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OF

NORTH CAROLINA

AT

RALEIGH

CRAZIE OVERSTOCK PROMOTIONS, LLC, PLAINTIFF
v.
STATE OF NORTH CAROLINA; AND MARK J. SENTER, IN HIS OFFICIAL CAPACITY AS BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT DIVISION, DEFENDANTS

No. COA18-1034

Filed 18 June 2019

Gambling—electronic gaming machines—sections 14-306.1A and 14-306.4—game of chance

In a declaratory judgment action initiated by an operator of electronic gaming machines, the trial court properly granted summary judgment for the State on the basis that one part of the operator's gaming scheme violated N.C.G.S. § 14-306.4 as a matter of law, because it awarded prizes to patrons in a game involving chance and not skill. However, summary judgment was improperly granted in favor of the State regarding a violation of section 14-306.1A because an issue of fact remained as to whether patrons were required to wager anything of value. The second part of the gaming scheme did not violate either statute because it involved an element of skill.

Judge HAMPSON concurring by separate opinion.

Appeal by Plaintiff from order entered 7 August 2018 by Judge Vince M. Rozier, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 24 April 2019.

Morning Star Law Group, by Keith P. Anthony and William J. Brian, Jr., for the Plaintiff.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga Vysotskaya de Brito, for the State.

DILLON, Judge.

Plaintiff Crazie Overstock Promotions, LLC ("Crazie Overstock"), appeals from an order granting partial summary judgment to Defendants (the "State") on the basis that Crazie Overstock operates a gambling enterprise in violation of Sections 14-306.1A and 14-306.4 of our General Statutes. After careful review, we affirm in part and reverse in part. Specifically, we conclude that Crazie Overstock operates electronic gaming machines in violation of Section 14-306.4, as a matter of law, because these machines award "prizes" to winning patrons in a game of chance. However, we conclude that the State was not entitled to summary judgment as to whether the operation of these machines violates Section 14-306.1A, as there is an issue of fact regarding whether patrons are required to pay consideration for the opportunity to play the machines.

I. Background

In May 2016, Crazie Overstock commenced the underlying action after the State began investigating its retail establishments. In its complaint, Crazie Overstock sought, among other relief, a declaratory judgment that its gaming machines at those establishments were lawful *and* an injunction to prevent the State from interfering with its business.

In July 2018, the State filed a motion for summary judgment. Crazie Overstock voluntarily dismissed its claims against any individual Defendants, leaving only its declaratory judgment and injunctive relief claims pending for trial.

After a hearing on the matter, the trial court granted summary judgment to the State, declaring that Crazie Overstock was violating two of North Carolina's "Lotteries and Gaming" statutes, namely Sections 14-306.1A and 14-306.4. The trial court certified its judgment for immediate appeal. Crazie Overstock timely appealed.

II. Crazie Overstock's Enterprise

Crazie Overstock's enterprise involves two games played on electronic machines: a game of chance followed by a game of skill. These games are played as follows:

Crazie Overstock sells gift certificates which may be used to purchase items from its website or its retail stores. For every ten dollars

($10.00) spent on gift certificates, a patron also receives one thousand (1,000) Game Points. With these Game Points, the patron is eligible to play two games on electronic machines: (1) a game of chance, called the Reward Game, followed by (2) a game of skill, called the Dexterity Game.

In the first game, patrons use their Game Points to play the Reward Game, a game of chance on an electronic machine simulating a traditional slot machine. Patrons wager Game Points for the chance to win Reward Points. If the patron "wins" on a particular play, he or she is awarded a number of Reward Points, equal to some multiple of the Game Points wagered on that winning play. If the patron loses all of his or her plays, he or she is still awarded one hundred (100) Reward Points.

After playing the Reward Game, the game of chance, the patron takes Reward Points earned and wagers them in the Dexterity Game, a game of skill which tests his or her hand-eye coordination. The Dexterity Game involves a simulated stopwatch which repeatedly and rapidly counts up from 0 to 1000 and back down to 0. A patron "wins" Dexterity Points by stopping the stopwatch between 801 and 1000. If a patron stops the stopwatch between 951 and 1000, then one hundred percent (100%) of any wagered Reward Points are converted to Dexterity Points; if between 901 and 950, then ninety percent (90%) of any wagered Reward Points are converted to Dexterity Points; and if between 801 and 900, then fifty percent (50%) of any wagered Reward Points are converted. Dexterity Points are redeemable for cash at a rate of one dollar ($1.00) for every one hundred (100) Dexterity Points. If a patron stops the stopwatch between 0 and 800, he or she does not win any Dexterity Points; but all wagered Reward Points are converted back into Game Points which can be used to play the Reward Game for more chances to try and win Reward Points.[1] The patron, though, is allowed three attempts at stopping the stopwatch with each play, with winnings based on the best result. And the evidence in the record suggests that the Dexterity Game is not all that difficult; over ninety-five percent (95%) of patrons playing the Dexterity Game successfully stop the stopwatch above 800 on at least one of their three tries, and therefore win some amount of money.

By way of example, consider a patron who enters a Crazie Overstock retail establishment and spends one hundred dollars ($100.00) to purchase a one hundred dollar ($100.00) gift certificate. The patron may

1. Crazie Overstock does offer every patron one hundred (100) Game Points per day with no purchase of a gift certificate required. Patrons may also receive one hundred (100) Game Points by requesting these points by mail.

use this gift certificate to purchase merchandise at the establishment or from Crazie Overstock's website. In any event, the patron also receives ten thousand (10,000) Game Points.

The patron uses the ten thousand (10,000) Game Points to play the Reward Game, the game of chance, betting some portion on each play, and either losing the Game Points wagered or winning Reward Points equal to some multiple of the Game Points wagered on that spin. After playing all of ten thousand (10,000) Game Points, the patron is left with some number of Reward Points. Even if the patron loses every play, the patron is still awarded a minimum of one hundred (100) Reward Points.

But assume that the patron is lucky in the Reward Game and has turned ten thousand (10,000) Game Points into twenty thousand (20,000) Reward Points. This lucky patron has essentially won the right to win up to two hundred dollars ($200.00) in the Dexterity Game. In the Dexterity Game, the patron bets all twenty thousand (20,000) Reward Points. If the patron's best score in three attempts is above 950, that patron essentially wins two hundred dollars ($200.00). The lucky patron has doubled his money. If the patron's best result is between 901 and 950, he walks away with one hundred eighty dollars ($180.00). If the patron's best result is between 801 and 900, he breaks even, walking away with one hundred dollars ($100.00). If the patron fails in any attempt to stop the stopwatch above 800, he does not win any Dexterity Points, and therefore no cash, but is awarded twenty thousand (20,000) Game Points, which can be used to again play the Reward Game, the game of chance, with hopes of winning Reward Points and another try at the Dexterity Game.

But even assuming our patron is not lucky in the Reward Game and loses all of his Game Points in that Reward Game of chance, he still receives a minimum of one hundred (100) Reward Points, which can be used to win up to one dollar ($1.00) in cash in the Dexterity Game, thus walking out with ninety-nine dollars ($99.00) less in cash than when he entered.

Therefore, a patron walking into a Crazie Overstock establishment who successfully plays the Reward Game of chance is likely to walk out with some multiple of the money he brought into the store. If he dedicates some amount of money into playing but is not successful in the Reward Game, the patron is likely to walk out with only one dollar ($1.00). In any event, the patron still walks out with gift certificates, redeemable for merchandise on Crazie Overstock's website and at its retail locations. It is unclear how much this merchandise is worth, but evidence in the record suggests that very few gift certificates are actually ever redeemed by patrons.

III. Analysis

Crazie Overstock argues that the trial court erred in granting summary judgment to the State, declaring that Crazie Overstock's program is illegal under Sections 14-306.1A and 14-306.4 of our General Statutes.

We review an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). A grant of summary judgment is proper when there is no genuine issue of material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018).

Based on our review of the record, for the following reasons we affirm the grant of summary judgment as to Section 14-306.4; but we agree with Crazie Overstock that it was error for the trial court to grant summary judgment as to Section 14-306.1A and reverse that portion of the order.

Section 14-306.1A prohibits one from placing into operation a video gaming machine which allows a patron to make a wager for the opportunity to win money or another thing of value through a game of chance. N.C. Gen. Stat. § 14-306.1A (2016).

Section 14-306.4 prohibits one from placing into operation an electronic machine which allows a patron, with or without the payment of consideration, the opportunity to win a prize in a game or promotion, the determination of which is based on chance. N.C. Gen. Stat. § 14-306.4 (2016). One key difference between this Section and Section 14-306.1A is that a violation of this Section can occur even if the patron is not required to wager anything for the opportunity to win a prize.

One of the issues on appeal is whether Crazie Overstock operates a "game of skill" rather than a "game of chance," as Sections 14-306.4 and 14-306.1A only proscribe machines where prizes can be won through a game of chance. Our Supreme Court has been rather consistent on the standard to apply in delineating between a game of chance and a game of skill. For instance, in 1848, in holding that bowling is a game of skill, Chief Justice Ruffin took great pains to describe the difference between a "game of chance" and a "game of skill," as follows:

> The phrase, "game of chance," is not one long known in the law and having therein a settled signification, but was introduced into our statute book by the act of 1835. . . . [This term] must be understood [] as descriptive of a certain kind of games of chance in contra-distinction to a certain other kind, commonly known as games of skill. [We hold that] "a game of chance" is such a game, as is

> determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance.

State v. Gupton, 30 N.C. 271, 273-74 (1848). More recently, in a dissent adopted by our Supreme Court, Judge (now Justice) Ervin similarly reasoned that "the essential difference between a game of skill and a game of chance for purposes of our gambling statutes . . . is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill." *Sandhill Amusements, Inc., v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 369, 762 S.E.2d 666, 685 (2014) (Ervin, J., dissenting), adopted by our Supreme Court, 368 N.C. 91, 773 S.E.2d 55 (2015).

As recognized by our Supreme Court, there are elements of "chance" in many "games of skill." For instance, in *Gupton*, Chief Justice Ruffin stated that "an unexpected puff of wind" or "unseen gravel" may turn aside a skillfully tossed ring or ball towards its target, but that such element of chance does not convert a ring toss game or bowling game into a game of chance. *Gupton*, 30 N.C. at 274. Similarly, it has been recognized that there are sometimes elements of skill present in games of chance. *See, e.g.*, *Collins Coin Music Co. of N.C., Inc., v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 409, 451, S.E.2d 306, 308 (1994) (holding that video poker is a game of chance as chance "negates [the] limited skill element"). Ultimately, whether a game is one of chance or one of skill is dependent on which element "is the dominating element that determines the result of the game." *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 616 (1972) (recognizing that blackjack has some elements of skill and chance).

In the present case, Crazie Overstock argues that its game is one of skill since skill is the dominating element in determining whether a patron wins money: no matter how lucky a patron is in the first part of the game in racking up Reward Points, the patron can only win money by performing well in the Dexterity Game.

We agree with Crazie Overstock that, though it appears little skill is truly required, its Dexterity Game alone is one of skill, which, by itself, does not violate either Section 14-306.4 or 14-306.1A. Though patrons can win money playing the Dexterity Game, the outcome of the game is dependent primarily on the patrons' ability to react in a timely fashion.

We conclude, however, that Crazie Overstock's Reward Game is a separate game in which patrons have the opportunity to win something of value. And there is no argument that the outcome of the Reward

Game is based on chance, as the game involves a simulated slot machine. Further, we conclude that the Reward Game indeed offers a "prize," that is, something of value. *See* N.C. Gen. Stat. § 14-306.4(a)(4) (2016) (defining "prize[,]" in part, as "anything [] of value"). Namely, lucky patrons win *the opportunity* to play an easy game of skill for money; and this opportunity to win money, itself, is a thing of value.

The exact odds and payouts for a winning spin of the virtual reels in the Reward Game is not in the record. But assume that a patron buys a twenty dollar ($20.00) gift certificate and, thus, receives two thousand (2,000) Reward Points. If the patron risks all these points in a single "spin" and the result is a winning combination which pays double, she is awarded *the opportunity* to play an easy game of skill, the Dexterity Game, where she has a high likelihood of walking away with forty dollars ($40.00). But if the patron's "spin" in the Reward Game results in a losing combination, she is awarded only the opportunity to win one dollar ($1.00) in the Dexterity Game. Thus, in the Reward Game of chance, the patron may win the opportunity to win thirty-nine ($39.00) extra dollars, just for being lucky.

If we were to hold that Crazie Overstock's Reward Game and Dexterity Game were together a game of skill, then our gambling statutes as a whole would be rendered largely meaningless, as illustrated in the following example: The operation of a typical roulette wheel, with eighteen (18) red slots, eighteen (18) black slots, and two green slots, is clearly illegal gambling in North Carolina. For example, an establishment who allows patrons to wager twenty dollars ($20.00) on "red" and then pays those patrons twenty additional dollars ($20.00) if the ball indeed falls into a red slot would be violating our gambling laws. *See* N.C. Gen. Stat. § 14-292 (2016) (proscribing most forms of gambling on games of chance). However, applying the logic of Crazie Overstock's argument, an establishment offering roulette could circumvent our proscription against gambling by simply *not* paying winners an additional twenty dollars ($20.00) in cash but rather award them each *the opportunity* to win an additional twenty dollars ($40.00) in cash by making at least one out of three lay-ups on a three-foot high basketball goal.[2] Such

2. The fact that Crazie Overstock allows "losers" of the Reward Game of chance the opportunity to win one dollar ($1.00) in the Dexterity Game does not change our analysis. In our example, an establishment is still operating an illegal game even if it offers losers the opportunity to win twenty-five (25) cents by making a lay-up, as the odds remain with the establishment.

an outcome is, of course, absurd. Therefore, we must reject Crazie Overstock's analysis.[3]

Our General Assembly has prohibited certain forms of gambling, including certain video games which offers prizes. Such is within the police power of that body. *Hech Techs.*, *Inc. v. State*, 366 N.C. 289, 290, 749 S.E.2d 429, 431 (2012) (recognizing that "[s]ince the founding of this nation, states have exercised the police power to regulate gambling"). It is not for the Courts to legalize gambling video games but rather is within the province of our General Assembly to make that decision.

IV. Conclusion

We, therefore, conclude that the Reward Game violates Section 14-306.4, as a matter of law, as it offers patrons the opportunity to win a "prize," defined, in part, as "anything [] of value," where the outcome is

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3. Even analyzing the Reward Game and the Dexterity Game as a *single* game, as advocated by Crazie Overstock, we conclude that the element of chance overrides any element of dexterity. In reaching this conclusion, we follow the reasoning applied in Judge Ervin's dissent in *Sandhills* that was adopted by our Supreme Court. *Sandhill Amusements*, 236 N.C. App. at 369, 762 S.E.2d at 685 (Ervin, J., dissenting). The game at issue in *Sandhills* involved a video machine displaying a virtual, three-reel slot machine. If the spin produced a winning combination, the player won. In that game, the position of the three reels after a spin was determined totally by chance, but the game also had a skill element. The game allowed the player *after the spin* to then "nudge" one of the reels by one position to produce a different, and perhaps winning, combination. Thus, in some plays, the player had the ability to change a losing spin into a winning spin. Notwithstanding, our Supreme Court still concluded that the game as a whole was one of chance, as a matter of law:

> [U]se of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays. Finally, the extent to which the opportunity arises for the "nudging" activity [to produce a winning combination] appears to be purely chance-based. . . . [T]he only basis for th[e] assertion [that the game was one of skill] was the player's ability to affect the outcome by "nudging" a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this "nudging" process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. . . . As a result, for all of these reasons, I am compelled by the undisputed evidence to conclude that the element of chance dominates the element of skill in the operation of Plaintiffs' machines[.]

Id. at 369-70, 762 S.E.2d at 686. In the same way, here, chance determines whether a Crazie Overstock patron will have the opportunity to use dexterity to win any money (over one dollar ($1.00)).

based on chance. N.C. Gen. Stat. § 14-306.4(a)(4). We further conclude that the operation of the Dexterity Game, by itself, does not violate either Section 14-306.4 or 14-306.1A, as a matter of law.

However, there is at least an issue of fact as to whether the Rewards Game violates Section 14-306.1A. One does not violate this Section unless the game of chance requires the patron to wager something of value. And it is unclear whether, here, patrons are required to wager anything of value. Patrons who are awarded two thousand (2,000) Game Points for twenty dollars ($20.00) also receive a twenty dollar ($20.00) gift certificate, redeemable for merchandise.

Accordingly, we affirm summary judgment awarded to the State on the claim under Section 14-306.4 of our General Statutes, as Crazie Overstock's business scheme constitutes an illegal sweepstakes. We reverse summary judgment on the claim for a declaration under Section 14-306.1A, as it is not clear whether payment is required to play the Reward Game. On remand, the trial court may consider whether a trial is necessary or whether this second issue is mooted by our determination that the scheme is otherwise illegal under Section 14-306.4.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge MURPHY concurs.

Judge HAMPSON concurs by separate opinion.

HAMPSON, Judge, concurring.

I concur with the majority opinion in this case. I write separately to add that, at least in my view, our reversal of summary judgment on the question of whether Crazie Overstock's business model violates N.C. Gen. Stat. § 14-306.1A should not be construed as an indication that Crazie Overstock's business model does not violate N.C. Gen. Stat. § 14-306.1A. Rather, Crazie Overstock has generated a triable issue of fact as to whether the sale of gift certificates, in fact, constitutes the sale of a legitimate product offered in the free marketplace by a business regularly engaged in the sale of such goods or services or whether the sales of these gift certificates constitutes a mere subterfuge for illegal gaming. *See American Treasures, Inc. v. State*, 173 N.C. App. 170, 177, 617 S.E.2d 346, 350 (2005).

Here, Crazie Overstock has forecast evidence that a customer purchasing gift certificates receives the same face value of certificates as

the amount the customer paid (i.e., a $20 payment results in a $20 gift card that may be used to purchase $20 of merchandise, as priced by Crazie Overstock). On the other hand, the State has forecast substantial evidence calling into question the actual value received from the gift card, including, *inter alia*, as to Crazie Overstock's practices in the operation of the retail merchandise component of its business and in the redemption rates of the certificates themselves.

In particular then, at least in part, the question *sub judice* is whether "the price paid for and the value received" from the gift certificates "is sufficiently commensurate to support the determination that the sale of [gift certificates] is not a mere subterfuge to engage in [illegal gaming], whereby consideration is paid merely to engage in a game of chance." *Id.* at 178-79, 617 S.E.2d at 351 (concluding sale of prepaid long-distance phone cards with an attached game piece did not constitute a lottery scheme where the long-distance rate purchased was among the best in the industry).

NHUNG HA AND NHIEM TRAN, PLAINTIFFS
v.
NATIONWIDE GENERAL INSURANCE COMPANY, DEFENDANT

No. COA19-75

Filed 18 June 2019

Insurance—provisional homeowner policy—cancellation—section 58-41-15(c)—furnishing of notice

An insurance company failed to meet the requirements of N.C.G.S. § 58-41-15(c) before cancelling a newly issued homeowner policy where the homeowner never received the cancellation letter, rendering the cancellation ineffective. Under the statute, a policy could be terminated only after "furnishing" notice, which required proof of actual delivery to and/or receipt of the notice by the insured.

Judge TYSON dissenting.

Appeal by plaintiffs from judgment entered 31 August 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 7 May 2019.

John M. Kirby for plaintiff-appellants.

Bailey & Dixon, LLP, by David S. Wisz, for defendant-appellee.

ARROWOOD, Judge.

Nhung Ha ("Ms. Ha") and Nhiem Tran ("Mr. Tran") (collectively, "plaintiffs") appeal from a judgment dismissing their complaint in part, and declaring Nationwide General Insurance Company ("defendant" or "Nationwide") properly cancelled the homeowner's insurance policy it issued to plaintiffs. For the reasons stated herein, we reverse and remand.

I. Background

Mr. Tran contacted Nationwide on or about 1 April 2015 to secure a homeowner's insurance policy for plaintiffs' home. Nationwide issued the policy that same day.

