of the state's child support statute is to provide support prior to the child's emancipation, not after. **Simms v. Bolger, 456.**

IV-D child support—pending custody action—stay order—misapprehension of the law—The Court of Appeals reversed an order staying an IV-D child support action, holding that the trial court misapprehended the law—and, therefore, abused its discretion—by ruling that it lacked jurisdiction to hear the child support claim while an appeal of the parties' Chapter 50 custody proceeding was pending. Additionally, the child support claim required a rehearing where the trial court erroneously combined the custody and child support actions and then entered a temporary child support order without jurisdiction to do so. **Watauga Cty. o/b/o McKiernan v. Shell, 608.**

Lump sum and monthly obligation—based on current income—impact on future income—The trial court did not abuse its discretion by ordering defendant-father to pay child support that included both monthly payments and a lump sum payment where the trial court based its award on defendant's current income at the time of the hearing and there was no evidence on the impact the lump sum payment would have on defendant's future income. **Simms v. Bolger, 456.**

Lump sum payment—from settlement funds—non-recurring income—The trial court did not abuse its discretion by ordering defendant-father to make a lump sum child support payment from the settlement funds he received from a work-related accident, which constituted non-recurring income subject to the N.C. Child Support Guidelines. **Simms v. Bolger, 456.**

Motion to modify custody—substantial change in circumstances—sufficiency of allegations—The trial court erred by denying a father's motion to modify custody without a hearing, because the motion contained allegations that, if taken as true, showed a substantial change in circumstances which would directly affect the welfare of the child, since the father no longer had to travel for employment and was available to care for the child on a regular basis. The trial court's reliance on an outside discussion with a prior judge in the case to determine the credibility and weight of the allegations was in error since trial courts must rule upon evidence and arguments presented before them at a hearing. **Stern v. Stern, 585.**

Permanent custody order—denial of all contact with minor child—sufficiency of findings—In an action to modify custody which resulted in removal

CHILD CUSTODY AND SUPPORT—Continued

of a father's visitation rights and prohibition against having any contact with the minor child or access to any information about her, the Court of Appeals rejected the father's argument that the order effectively terminated his parental rights. Unlike an order of termination, custody orders can be modified at any time based on a substantial change of circumstances that affect the best interest of the child. Here, the trial court's findings of fact supported its conclusion that the father should have no direct contact with his daughter, and the trial court did not abuse its discretion by allowing the mother to withhold her address from the father or by barring the father from obtaining information about his daughter from third parties, where father exhibited threatening behavior and failed to comply with court-mandated programs. **Huml v. Huml, 376.**

Permanent custody order—findings of fact—evidentiary support—The Court of Appeals overruled a father's challenge to findings of fact in a permanent custody order that related to the trial court's concern about possible inappropriate sexual behavior between the father and his daughter, where the findings were supported by the evidence. The trial court did not actually find that inappropriate behavior occurred, and even if the findings were omitted, the remaining findings of fact supported the trial court's conclusions of law. **Huml v. Huml, 376.**

Request for deviation from Child Support Guidelines—deviation not required—The trial court did not abuse its discretion by denying defendant-father's motion requesting a deviation from the N.C. Child Support Guidelines where defendant argued the Guidelines approach would exceed the reasonable needs of the child. Trial courts are not required to deviate from the Guidelines even when presented with compelling reasons to do so; further, the trial court made appropriate findings and concluded that application of the Guidelines would not be unjust or inappropriate. **Simms v. Bolger, 456.**

Substantial change of circumstances—settlement of Workers' Compensation claim—increase in child's expenses—The trial court did not err by concluding that a substantial change of circumstances warranted modification of defendant-father's ongoing child support obligation where defendant himself alleged a substantial change of circumstances resulting from the settlement of his workers' compensation claim and the termination of monthly temporary disability payments, and where the trial court's findings focused on defendant's allegations and the increase in the child's expenses for day care and health insurance. **Simms v. Bolger, 456.**

CHILD VISITATION

Grandparent's rights—dismissal of contempt motion—effect unclear—A trial court's form order dismissing a motion for contempt was remanded for clarification on whether the trial court intended to dismiss only the portion of a custody action pertaining to a parent whose parental rights had been terminated, or the entire custody action—including a grandparent-intervenor's visitation rights, which survived the termination action. **Adams v. Langdon, 251.**

Grandparent's rights—survival after parent's rights terminated—A termination of parental rights order with regard to one parent did not extinguish previously granted visitation rights to a grandparent who had been allowed to intervene in a custody action between a child's parents. The grandparent-intervenor's visitation rights existed independently of the terminated parent's parental and custodial rights and could be enforced through contempt proceedings. **Adams v. Langdon, 251.**

DIVORCE—Continued

DRUGS

PARTITION

By sale—joint tenant ownership—unequal distribution—equitable principles apply—In an action to partition by sale property owned by an unmarried couple as joint tenants, the trial court's unequal division of the proceeds—in proportion to each person's contribution to the purchase price—properly applied the equitable principles set forth in N.C.G.S. § 46-10, even though that section applies to actual partition and not partition by sale, since trial courts have jurisdiction to adjust all equities between the parties with respect to partition proceedings. Moreover, section 41-2(b) (presuming owners holding property in joint tenancy with right of survivorship have equal interests) did not limit the trial court's equitable powers to order an unequal distribution of the sale proceeds. **Tarr v. Zalaznik, 597.**

Partial sale—consent by parties—abuse of discretion analysis—In an action to partition real property that had been distributed to eleven children in equal shares (but after subsequent transfers and acquisitions belonged to sixteen tenants in common with unequal shares), the trial court did not abuse its discretion in confirming a partial sale of 2.27 acres of an approximately 102-acre lot (with the remainder partitioned in kind), where all parties were included in the action and expressly consented to the in-kind division of the larger tract. It was reasonable for the court to consider the express consent to include consent to the sale of the separated 2.27-acre tract. Moreover, since the smaller tract had not yet been sold, the party challenging the sale could purchase the tract and still be entitled to his portion of the sale proceeds as a tenant in common owner of that tract. **Donnell-Smith v. McLean, 164.**

Report by commissioners—confirmation by clerk—review by superior court—In an action to partition real property that had been distributed to eleven children in equal shares, the trial court did not abuse its discretion when it confirmed the commissioners' report recommending partition in kind and partial sale, where the commissioners testified at the hearing regarding their methodology used to divide the property, many of the parties gave testimony and were given an opportunity to ask questions, and the challenging party (respondent) did not testify and presented only one witness. The trial court made specific findings of fact and conclusions of law in support of its ruling. **Donnell-Smith v. McLean, 164.**

Unequal partition—based on allocated shares—value of whole—In an action to partition real property that had been distributed to eleven children in equal shares (but after subsequent transfers and acquisitions belonged to sixteen tenants in common with unequal shares), the trial court did not abuse its discretion in confirming the commissioners' report, which detailed the method by which the property was valued, and which demonstrated that the valuation of the land was consistently applied to all tracts during the division of the property according to each party's interest. Even though the tracts were valued differently, the commissioners took into account various factors affecting value, including timber, structures, and road access that differed between tracts. The Court of Appeals rejected respondent's argument that the commissioners should have considered the post-division value of each tract. **Donnell-Smith v. McLean, 164.**

PLEADINGS

Motion to amend—denial—futility of amendment—In a case involving tort and civil rights claims against government entities, there was no abuse of discretion in denying plaintiff's motion to amend her complaint to clarify defendants' names because her failure to state a claim upon which relief could be granted rendered any subsequent amendment futile. **Doe v. Wake Cty., 692.**

SEARCH AND SEIZURE—Continued

dangerous. Defendant's behavior—including "blading," or turning away to prevent the officers from seeing his weapon—and his failure to inform the officers he was lawfully armed as required by concealed carry statutes were sufficient to support the officers' stop and frisk. **State v. Malachi, 233.**

Reasonable suspicion—totality of evidence—defendant backing away from officer—The trial judge did not err by denying defendant's motion to suppress evidence of a handgun that fell from defendant's waistband when he was seized. The trial court found that defendant was out at an unusual hour in deteriorating weather, defendant was in an area where a crime spree had occurred, defendant's companion lied about his name and both gave vague answers about where they were coming from, and defendant's companion ran as he was being searched. The findings, taken together, support the conclusion that the officer had reasonable suspicion to search defendant. There was no need to determine whether it was appropriate to consider the fact that defendant was backing away; the findings concerning the pair's behavior prior to that occurring were sufficient. **State v. Augustin, 81.**

Reasonable suspicion—traffic stop—vague anonymous tip—car in parking lot of closed business—no trespass or traffic infraction—A police officer lacked reasonable suspicion to stop defendant's vehicle where there was a vague anonymous report of a suspicious male walking around the parking lot of a closed business at 8:40 pm, the officer was familiar with the area and knew there had been break-ins, defendant ignored the officer and continued exiting the parking lot in his vehicle when the officer spoke to him, and defendant did not commit any traffic infractions to justify a traffic stop. The officer had nothing more than a hunch that a crime might be underway, and the trial court erred by denying defendant's motion to suppress. **State v. Horton, 711.**