On or about 14 April 2015, Nationwide's underwriting department sent an inspector to plaintiffs' home. The inspector issued a report on 25 April 2015, identifying several hazards he discovered at the home: (1) rotten siding, (2) an unsecured trampoline, and (3) an unfenced inground pool. Based on this report, Nationwide decided to cancel plaintiffs' policy. The underwriter who made this decision contacted Ms. Brenda Elkerson, a Nationwide employee whose job responsibilities include drafting written notices of policy cancellations, and asked her to prepare a notice cancelling plaintiffs' policy. Ms. Elkerson drafted the letter and sent a memo to the agent on plaintiffs' policy regarding the cancellation. The letter of cancellation listed the hazards identified by the inspector as the reason for the policy's cancellation, and explained the specific steps plaintiffs could take to ameliorate the hazards to reinstate coverage. The letter, dated 22 May 2015, gave plaintiffs until 6 June 2015 to address the hazards. If they did not, Nationwide would cancel the policy at 12:01 a.m. on 6 June 2015.

Ms. Elkerson instructed Nationwide's processing department to print the cancellation letter for mailing. The certificate of mail report maintained by Nationwide shows that the cancellation letter was presented for mailing on 22 May 2015. Although the letter was not returned to Nationwide, plaintiffs never received it.

On 24 July 2015, a fire destroyed plaintiffs' home. When plaintiffs contacted Nationwide to file a claim, they were informed they were not insured, as the policy had been cancelled. Thereafter, plaintiffs retained

legal counsel to pursue a claim for reimbursement, which Nationwide denied by letter on 1 October 2015.

Plaintiffs initiated an action against defendant by filing a complaint in Wake County Superior Court on 24 January 2017, seeking damages for breach of contract and a declaratory judgment that Nationwide did not timely and properly cancel the policy. Nationwide answered and asserted a counterclaim requesting a declaratory judgment that it properly cancelled plaintiffs' policy.

The matter came on for hearing before the Honorable Rebecca W. Holt in Wake County Superior Court on 27 August 2018. On 31 August 2018, the trial court entered a judgment dismissing plaintiffs' breach of contract claim, and declaring: "Nationwide has no duty or obligation under the Policy to make payment to the Plaintiffs for the damage to the Residence and its contents which resulted from the loss on the grounds that the Policy was timely and properly cancelled." The trial court taxed the costs of the action to plaintiffs.

Plaintiffs appeal.

II. Discussion

Plaintiffs argue the trial court erred by concluding Nationwide complied with: (1) N.C. Gen. Stat. § 58-41-15(c) (2017), and (2) the insurance policy's termination requirements. Because we agree with plaintiffs that the trial court erred by concluding Nationwide complied with N.C. Gen. Stat. § 58-41-15(c), we reverse and do not reach the second issue on appeal.

"In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the . . . ultimate conclusions of law." *State v. Navarro*, 247 N.C. App. 823, 829, 787 S.E.2d 57, 62 (2016) (citations and internal quotation marks omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

N.C. Gen. Stat. § 58-41-15 governs the cancellation of homeowners' insurance policies. Pursuant to this section, an insurer may only cancel an insurance policy, or renewal thereof "prior to the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured" if the insurer cancels for one of the reasons listed in N.C. Gen. Stat. § 58-41-15(a), which are:

(1) Nonpayment of premium in accordance with the policy terms;

(2) An act or omission by the insured or his representative that constitutes material misrepresentation or nondisclosure of a material fact in obtaining the policy, continuing the policy, or presenting a claim under the policy;

(3) Increased hazard or material change in the risk assumed that could not have been reasonably contemplated by the parties at the time of assumption of the risk;

(4) Substantial breach of contractual duties, conditions, or warranties that materially affects the insurability of the risk;

(5) A fraudulent act against the company by the insured or his representative that materially affects the insurability of the risk;

(6) Willful failure by the insured or his representative to institute reasonable loss control measures that materially affect the insurability of the risk after written notice by the insurer;

(7) Loss of facultative reinsurance, or loss of or substantial changes in applicable reinsurance as provided in G.S. 58-41-30;

(8) Conviction of the insured of a crime arising out of acts that materially affect the insurability of the risk; or

(9) A determination by the Commissioner that the continuation of the policy would place the insurer in violation of the laws of this State;

(10) The named insured fails to meet the requirements contained in the corporate charter, articles of incorporation, or bylaws of the insurer, when the insurer is a company organized for the sole purpose of providing members of an organization with insurance coverage in this State.

N.C. Gen. Stat. § 58-41-15(a)(1)-(10).

A cancellation permitted by N.C. Gen. Stat. § 58-41-15(a):

> is not effective unless written notice of cancellation has been delivered or mailed to the insured, not less than 15 days before the proposed effective date of cancellation. The notice must be given or mailed to the insured, and any designated mortgagee or loss payee at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. The notice must state the precise reason for cancellation. *Proof of mailing is sufficient proof of notice.* Failure to send this notice to any designated mortgagee or loss payee invalidates the cancellation only as to the mortgagee's or loss payee's interest.

N.C. Gen. Stat. § 58-41-15(b) (emphasis added). However, N.C. Gen. Stat. § 58-41-15(b)

> does not apply to any insurance policy that has been in effect for less than 60 days and is not a renewal of a policy. That policy may be cancelled for *any reason by furnishing* to the insured at least 15 days prior *written notice of and reasons for cancellation.*

N.C. Gen. Stat. § 58-41-15(c) (emphasis added). The failure to comply with the statutory requirements for cancelling an insurance policy renders the cancellation ineffective. *Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 259, 382 S.E.2d 745, 751-52 (1989).

Here, the trial court found that plaintiffs "did not receive the cancellation letter." But the trial court concluded that Nationwide proved by a preponderance of the evidence that it complied with N.C. Gen. Stat. § 58-41-15(c), explaining:

> Although [sub]section (c) does not include the language,[ ] ["]proof of mailing is sufficient proof of notice", that language is included in [sub]section (b). Reading the statute as a whole and giving the term "furnishing" it's [*sic*] ordinary meaning – "to provide, supply of equip [*sic*], for the accomplishment of a particular purpose" (Black's Law Dictionary 608 – 5[th] ed. 1979), this Court finds that the proof of mailing by Nationwide is sufficient notice under the statute. This Court declines to interpret the statute to require Nationwide to prove actual knowledge on the part of the insureds.

It is undisputed that the cancellation of plaintiffs' policy is controlled by N.C. Gen. Stat. § 58-41-15(c): the policy was in effect less than 60 days and was not the renewal of a policy. However, plaintiffs contend the trial court erred by concluding proof of mailing provided sufficient notice to the insured under this subsection. Instead, plaintiffs argue, subsection (c)'s use of the statutory term "furnishing" required actual delivery to and/or receipt of the notice by the insured. We agree.

N.C. Gen. Stat. § 58-41-15 does not define "furnishing[,]" and no case law in North Carolina directly addresses what is required for an insurer to "furnish" notice of cancellation. The only North Carolina case that addresses the definition of "furnishing" is *Queensboro Steel Corp. v. E. Coast Mach. & Iron Works, Inc.*, 82 N.C. App. 182, 346 S.E.2d 248 (1986). However, *Queensboro* is not controlling here, as it involved this Court's interpretation of the term "furnish" in the context of a materialman's lien statute claim under Chapter 44A of the General Statutes, and the relevant statute specifically required furnishing "at the site[.]" *See id.* at 184, 346 S.E.2d at 250 (analyzing N.C. Gen. Stat. § 44A-10 (2017)). Nonetheless, as in *Queensboro*, the language before our Court in the instant case is ambiguous, and therefore subject to judicial determination of legislative intent.

As this Court explained in *Queensboro*, "[g]enerally, words in a statute that have not acquired a technical meaning must be given their natural, approved, and recognized meaning. In determining whether statutory language is ambiguous, and therefore subject to judicial determination of legislative intent, courts may consult a dictionary." *Id.* at 185, 346 S.E.2d at 250 (citations and internal quotation marks omitted). Black's Law Dictionary defines furnish, in a legal context, as "[t]o supply, provide, or equip, for accomplishment of a particular purpose." *Id.* at 185-86, 346 S.E.2d at 250 (quoting Black's Law Dictionary 608 (5th ed. 1979)); *see* Webster's College Dictionary 588 (2014) (defining "furnish" as "to supply, provide, or equip with whatever is necessary. . . .").

Given the lack of a statutory definition and the dictionary definition of "furnish," it is not clear whether the legislature, by requiring the insurer "furnish" notice, intended to require actual delivery to and/or receipt of the notice by the insured. Another reasonable interpretation, as argued by defendant, is that proof of mailing is sufficient to "furnish" notice under the statute. Therefore, we conclude the statutory language is ambiguous and we must consider relevant canons of statutory interpretation. *See Purcell v. Friday Staffing*, 235 N.C. App. 342, 347, 761 S.E.2d 694, 698 (2014) ("When . . . a statute is ambiguous, judicial

construction must be used to ascertain the legislative will." (citation and internal quotation marks omitted)).

"Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483, 810 S.E.2d 217, 222 (2018) (citation and internal quotation marks omitted). Accordingly, we read N.C. Gen. Stat. § 58-41-15 holistically to determine whether the trial court erred by concluding proof of mailing provided sufficient notice to the insured under subsection (c) of this statute.

Subsection (c) clearly varies from subsection (b), and, because we "presume[ ] that the Legislature acted with full knowledge of prior and existing law[,]" *see Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977), we must presume that this variation is meaningful. As such, "proof of mailing" must be different from "furnishing" notice. After all, if the General Assembly intended for proof of mailing to be sufficient under subsection (c), they could have included the express language found in subsection (b) in subsection (c). Instead, the General Assembly provided two different standards for notice.

Defendant does not dispute there is variation between the standards for notice in subsection (b) and (c). However, defendant argues that, reading the statute holistically, subsection (c) does not require as much notice as subsection (b). Therefore, defendant contends, the use of "furnish" in subsection (c) must suggest something less than proof of mailing, which the plain language of the statute states is sufficient to provide notice under subsection (b). In support of this argument, defendant argues the General Assembly would require less notice for cancellations of policies pursuant to subsection (c) because policies cancelled under subsection (c) are either not renewals, or have not been in effect longer than 60 days, or both. In contrast, policies cancelled pursuant to subsection (b) are either renewals, or have been in effect for longer than 60 days. We disagree.

Subsection (b) provides for notice of cancellation to insureds who have committed an offense listed in subsection (a); thus, these insureds are likely aware both that they are noncompliant with the policy, and also that the policy could be terminated based on this act. In contrast, subsection (c) provides for notice of cancellation of policies for any reason. As such, it stands to reason that termination under this subsection requires more notice, as an insured could be caught completely unaware

by a termination of a policy pursuant to subsection (c). Therefore, we hold proof of mailing is not sufficient to "furnish" notice of cancellation to insureds under N.C. Gen. Stat. § 58-41-15(c).

Furthermore, the statute at issue is remedial, and intended to protect insureds from in-term policy cancellations without notice; therefore, we construe the statute in favor of finding coverage. *See Metro. Prop. & Cas. Ins. Co. v. Caviness*, 124 N.C. App. 760, 764, 478 S.E.2d 665, 668 (1996). Toward that end, the purpose of the statute is best served when every provision of the Act is interpreted to provide an insured with the fullest possible protection. It follows that the required notice of cancellation to insureds who are innocent of wrongdoing would not be less than notice to those insureds whose policies are cancelled under subsection (b), based on a bad act listed in subsection (a), such as "[s]ubstantial breach of contractual duties, conditions, or warranties that materially affects the insurability of the risk;" or "[a] fraudulent act against the company by the insured or his representative that materially affects the insurability of the risk[.]" N.C. Gen. Stat. § 58-41-15(a)(4)-(5). Accordingly, subsection (c), which provides for the cancellation of policies for any reason, must be afforded the fullest possible protection.

Therefore, subsection (c)'s requirement that the insurer "furnish" notice of cancellation must mean something more than "proof of mailing." Considering this conclusion in light of the dictionary definition of furnishing, "[t]o supply, provide, or equip, for accomplishment of a particular purpose[,]" we hold the statute requires actual delivery to and/or receipt of the notice by the insured.

Because the facts before us demonstrate nothing more than that Nationwide provided "proof of mailing[,]" and the trial court expressly found plaintiffs did not receive notice, Nationwide failed to afford plaintiffs sufficient notice of the policy's cancellation. As a result, the cancellation was ineffective, *Pearson*, 325 N.C. at 259, 382 S.E.2d at 751-52, and the trial court erred by concluding Nationwide complied with the provisions of N.C. Gen. Stat. § 58-41-15(c).

III. Conclusion

For the foregoing reasons, we reverse and remand for the trial court to consider the matter consistent with this opinion.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Sympathetic facts result in bad precedents. All evidence presented at trial shows Nationwide General Insurance Company ("Nationwide" or "defendant") timely and correctly furnished notice of cancellation to plaintiffs, Ha and Tran. Nationwide's actions and notice fully complied with N.C. Gen. Stat. § 58-41-15 and with the requirements of the policy agreed to by plaintiffs.

The trial court properly determined Nationwide had furnished notice to plaintiffs concerning the impending termination of plaintiffs' policy. The trial court's conclusions of law are supported by its findings and the evidence at trial and its order is properly affirmed. I respectfully dissent from the majority's opinion.

I. Factual Background

The majority's opinion fails to include relevant evidence and events the trial court found and upon which it entered judgment for defendant. An excess premium check for $89.50 was refunded by Nationwide and returned to plaintiffs on 8 June 2015. Pursuant to its policy, Nationwide "returned a pro rata portion of the premium" which also contained the policy number affiliated with plaintiffs' home insurance policy. Nationwide's policy includes printing the policy number on each check to distinguish it from other insurance policies.

Plaintiffs initially denied receipt of this premium refund, but later conceded they had, in fact, received and cashed the check. Nationwide submitted a copy of the cancelled premium refund check with the policy number thereon, and authenticated plaintiffs' signature thereon. After having mailed the premium refund check, Nationwide also discontinued withdrawing policy payments from plaintiffs' checking account. None of these undisputed facts are set out in the majority's opinion.

The majority's opinion also provides only a cursory overview of Nationwide's process to mail notices. The testimony describes Nationwide's extensive mailing protocol. This process includes "an employee from the processing department hand-delivering" the notices of cancellation to "a mailroom employee along with a Certificate of Mail Report." Accompanying the Certificate of Mail Report, was a "manifest listing each cancellation letter with an individual article number and the addressee."

Next, the mailroom employee matches the manifest and the letters, folds the letters by hand, and places the letters into the properly addressed and stamped envelopes. Before delivering the letters to the post office, the mailroom employee counts the number of envelopes to account for all pieces of mail. The 22 May 2015 Certificate of Mail Report, which specifically includes the letter mailed to plaintiffs, shows 510 cancellation letters were presented to the United States Postal Service. This document included Ha's name, address, and policy number. The detailed protocol insures each piece of mail is sent to the proper address. The premium check sent to plaintiffs and was cashed more than six weeks prior to plaintiffs' loss.

II. Cancellation of Policy

A. Statutory Requirements

The trial court correctly determined the undisputed timeline of this case. On 1 April 2015, Nationwide effectuated a provisional homeowner's insurance policy for plaintiffs. Plaintiffs agreed to pay premiums by automatic draft from their checking account. A Nationwide representative left a voicemail on 10 April 2015 at the number plaintiffs had provided, advising plaintiffs of a routine inspection of their home.

Nationwide inspected plaintiffs' premises on 14 April 2015 and identified several hazards. On 22 May 2015, Nationwide "furnished" and mailed written notice of policy cancellation. The notice of cancellation indicated the policy would terminate on 6 June 2015 at 12:01 a.m.

Our general statutes provide that no insurance provider may cancel a policy without the insured's consent outside an enumerated list of ten specified exceptions. N.C. Gen. Stat. § 58-41-15(a) (2017) ("No insurance policy or renewal thereof may be cancelled by the insurer prior to the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, *except* for any one of the following [ten] reasons" (emphasis supplied)). This non-cancellation provision prior to the expiration of the term specifically

> *does not apply* to any insurance policy that has been in effect for less than 60 days and is not a renewal of a policy. That policy may be cancelled *for any reason by furnishing* to the insured at least 15 days prior written notice of and reasons for cancellation.

N.C. Gen. Stat. § 58-41-15(c) (2017) (emphasis supplied).

This statute plainly indicates section (c) applies to insureds, like plaintiffs, whose policies have been provisionally initiated or insured within the previous sixty-day period. Based upon the stipulated timeline, the policy had been in effect for 51 days when Nationwide furnished notice to plaintiffs to cancel the policy. It is undisputed and the majority's opinion acknowledges defendant's cancellation of plaintiffs' policy clearly falls within N.C. Gen. Stat. § 58-41-15(c), because the policy had been in effect "for less than 60 days." *Id.* Here, Nationwide properly cancelled the policy within the first sixty days of issuance. Nationwide is not limited by the enumerated reasons for cancellation, but rather maintained the absolute right to cancel the policy "for any reason." *Id.*

The stipulated timeline also indicates the notice of cancellation fully complied with the statutory requirement of fifteen days' prior written notice to the insured before cancellation became effective. The trial court properly found and the majority's opinion concedes that Nationwide fully complied with the plain terms of the controlling statute.

B. "Furnishing" Notice

The majority's opinion erroneously concludes the word "furnish" must be interpreted to mean Nationwide must prove actual delivery to and receipt of a cancellation letter by plaintiffs. No binding precedents interpret how "furnish" is to be defined in the context of N.C. Gen. Stat. § 58-41-15. The majority's opinion notes the only North Carolina case that addresses the definition of "furnish" is *Queensboro Steel Corp. v. E. Coast Mach. & Iron Works, Inc.*, 82 N.C. App. 182, 346 S.E.2d 248 (1986). The majority's opinion acknowledges *Queensboro Steel* does not control here because it pertains to the Court's interpretation of the term "furnish" within Chapter 44A of the General Statutes which focuses on materialman's and mechanic's liens.

In reviewing questions of statutory intent and meaning, "[t]he primary objective of statutory interpretation is to give effect to the intent of the legislature." *Purcell v. Friday Staffing*, 235 N.C. App. 342, 346, 761 S.E.2d 694, 698 (2014). If statutory language is ambiguous, this Court should analyze the entire statute in order to determine legislative intent. *See id.* at 347, 761 S.E.2d at 698 ("When . . . a statute is ambiguous, judicial construction must be used to ascertain the legislative will.").

The majority's opinion asserts the statutes must be viewed holistically to determine the intent of the legislature. *See N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483, 810 S.E.2d 217, 222 (2018) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter

to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

This Court can deduce the intent of the legislature by considering the entire text of the statute and comparing the language of two distinct sections. N.C. Gen. Stat. § 58-41-15(a) requires actual notice by way of the insured's consent where an insurance company terminates a non-provisional policy prior to its stated expiration.

Section (c) of the statute only requires the insurer to furnish notice of cancellation to an insured under a policy "that has been in effect for less than 60 days." The legislature could have written the statute to require the insurer to prove actual notice and receipt. *See* N.C. Gen. Stat. § 58-36-105 (2017) (governing the cancellation of worker's compensation insurance policies and requiring that a written notice of cancellation must be sent by registered or certified mail, return receipt requested, with the policy remaining in effect "until such method is employed and completed"); *see also* N.C. Gen. Stat. § 58-36-85 (2017) (requiring the cancellation of personal motor vehicle insurance policies be sent by first-class mail and providing the insured ten days from receipt of the notice to request review by the Department of Insurance).

Instead, section (c), which applies to provisional and newly issued policies "that has been in effect for less than 60 days," such as plaintiffs' policy, plainly and unambiguously requires notice of cancellation to be furnished. As the majority's opinion concedes, the language distinguishing sections (a) and (c) in the statute indicates the General Assembly's intention to provide "two different standards for notice" to policy holders.

"In a legal context, 'furnish' means '[t]o supply, provide, or equip, for the accomplishment of a particular purpose.' " *Queensboro Steel*, 82 N.C. App. at 185-86, 346 S.E.2d at 250 (quoting *Black's Law Dictionary* 608 (5th ed. 1979)). English language dictionary definitions are similar. *See Webster's New World College Dictionary* 588 (5th ed. 2014) ("to supply; provide; give)." Applying the plain meaning of "furnish" or "furnishing," and reading the statute as a whole, led the trial court to correctly conclude the insurer's undisputed proof of mailing satisfies proof of notice.

The General Assembly clearly enacted two different standards of notice. Section (a) requires signed consent and acknowledgment of a cancellation from an insured. Section (c) requires that an insurance company "furnish" or provide notice. In this case, Nationwide acted in accordance with the statute by *providing* or furnishing notice via the United States Postal System to the address plaintiffs had provided.

Requiring the insurer to additionally prove actual receipt of the cancellation letter by the insured is not required by statute.

In *Allstate Ins. Co. v. Nationwide Ins. Co.*, this Court rejected the notion the insured must be provided actual notice. *Allstate Ins. Co. v. Nationwide Ins. Co.*, 82 N.C. App. 366, 346 S.E.2d 310, (1986). This Court held a cancellation was effective because "[u]nder North Carolina law, and under the policy language contained in the policy at issue, proper mailing of the cancellation notice is all that is required to cancel the policy." *Id.* at 369-70, 346 S.E.2d at 312-313.

Here, Nationwide properly followed the plain meaning of the statute by using its mailing protocol to timely cancel this policy. Nationwide need not guarantee receipt by plaintiffs. Had the General Assembly wanted to burden an insurer under the facts before us with the additional responsibility of proving actual receipt by the insured, it clearly knew how to so require and would have drafted and enacted the statute to so provide. The trial court properly concluded Nationwide's proof of mailing sufficiently satisfied the statutory requirements.

C. Nationwide's Policy

Similar to N.C. Gen. Stat. § 58-41-15, Nationwide's policy grants it the absolute right to cancel a policy within sixty days of issuance:

> 2. We may cancel this policy only for the reasons stated below by letting you know in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the Declarations. *Proof of mailing will be sufficient proof of notice.*
>
> . . . .
>
> (b) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel *for any reason* by letting you know at least 10 days before the date cancellation takes effect.

Plaintiffs' assertion that they never received the letter is not determinative of this issue. The testimony at trial indicates Nationwide used a mailing system and protocols to ensure each piece of mail, especially those containing important notices such as notices of cancellation, were furnished to the insured that evidences the statutory and policy requirements. Nationwide provided prior written notice to the plaintiffs of the impending policy cancellation by mailing a letter explaining the

policy would be terminated. The policy explicitly stated proof of mailing served as proof of sufficient notice. Although plaintiffs purportedly never received the letter, detailed testimony of the mailing protocol, the cashed premium check, and the discontinued drafting from plaintiffs' account corroborates the proper cancellation under the policy and the statute.

The "mailbox rule" also "creates a rebuttable presumption that an envelope sent via the postal service with proper postage was delivered to the intended party." *Nationwide Prop. & Cas. Ins. Co. v. Martinson*, 208 N.C. App. 104, 116, 701 S.E.2d 390, 398 (2010) (citations omitted). Here, the testimonial evidence shows the cancellation letter had been sent with the proper postage to plaintiffs' address.

In accordance to the mailbox rule, there is a rebuttable presumption the letter sent via the Nationwide mailing procedures through the postal service was delivered to plaintiffs. *Id.* Plaintiffs failed to rebut this presumption and explain their cashing of the returned premium check for this policy and the discontinued drafting of premiums from their checking account.

The impact of the majority's interpretation of "furnishing" to require actual receipt of cancellation notice by plaintiffs of policies issued less than sixty days will decrease the willingness of insurers to provide immediately binding insurance coverage. Judicially imposing a requirement on insurers to guarantee delivery to or receipt of a cancellation letter during underwriting of new policies issued less than sixty days will lead to greater costs and decreased availability of insurance coverage.

These added costs of guaranteed receipt to cancel by the insurer will inevitably be passed onto consumers. Imposing judicially required certified mailing or other independent verification also interferes with the insurance company's policy and the parties' freedom of contract.

III. Conclusion

N.C. Gen. Stat. § 58-41-15(c) provides that a policy, which has been in effect for less than sixty days, may be cancelled for any reason so long as the insurer furnishes prior written notice. Nationwide properly provided notice by timely mailing a letter of notification to plaintiffs.

The plain meaning of the words "furnish" or "furnishing" does not include nor compel actual "delivery to" or "receipt of" notice as the majority's opinion holds. Furnish means "to provide." In mailing the letter to the designated address, Nationwide clearly provided and furnished

timely notice to plaintiffs, effectively and timely cancelling their policy and giving them the opportunity to pursue other insurance coverage.

The trial court correctly found the policy had been cancelled effective 6 June 2015 in compliance with N.C. Gen. Stat. § 58-41-15 and with terms of the Nationwide policy. The trial court's order is correctly affirmed. I respectfully dissent.

JEFFREY HUNT, PETITIONER
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA18-1195

Filed 18 June 2019

Administrative Law—attorney fees—appellate—authorized by plain language of statute

Pursuant to the plain language of N.C.G.S. § 126-34.02(e), the Office of Administrative Hearings (OAH) had authority to award appellate attorney fees to a career status state employee who prevailed when respondent-employer appealed OAH's final decision (that the employee was terminated without just cause) to the Court of Appeals.

Appeal by respondent from order entered 24 August 2018 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 21 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for the State.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner.

The McGuinness Law Firm, by J. Michael McGuinness, for amicus curiae North Carolina Police Benevolent Association and Southern States Police Benevolent Association.

ARROWOOD, Judge.

The North Carolina Department of Public Safety ("DPS" or "respondent") appeals from an order of the North Carolina Office of Administrative

Hearings (the "OAH") granting Jeffrey Hunt ("petitioner")'s petition for appellate attorneys' fees. For the reasons stated herein, we affirm the order of the administrative law judge ("ALJ").

I. Background

In November 2016, petitioner was a career status State employee, working for DPS as a correctional officer at Scotland Correctional Institution. Petitioner's unit manager, Ms. Queen Gerald, requested a meeting with petitioner on 3 November 2016. During the meeting, Ms. Gerald informed him that she was investigating his alleged absence from work on 18 August 2016. She asked him to sign paperwork regarding the absence. Petitioner refused, and became upset. He said he was tired of "this s***" and stated either "I quit" or "I'm quitting" before walking out of the prison, through the main door. Instead of "swiping out" at the security checkpoint, petitioner informed the officer-in-charge that he had resigned.

On 9 November 2016, petitioner spoke with the Superintendent at Scotland Correctional Institution, Ms. Katy Poole, by telephone. Petitioner asked Ms. Poole if he could return to work. In response, Ms. Poole asked whether petitioner was rescinding his resignation. Petitioner replied, "Yes." Ms. Poole informed him that she had already accepted his resignation, and was unwilling to rescind it based on "his history of pending investigations and corrective actions[,]" and his behavior on 3 November 2016. That same day, petitioner received a letter confirming he tendered his resignation on 3 November 2016. Although petitioner attempted to use DPS's internal grievance procedure, he was notified that the agency would not process his grievance because he had resigned from employment.

Petitioner filed a petition for a contested case hearing in the OAH on 22 February 2017. The matter came on for hearing before ALJ Melissa Owens Lassiter on 15 June 2017. The ALJ issued a final decision pursuant to N.C. Gen. Stat. § 150B-34 on 17 August 2017, holding petitioner was terminated without just cause because petitioner "never submitted a verbal statement of resignation to any DPS employee authorized to accept it." Accordingly, the ALJ ordered that petitioner be reinstated and receive back pay. After the issuance of the final decision, petitioner filed a petition for attorneys' fees, which the ALJ granted in an order entered 28 August 2017. The order awarded $11,720.00 in attorneys' fees and $20.00 in filing fees. Respondent appealed.

Our Court affirmed the ALJ's final decision in *Hunt v. N.C. Dep't of Pub. Safety* ("*Hunt I*"), 260 N.C. App. 40, 817 S.E.2d 257 (2018).

Following the entry of *Hunt I* in the OAH, petitioner filed a petition for attorneys' fees incurred during petitioner's appeal. Petitioner argued the OAH had the authority to grant this petition pursuant to N.C. Gen. Stat. § 126-34.02(e). The OAH granted the petition and awarded petitioner $14,700.00 in attorneys' fees.

Respondent appeals.

II. Discussion

Respondent argues the OAH erred by awarding appellate attorneys' fees absent statutory authority. Alternatively, respondent argues an award of appellate attorneys' fees was not warranted because the agency had substantial justification to appeal the underlying order. We disagree with both arguments.

A. Standard of Review

"Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision." *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98, 798 S.E.2d 127, 132, *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017). Chapter 150B provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017). "The standard of review is dictated by the substantive nature of each assignment of error." *Harris*, 252 N.C. App. at 99, 798 S.E.2d at 132 (citing N.C. Gen. Stat. § 150B-51(c)).

"[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Id.* (citation and internal quotation marks omitted).

B. Statutory Authority to Award Appellate Attorneys' Fees

"In 2013, our General Assembly significantly amended and streamlined the procedure governing state employee grievances and contested case hearings, applicable to cases commencing on or after 21 August 2013." *Id.* at 97, 798 S.E.2d at 131. Prior to these amendments, appeal of a final agency decision of the OAH was controlled by Chapter 150B, which provides:

> [a]ny party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. . . .

N.C. Gen. Stat. § 150B-43 (2017). Under N.C. Gen. Stat. § 150B-45, appeal of a final agency decision of the OAH is to the superior court. N.C. Gen. Stat. § 150B-45(a) (2017).

Prevailing petitioners in personnel cases brought pursuant to Chapter 150B, prior to the 2013 amendments, were able to recover attorneys' fees at both the OAH and the superior court. The OAH had jurisdiction to award attorneys' fees for the attorneys' work related to the case before the OAH under N.C. Gen. Stat. § 150B-33(b)(11), which provides:

> (b) An administrative law judge may:
>
> . . . .
>
> (11) Order the assessment of reasonable attorneys' fees . . . against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously or under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

N.C. Gen. Stat. § 150B-33(b)(11) (2017). In contrast, the superior court had jurisdiction to award attorneys' fees for the attorneys' work related to the case before the superior court, as well as for the fees related to appeals before the Court of Appeals and the Supreme Court, pursuant to N.C. Gen. Stat. § 6-19.1, which provides:

> (a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State *or brought by a party who is contesting State action pursuant to G.S. 150B-43* or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1(a) (2017) (emphasis added).

As part of the 2013 amendments, the General Assembly enacted N.C. Gen. Stat. § 126-34.02(a) and (e). N.C. Gen. Stat. § 126-34.02(a) provides, in relevant part, "[a]n aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a)." N.C. Gen. Stat. § 126-34.02(a) (2017). Thus, the superior court no longer reviews the OAH's final decisions in State personnel appeals in cases commenced after 21 August 2013. Instead, final decisions in State personnel actions are now appealed directly to the Court of Appeals. *See Swauger v. Univ. of N. Carolina at Charlotte*, 259 N.C. App. 727, 731, 817 S.E.2d 434, 437 (2018).

Subsection (e) authorizes the OAH to award attorneys' fees. Specifically, the subsection states: "The Office of Administrative Hearings may award attorneys' fees to an employee where reinstatement or back pay is ordered or where an employee prevails in a whistleblower grievance. The remedies provided in this subsection in a whistleblower appeal shall be the same as those provided in G.S. 126-87." N.C. Gen. Stat. § 126-34.02(e).

The ALJ in the instant case determined that N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to award attorneys' fees and costs for both the administrative and the appellate portions of contested cases. On appeal, respondent argues the ALJ erred by reaching this conclusion because N.C. Gen. Stat. § 126-34.02(e) does not grant the OAH the authority to award attorneys' fees and costs for the appellate portion of a contested case. We disagree.

"Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo. The principal goal of statutory construction is to accomplish the legislative intent." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (citation and internal quotation marks omitted).

> When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself: When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

State v. Ward, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (citation and internal quotation marks omitted).

Here, the plain language of N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to "award attorneys' fees to an employee where reinstatement or back pay is ordered or where an employee prevails in a whistleblower grievance." N.C. Gen. Stat. § 126-34.02(e). Significantly, the plain language does not limit the OAH's authority to award attorneys' fees to the administrative portion of a contested case before the OAH, nor does it prohibit the OAH from awarding attorneys' fees incurred during judicial review before this Court or our Supreme Court, taken pursuant to N.C. Gen. Stat. § 126-34.02(a). Therefore, we do not read these limitations

into the statute. We conclude the OAH has the authority to award attorneys' fees for both the administrative portion of a contested case before the OAH, and for the attorneys' fees incurred during judicial review of the OAH's final decision.

The plain language of the second sentence of subsection (e) further evidences that the statute expands the OAH's authority to award attorneys' fees by authorizing remedies where an employee prevails in the appeal of a whistleblower grievance: "The remedies provided in this subsection in a whistleblower *appeal* shall be the same as those provided in G.S. 126-87." N.C. Gen. Stat. § 126-34.02(e) (emphasis added). At the same time the General Assembly enacted this statutory change, it made a significant contemporaneous change to the whistleblower law, amending N.C. Gen. Stat. § 126-86 (2013).

Prior to the 2013 changes, State employees had the discretion to pursue a whistleblower claim in superior court under N.C. Gen. Stat. § 126-85, or in the OAH under N.C. Gen. Stat. § 126-34.1, but not in both. *Swain v. Elfland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535 (2001). If the employee brought the action in the OAH, the employee would not be able to seek recovery of the remedies in N.C. Gen. Stat. § 126-87, which include treble damages and injunctive relief; whereas, the superior court was authorized, pursuant to N.C. Gen. Stat. § 126-87, to allow the recovery of these remedies.

However, in 2013, the General Assembly amended the whistleblower statute, N.C. Gen. Stat. § 126-86. *See* S.L. 2013-382, § 7.10, eff. Aug. 21, 2013. It now states, "Any State employee injured by a violation of G.S. 126-85 who is *not subject to Article 8 of this Chapter* may maintain an action in superior court for damages, an injunction, or other remedies provided in this Article. . . ." N.C. Gen. Stat. § 126-86 (2017) (emphasis added). Thus, State employees subject to Article 8 of Chapter 126 now must pursue a whistleblower claim in the OAH. By simultaneously amending N.C. Gen. Stat. § 126-86 and enacting N.C. Gen. Stat. § 126-34.02(e), the General Assembly ensured remedies described by N.C. Gen. Stat. § 126-87 are still available to these claimants.

These corresponding changes are significant to the case at hand because they expanded the OAH's authority to award attorneys' fees in whistleblower appeals. Therefore, because "words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent, while avoiding absurd or illogical interpretations," it is clear the General Assembly authorized the OAH to award

attorneys' fees not only for fees incurred during whistleblower appeals, but also for fees incurred during appeals of contested cases where reinstatement or back pay is ordered. *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012) (citations and internal quotation marks omitted).

To determine otherwise, and accept respondent's argument on appeal that N.C. Gen. Stat. § 126-34.02(e) does not authorize the OAH to award attorneys' fees for fees incurred during appeals of contested cases where reinstatement or back pay is ordered, and only authorizes the OAH to award attorneys' fees for the administrative portion of a contested case, would interpret the law in a way that renders the General Assembly's actions meaningless The OAH already had the authority to award attorneys' fees for the administrative portion of a contested case pursuant to N.C. Gen. Stat. § 150B-33, so N.C. Gen. Stat. § 126-34.02(e) would have no effect on the law if read in accord with respondent's argument. We decline to read the statute in this way, as our Court "presume[s] that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein." *Fort*, 218 N.C. App. at 407, 721 S.E.2d at 355 (citation and internal quotation marks omitted).

Furthermore, to agree with respondent that subsection (e) of N.C. Gen. Stat. § 126-34.02 does not allow a method of recovering fees for the appellate portion of contested cases would mean the General Assembly intended that State employees who successfully defended appeals against State agencies would have no method of recovering attorneys' fees incurred on appeal. This interpretation would harm the fair administration of justice, as it would drastically impair an employee's ability to contest State action in appellate courts.

Therefore, we hold N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to award attorneys' fees for the appellate or judicial review portion of a contested case. Respondent's argument is without merit.

C. Award of Attorneys' Fees

We now turn to respondent's alternative argument that attorneys' fees were not warranted. Respondent contends the attorneys' fees were not warranted because: (1) Chapter 126 did not grant the OAH the authority to award appellate fees, so it does not provide an analytical framework for such an award; and (2) even assuming *arguendo* it is appropriate for the OAH to evaluate the propriety of appellate attorneys' fees under N.C. Gen. Stat. § 6-19.1, the agency had substantial justification to appeal the OAH's order reinstating petitioner and awarding back pay in the instant case.

We disagree. As discussed *supra*, N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to award attorneys' fees for the appellate or judicial review portion of a contested case. Additionally, the ALJ's order awarding attorneys' fees was not made pursuant to N.C. Gen. Stat. § 6-19.1. Rather, it was made pursuant to N.C. Gen. Stat. § 126-34.02(e). Therefore, respondent's argument is without merit.

Although not raised by respondent as an issue on appeal, and therefore waived, we find it pertinent to address the standard the ALJ utilized to determine reasonable attorneys' fees in this case. The ALJ applied the twelve "*Johnson* factors" set forth in *Johnson v. Georgia Highway Exp. Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), which was adopted by the Fourth Circuit. *Grissom v. The Mills Corp.*, 549 F.3d 313, 321 (4th Cir. 2008). These factors have been summarized by the Fourth Circuit as:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Id. (citation and internal quotation marks omitted).

North Carolina courts do not use these factors to determine reasonable attorneys' fees. Instead, it is well-established that the correct standard is as follows: A court's decision to grant attorneys' fees is discretionary. *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001). However, if attorneys' fees are awarded, the court "must make findings of fact to support the award. These findings must include the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Id.* at 131, 557 S.E.2d at 629 (citations and internal quotation marks omitted). Although these findings are contemplated by the *Johnson* factors, our State has not adopted the *Johnson* framework. Therefore, the ALJ should not have applied *Johnson* to determine the reasonable attorneys' fees in this case. Nevertheless, respondent did not raise this argument on appeal, and it is waived.

III. Conclusion

For the foregoing reasons, we affirm the ALJ's order allowing petitioner's petition for appellate attorneys' fees.

AFFIRMED.

Chief Judge McGEE and Judge ZACHARY concur.

IN THE MATTER OF D.A.Y.

No. COA18-1226

Filed 18 June 2019

Termination of Parental Rights—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—initial custody determination in out-of-state court

The trial court lacked subject matter jurisdiction to terminate a mother's parental rights where a California court had entered an initial child custody determination regarding the child, the California court did not determine it no longer had exclusive, continuing jurisdiction or that North Carolina would be a more convenient forum (N.C.G.S. § 50A-203(1)), and the mother had resided in California throughout the duration of the termination proceedings (N.C.G.S. § 50A-203(2)).

Appeal by respondent-mother from order entered 4 September 2018 by Judge John R. Nance in Stanly County District Court. Heard in the Court of Appeals 30 May 2019.

David A. Perez for petitioner-father appellee.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Joyce L. Terres, for respondent-mother appellant.

TYSON, Judge.

Respondent-mother appeals from an order terminating her parental rights in D.A.Y. ("Dylan"). *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of the child). The trial court erred in exercising jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement

Act ("UCCJEA") and its order is vacated. This cause is remanded for dismissal of the petition.

I. Factual Background

Petitioner and Respondent were married briefly and separated prior to Dylan's birth in Las Vegas, Nevada. Petitioner is Dylan's father and is a resident of Stanly County, North Carolina. Respondent is Dylan's mother and lives in Ventura County, California.

Petitioner filed a petition and a subsequent amended petition to terminate Respondent's parental rights in the Stanly County District Court on 29 March 2018 and 18 May 2018, respectively. Petitioner alleged Dylan resided with him in Stanly County, such that "North Carolina is the home state of the child," pursuant to "a juvenile court order from the State of California entered as a result of a juvenile protective services investigation filed October 18, 2013 which gave custody to petitioner with supervised once per year visits granted to respondent." Petitioner further alleged "California terminated [its] jurisdiction by the terms of said order." The petition alleged Respondent is "a citizen and residence [sic] of Ventura County, California," but claimed she had temporarily "moved to Nevada in or about 2016 thereby terminating California's jurisdiction."

Respondent filed a written answer admitting the petition's allegations regarding the respective locations of the parties and the actions of the court in California in the 2013 custody proceeding. Respondent denied many of the substantive allegations in the petition and accused Petitioner of "withholding [Dylan] from the Respondent" and not allowing her to communicate with her son.

After a hearing on 9 August 2018, the trial court found grounds existed to terminate Respondent's parental rights based upon her neglect and willful abandonment of Dylan. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (7) (2017). The court further concluded Dylan's best interest required terminating Respondent's parental rights. *See* N.C. Gen. Stat. § 7B-1110(a) (2017). Respondent filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the district court entered 4 September 2018 pursuant to N.C. Gen. Stat. § 7B-1001(a) (2017).