Traffic stop—reasonable suspicion—frisk of defendant outside of vehicle—duration of stop—In a prosecution for multiple drug offenses, defendant's motion to suppress contraband was properly denied where the investigating officer had reasonable suspicion to initiate a traffic stop based on defendant's failure to wear a seatbelt, and the officer's lawful request that defendant exit the vehicle and submit to a weapons frisk did not prolong the stop beyond the time reasonably necessary to safely carry out the mission of the stop. The trial court's order was affirmed, even though the court based its denial on a different basis—that the officer had reasonable suspicion to extend the stop. **State v. Jones, 225.**

SENTENCING

Prior record level—calculation—stipulation—In a prosecution for misdemeanor stalking, the trial court did not err in sentencing defendant as a Level II offender where he stipulated to his previous conviction of a Class 2 misdemeanor. In effect, defendant stipulated that the facts underlying his prior conviction justified that particular classification; therefore, defendant did not improperly stipulate to a conclusion of law reserved for the trial court, and the trial court was not required to pursue further factual inquiry on the matter. **State v. Salter, 724.**

SEXUAL OFFENSES

Sexual exploitation of a minor—nude photograph—lascivious—There was sufficient evidence to submit sexual exploitation of a minor charges to the jury where defendant photographed the victim while she was naked, standing in his bedroom,

STATUTES OF LIMITATION AND REPOSE—Continued

of an allegation of child abuse at a day care center. Plaintiff sought monetary damages, a remedy not available through appeal from the final agency decision under the North Carolina Administrative Procedure Act. **Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Human Servs., 71.**

Trespass—damage to adjacent property—promise to repair and partial performance—no tolling of limitations period—In a dispute between adjacent landowners, where defendants allegedly damaged plaintiffs' property while installing a brick wall and metal fence along the dividing property line, plaintiffs' trespass claim was untimely because they filed their complaint more than three years after the original trespass (N.C.G.S. § 1-52(3)) and because neither defendants' promises to repair the damage nor their partial performance on that promise tolled the limitations period. **Brown v. Lattimore Living Tr., 682.**

TAXATION

Leased property—option to purchase—not "inventories" subject to exemption—A taxpayer's property possessed by a lessee pursuant to a lease purchase agreement was not exempt from taxation because it did not constitute "inventories" held for sale by a merchant pursuant to N.C.G.S. § 105-275(34). The fact that the lease purchase agreement contained an option for lessees to purchase the property did not transform the agreement into a sales contract, since lessees were not obligated to make a purchase. Further, the total cost to purchase the property was significantly higher under the rent-to-own scheme than if it were purchased in a direct sale, demonstrating that the transactions were leases and not sales. **In re Aaron's, Inc., 20.**

UNFAIR TRADE PRACTICES

Learned profession exemption—physician—practice of medicine—A claim of unfair and deceptive trade practices against a physician for "the solicitation of patients and the practice of medicine and surgery in North Carolina in violation of [an employment agreement between the employer and the physician]" was barred by the learned profession exemption. **Aesthetic Facial & Ocular Plastic Surgery Ctr., P.A. v. Zaldivar, 260.**

Sufficiency of complaint—specificity—The trial court properly dismissed unfair and deceptive trade practices claims arising from a real estate transaction where the complaint failed to plead specifically what statement or misrepresentation defendants made, how plaintiff relied to its detriment on such statement or misrepresentation, or how such statement or misrepresentation proximately caused an injury to plaintiff. **BDM Invs. v. Lenhil, Inc., 282.**

WATERS AND ADJOINING LANDS

Nuisance—reasonable use of surface water drainage—balancing test—inappropriate on summary judgment—In a dispute between adjacent landowners, where defendant allegedly damaged plaintiffs' property by causing the redirection of water in a drainage ditch running across their properties, the trial court erred in granting summary judgment in defendants' favor on plaintiffs' nuisance claim because the balancing test for determining reasonable use of surface water drainage cannot be completed on summary judgment. Whether defendants' conduct was reasonable was a question for the fact finder. **Brown v. Lattimore Living Tr., 682.**

WRONGFUL DEATH—Continued

summary judgment to defendant fraternity because there was no genuine issue of material fact that the fraternity's negligence proximately caused the student's death. Although there was evidence that members of the fraternity previously hazed the student, the evidence did not establish either the specific cause of his head injury or any link between the head trauma and any of the fraternity members' actions, rendering the theory that hazing caused the student's death mere speculation. One fraternity member's actions in deleting messages and photographs from the decedent's cell phone and computer did not create an inference of spoliation where defendant fraternity had no knowledge of that conduct. **Estate of Tipton v. Delta Sigma Phi Fraternity, Inc., 313.**