III. Issue

Respondent argues the trial court lacked subject matter jurisdiction to hear and enter orders under the UCCJEA because: (1) a court

in California entered an initial child-custody determination with regard to Dylan, *see* N.C. Gen. Stat. §§ 50A-102(3)-(8), 50A-201 (2017); (2) the court in California did not determine it no longer had jurisdiction or that North Carolina would be a more convenient forum, *see* N.C. Gen. Stat. § 50A-203(1) (2017); and (3) Respondent had resided in California from the time Petitioner filed the petition to terminate her parental rights through the date of the termination hearing, *see* N.C. Gen. Stat. § 50A-203(2) (2017).

IV. Standard of Review

"The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009) (citations and internal quotation marks omitted). "The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal." *In re B.L.H.*, 239 N.C. App. 52, 58, 767 S.E.2d 905, 909 (2015).

V. Analysis

A. Subject Matter Jurisdiction

"Jurisdiction over termination of parental rights proceedings is governed by N.C. Gen. Stat. § 7B-1101." *In re. J.M.*, 249 N.C. App. 617, 619, 797 S.E.2d 305, 306 (2016). Compliance with the UCCJEA, as codified in Chapter 50A of our General Statutes, is essential to the juvenile court's subject matter jurisdiction under N.C. Gen. Stat. § 7B-1101.

> [B]efore exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 . . . .

N.C. Gen. Stat. § 7B-1101 (2017); *see also In re J.D.*, 234 N.C. App. 342, 345, 759 S.E.2d 375, 378 (2014) ("pursuant to N.C. Gen. Stat. § 7B-1101 and the UCCJEA, we must determine whether the trial court possessed subject matter jurisdiction under N.C. Gen. Stat. §§ 50A-201 or -203").

The trial court made findings of fact in support of its assertion and conclusion of jurisdiction:

> 1. That this Court has . . . subject matter jurisdiction . . . . There is an existing custody order in favor of the petitioner, however, California relinquished continuing, exclusive jurisdiction when that State terminated their jurisdiction, and when both parties and the minor child subsequently moved from the State of California.
>
> . . . .
>
> 3. The petitioner . . . is a citizen and resident of Stanly County, North Carolina, and has been for more than six (6) months next preceding the institution of this action. Further, the minor child herein has also been a citizen and resident of the State of North Carolina, County of Stanly, for more than six (6) months next proceeding the commencement of this action.
>
> 4. The respondent is . . . a citizen and resident of the State of California.

The court separately concluded that it "has . . . subject matter jurisdiction over the . . . subject matter herein."

Respondent objects to the trial court's finding that "California relinquished continuing, exclusive jurisdiction when that State terminated [its] jurisdiction, and when both parties and the minor child subsequently moved from the State of California." To the extent the trial court's findings of fact refer to the legal effect of actions taken by the parties or the court in California, they are reviewed *de novo* as conclusions of law. *See In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611, S.E.2d 413 (2005). Respondent specifically challenges the trial court's assessment that the court in California had "terminated [its] jurisdiction" in the custody proceeding or that North Carolina had otherwise obtained subject matter jurisdiction under the UCCJEA.

It is undisputed that a juvenile court in Los Angeles, California, entered a "Custody Order—Juvenile—Final Judgment" on 18 October 2013 awarding legal and physical custody of Dylan to Petitioner in case number CK98455, with visitation awarded to Respondent. This order constitutes a prior child-custody determination under the UCCJEA. *See* N.C. Gen. Stat. 50A-102(3) (2017). " 'Accordingly, any change to that [California] order qualifies as a modification under the UCCJEA.' " *In re*

N.B., 240 N.C. App. 353, 357, 771 S.E.2d 562, 565 (2015) (quoting *In re N.R.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004)).

Modification of another state's child-custody determination is governed by N.C. Gen. Stat. § 50A-203 (2017), which provides in pertinent part:

> a *court of this State may not modify* a child-custody determination made by a court of another state unless a court of this State has *jurisdiction to make an initial determination* under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) *and*:
>
> (1) The court of the other state determines it *no longer has exclusive, continuing jurisdiction* under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; *or*
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent *do not presently reside in the other state.*

N.C. Gen. Stat. § 50A-203(1)-(2) (emphasis supplied).

We agree with Petitioner the district court in North Carolina could have asserted "jurisdiction to make an initial [custody] determination" under N.C. Gen. Stat. § 50A-201(a) based upon Petitioner and Dylan having resided in Stanly County since 2016. N.C. Gen. Stat. § 50A-203. However, neither of the alternative bases exist for the court in North Carolina to assert jurisdiction to modify or terminate the California court's 2013 initial custody determination under N.C. Gen. Stat. § 50A-203(1) or N.C. Gen. Stat. § 50-203(2).

With regard to N.C. Gen. Stat. § 50A-203(1), "[t]he court of the other state," i.e., California, did not "determine[] it no longer has exclusive, continuing jurisdiction" or that "a court of this State would be a more convenient forum." The California court's 18 October 2013 custody order provides as follows:

> 9. As of the date below, the juvenile court
>
> a. has terminated jurisdiction over [Dylan]; requests for any modifications of these orders must be brought in the family court case in which these orders are filed under Welfare and Institutions Code section 302(d) or 726.5(c).

. . . .

13. The clerk of the juvenile court . . . must transmit this order within 10 calendar days to the clerk of the court of any county in which a custody proceeding involving the child is pending or, if no such case exists, to the clerk of the court of the county in which the parent given custody resides. The clerk of the receiving court must, immediately upon receipt of this order, file the order in the pending case or, if no such case exists, open a file without a filing fee and assign a case number.

14. The clerk of the receiving court must send by first-class mail an endorsed filed copy of this order, showing the case number of the receiving court to:

    . . . .

    b. Father (*name and address*): Desa Lagorio . . . Northridge, CA 91234 [order erroneously records Respondent's name and address as that of Petitioner's, then a resident of South Carolina]

Although the California *juvenile* court terminated its own jurisdiction, it did so for the purpose of transferring custody jurisdiction to the California *family* court. *See* Cal. Welf. & Inst. Code § 726.5(d) (2016); *cf. also* N.C. Gen. Stat. § 7B-911(a)-(b) (2017) (authorizing juvenile court, upon awarding custody to a parent, to terminate its own jurisdiction and direct the clerk of court to enter a civil custody order under Chapter 50 of the North Carolina General Statutes). The trial court in Stanly County properly noted the nature of the California court's directive at the outset of the termination hearing:

> THE COURT: . . . Looking at a custody Order out of the state of California. By the terms of that custody Order it appears entered October 18th, 2013. It says as of the date below which is the same date October 18th, that the juvenile Court has terminated jurisdiction over the . . . child[] we're concerned here with. Uhm, does that, *certainly it appears that it terminates jurisdiction in the juvenile Court but I'm not so sure whether that terminates California's jurisdiction as such.*

(Emphasis supplied).

The trial court proceeded with the hearing based on the parties' agreement that North Carolina was Dylan's home state and Respondent's waiver of objection "as far as submitting to the personal jurisdiction of the Court."

Because the UCCJEA governs the court's *subject matter* jurisdiction, we conclude the court entering the order under review did not possess subject matter jurisdiction under N.C. Gen. Stat. § 50A-203(1) based upon Respondent's waiver. Moreover, the record before this Court contains no determination by a court in California that "it no longer has exclusive, continuing jurisdiction" as is required by N.C. Gen Stat. § 50-203(1).

With regard to N.C. Gen. Stat. § 50A-203(2), neither the court in California nor the court at the hearing made a finding that Respondent "do[es] not presently reside in [California]." N.C. Gen. Stat. § 50A-203(2). Petitioner alleged, Respondent admitted, and the trial court found that Respondent "is a citizen and resident of the State of California."

Respondent was served with the petition and summons by certified mail at her home address in Simi Valley, California. Petitioner concedes Respondent was residing in California at the time he had initiated the termination proceeding in March 2018. The trial court acquired no jurisdiction to modify the California court's child-custody determination under N.C. Gen. Stat. § 50A-203(2) when that court had not terminated jurisdiction.

B. Relocation to Another State

Petitioner contends Respondent's act of moving to Nevada for two years had the effect of ending the California court's "exclusive, continuing jurisdiction" over Dylan's custody, notwithstanding the undisputed fact that Respondent had returned to and was a resident of California prior to the filing and service of the petition to terminate her parental rights. Petitioner points to the Official Commentary for N.C. Gen. Stat. § 50-202, which states as follows:

> Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. . . . [U]nless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.

. . . .

> Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns.

N.C. Gen. Stat. § 50A-202, Official Comment (2017); *see also* Cal. Fam. Code § 3422(a) (2017).

Presuming *arguendo* the court in California lost exclusive, continuing jurisdiction when Respondent temporarily relocated from California to Nevada, this occurrence did not confer jurisdiction upon the district court in North Carolina to modify the initial custody determination which was entered in California. Subsection 50A-203(1) requires a finding by the court in California that it no longer has continuing, exclusive jurisdiction, a finding that is not in evidence in the record or in the order appealed from.

C. Parental Kidnapping Prevention Act

Petitioner also asserts California's court lost continuing jurisdiction under the provisions of the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A(d) (2019), and notes the PKPA controls over state custody law, where the two statutes are in conflict. *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686 (1999). Because we presume the court in California lost continuing, exclusive jurisdiction under the UCCJEA when Respondent temporarily moved out of the state, we observe no conflict between the relevant state law and the PKPA on this issue.

Alternatively, N.C. Gen. Stat. § 50A-203(2) requires a finding by either the court in California or in North Carolina that Respondent does not "presently reside[]" in California, which is directly contrary to the parties' stipulations, the evidence and the trial court's finding. *Cf. In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473 (finding jurisdictional requirement in N.C. Gen. Stat. § 50A-203(2) satisfied by evidence that "both parents had left South Carolina at the time of the commencement of the [North Carolina termination] proceeding"), *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007).

VI. Conclusion

The trial court lacked subject matter jurisdiction under either N.C. Gen. Stat. § 7B-203(1) or (2) to modify the California court's child-custody determination. " 'When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as

if it had never happened.' " *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (quoting *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970)).

The order terminating Respondent's parental rights is vacated. *See id.* at 135, 702 S.E.2d at 108. This cause is remanded for dismissal of the petition for lack of subject matter jurisdiction. *It is so ordered.*

VACATED.

Judges DILLON and BERGER concur.

IN RE T.H. & M.H.

No. COA18-926

Filed 18 June 2019

1. Termination of Parental Rights—best interests of child—statutory factors

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights was in the best interests of her children after it considered and weighed the factors contained in N.C.G.S. § 7B-1110(a), including the mother's attempts to maintain sobriety and the bond between the children and their parents and other family members. The Court of Appeals rejected the mother's argument that the trial court was required to make findings regarding reunification pursuant to section 7B-906.2(b), particularly where reunification was not the primary permanent plan at the time of the termination hearing.

2. Termination of Parental Rights—no-merit brief—neglect

No prejudicial error occurred in a proceeding to terminate a father's parental rights to his children on the ground of neglect, where the trial court's conclusions were supported by sufficient findings, which were in turn supported by clear, cogent, and convincing evidence.

Appeal by Respondents from order entered 1 June 2018 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 30 May 2019.

Jane R. Thompson for Petitioner-Appellee Rowan County Department of Social Services.

Cranfill Sumner & Hartzog LLP, by Katherine Barber-Jones, for guardian ad litem.

Dorothy Hairston Mitchell for Respondent-Appellant Mother.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellant Father.

DILLON, Judge.

Respondents, Mother and Father of the minor children T.H. ("Tonya") and M.H. ("Madeline"),[1] appeal from the trial court's order terminating their parental rights to the children. We hold the trial court did not abuse its discretion in determining that termination of Mother's parental rights was in the children's best interests, and we hold it properly concluded grounds existed to terminate Father's parental rights based on neglect. We, therefore, affirm the trial court's order.

I. Background

Respondents' history with the Rowan County Department of Social Services ("DSS") dates back to 2011 due to substance abuse and mental health issues and their lack of proper care and supervision of the children. In November 2011, Mother tested positive for methadone and amphetamines at Tonya's birth, and Tonya had to remain in the hospital for weeks due to significant withdrawal symptoms. From 2011 to 2016, DSS received multiple reports regarding the family due to drug abuse and supervision issues.

DSS most recently became involved with the family in early 2016 after receiving reports relating to Respondents' substance abuse and inappropriate living conditions. On 12 February 2016, DSS filed a juvenile petition alleging both juveniles to be neglected and dependent and took the children into non-secure custody.

A week later, Respondents entered into an Out of Home Family Services Agreement (OHFSA) in which they agreed to obtain and

1. Pseudonyms are used to protect the juveniles' identities, *see* N.C. R. App. P. 42, and for ease of reading.

maintain appropriate housing, obtain and maintain employment, complete substance abuse and mental health treatment, complete a psychiatric evaluation, submit to random drug screens, complete a parenting education course, resolve all pending legal issues, and refrain from criminal activity.

Five weeks later, on 31 March 2016, the trial court entered a consent order, adjudicating the children neglected and dependent. The trial court found that Respondents had multiple pending criminal charges and continued to suffer from long-term, untreated substance abuse and mental health issues. The court also found that the children were living in an unsafe environment and were not receiving proper medical or dental care. The court ordered Respondents to comply with the components of their case plan. Over the next several months, however, both Mother and Father were in and out of jail.

On 2 June 2016, Mother completed her substance abuse assessment and was recommended to complete forty (40) hours of structured group therapy and to see a psychiatrist. Mother attended one group session in December 2016 but did not attend another session. On 23 January 2017, Mother was arrested for obtaining a controlled substance by fraud or forgery after attempting to fill her recently deceased mother's prescription for Alprazolam.

In June 2017, the trial court entered a permanency planning review order, changing the primary permanent plan to adoption with a secondary plan of reunification. The trial court found that Respondents had not made any progress on their case plans, finding that Respondents had not participated in any treatment recommendations, including any substance abuse or mental health services, that they had not engaged in any parenting education services, and that "[n]either parent understands the severity of their [criminal] charges or the effect their criminal behavior and incarcerations have on their children."

A month later, in July 2017, DSS filed a petition to terminate Respondents' parental rights based on the grounds of neglect, willfully leaving the children in foster care without making reasonable progress to correct the conditions which led to the children's removal, and willfully failing to pay a reasonable portion of the children's cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2017).

Eleven months later, in June 2018, following two hearings on the matter, the trial court entered an order concluding that grounds existed to terminate Respondents' parental rights based on neglect and willfully leaving the children in foster care without making reasonable progress,

and that termination of Respondents' parental rights was in the children's best interests.

Accordingly, the trial court terminated Respondents' parental rights to Tonya and Madeline. Respondents each filed timely written notice of appeal.

II. Analysis

Mother and Father appeal, each bringing separate issues corresponding to termination of their individual parental rights. We address each respondent in turn.

A. Mother's Appeal

[1] Mother does not challenge the trial court's adjudication that grounds existed to terminate her parental rights. Rather, Mother's sole issue on appeal is that the trial court abused its discretion in determining that termination of her parental rights was in the children's best interests.

After a trial court adjudicates the existence of at least one ground for termination, the court must then determine at disposition whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2017). The court must consider the factors listed in Chapter 7B-1110(a).

"The court's determination of the juvenile's best interest will not be disturbed absent a showing of an abuse of discretion." *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Mother first argues the trial court failed to make the written findings required by Chapter 7B-906.2(b) of our General Statutes, which applies to "permanency planning hearing[s]," in order to cease reunification efforts. Specifically, Mother appears to view the requirements of Section 7B-906.2(b) as part of the court's inquiry under Section 7B-1110(a)(3) in a termination determination. Mother argues that reunification remained the primary permanent plan at the time of the termination hearing, and thus the court was required to make the necessary findings under Chapter 7B-906.2(b) in order to cease reunification efforts. We disagree.

First, contrary to Mother's assertion, reunification was not the primary permanent plan at the time of the termination hearing. In a 30 June 2017 permanency planning order, the trial court changed the permanent plan to a primary plan of adoption with a secondary plan

of reunification. Second, a hearing on a petition to terminate parental rights is not a permanency planning hearing. Section 7B-906.2 pertains to permanent plans that must be established at permanency planning hearings, while Chapter 7B, Article 11, the statute at issue here, provides for the judicial procedures for terminating parental rights. *See* N.C. Gen. Stat. § 7B-1100(1) (2017).

Mother relies on this Court's recent decision in *In re D.A.* to support her argument. However, *In re D.A.* was not an appeal from a termination order, but from a permanency planning order granting custody of the child to the foster parents and waiving further review hearings. *In re D.A.*, ___ N.C. App. ___, 811 S.E.2d 729 (2018). Mother has not cited any authority requiring the trial court to make the findings set forth in Section 7B-906.2(b) at a hearing for the termination of parental rights.

Here, the trial court found that terminating Respondents' parental rights "[was] necessary to accomplish the best permanent plan for the juveniles, which is adoption." Mother does not challenge this finding, and it is therefore binding on appeal. *In re D.L.H.*, 364 N.C. 214, 218, 694 S.E.2d 753, 755 (2010). Therefore, the trial court made the appropriate finding addressing Section 7B-1110(a)(3), and Mother's first argument is overruled.

Mother next argues the trial court failed to consider three "other relevant considerations" under Section 7B-1110(a)(6) in determining termination was in the children's best interest. Mother contends the trial court failed to consider (1) her substantial progress toward her sobriety, (2) the bond the children shared with her and other maternal family members, and (3) DSS's failure to make reasonable efforts toward reunification. We disagree and address each in turn.

Mother first asserts the trial court failed to consider the progress she made toward her sobriety and self-sufficiency. The trial court's findings indicate that it did consider Mother's claim regarding her progress toward her sobriety, finding that mother "report[ed] that she [had] been sober for one year" and "that she tested negative on a drug screen administered by her probation officer yesterday." However, there was evidence that Mother was incarcerated for all but a few days of that year of her claimed sobriety. It is the trial "judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). Thus, it was within the trial court's discretion to determine that Mother's years of unaddressed substance abuse issues outweighed her claim of recent progress.

Next, Mother argues the trial court failed to consider the children's bond with both her and the children's biological relatives. Contrary to Mother's assertion, the trial court *did* consider this bond and found that there was not a strong bond. Specifically, the trial court found that

> There is not a strong bond between the children and their parents. [Tonya] does not have memories of being with [Mother] and [Father] other than sitting in front of a TV. [Tonya] was worried with adoption in the beginning as she thought if she loved [her foster parents, Mr. and Mrs. C,] then she would be betraying her parents. She does not want to be removed from Mr. and Mrs. [C's] home. [Madeline] loves her parents. She worries about them and remembers some of the things she was exposed to while in the care of her parents. [Madeline] does not feel like she is important to [Mother] and [Father]. [Madeline] has referred to her parents [by their first names]. [Tonya] and [Madeline] have not asked [Mr. and Mrs. C] to have contact with [Mother] and [Father].

Mother does not challenge this finding, and therefore it is binding on appeal. *In re D.L.H.*, 364 N.C. at 218, 694 S.E.2d at 755.

Mother also contends the court failed to consider the bond the children have with their biological relatives, namely their maternal aunt and uncle and maternal grandfather, and argues that terminating her parental rights threatens to destroy the bonds the children have with the maternal family members. However, the trial court did make findings in this regard, for instance, specifically finding that the children visit with their maternal grandfather and their maternal aunt and uncle. Therefore, we find no merit to Mother's contention.

Lastly, Mother argues the trial court failed to consider DSS's failure to make efforts toward reunification. She argues DSS only contacted her once a month while she was incarcerated and made no efforts to achieve reunification. She contends that, once she was incarcerated, DSS gave up on its reunification efforts, and that the court's failure to consider this factor was an abuse of discretion.

However, "[t]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered" when determining its disposition under Section 7B-1110. *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005). While the trial court must consider all of the factors in Section 7B-1110(a), it only is required to make written findings regarding those factors that are relevant. *In re D.H.*, 232

N.C. App. 217, 221, 753 S.E.2d 732, 735 (2014). A factor is relevant if there is conflicting evidence concerning the factor such that it is placed in issue. *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015).

There was no conflicting evidence concerning DSS's efforts in contacting Mother during her incarceration. The only evidence regarding DSS's reunification efforts comes from a social worker's "previously-provided sworn testimony" during the adjudication phase which was incorporated without objection during the disposition phase. Because this factor was not "placed in issue[,]" no findings regarding DSS's efforts toward reunification were required. *Id.* Mother has not provided any indication that the trial court failed to consider this information in making its determination.

Additionally, to the extent Mother attempts to excuse her failure to make reasonable progress by claiming DSS failed to make efforts toward reunification, Mother did not challenge the trial court's adjudication that she willfully failed to make reasonable progress under Section 7B-1111(a)(2). By arguing that the trial court "failed to appreciate" DSS's alleged failure to make reunification efforts, Mother essentially contends this evidence was not given sufficient weight by the trial court. However, "[i]t is not the function of this Court to reweigh the evidence on appeal." *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).

In sum, we see no indication that the trial court failed to consider any "relevant consideration" under the catch-all provision of Section 7B-1110(a)(6). A court is entitled to give greater weight to certain factors over others in making its determination concerning the best interest of a child. *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709-10 (2005) (explaining that, though mother emphasized her bond with the child, "[t]he trial court was, however, entitled to give greater weight to other facts that it found"), *aff'd per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006) (affirming the majority opinion). The trial court's order reflects that it properly considered the required factors and made a reasoned determination that termination was in the children's best interests. Accordingly, we hold the trial court did not abuse its discretion in determining that termination of Mother's parental rights was in the best interests of the children, and we affirm the order terminating her parental rights.

B. Father's Appeal

[2] Father's counsel has filed a "no-merit" brief on his behalf in which they state that, after a conscientious and thorough review of the record

on appeal and transcripts, they were unable to identify any issue of merit on which to base an argument for relief. Pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure, they request that this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(e).

In accordance with Appellate Rule 3.1(e), appellate counsel wrote Father a letter advising him of (1) counsel's inability to find error; (2) counsel's request for this Court to conduct an independent review of the record; and (3) Father's right to file his own arguments directly with this Court while the appeal is pending. Counsel attached to the letter a copy of the record, transcript, and no-merit brief. Father, however, has not submitted written arguments of his own to this Court.

As such, we are not required to conduct a review as neither Father nor his counsel has brought forth any issue for our consideration. *In re L.V.*, ___ N.C. App. ___, ___, 814 S.E.2d 928, 928-29 (2018). That is, the no-merit brief provision in Rule 3.1(e) promulgated by our Supreme Court, which does not contain any such requirement, should not be conflated with the requirements set forth by the United States Supreme Court where no-merit briefs are filed in a criminal appeal. *In re L.V.* is based on the following reasoning, as found in the concurring opinion in *State v. Velasquez-Cardenas*, ___ N.C. ___, 815 S.E.2d 9 (2018).

Our State Constitution provides that our "Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. Art. IV, sec. 13(2). Pursuant to its exclusive authority, our Supreme Court has promulgated Rule 28(a), which limits *the right* of an appellant to a review by our Court to those issues raised in its brief, though *in our discretion* we can waive Rule 28(a) by invoking Rule 2 of our Rules of Appellate Procedure in order to review *other* issues not raised in the briefs. N.C. R. App. P. 2; N.C. R. App. P. 28(a).

Rule 28(a)'s limited right to review, however, is qualified somewhat by the United States Supreme Court decision in *Anders v. California*, in which that Court determined that a criminal defendant has the right to a review by an appellate court of issues *not* raised in his brief *in certain circumstances*. *Anders v. California*, 386 U.S. 738, 744 (1967). *Anders*, however, only applies to the *first* appeal of right in criminal cases, not to parental rights appeals. Specifically, in *Anders*, that Court held that indigent criminal defendants are entitled under our federal constitution to certain procedures during a first appeal of right, where appointed counsel fails to discern a non-frivolous appellate issue. *Id*. These procedures

include (1) the defendant's right to file a brief when his attorney has filed a "no merit" brief and (2) the defendant's right to a full search of the record by the appellate court, even if no meritorious issues were raised by the defendant or his attorney.

In a later case, the U.S. Supreme Court held that, under our federal constitution, an indigent defendant is *not* entitled to *Anders* procedures on *subsequent* post-conviction appeals even where state law provides such defendants a right to counsel for that appeal. *See Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987).

This present matter is not criminal in nature; therefore *Anders* does not apply. Our General Assembly, however, has provided parents the right to an appeal where their parental rights are terminated and a right to counsel for that appeal. Our General Assembly, though, has not provided these parties the right to all *Anders* procedures, such as the right to a full *Anders* review of issues not raised in the briefs. Neither our State Constitution nor the federal constitution provides this right. And our Supreme Court has not provided for such a right by appellate rule or otherwise. Rather, our Supreme Court has restricted the right of review in all appeals to those raised in the briefs. N.C. R. App. 28(a).

The Supreme Court had the opportunity to create a right to an *Anders*-type review in parental rights cases, but that Court has not done so. Specifically, in 2007, we held that an indigent parent with a statutory right to counsel had no right to *Anders* procedures; but we urged "our Supreme Court or the General Assembly to reconsider this issue." *In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). The General Assembly has not responded. Our Supreme Court did respond by promulgating Rule 3.1(e), creating a right to *some Anders*-type procedures in the termination of parental rights context. Specifically, where a party typically has no right to file a separate brief when represented by counsel, our Supreme Court created a right for an indigent parent to raise issues in a separate brief where that parent's counsel has filed a "no-merit" brief. N.C. R. App. 3.1(e). However, our Supreme Court, in Rule 3.1(e), has *not* created any right for that parent to receive an *Anders*-type review of the record by our Court for consideration of issues not explicitly raised by the parent or that parent's counsel.

Therefore, until our Supreme Court, by rule or holding, or our General Assembly, by law, creates a right to an *Anders*-type review of issues not raised by the parties or their counsel, we must follow our Supreme Court's Rule 28(a), which limits *the right* of appellants to a review of issues actually raised in the briefs.

This is not to say that we cannot exercise our discretion, pursuant to Rule 2, to consider issues not properly raised in the briefs, which we do here.

In our discretion, we have reviewed the transcript and record. Based on our review, we are unable to find any prejudicial error in the trial court's order terminating Father's parental rights. The termination order contains sufficient findings of fact supported by clear, cogent, and convincing evidence to support the conclusion that grounds exist to terminate Father's parental rights based on neglect. The trial court's findings demonstrate that the children were previously adjudicated neglected, and that Father did not take any steps to correct the conditions that led to the children being removed from his care, but instead absconded from his probation with Mother. *See In re M.J.S.M.*, ___ N.C. App. ___, ___, 810 S.E.2d 370, 373 (2018) ("A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect."). The trial court also made appropriate findings in determining that the termination of Father's parental rights was in the children's best interests. *See* N.C. Gen. Stat. § 7B-1110(a).

AFFIRMED.

Judges TYSON and BERGER concur.

WENDY JOHNSON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA18-822

Filed 18 June 2019

1. Civil Rights—contested case—sex discrimination—hiring decision—burden-shifting framework for mixed motive cases—applicable

In a contested case alleging sex discrimination where a female employee of a state agency applied for an internal position that eventually went to a highly qualified male candidate, the administrative law judge erred in applying the burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), rather than the framework from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for "mixed-motive" cases. The female employee presented

direct evidence that sex was a motivating factor in the agency's hiring decision, where the hiring manager submitted a "request for candidate pre-approval" to the agency stating that the male candidate would add diversity to an all-female staff.

2. Appeal and Error—mootness—contested case—state agency's hiring decision—alleged failure to apply veteran's preference

In an appeal from a contested case where a state agency employee was not hired for an internal position that she applied for, the issue of whether the state agency improperly applied a veteran's preference (pursuant to N.C.G.S. § 126-80) was dismissed as moot. The employee conceded that, even if the agency improperly applied the veteran's preference, that failure was harmless because she still got to interview for the job and competed against applicants with substantially equal qualifications.

Appeal by Petitioner from Final Decision and Amended Final Decision entered 21 May 2018 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 30 January 2019.

Pope McMillan, P.A., by Clark D. Tew, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for respondent-appellee.

MURPHY, Judge.

This case requires us to consider whether the Administrative Law Judge ("ALJ") erred in applying the *McDonnell Douglas* burden-shifting framework, rather than the *Price Waterhouse* mixed-motive burden-shifting framework, in determining a claim of alleged discrimination on the basis of sex. We conclude the ALJ applied the incorrect burden-shifting framework. While we reverse and remand for further proceedings, we dismiss as moot Appellant's argument that the ALJ erred in concluding that NCDPS improperly denied her veteran's preference.

BACKGROUND

On 7 February 2017, the North Carolina Department of Public Safety ("NCDPS") internally announced that it was accepting applications for a vacant Personnel Technician III position at the Western Foothills Regional Employment Office ("WFREO"). The posting described the position as the salary administration specialist and assistant manager of

WFREO. It stated that applicants must possess "[d]emonstrated knowledge and experience with using BEACON/SAP to include report generation" and "with salary administration in NC state government" and "[c]onsiderable knowledge of state personnel policies and procedures related to recruitment, employment and salary administration." At the time of the job posting, the entire staff of WFREO was female.

Appellant, Wendy Johnson ("Johnson"), was a female employed by NCDPS as an Administrative Services Assistant V at Wilkes Correctional Center when she applied for the position at WFREO. Johnson had a high school education and 150 months of experience in State government positions. Several other NCDPS employees applied for the position, and an independent "screener" narrowed the applicant pool to seven individuals to be interviewed based on selective criteria, including the candidates' education and experience and related knowledge, skills, abilities, and competencies. The interview pool consisted of two male and five female candidates, Johnson included.

Lou Ann Avery ("Avery"), the manager of WFREO and the hiring manager for the vacant position, interviewed the seven candidates with Larry Williamson ("Williamson"), the Superintendent at Foothills Correctional Institution. At the interview, "each candidate was asked a series of 'benchmarked' questions. Three of the nine questions were not truly 'benchmarked', but were accompanied by vague and generalized instructions for scoring responses that left substantial room for subjective interpretation by the interviewer in scoring those questions." Johnson received an overall interview score of "average." Of the candidates interviewed, only one candidate, a male, scored "above average."

Avery decided to offer the male ("John Doe") the position and submitted her "Request for Candidate Pre-Approval" to NCDPS. The Request stated the following under "justification":

> WFREO is recommending [John Doe] for the position of Personnel Tech III. Mr. [Doe] has a Bachelor's degree and 104 months experience above minimum in Human Resources, NCDPS and private sector. Mr. [Doe] brings experience in Beacon, Benefits, NeoGov, BobJ reports and supervisory. On February 22, 2017 we interviewed a total of 7 applicants. Three applicants scored Average, three scored Below Average, Mr. [Doe] was the only Above Average score. *Promoting Mr. [Doe] to the WFREO will also add diversity to an all female staff.* I am recommending $42,159 salary for Mr. [Doe], a 10% increase from his current salary.

(emphasis added). Lisa Murray ("Murray") at NCDPS approved Avery's Request without making any alterations to the justification.

After Johnson was informed that she was not selected for the position, she spoke with Natalie Crookston ("Crookston"), another applicant for the position who was not selected. Crookston stated she had spoken with Avery, who "implied in the conversation" that Doe was selected for the position because he was a male. Johnson subsequently filed a *Petition for a Contested Case Hearing* in the Office of Administrative Hearings ("OAH"), alleging discrimination based on sex and failure to receive priority consideration for veteran's preference. The matter was heard before an ALJ in Catawba County, who concluded, "Petitioner failed to carry her burden to demonstrate by a preponderance of the evidence that the Respondent's hiring decision was discriminatory." The ALJ also concluded "Petitioner failed to meet her burden of proof that Respondent failed to properly apply the Veterans' Preference in violation of [N.C.G.S.] § 126-82." Johnson appeals.

ANALYSIS

A. Discrimination on the Basis of Sex

[1] Johnson argues the ALJ erred in applying the *McDonnell Douglas* burden-shifting framework rather than the *Price Waterhouse* framework. We agree.

1. Standard of Review

N.C.G.S. § 150B-51(b) provides the applicable standards of review in appeals of final decisions by an administrative tribunal:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2017).

"Where the asserted error falls under subsections 150B-51(b)(5) and (6), we apply the whole record standard of review." *Whitehurst v. East Carolina Univ.*, ___ N.C. App. ___, ___, 811 S.E.2d 626, 631 (2018). Under this standard, we "examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decisions. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and internal quotation marks omitted).

"We conduct a *de novo* review of an asserted error of law falling under subsections 150B-51(b)(1)-(4) . . . ." *Id.* at ___, 811 S.E.2d at 631. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the ALJ." *Id.* (citation and internal quotations marks omitted).

2. Legal Frameworks

Under N.C.G.S. § 126-34.02, "[a]n applicant for State employment, a State employee, or former State employee may allege discrimination or harassment based on . . . sex . . . if the employee believes that he or she has been discriminated against in his or her application for employment . . . ." N.C.G.S. § 126-34.02(b)(1) (2017). "[W]e look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *N.C. Dep't. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

There are multiple avenues by which a petitioner may establish a causal connection between an adverse employment action and a discriminatory motive on the basis of sex. *Newberne v. Dep't of Crime Control and Public Safety*, 359 N.C. 782, 790, 618 S.E.2d 201, 207 (2005). A petitioner may rely on direct evidence of a single discriminatory motive, such as an "employer's admission that it took adverse action against the plaintiff solely because of the" plaintiff's sex or protected characteristic. *Id.* (citation, alterations, and internal quotation marks omitted). Recognizing that such evidence is rare, the U.S. Supreme Court created a second avenue by which a plaintiff may establish a claim of sex discrimination based on circumstantial evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 677-78 (1973); *Newberne*, 359 N.C. at 790, 618 S.E.2d at 207. The *McDonnell Douglas* framework created a burden-shifting scheme:

> Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful [discrimination], the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Newberne, 359 N.C. at 791, 618 S.E.2d at 207-08 (citations omitted).

A successful claim under the *McDonnell Douglas* framework assumes a single discriminatory motive and that any preferred legitimate motive is pretextual. Yet, there are situations where an employment decision is the result of both legitimate and discriminatory motives. This third avenue of proof is widely referred to as a "mixed-motive" case, first recognized by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268 (1989). The plurality opinion created a new burden-shifting framework for mixed-motive cases where, "once a plaintiff . . . shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-45, 104 L. Ed. 2d at 284. Justice O'Connor concurred, stating, "In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* at 276, 104 L. Ed. 2d. at 304 (O'Connor, J., concurring).

Congress subsequently codified and, on multiple occasions, modified the mixed-motive framework. Under the Civil Rights Act of 1991:

> a plaintiff succeeds on a mixed-motive claim if she demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice. Once such a showing has been made, the employer cannot escape liability. However, through use of a limited affirmative defense, if an employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, it can restrict a plaintiff's damages to injunctive and declaratory relief, and attorney's fees and costs.

Diamond v. Colonial Life Acc. Ins. Co., 416 F.3d 310, 317 (4th Cir. 2005) (citations and internal quotation marks omitted). Yet, courts were still divided as to whether direct evidence of discrimination was required for a plaintiff to pursue a mixed-motive theory, with many relying on Justice O'Connor's concurrence in *Price Waterhouse*. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95, 156 L. Ed. 2d. 84, 91 (2003). In *Desert Palace*, based on a plain reading of 42 U.S.C. § 2000e-2(m), the U.S. Supreme Court held that "direct evidence of discrimination is not required in mixed-motive cases[.]" *Desert Palace*, 539 U.S. at 101-02, 156 L. Ed. 2d at 96.

It is elementary that, while "we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases[,]" those decisions are not binding authority. *See N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Our courts have not directly addressed the evidentiary showing required for a plaintiff alleging discrimination on the basis of sex to succeed on a mixed-motive theory. However, our Supreme Court addressed the proper mixed-motive framework for an unlawful retaliation claim under the Whistleblower Act in *Newberne*. The Court engaged in a similar analysis of the various avenues a plaintiff may use to establish a causal connection between protected activity and adverse employment action:

> Therefore, claims brought under the Whistleblower Act should be adjudicated according to the following procedures. First, the plaintiff must endeavor to establish a prima facie case of retaliation under the statute. The plaintiff should include any available direct evidence that the adverse employment action was retaliatory along with circumstantial evidence to that effect. Second, the defendant should present its case, including its evidence as to legitimate reasons for the employment decision. Third, once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has demonstrated that he or she engaged in a protected activity and the defendant took adverse action against the plaintiff in his or her employment, and if the plaintiff has further established by *direct evidence* that the protected conduct was a substantial or motivating factor in the adverse employment action, then the defendant bears the burden to show that its legitimate

> reason, standing alone, would have induced it to make the same decision. If, however, the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken for retaliatory purposes.

Newberne, 359 N.C. at 794, 618 S.E.2d at 209-10 (citations, alterations, and internal quotation marks omitted) (emphasis in original). In a footnote, our Supreme Court acknowledged that Justice O'Connor's concurrence and the direct evidence requirement has since been abrogated as acknowledged in *Desert Palace*, but nevertheless states this abrogation "applies only to claims brought under Title VII of the Civil Rights Act of 1964." *Id.* at 793-94, 618 S.E.2d at 209, n.4.

Given that sex is a protected characteristic analogous to the protected activity under the Whistleblower Act, *Newberne* requires us to apply its framework to claims of discrimination on the basis of sex under N.C.G.S. § 126-34.02.

3. Discussion

The ALJ made the following conclusions in its Final Decision:

> 17. Petitioner has easily established the first three prongs of a prima facie case of sex discrimination for failure to promote. She belongs to a protected class, she applied for the Tech III position, and the Department doesn't dispute that Petitioner was qualified for the position. It is less clear that Petitioner was rejected under circumstances giving rise to an inference of unlawful discrimination. Nonetheless, the undersigned will proceed as though Petitioner satisfied all four elements of a prima facie case of sex discrimination.
>
> . . .
>
> 20. The Department has articulated a legitimate, non-discriminatory basis for not selecting Petitioner for the promotion. Specifically, [Doe] was the most qualified candidate. [Doe] had more education (a bachelor's degree as compared to Petitioner's High School diploma), more supervisory experience, and was rated higher on the interview.

Having determined, or at least assumed, that Johnson established a prima facie case of discrimination on the basis of sex and that NCDPS

introduced evidence of a legitimate, nondiscriminatory reason for the employment action, the ALJ next determined whether Johnson offered direct evidence that sex was a substantial or motivating factor in the employment action.

"In saying that [sex] played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be" the sex of applicant or employee. *Price Waterhouse*, 490 U.S. at 250, 104 L. Ed. 2d. at 287-88. Direct evidence of sex as a motiving factor "has been defined as evidence of conduct or statements that both reflect directly the alleged [discriminatory] attitude and that bear directly on the contested employment decision." *Newberne*, 359 N.C. at 792, 618 S.E.2d at 208-09 (citation, alteration, and internal quotation marks omitted). Moreover, "direct evidence does not include stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself." *Id.*

The ALJ concluded that Johnson failed to produce direct evidence that sex was a motivating factor in the employment action, making the *Price Waterhouse* mixed-motive framework inapplicable:

> 30. Petitioner argues that she produced direct evidence of discrimination which would require the undersigned to employ the discrimination analysis set forth in Justice O'Connor's concurrence in Price Waterhouse v. Hopkins, instead of the McDonnell Douglas "burden shifting" analysis. . . .
>
> 31. Petitioner relies on Avery's notation in the request for candidate pre-approval that "promoting Mr. [Doe] to the WFREO will also add diversity to an all female staff" as direct evidence of discrimination. Avery's comment is not direct evidence of discrimination. To show discrimination by direct evidence, a plaintiff typically must show discriminatory motivation on the part of the decision maker involved in the adverse employment action. As discussed above, Avery was motivated to hire [Doe] because he was the most qualified candidate. Avery did not deny Petitioner the promotion because of her sex, nor did Avery promote [Doe] because of his sex.

We agree with Johnson that Conclusion of Law #31 was made in error.

The undisputed statement made by Avery that Doe "will also add diversity to an all female staff" is necessarily premised upon Doe's sex. That is, Doe adds diversity to an all-female staff *because* he is a male. Avery's use and reference to Doe's sex in the justification for hire, taken at face value, exhibit her view that his sex as a male was a benefit – a benefit that Johnson, as a female, could not offer simply by the nature of her sex. While gender may certainly "play a role in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion[,]" this is not that situation. *Price Waterhouse*, 490 U.S. at 277, 104 L. Ed. 2d. at 305 (O'Connor, J., concurring). NCDPS argues that "Johnson's contention that the reference to diversity alone constituted direct evidence of discriminatory motive is misplaced[,]" and cites several federal district court cases addressing diversity policies in support of this argument. *See Bernstein v. St. Paul Cos., Inc.*, 134 F. Supp. 2d 730, 739 n. 12 (D. Md. 2001); *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 185 (D. Del. 2001). These cases, however, are inapposite. This is not a challenge to an entity's diversity policy or the existence of a general policy promoting diversity awareness – it is a challenge to a specific hiring decision.

Additionally, Avery's statement bore directly on the contested employment action and was not made by an individual unrelated to the decisionmaking process. It strains credulity to argue that Avery's statement, made on an official employment document listing the "JUSTIFICATION" for hire, does not bear directly on the contested employment action – which candidate to hire. The ALJ found that "Avery was the decision maker in the hiring process for the Tech III position." Her statement regarding Doe adding diversity to an all-female staff was made in Avery's "Request for Candidate Pre-Approval." Murray then adopted Avery's recommendation, including the justification, wholesale and without making any alterations. This remark was also not made outside of the decisionmaking process.

For these reasons, the ALJ erred in concluding that this evidence was not direct evidence and thus erred in failing to apply the *Price Waterhouse* mixed-motive framework.[1] The State argues that "assuming,

1. Johnson challenges numerous Findings of Fact, arguing these challenged findings "led [the ALJ] to conclude that *Price Waterhouse* did not apply to this case." We have concluded that, based upon the undisputed statement in the justification for the recommendation to hire Doe, the ALJ erred in failing to apply *Price Waterhouse* and that a new determination under that framework is required. We need not address these additional Findings of Fact.

arguendo, that the evidence presented by Johnson is properly characterized as direct evidence, the virtual entirety of the remaining evidence presented below demonstrated that the Department would have made the same hiring decision regardless of [Doe's] gender." It contends, "under either analytical framework, Johnson's discrimination claim failed as a matter of law and the evidence supported a finding that no sex discrimination occurred." It is beyond our role as an appellate court to reweigh evidence under a fundamentally different burden-shifting framework. *See Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995) ("Employment discrimination law recognizes an important distinction between mixed-motive and pretext cases. The distinction is critical, because plaintiffs enjoy more favorable standards of liability in mixed-motive cases . . . ."), *overruled in part by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 156 L. Ed. 2d 84 (2003). This is solely the role of the ALJ. As such, our holding goes no further than to reverse and remand for the ALJ to apply the correct framework, reweigh the evidence accordingly, and issue a new Final Decision.

B. Veteran's Preference

[2] Johnson also contends the trial court erred in concluding that she failed to meet her burden of proof that NCDPS failed to properly apply a veterans' preference. We disagree.

N.C.G.S. § 126-80 states:

> It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be granted preference in employment for positions subject to the provisions of this Chapter with every State department, agency, and institution.

N.C.G.S. § 126-80 (2017). It is the applicant's burden to "submit a DD Form 214, Certificate of Release or Discharge from Active Duty, along with a State Application for Employment . . . to the appointing authority." 25 N.C.A.C. 1H.1102. The appointing authority is then "responsible for verifying eligibility and may request additional documentation as is necessary to ascertain eligibility." *Id.* The veterans' preference applies in limited circumstances when an applicant is applying for a promotion:

> (d) For promotion, reassignment and horizontal transfer, after applying the preference to veterans who are current State employees as explained under Subparagraph (a)(1)

> or (2) of this Rule, the eligible veteran receives no further preference and competes with all other applicants who have substantially equal qualifications.

25 N.C.A.C. 1H.1104(d).

We need not reach the question of whether the ALJ erred in concluding that Johnson failed to meet her burden that NCDPS improperly applied the veterans' preference. Johnson concedes that, even if we were to assume the preference was improperly applied, that failure was harmless in her case, as she was granted an interview and competed with all other applicants with substantially equal qualifications. We dismiss this argument as moot.

CONCLUSION

Johnson presented direct evidence that sex was a substantial and motivating factor in the adverse employment action taken against her. Accordingly, the ALJ erred in failing to apply the *Price Waterhouse* burden-shifting framework, and we reverse and remand for further proceedings under the proper framework. Johnson's argument that NCDPS failed to properly apply the veteran's preference is dismissed.

REVERSED AND REMANDED IN PART; DISMISSED IN PART.

Judges DILLON and ARROWOOD concur.

NORTH CAROLINA INDIAN CULTURAL CENTER, INC., PLAINTIFF
v.
MACHELLE SANDERS, SECRETARY, N.C. DEPARTMENT OF ADMINISTRATION, IN HER OFFICIAL CAPACITY, FURNIE LAMBERT, CHAIRMAN, N.C. STATE COMMISSION OF INDIAN AFFAIRS, IN HIS OFFICIAL CAPACITY, N.C. DEPARTMENT OF ADMINISTRATION, N.C. COMMISSION OF INDIAN AFFAIRS, STATE OF NORTH CAROLINA, AND PAUL BROOKS, DEFENDANTS

No. COA18-807

Filed 18 June 2019

1. Contracts—lease of state-owned property—implied covenant of quiet enjoyment—no breach

At the summary judgment phase of an action where the State leased property—to be used for a Native American cultural center—to plaintiff nonprofit corporation but later enacted a session law terminating the lease, the trial court properly ruled in favor of the State defendants on plaintiff's claim for breach of the implied covenant of quiet enjoyment. Plaintiff never disputed that it defaulted on the lease, the evidence showed that the State defendants terminated the lease pursuant to its terms after giving plaintiff notice and an opportunity to cure the default, and plaintiff failed to show constructive eviction where it offered no evidence that the State defendants' actions forced it to abandon the property.

2. Constitutional Law—lease of state-owned property—legislation terminating lease—no constitutional violations

Where plaintiff nonprofit corporation alleged multiple violations of the state and federal constitutions after the State leased property to plaintiff but later enacted a session law terminating the lease, the trial court properly found no violations under the Contracts Clause, the prohibition against Bills of Attainder, the Takings Clause, the Due Process Clause, or under general separation-of-powers principles because, among other things, the legislation neither changed the parties' obligations nor barred plaintiff from asserting its rights under the lease or from seeking legal remedies through judicial action.

3. Statutes of Limitation and Repose—voluntary dismissal of prior action—based on insufficient service of process—limitations period not tolled

Where a nonprofit sued the former chairman of a state commission for tortious interference with a contract and damages under

42 U.S.C. § 1983, and then obtained a voluntary dismissal of the action without prejudice, the trial court properly dismissed the nonprofit's second complaint asserting the same claims. Not only did the three-year statute of limitations for both claims expire well before plaintiff filed the second complaint, but also the voluntary dismissal of the prior action did not toll the limitations period where, based on the record, the nonprofit never properly served the defendant with the first complaint.

Appeal by Plaintiff from Order entered 23 April 2018 by Judge D. Thomas Lambeth, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 February 2019.

Linck Harris Law Group, PLLC, by David H. Harris, Jr., for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State.

Lewis Brisbois Bisgaard & Smith LLP, by Christopher Derrenbacher, for defendant-appellee Paul Brooks.

HAMPSON, Judge.

Factual and Procedural Background

North Carolina Indian Cultural Center, Inc. (Plaintiff) appeals from an Order (1) granting summary judgment in favor of the State of North Carolina (State), the North Carolina Department of Administration (DOA), the North Carolina Commission of Indian Affairs (Commission), Machelle Sanders (Sanders), Secretary of the DOA, in her official capacity, and Furnie Lambert (Lambert), Chairman of the Commission, in his official capacity (collectively, the State Defendants); (2) denying Plaintiff's Motion for Partial Summary Judgment; and (3) dismissing Plaintiff's Complaint against Paul Brooks (Brooks). The Record before us tends to show the following:

Beginning in or around 1983, the State began acquiring land in Maxton Township in Robeson County (Property) for the purpose of ultimately developing the North Carolina Indian Cultural Center (Cultural Center) with a focus on the heritage and culture of North Carolina's Native Americans. Plaintiff incorporated as a non-profit corporation in 1985 to "develop, establish, manage, furnish, equip, maintain, preserve,

exhibit and interpret to the public the North Carolina Indian Cultural Center . . . ." Plaintiff has its own Board of Directors appointed under its Articles of Incorporation.

In 1989, the General Assembly enacted legislation directing the State to enter into a 99-year lease of the Property with Plaintiff for the sum of $1.00 per year for the establishment of the Cultural Center. The legislation also called for the lease to include certain terms and conditions, such as requiring Plaintiff to obtain funding of $4.16 million for the Cultural Center within five years of a lease agreement. 1989 N.C. Sess. Law 1074, § 18. In 1992 and 1993, the General Assembly amended this legislation by excluding from the prospective lease a portion of the Property used for a golf course, extending the timeframe for the State and Plaintiff to enter into a lease, and easing Plaintiff's funding requirements. *See* 1991 N.C. Sess. Law 900, § 22; 1993 N.C. Sess. Law 88, § 1; 1993 N.C. Sess. Law 561, § 33.

On 12 May 1994, Plaintiff and the State entered into a lease agreement for the Property, excluding the golf course (Lease). The Lease, among other provisions, included requirements that Plaintiff: maintain and improve the premises at no cost to the State; furnish utilities, including water service, to the Cultural Center; maintain certain insurance policies; provide ingress and egress via the main road through the Property, including to permit access to the golf course; and not sublease or assign the Lease without prior written approval from the DOA. The Lease was amended, pursuant to legislation, in 1997 to add an additional parcel of land to the Property and Lease and to reduce Plaintiff's funding obligation to $3 million. 1997 N.C. Sess. Law 41, § 1. The Lease was further amended, pursuant to additional legislation, in 2001 to eliminate the funding obligation altogether. 2001 N.C. Sess. Law 89, § 1.

The 1997 legislation also required Plaintiff to reorganize with a Board of Directors appointed by the Commission. 1997 N.C. Sess. Law 41, § 2. This legislation was amended in 2003, changing the makeup of Plaintiff's Board of Directors but leaving the Commission with the authority to appoint directors. 2003 N.C. Sess. Law 260, § 1 (hereinafter, 2003 Legislation). In 2009, an Administrative Law Judge issued a decision blocking the Commission from appointing directors, which was subsequently adopted as a Final Agency Decision by the Commission. Subsequently, in 2011, a Superior Court Judge declared the 2003 Legislation unconstitutional.

In March 2010, a team from the State Construction Office, an office within the DOA, inspected the Property and on 26 March 2010 issued

a Facility Condition Assessment Report (FCAR) on the Property. The FCAR identified a number of deteriorated or dilapidated buildings on the Property (including on the golf course) that needed significant repair or demolition. The FCAR observed there was vandalism throughout the site, theft of electrical wiring, and exposed wiring posing safety problems. With respect to the Cultural Center, the FCAR recommended a theater complex used for an outdoor drama be rebuilt, as it was in such an advanced state of deterioration it was unsafe for public access. In addition, the FCAR indicated the Cultural Center museum required substantial repairs, including complete renovation of the interior along with complete replacement of the electrical system. Among other things, the FCAR noted the museum had various Building Code violations and safety hazards, including exposed electrical wiring and its restrooms were unsuitable for public use. The FCAR further recommended demolition of a warehouse attached to the museum because it was in such poor condition. In his affidavit, John F. Webb, III, the Manager of the Leasing and Space Planning Section of the DOA, calculated the amount needed to make the immediate repairs necessary for the portion of the Property leased to Plaintiff was $2.083 million.

On 18 January 2011, the State issued Plaintiff a letter (Default Letter) detailing a number of claimed defaults under the lease, including failure to maintain and improve the leased premises as set out in the FCAR; failure to pay for water service to the Cultural Center; failure to obtain required insurance coverage; subleasing without prior written approval; and hindering access to patrons of the golf course. In addition, the Default Letter expressly invoked a requirement under the terms of the Lease that Plaintiff begin efforts to cure the defaults within 60 days and remedy the defaults within 120 days.

Plaintiff's then attorney formally responded by email on or about 17 March 2011, disputing any default under the Lease. Plaintiff, through its counsel, indicated Plaintiff had begun to address each of the concerns raised by the State, including obtaining new insurance policies. Plaintiff also asserted the Commission and DOA had interfered with Plaintiff's efforts to maintain the Property and interfered in contractual arrangements, including having "conspired and collaborated" with a private corporation to operate the golf course on the Property. Plaintiff further claimed the Commission and DOA "sabotaged the work" of the Cultural Center and resultantly were themselves responsible for the conditions on the Property. On 28 April 2011, in reply, the State sent Plaintiff correspondence disputing Plaintiff's assertions and noting the State was provided no evidence of efforts to cure the defaults.

On 3 October 2011, the Office of State Fire Marshall issued a report (Fire Marshall Report) to the DOA, identifying a number of Building and Fire Code violations existing on the Property, including at the theater, museum store, and warehouse. This Report also noted the theater stage, built in 2007, had not received necessary approvals prior to construction and appeared to be in violation of the Building Code as well.

In June 2012, the Joint Legislative Program Division Oversight Committee of the General Assembly directed its Program Evaluation Division to evaluate the current and long-term disposition of the Property. The Program Evaluation Division delivered its report on 12 December 2012 (PED Report). The PED Report noted many of the same problems as the 2010 FCAR and 2011 Fire Marshall Report, including dilapidated buildings, exposed wiring, vandalism, and theft of copper wiring. The PED Report identified over $2.1 million in necessary repairs to the Property, including demolition of the museum, warehouse, and amphitheater complex.

This PED Report further acknowledged that while the State had declared Plaintiff in default under the Lease, the DOA felt constrained from proceeding further by the legislative directive contained in the 1989 Session Law, as later amended, requiring the State to specifically enter into the Lease with Plaintiff. Among other recommendations, the PED Report recommended the General Assembly enact legislation terminating the Lease.

On 26 June 2013, Session Law 2013-186 was enacted, directing the DOA to terminate the Lease to Plaintiff within 15 days. *See* 2013 N.C. Sess. Law 186, § 2. On 10 July 2013, the DOA issued notice to Plaintiff that the Lease would terminate in 60 days. In 2014, a substantial portion of the Property previously leased to Plaintiff was sold to the Lumbee Tribe of North Carolina. The remainder was reallocated to the North Carolina Department of Environment and Natural Resources for incorporation into the Lumber River State Park.

On 3 October 2013, Plaintiff filed an amended complaint[1] against the DOA, the Commission, the State, as well as Brooks, a former Chairman of the Commission and then Chair of the Tribal Council of the Lumbee Tribe, Inc. (2013 Complaint). In the 2013 Complaint, Plaintiff alleged breach of contract and various constitutional violations, seeking both damages and a declaratory judgment that Session Law 2013-186 was unconstitutional.

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1. The original complaint from this action is absent from the record.

The Record reflects no proof the 2013 Complaint was served on Brooks. On 10 February 2014, Brooks filed Motions to Dismiss and an Answer to the 2013 Complaint, alleging, *inter alia*, failure by Plaintiff to provide proof of service of the 2013 Complaint on Brooks. On 11 March 2016, prior to Brooks's Motions being heard, Plaintiff filed a Notice of Voluntary Dismissal Without Prejudice.

On 6 March 2017, Plaintiff filed the present action against the State Defendants and Brooks (collectively, Defendants). In this Complaint, Plaintiff alleged Defendants' actions "were taken with the clear intent to breach the Ground Lease" and that the Lease was a valid contract, constituting waiver of sovereign immunity. Plaintiff further alleged breach of contract against the State Defendants and sought a declaratory judgment that Session Law 2013-186 was invalid. Against Brooks specifically, Plaintiff alleged tortious interference with contract and a claim for damages pursuant to 42 U.S.C. § 1983. Plaintiff sought various damages and the return of the leased portion of the Property from the State.

On 24 May 2017, the State Defendants filed a Motion to Dismiss under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. On 12 June 2017, Brooks filed a Motion to Dismiss under Rules 12(b)(1), (2), (4), (5), and (6) of the North Carolina Rules of Civil Procedure. In his Motion, Brooks alleged, *inter alia*, that Plaintiff failed to provide proof of service of process of the 2013 Complaint prior to taking a voluntary dismissal and that Plaintiff's Complaint was thereby barred by the statute of limitations.

On 19 February 2018, the State Defendants filed a Motion for Summary Judgment. On 16 March 2018, Plaintiff filed a Motion for Partial Summary Judgment "on the issues of liability[.]" On 23 April 2018, the trial court entered its Order granting summary judgment to the State Defendants, denying Plaintiff's Partial Summary Judgment Motion, and granting Brooks's Motion to Dismiss.

Issues

The dispositive issues in this case are whether: (I) the trial court erred in granting summary judgment for the State Defendants and denying partial summary judgment for Plaintiff on the breach-of-contract and constitutional claims; and (II) Plaintiff's voluntary dismissal of the 2013 Complaint tolled the statute of limitations on the claims against Brooks where there is no proof he was served with the 2013 Complaint.

Analysis

I. Summary Judgment Motions

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

B. Breach of Contract

[1] Plaintiff first argues the trial court erred in granting summary judgment to the State Defendants and, in turn, denying Plaintiff partial summary judgment on its breach-of-contract claim. Plaintiff contends the State Defendants breached the Lease by (1) attempting to appoint directors under the 2003 Legislation; (2) failing to prevent vandalism on the Property; and (3) enacting Session Law 2013-186 requiring termination of the Lease.

Notably, although Plaintiff disputes the nature, extent, and cause of Plaintiff's defaults under the Lease, Plaintiff makes no contention it was not, in fact, in default. Indeed, the pleadings and affidavits submitted by the State demonstrate a number of areas in which Plaintiff was in default, including failing to procure necessary insurance policies and failing to maintain the leased portion of the Property. Despite being put on notice of these defaults, particularly as to the dilapidated nature of the Property, Plaintiff failed to take steps to cure its default between 2010, when the FCAR issued, and the end of 2012 when the PED Report issued, with both Reports detailing many of the same problems.

Rather, Plaintiff contends it was the State Defendants who were in breach of the Lease by breaching the implied covenant of "quiet enjoyment." "[T]he provisions of a lease are interpreted according to general principles of contract law." *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003) (citation omitted). " 'Under North Carolina law, . . . a lease carries an implied warranty that the tenant will have quiet and peaceable possession of the leased premises during the term of the lease[,] . . . stand[ing] for the principle that a landlord breaches the implied covenant of quiet enjoyment when he constructively evicts the tenant.' " *Charlotte Eastland Mall, LLC v. Sole Survivor, Inc.*, 166 N.C. App. 659, 663, 608 S.E.2d 70, 73 (2004) (alterations in original) (quoting *K & S Enters. v. Kennedy Office*

Supply Co., 135 N.C. App. 260, 267, 520 S.E.2d 122, 126-27 (1999), *aff'd per curiam*, 351 N.C. 470, 527 S.E.2d 644 (2000)). "An act of a landlord which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing the tenant to abandon them, amounts to a constructive eviction. Put another way, when a landlord breaches a duty under the lease which renders the premises untenable, such conduct constitutes constructive eviction." *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830 (1990) (citations omitted). "A tenant seeking to show constructive eviction has the burden of showing that he abandoned the premises within a reasonable time after the landlord's wrongful act." *K & S Enters.*, 135 N.C. App. at 266-67, 520 S.E.2d at 126 (citation omitted).

Specifically, Plaintiff argues the Commission's efforts to appoint directors to Plaintiff's Board pursuant to the 2003 Legislation constituted a constructive eviction. However, the Commission's own Final Agency Decision blocking enforcement of the 2003 Legislation was issued in May 2010. Plaintiff made no allegation in its Complaint and offered no evidence at summary judgment that it was forced to abandon the Property during this time. Indeed, the Record demonstrates Plaintiff did not abandon the Property until after enactment of Session Law 2013-186 when the Lease was, in fact, terminated. Moreover, Plaintiff makes no showing that the State Defendants' actions resulted in Plaintiff falling into default under the Lease.

To the contrary, Plaintiff submitted two affidavits in support of its case. One from Bobbie Jacobs-Ghaffar (Jacobs-Ghaffar), a former employee of Plaintiff 1990–1994. Jacobs-Ghaffar spoke to the work done by Plaintiff and its value and history in the community during her employment in the early 1990s. The second more salient affidavit was from Beverly Collins-Hall (Collins-Hall), an active member of Plaintiff and spouse of the current Board Chair. Collins-Hall served as a Site Administrator at the Cultural Center 2001–2003 and again 2009–2013. In her affidavit, Collins-Hall emphasized the importance of Plaintiff and its facility in the community; her belief that "the Commission on Indian Affairs was an enemy" to Plaintiff; and various acts of vandalism to the Cultural Center. Collins-Hall further stated 2009–2013 she supervised 24 full-time employees at the Cultural Center and highlighted upgrades and maintenance to the Property during that period, as well as providing numerous photographs of the Property. Collins-Hall's affidavit in particular shows Plaintiff did not abandon the Property.

Plaintiff also claims the State Defendants breached the implied warranty of quiet enjoyment by allowing vandalism to occur at the Cultural

Center. "However, it is long-settled that '[t]he covenant of quiet enjoyment . . . does not extend to the acts of trespassers and wrongdoers[.]' " *Charlotte Eastland Mall, LLC*, 166 N.C. App. at 663, 608 S.E.2d at 73 (alterations in original) (quoting *Huggins v. Waters*, 167 N.C. 197, 198, 83 S.E. 334, 334 (1914)). As in *Charlotte Eastland Mall*, Plaintiff does "not cite any cases in support of the proposition that the implied covenant of quiet enjoyment imposes upon [defendant]-landlord the duty to a commercial tenant to prevent criminal acts by third parties, and we find none." *Id.*

Lastly, Plaintiff asserts the enactment of Session Law 2013-186, directing termination of the Lease, itself constitutes a breach. Plaintiff points to no authority for its position. Indeed, the evidence reflects the enactment of Session Law 2013-186 was consistent with the State's rights under the Lease. The State provided timely notice of default and gave Plaintiff an extended opportunity to cure its defaults. The evidence is undisputed the DOA sought this legislation for no other reason than to ensure its own compliance with legislative directives, since the General Assembly had directed the DOA to lease the premises specifically to Plaintiff. Consequently, Session Law 2013-186 did not constitute a breach of the Lease but rather constituted the State's enforcement of its right to terminate under the terms of the Lease.

Accordingly, we conclude where it is undisputed Plaintiff was in default under the Lease, the State Defendants terminated the Lease pursuant to its terms after giving notice of default and an opportunity to cure, and Plaintiff has made no showing of its abandonment of the premises constituting constructive eviction, the trial court did not err in granting summary judgment in favor of the State Defendants on Plaintiff's breach-of-contract claim. Consequently, the trial court also did not err in denying Plaintiff's Motion for Partial Summary Judgment on this ground.

C. Constitutional Claims

[2] Plaintiff next asserts the trial court erred in granting summary judgment to the State Defendants on Plaintiff's claim that the enactment of Session Law 2013-186 violated a host of provisions of both the North Carolina and United States Constitutions, including the Contract Clause, prohibition on Bills of Attainder, the Takings Clause, due process protections of the Fourteenth Amendment, and general separation-of-powers principles. At the heart of Plaintiff's constitutional arguments is its position that Session Law 2013-186, by legislative action, bars Plaintiff from asserting rights under the Lease and seeking legal remedies through judicial action.

As such, Plaintiff first contends Session Law 2013-186's termination of the Lease constitutes an unconstitutional impairment of contract under the federal Constitution. "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 52 L. Ed. 2d 92, 106 (1977) (citations omitted). "Yet the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects. Thus, as a preliminary matter, appellant's claim requires a determination that the repeal has the effect of impairing a contractual obligation." *Id.* (footnote omitted).

As our North Carolina Supreme Court has noted: "Not every modification of a contractual promise, however, impairs the obligation of contract." *Smith v. State*, 298 N.C. 115, 128, 257 S.E.2d 399, 407 (1979) (citing *El Paso v. Simmons*, 379 U.S. 497, 506-07, 13 L. Ed. 2d 446, 453-54 (1965)). Here, though, we are faced with the State's termination of the Lease to which it was a party. Although the parties provide no direct authority addressing such an instance, we find guidance from the Fourth Circuit, in turn, guided by the Seventh Circuit:

> As the Seventh Circuit has explained, "when a state repudiates a contract to which it is a party it is doing nothing different from what a private party does when the party repudiates a contact; it is committing a breach of contract." *Horwitz–Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir.1996). We wholeheartedly agree with our learned colleagues that "[i]t would be absurd to turn every breach of contract by a state or municipality into a violation of the federal Constitution." *Id.* If the offended party retains the right to recover damages for the breach, the Contracts Clause is not implicated; if, on the other hand, the repudiation goes so far as to extinguish the state's duty to pay damages, it may be said to have impaired the obligation of contract.

Crosby v. City of Gastonia, 635 F.3d 634, 642 n.7 (4th Cir. 2011) (citation omitted). This is consistent with our Supreme Court's holding in *Smith*, concluding there was no impairment of a contract where a legislative amendment made "no change in either the obligations of the parties or the remedies available to plaintiff in enforcing [its] agreement." *Smith*, 298 N.C. at 129, 257 S.E.2d at 407.

Here, of course, Plaintiff has asserted a breach-of-contract claim, and the State Defendants have not contended—and, indeed, on the

Record before us could not contend—Session Law 2013-186 barred any right or remedy Plaintiff held under the Lease upon the State's repudiation of the Lease. Nor do the State Defendants argue this legislation acted as a statutory bar or defense to Plaintiff's breach-of-contract claim for damages or other similar remedy. *See Horwitz–Matthews, Inc.*, 78 F.3d at 1250-51 (citations omitted). Thus, we conclude the evidence of record demonstrates enactment of Session Law 2013-186 made "no change in either the obligations of the parties or the remedies available to plaintiff in enforcing [its] agreement." *Smith*, 298 N.C. at 129, 257 S.E.2d at 407. Rather, the Record in this case shows Session Law 2013-186 was enacted to effectuate the terms of the Lease, including its termination provisions, and to provide for the subsequent disposition of the Property, not to impair Plaintiff's rights under the Lease. Therefore, Session Law 2013-186 did not act as an unconstitutional impairment of contract.

For the same essential reasons, Session Law 2013-186 does not constitute a Bill of Attainder because it was not punitive or retributive against Plaintiff. *See Citicorp v. Currie, Comr. Of Banks*, 75 N.C. App. 312, 316, 330 S.E.2d 635, 638 (1985) ("A [Bill of Attainder] is a legislative act that inflicts punishment on a person without a [judicial] trial."). It merely directed the DOA to proceed with termination of the Lease. Session Law 2013-186 did not deprive Plaintiff of any rights it had in the enforcement of the Lease or limit its remedies for the State's termination of the Lease. It did not bar Plaintiff from leasing any other property or otherwise continuing to operate. Rather, the legislation sought to advance "what the General Assembly determined was a legitimate state interest" in the use and disposition of State-owned property following Plaintiff's default under the existing Lease. *See id.* at 316-17, 330 S.E.2d at 638.

Nor does the State Defendants' assertion of rights under the Lease give rise to a takings claim. *See Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("The interferences with plaintiffs' lease rights were grounded on matters that, at times material herein, bespoke an effort to operate within the framework of the lease and applicable regulations, not to take plaintiffs' property rights. If defendant's interferences were unjustified or unreasonable, plaintiffs' rights emanate from the lease agreement, not the Fifth Amendment.").

Similarly, Plaintiff's claims of violations of due-process and separation-of-powers principles likewise fail. Plaintiff asserts Session Law 2013-186 precludes judicial determination of whether the Lease should be terminated. However, nothing in Session Law 2013-186 limited

Plaintiff's right to seek a judicial determination either through the context of forcing a summary-ejectment action or through an action, like the present one, for breach of contract. Consequently, the trial court did not err in granting summary judgment for Defendants and in denying partial summary judgment for Plaintiff on these constitutional claims.

II. Brooks's Motion to Dismiss

A. Standard of Review

[3] "A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citations omitted). Under Rule 12(b)(6), 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." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003).

In addition to the statute of limitations, Brooks also asserted defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. We review a trial court's decision to grant a motion to dismiss for lack of personal jurisdiction to see "whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate." *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 257 (2012) (citations and quotation marks omitted). "We review *de novo* questions of law implicated by the denial of a motion to dismiss for insufficiency of service of process." *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) (citation omitted).

B. Statute of Limitations

Here, Plaintiff alleged claims against Brooks for tortious interference with contract and under 42 U.S.C. § 1983, based on his alleged role in the enactment of Session Law 2013-186 on 26 June 2013. Brooks moved to dismiss the claims against him under Rule 12(b)(6) on the basis, *inter alia*, that the Complaint showed on its face that the statute of limitations on Plaintiff's claims against him had expired.

The statute of limitations for both of Plaintiff's claims against Brooks is three years. "A plaintiff seeking to recover damages or to obtain other relief for . . . tortious interference with contract . . . must assert that claim within three years of the date upon which the underlying injury

occurred." *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 48, 762 S.E.2d 645, 649 (2014) (citing N.C. Gen. Stat. § 1-52(5)). "The three year statute of limitations as set forth in N.C.G.S. § 1-52 applies to 42 U.S.C. § 1983 actions brought in the North Carolina court system." *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 367, 424 S.E.2d 420, 424 (citations omitted), *aff'd per curiam*, 335 N.C. 158-60, 436 S.E.2d 821-22 (1993).

Here, Plaintiff contends, and the face of the Complaint demonstrates, the enactment of Session Law 2013-186 constituted the underlying injury allegedly caused by Brooks's actions. Plaintiff's Complaint in the instant action was not filed until 6 March 2017, over three years after the alleged injury occurred. Thus, on the face of the Complaint, Brooks's Rule 12(b)(6) Motion alleging the expiration of the statute of limitations was properly brought.

"Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted). "A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* (citation omitted). Here, Plaintiff contends the voluntary dismissal of the 2013 Complaint without prejudice tolled the statute of limitations and allowed the filing of the new Complaint within one year. We disagree.

At the outset, we note resolution of this issue requires us to review matters outside of the pleadings. *See N.C. Railroad Co. v. Ferguson Builders Supply*, 103 N.C. App. 768, 771, 407 S.E.2d 296, 298 (1991) (earlier complaints and voluntary dismissals not referenced in pleading at issue constituted materials outside the pleadings for purposes of Rule 12(b)(6)). As such, we follow the lead of our prior case law addressing the same issue and review the parties' contentions on the impact of Plaintiff's voluntary dismissal of the 2013 Complaint on the statute of limitations through the lens of Rules 12(b)(2) (lack of personal jurisdiction), 12(b)(4) (insufficiency of process), and 12(b)(5) (insufficiency of service of process). *See Lawrence v. Sullivan*, 192 N.C. App. 608, 666 S.E.2d 175 (2008); *Camara v. Gbarbera*, 191 N.C. App. 394, 662 S.E.2d 920 (2008).

In *Camara*, we recognized:

> If an action is commenced within the statute of limitations, and a plaintiff voluntarily dismisses the action without prejudice, a new action on the same claim may

> be commenced within one year. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2007). However, a plaintiff must obtain proper service prior to dismissal in order to toll the statute of limitations for a year. In *Latham*, this Court held that if a voluntary dismissal is based on defective service, the voluntary dismissal does not toll the statute of limitations.

191 N.C. App. at 396-97, 662 S.E.2d at 922 (internal citations omitted) (citing *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993)). In *Camara*, proper service of the original action was never made. *Id.* at 396, 662 S.E.2d at 921. This Court noted:

> Plaintiffs' argument that the subsequent action is valid because it was brought within one year as prescribed by Rule 41(a) does not take into account that proper service on defendant was never obtained prior to the voluntary dismissal. Because the service was defective, the statute of limitations did not toll.

Id. at 397, 662 S.E.2d at 922. Thus, where the subsequent action was filed outside the three-year statute of limitations, this Court upheld the trial court's dismissal of the subsequent action. *Id.*

In *Lawrence*, the plaintiff filed her initial complaint within the statute of limitations. 192 N.C. App. at 622, 666 S.E.2d at 183. The original summons was returned undelivered; however, an alias and pluries summons sent to the same address was signed for by someone other than the defendant. *Id.* The plaintiff filed an affidavit of service and took a voluntary dismissal without prejudice the same day. *Id.* The plaintiff then filed a new complaint within one year. The defendant filed a motion to dismiss along with an affidavit stating she was not residing at the address where the first complaint had been served and that she had not received the summons and complaint in the first action. *Id.* The plaintiff failed to present any evidence to the contrary. This Court noted, "As defendant was never properly served with the first complaint, plaintiff's voluntary dismissal without prejudice did not toll the statute of limitations." *Id.* at 623, 666 S.E.2d at 183 (citation omitted). As the second complaint was filed outside the statute of limitations, we, again, upheld the trial court's dismissal. *Id.*

In the present case, Brooks filed an affidavit stating he had no recollection of being served with a copy of the 2013 Complaint and summons. The only summons in the 2013 action directed to him is an unreturned alias and pluries summons. There is no proof of service of the 2013 Complaint or summons in the Record, and although Plaintiff contends

service was made in 2013, Plaintiff provided no evidence of service on Brooks. Therefore, on this Record, Brooks was never served with the 2013 Complaint, and Plaintiff's voluntary dismissal did not toll the statute of limitations. As the Complaint in this action was filed outside the three-year statute of limitations for the claims against Brooks, the trial court properly granted Brooks's Motion to Dismiss.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 23 April 2018 Order granting summary judgment to the State Defendants, denying Plaintiff's Partial Summary Judgment Motion, and dismissing Plaintiff's Complaint against Brooks.

AFFIRMED.

Judges ZACHARY and BERGER concur.

R.C. KOONTS AND SONS MASONRY, INC., DAVID CRAIG KOONTS, AND ROY CLIFTON KOONTS, III, PLAINTIFFS
v.
FIRST NATIONAL BANK, F/K/A YADKIN BANK F/K/A NEWBRIDGE BANK F/K/A LEXINGTON STATE BANK, DEFENDANT

No. COA18-1075

Filed 18 June 2019

1. Appeal and Error—interlocutory appeal—denial of summary judgment—substantial right—possibility of inconsistent verdicts

In a case involving collateral seized and then sold by a bank, an interlocutory order denying a motion for summary judgment was immediately appealable where the bank asserted it would be deprived of a substantial right without immediate review—namely, that re-litigation of claims already tried was barred by res judicata and collateral estoppel, and if the second case were allowed to proceed, inconsistent verdicts might result.

2. Collateral Estoppel and Res Judicata—res judicata—prior lawsuit—same parties—same issues—collateral seized by bank

In a case involving collateral seized and then sold by a bank, claims related to the seizure and consequent damages were barred by res judicata where they were asserted in a prior lawsuit involving

the same factual issues and same parties and the suit resulted in a final judgment. The only claim allowed to go forward was one relating to the commercial reasonableness of the bank's disposition of the collateral under the Uniform Commercial Code, which was dismissed without prejudice by the trial court in the first lawsuit.

Appeal by defendant from order entered 5 July 2018 by Judge Martin B. McGee in Davidson County Superior Court. Heard in the Court of Appeals 21 May 2019.

Smith Law Group, PLLC, by Steven D. Smith, Matthew L. Spencer, and Jonathan M. Holt, for plaintiff-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and James C. Adams, II, for defendant-appellant.

ARROWOOD, Judge.

First National Bank, formerly known as Yadkin Bank, formerly known as NewBridge Bank, formerly known as Lexington State Bank ("defendant") appeals from an order denying its motion for summary judgment. For the reasons stated herein, we affirm in part and reverse in part.

I. Background

Defendant engages in commercial lending. On or about 22 November 2004, R.C. Koonts and Sons Masonry, Inc. (the "corporate plaintiff") obtained a $417,306.14 loan from defendant. The individual plaintiffs, plaintiff David Craig Koonts ("David Koonts") and plaintiff Roy Clifton Koonts, III ("R.C. Koonts"), who owned the corporate plaintiff at all times relevant to this action, guaranteed the loan.

The parties renewed the loan in 2005. As collateral, R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts (collectively, "plaintiffs") pledged all inventory, vehicles, accounts receivable, machinery, and equipment of the corporate plaintiff. Plaintiffs defaulted on the loan in 2007. The parties entered into a forbearance agreement on 19 December 2007, however, plaintiffs subsequently defaulted on the agreement.

On 15 January 2009, defendant filed suit against plaintiffs seeking repayment of the loan. Defendant also instituted a claim and delivery proceeding to seize the collateral pledged as security for the loan. Pursuant to a 12 February 2009 court order, defendant posted a surety bond and seized the collateral in a claim and delivery proceeding. Plaintiffs were

unable to secure a bond to recover the collateral. On 15 October 2012, the Honorable Theodore Royster of Davidson County Superior Court determined plaintiffs were liable to defendant on the loan.

Plaintiffs filed counterclaims challenging the propriety of the seizure of collateral and requesting consequential damages. Specifically, the counterclaims challenged the enforceability of defendant's security interest and of the forbearance agreement, defendant's right to seize the collateral, and the amount of the loan that remained outstanding. The counterclaims also alleged: the amount of collateral seized forced the corporate plaintiff out of business, the corporate plaintiff lost the rental value of the collateral due to the seizure, and defendant failed to maintain the collateral in proper condition, in violation of Article 9 of the Uniform Commercial Code ("UCC"). Defendant moved for summary judgment on plaintiffs' counterclaims.

The matter came on for hearing before the Honorable John O. Craig, III in Davidson County Superior Court on 15 June 2015. On 3 November 2015, the trial court entered an order granting partial summary judgment, as follows.

> 1. Insofar as [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts'] counterclaims challenge [the] seizure of collateral, pursuant to N.C. Gen. Stat. § 1-473, et. seq., they are hereby dismissed, with prejudice.
>
> 2. Insofar as [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts'] counterclaims arise out of Article 9 of the Uniform Commercial Code, N.C. Gen. Stat. § 25-9-100, et seq., for failure to make a commercially reasonable disposition of the collateral, [the] claims are not ripe at this time. The Court approves of [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] voluntary dismissal of such claims without prejudice, [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] shall not be required to pay the costs pursuant to Rule 41(d) when filing or refiling such counterclaims.
>
> 3. All other counterclaims of [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] are dismissed with prejudice.[1]

1. Alterations have been added for clarity because plaintiffs were the defendants in the first law suit, and defendant was the plaintiff.

Following a bench trial, the trial court ruled that plaintiffs owed defendant $708,373.80, plus interest accruing at 13.25% per annum, plus costs. The trial court entered the final judgment on 3 November 2015. Plaintiffs did not appeal.[2]

After defendant sold the collateral, plaintiffs filed the instant lawsuit, claiming defendant violated N.C. Gen. Stat. §§ 25-9-100, *et seq.*, (2017) and committed unfair and deceptive trade practices. Defendant answered the complaint on 3 August 2016, and moved for summary judgment on 20 April 2018. Defendants argued in particular that plaintiffs' claims were barred by *res judicata* and collateral estoppel, that plaintiffs lack standing, and that plaintiffs' claims were barred for failure to adduce evidence supporting the elements of their claims.

The matter came on for hearing before the Honorable Martin B. McGee in Davidson County Superior Court on 21 May 2018. The trial court denied defendant's motion for summary judgment by order entered 5 July 2018.

Defendant appeals the trial court's denial of summary judgment.

II. Discussion

Defendant argues the trial court erred by wholly denying its motion for summary judgment because *res judicata* and collateral estoppel bar all claims except the allegation that defendant disposed of the collateral in a commercially reasonable manner. Therefore, defendant argues the trial court erred when it did not grant partial summary judgment. We agree.

A. Grounds for Appellate Review

[1] At the outset, we must address the interlocutory nature of this appeal. Defendant contends the trial court's interlocutory order is immediately appealable because defendant would be deprived of a substantial right without immediate review. We agree.

"The denial of summary judgment is not a final judgment, but rather is interlocutory in nature." *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 589, 599 S.E.2d 422, 426 (2004) (citation and quotation marks omitted). As a matter of course, our Court does not review

2. The partial summary judgment order and the final order were amended twice; however, the amendments did not alter the dismissal of plaintiffs' counterclaims. The amendments only added language describing the seized collateral, which was required by the North Carolina Division of Motor Vehicles and the Federal Aviation Administration to permit defendant to proceed with the disposition of the property.

interlocutory orders. *Id.* "If, however, the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review, we may review the appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1)." *Id.* (citation and internal quotation marks omitted).

"[T]he 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 589, 599 S.E.2d at 426 (citation and quotation marks omitted). However, a mere allegation that *res judicata* bars a suit "does not *automatically* affect a substantial right; the burden is on the party seeking review of an interlocutory order to show how it will affect a substantial right absent immediate review." *Whitehurst Inv. Properties, LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (emphasis in original). For an appellant "to meet its burden of showing how a substantial right would be lost without immediate review," the appellant must demonstrate: "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Id.* at 96, 764 S.E.2d at 490 (citation and quotation marks omitted).

Here, defendant argues it was entitled to summary judgment on all claims except those arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral. Therefore, defendant contends, because plaintiffs' complaint includes allegations that were already litigated, or could have been litigated, in the prior case in addition to claims arising out of Article 9, the trial court's denial of its motion for summary judgment is immediately appealable because re-litigation of the claims is barred by *res judicata* and collateral estoppel. Absent immediate appeal, defendant would lose a substantial right because trial of the instant case could result in inconsistent judgments between the same parties involving the seizure of the same collateral. For the reasons that follow, we agree. Therefore, defendant's appeal is properly before this court.

B. *Res Judicata*

[2] First, defendant argues *res judicata* bars all claims except issues related to the commercial reasonableness of the disposition of the collateral.

"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)).

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011) (citation and quotation marks omitted). For an action to be barred by *res judicata*, "a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties." *Id.* (citation and quotation marks omitted). *Res judicata* bars both "matters actually determined or litigated in the prior proceeding" and also "all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Id.* at 7, 719 S.E.2d at 93 (citation and quotation marks omitted).

Here, it is undisputed that the parties in the instant action are the same parties that litigated the first suit, which resulted in a final judgment. Additionally, both suits rose from the same factual circumstances addressed by the first suit: When plaintiffs defaulted on defendant's loan to plaintiffs, defendant filed a complaint to enforce repayment. Defendant also caused a claim and delivery order of seizure of the items plaintiffs had pledged as collateral for the loan. Plaintiffs then raised various allegations in their counterclaims related to both the seizure and disposition of the collateral.

Although the first suit resulted in a final judgment, finding plaintiffs owed defendant $708,373.80, plus interest accruing at 13.25%, plus costs, and that defendant could sell the collateral, both parties anticipated plaintiffs would file a second suit based on this same collateral. The trial court specifically dismissed one of plaintiffs' counterclaims in the first suit, without prejudice, because it was not ripe:

> 2. Insofar as [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts'] counterclaims arise out of Article 9 of the Uniform Commercial Code, N.C. Gen. Stat. § 25-9-100, et seq., for failure to make a commercially reasonable disposition of the collateral, [the] claims are not ripe at this time. The Court approves of [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] voluntary dismissal of such claims without prejudice, [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] shall not be

> required to pay the costs pursuant to Rule 41(d) when filing or refiling such counterclaims.

However, the complaint in the instant, second suit exceeds the counterclaim the trial court dismissed without prejudice in the first suit. The complaint specifically raises allegations related to the seizure of the collateral, an issue that was adjudicated in the first lawsuit:

> 15. R.C. Koonts and Sons was operated and been incorporated [*sic*] for 15 years, and operated as a partnership for 27 years to the formation of a corporation. R.C. Koonts and Sons operated and engaged in the masonry business continuously until Defendant *seized* Plaintiffs assets *thereby* putting them out of business. Plaintiffs had no assets with which to operate since said seizure of all its assets by Defendant, and has been closed since the seizure after many years of continuous, successful operation as a thriving business. . . .
>
> . . . .
>
> 17. Plaintiffs have been damaged for the loss of said assets in an amount to be determined at trial but believed to be in excess of $25,000.00.
>
> 18. In addition, Plaintiffs have been damaged in that they have lost their business and the use of said assets, which had a fair rental value of $50,000.00 per month for each month since the seizure of said assets on March 12, 2009.
>
> 19. Defendant's *seizure* of the assets of Plaintiffs, proximately caused the closure of the business of R.C. Koonts and Sons, damaging said Plaintiff by the loss of business and income, an amount to be determined at trial, since the closure of Plaintiffs' business continuing into an indefinite time into the future.
>
> 20. Defendant's *seizure* of the helicopter of Defendant David Craig Koonts has proximately caused and damaged said Plaintiff in the fair market value and rental value of the helicopter in an amount to be determined at trial but believed to be in excess of $25,000.00[.]

(Emphasis added).

Clearly, these claims relate to the *seizure* of the collateral. Allegations related to the collateral's seizure were litigated in the first lawsuit, where the trial court determined "Plaintiff was legally permitted to seize all of the machinery, equipment and other collateral[.]" Therefore, all of defendant's counterclaims related to the seizure of collateral pursuant to N.C. Gen. Stat. § 1-473, *et seq.*, in the first suit were dismissed. Accordingly, *res judicata* bars these claims and the damages plaintiffs prayed for in their complaint related to allegations of an improper seizure, and loss of the business due to the seizure, cannot be recovered. To hold otherwise could result in inconsistent verdicts related to the seizure of the collateral.

In sum, the 3 November 2015 order makes clear that all claims except those arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral were decided in the first suit. Therefore, plaintiffs' attempts to bring claims outside of those arising out of Article 9 of the UCC are barred by *res judicata*. Plaintiffs can no longer request damages based on allegations that the business could not continue after the seizure of the collateral, that defendant seized more collateral than it was entitled to seize, that the seizure proximately caused the loss of the business, and that the business was damaged because it did not have the use of the collateral after the seizure. Furthermore, to the extent the second claim, alleging unfair and deceptive trade practices, relates to anything other than the claim reserved by the 3 November 2015 order, it is also barred by *res judicata*.

However, it is clear that the trial court in the first suit dismissed plaintiffs' claim arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral without prejudice. Therefore, plaintiffs' allegations that defendant failed to dispose or sell of the collateral in a commercially reasonable manner, including that defendant did not properly maintain the property to allow for a commercially reasonable sale, is not barred by *res judicata* and may proceed to trial. Because defendant's collateral estoppel argument requests the same conclusion we have reached based on the doctrine of r*es judicata*, we need not consider defendant's second argument on appeal.

We reverse the trial court's order to the extent it permitted plaintiffs to raise claims in addition to those arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral.

III. Conclusion

For the foregoing reasons, we reverse in part and affirm in part.

REVERSED IN PART; AFFIRMED IN PART.

Chief Judge McGEE and Judge INMAN concur.

SARAH ELIZABETH SFREDDO, Plaintiff
v.
JACOB MICHAEL HICKS, Defendant

No. COA18-1010

Filed 18 June 2019

1. Appeal and Error—timeliness of appeal—Rule 59 motion—tolling of time

In a dispute over the validity of a couple's separation agreement, the wife's appeal—from a final order the trial court incorrectly labelled an order of summary judgment, even though neither party moved for summary judgment and despite the fact that the court held a bench trial and made findings of fact—was timely where her Rule 59 motion stated a proper basis for a new trial and therefore tolled the time for giving notice of appeal.

2. Acknowledgments—separation agreement—presumption of regularity—rebuttal required

In a dispute over the validity of a couple's separation agreement, where the husband did not deny he signed the agreement in the presence of a notary and presented no evidence to rebut the presumption of regularity of the notarization, and where the wife's evidence, along with the agreement itself, supported that presumption, the trial court erred by determining the agreement was not properly acknowledged and therefore void.

Appeal by plaintiff from orders entered 12 December 2017 and 19 April 2018 by Judge Debra Sasser in District Court, Wake County. Heard in the Court of Appeals 27 March 2019.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, Andrea Bosquez-Porter and Zachary K. Dunn, for plaintiff-appellant.

Wake Family Law Group, by Helen M. O'Shaughnessy and Katherine Hardersen King, for defendant-appellee.

STROUD, Judge.

Plaintiff-wife appeals an order granting summary judgment and dismissing her complaint and order denying her Rule 59 motion. Although the trial court titled the order as a summary judgment order, because the trial court conducted a bench trial and entered a final order dismissing Wife's case based upon findings of fact and conclusions of law, we consider the order based upon its substance and not its title. Because defendant-husband made no allegation or showing that he and Wife did not actually sign the Agreement in the presence of the notary public and no showing of any other irregularity in the acknowledgement of the separation agreement by the notary public, Husband failed to rebut the presumption of regularity of the acknowledgement established by North Carolina General Statute § 10B-99. Both the Agreement itself and Wife's testimony indicated that the Agreement was properly acknowledged in the presence of the notary under North Carolina General Statute § 10B-3(1), so the trial court erred by finding that "[n]o evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement" and concluding that the Agreement was "not a valid contract" because it was not properly acknowledged under North Carolina General Statute §§ 52-10 and 10B-3. We reverse and remand for further proceedings consistent with this opinion.

I. Background

In September of 2015, wife filed a complaint against husband for breach of contract, specific performance, and attorney's fees, alleging that he had failed to perform his obligations under a separation and property settlement agreement ("Agreement") between the two of them. On 5 November 2015, Husband filed his answer and affirmative defenses; he denied many of the factual allegations of the complaint and raised affirmative defenses as follows:

> As defenses to any claims Plaintiff may have, Defendant asserts the following affirmative defenses: estoppel, waiver, duress, unconscionability and unclean hands. In addition, the Separation Agreement that is the subject of Plaintiff's action is VOID because the agreement was

not properly acknowledged as required by N.C. Gen. Stat. § 52-10.1.[1]

On 23 May 2017, Husband filed a motion to dismiss for failure to prosecute, and the trial court denied the motion on or about 12 October 2017, noting that the Trial Court Administrator had set the case for trial on 25 October 2017.

On 25 October 2017, the case came on for hearing, and the trial court announced it would first consider Husband's motion to dismiss based upon the affirmative defense in his answer of a "procedural defect in the parties' separation[.]" Husband's attorney gave the trial court a copy of North Carolina General Statute § 52-10.1 regarding acknowledgment of separation agreements and presented Husband's argument regarding the defects in the acknowledgement of the Agreement. Husband's counsel argued that based upon the wording of the notarial certificate on the Agreement, "there was no indication that the notary has personal knowledge of the identity of the principal or that the notary acknowledged that the signature was the individual's signature."

Wife, who was representing herself, then began to present her argument, but the trial court placed her under oath to testify. The trial court then conducted a direct examination of Wife regarding the execution and acknowledgement of the Agreement. Husband's counsel had no questions and did not tender any evidence. The trial court then announced that the case would be treated "very much akin to a motion for summary judgment" and announced that it would grant summary judgment for Husband, dismissing the case. The trial court stated that Husband had "rebutted the presumption of the validity" of the acknowledgement and that Wife's "evidence wasn't sufficient to show me that all the prerequisites of the acknowledgement were met."

On 12 December 2017, the trial court entered its order which was entitled "ORDER FOR SUMMARY JUDGMENT[.]" The order stated that because the court was considering matters outside of the pleadings it was converting the hearing on the motion to dismiss to a summary judgment hearing, but it also made findings of fact and conclusions of law

1. "Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract." N.C. Gen. Stat. § 52-10.1 (2017). A notary public is one of the certifying officers designated by North Carolina General Statute § 52-10. *See* N.C. Gen. Stat. § 52-10 (2017).

and granted summary judgment for Husband, dismissing Wife's complaint. On 28 December 2017, Wife filed a Rule 59 motion for amendment of the judgment or alternatively for a new trial. On 19 April 2018, the trial court denied the Rule 59 motion. On 18 May 2018, Wife appealed both the summary judgment and Rule 59 orders.

II. Timeliness of Appeal

[1] Husband contends this Court has no jurisdiction to review the summary judgment order because Wife's notice of appeal for the summary judgment order was not timely filed. But despite the title of the order, as explained further below, Wife actually appealed a final order on the merits, with findings of fact, entered after a bench trial. *See generally Edwards v. Edwards*, 42 N.C. App. 301, 307, 256 S.E.2d 728, 732 (1979) ("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.").

In this case, the analysis of the distinction between a summary judgment order and a final order following a bench trial is necessary to determine the applicability of Rule 59. *See generally Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 538 (2016) ("All of the enumerated grounds in Rule 59(a), and the concluding text addressing an action tried without a jury, indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits." (quotation marks omitted)). Because this was a trial on the merits upon which a final judgment was entered, despite the title of the order and the trial court's intent to consider the case as "akin to a motion for summary judgment," Wife's Rule 59 motion tolled the time for appeal of the trial court's order dismissing her case. *See id.* N.C. R. App. P. 3(c) ("In civil actions and special proceedings, a party must file and serve a notice of appeal . . . 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 . . . if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of

entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).")

A. Type of Order on Appeal

This appeal is complicated by the trial court's *sua sponte* designation of the proceeding as a summary judgment hearing and by the order entered after the hearing designated as a summary judgment order, despite having conducted a bench trial taking live testimony, and making findings of fact. Since the trial court's standards for deciding the case, the applicability of Rule 59, and our standards of review are dictated by the substance of the motion under consideration and the type of hearing conducted, where the wrong title is assigned to the hearing and order, we still must consider the issues under the correct standards and law. *See generally Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (noting substance, not "labels," determines our review). We review an order based upon substance and not upon the label or title the trial court assigns to it. *See id.* The trial court conducted a bench trial, not a summary judgment hearing, and we make this determination based upon several factors: (1) Neither party had filed a motion for summary judgment and neither had filed any affidavits or other evidence which could support a ruling on summary judgment; (2) neither party expected or requested a summary judgment hearing; the trial court determined *sua sponte* to treat Husband's motion to dismiss as a summary judgment motion; and (3) the trial court made findings of fact, "and summary judgment presupposes that there are no triable issues of material fact." *Hodges v. Moore*, 205 N.C. App. 722, 723, 697 S.E.2d 406, 407 (2010) (citations and quotation marks omitted); *see also War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 552, 694 S.E.2d 497, 500 (2010) ("By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings. We understand that a number of trial judges feel compelled to make findings of fact reciting those 'uncontested facts' that form the basis of their decision. When this is done, any findings should clearly be denominated as 'uncontested facts' and not as a resolution of contested facts. In the instant case, there was no statement that any of the findings were of 'uncontested facts.' ").

Although the trial court treated the case as if Husband had "rebutted the presumption of the validity" of the acknowledgement, he had not filed any affidavit or response sufficient to rebut the presumption but only denied validity of the Agreement in his answer:

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element

> of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. *If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. If the moving party fails to meet his burden, summary judgment is improper regardless of whether the opponent responds.* The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial.
>
> If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. The non-moving party may not rest upon the mere allegations of his pleadings.
>
> *Subsection (e) of Rule 56 does not shift the burden of proof at the hearing on motion for summary judgment. The moving party still has the burden of proving that no genuine issue of material fact exists in the case.* However, when the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him. The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists. However, subsection (e) of Rule 56 precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts.

Lowe v. Bradford, 305 N.C. 366, 369–70, 289 S.E.2d 363, 366 (1982) (emphasis added) (citations and quotation marks omitted).

Here, the trial court treated Husband as the "moving party" for purposes of summary judgment, but he never met his "burden of proving that no genuine issue of material fact exists in the case." *Id.* at 370, 289 S.E.2d at 366. Husband did not file an affidavit or present any evidence,

which is unsurprising since he did not move for summary judgment. Despite the lack of *any* showing from Husband that he may be entitled to summary judgment, the trial court reasoned that Husband had "rebutted" the presumption of regularity and required Wife to testify to present evidence in response to Husband's mere denial. In *Hill v. Durett*, Judge (now Justice) Davis noted the differences between a summary judgment hearing and a bench trial upon the substance of the hearing and order, despite confusion over the type of hearing before the trial court, noting,

> 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.

___ N.C. App. ___, ___, ___S.E.2d ___, ___ (COA18-515) (March 19, 2019) (footnote omitted).

Even if the trial court, as it stated, was considering the matter as a motion for summary judgment, it should have considered Wife's testimony as true and construed it in the light most favorable to her, not to Husband. *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 487, 764 S.E.2d 203, 210 (2014) ("Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party." (citation and quotation marks omitted)). *Only* if there was no genuine issue of material fact based upon the view of Wife's evidence in the light most favorable to her, *see id.*, could Husband be entitled to judgment as a matter of law, assuming the law supported his position. *See Lowe*, 305 N.C. at 369–70, 289 S.E.2d at 366. Instead, here, the trial court made findings of fact considering Wife's testimony in the light most favorable to Husband.

The trial court found, "No evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement." But the Agreement itself indicates that the parties signed in the presence of the notary, and Wife testified that she

and Husband signed in the presence of the notary. Since the hearing had "virtually all of the hallmarks" of a bench trial, we consider the trial court's order as a final judgment following a bench trial, despite its label from the trial court. *See Hill*, ___ N.C. App. at ___, ___ S.E.2d at ___.

B. Rule 59 Motion and Tolling of Time for Appeal

In addition, the Rule 59 motion must be a proper Rule 59 motion to toll the time for appeal. *See generally Batlle v. Sabates*, 198 N.C. App. 407, 413–14, 681 S.E.2d 788, 793–94 (2009). Wife moved for a new trial pursuant to Rule 59(a)(7) and (8) or for amendment of judgment under rule 59(e):

> If a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30–day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order.

As a result, the timeliness of Plaintiff's appeal from the 21 September 2007 order hinges upon whether Plaintiff's 5 October 2007 motion sufficiently invoked the provisions of N.C. Gen.Stat. § 1A–1, Rules 50(b), 52(b), or 59.

In analyzing the sufficiency of a motion made pursuant to N.C. Gen.Stat. § 1A–1, Rule 59, one should keep in mind that a failure to give the number of the rule under which a motion is made is not necessarily fatal, if the grounds for the motion and the relief sought is consistent with the Rules of Civil Procedure. As long as the face of the motion reveals, and the Clerk and the parties clearly understand, the relief sought and the grounds asserted and as long as an opponent is not prejudiced, a motion complies with the requirements of N.C. Gen.Stat. § 1A–1, Rule 7(b)(1). In other words, to satisfy the requirements of Rule 7(b)(1), the motion must supply information revealing the basis of the motion. However, while a request that the trial court reconsider its earlier decision "granting the sanction" may properly be treated as a Rule 59(e) motion," a motion made pursuant to N.C. Gen. Stat. § 1A–1, Rule 59, cannot be used as a means to reargue matters already argued or to put forward arguments which were not made but could have been made. Thus, in order to properly address the issues raised by Defendant's dismissal motion, we must examine the allegations in Plaintiff's motion to ascertain

> whether Plaintiff stated a valid basis for seeking to obtain relief pursuant to N.C. Gen. Stat. § 1A–1, Rule 59.

Id. (citations, quotation marks, brackets, and footnote omitted).

Thus, if at least one of the grounds asserted in Wife's Rule 59 motion is a proper basis for new trial under Rule 59, the motion tolls the time for appeal.

> N.C. Gen. Stat. Sec. 1A–1, Rule 59(a) sets forth the various grounds for a new trial. Rule 59(a)(8) permits a new trial for errors in law occurring at the trial and objected to by the party making the motion. The trial court's ground for the new trial — for errors committed by the Court — is an order under Rule 59(a)(8).
>
> Both a motion and an order for new trial filed under Rule 59(a)(8) have two basic requirements. First, the errors to which the trial judge refers must be specifically stated. Second, the moving party must have objected to the error which is assigned as the basis for the new trial. N.C. Gen. Stat. 1A–1, Rule 59(a)(8).

Barnett v. Security Ins. Co. of Hartford, 84 N.C. App. 376, 380, 352 S.E.2d 855, 858 (1987) (citations and quotation marks omitted).

Wife's motion noted that the trial court's order found that "[n]o evidence was presented that the separation agreement and property settlement was signed in the presence of the notary[.]" Wife's motion included quotes from a transcription of the testimony at the hearing, including her testimony about going before the notary, providing identification, and signing the Agreement. Wife's motion noted the trial court's comments at the hearing:

> Judge: I don't recall you saying that after she looked at the document that she had you all then sign it.
>
> Plaintiff: I did say that.
>
> Judge. You may have thought you said that. I don't recall you saying that. What I recall you saying was that she looked at the licenses she looked at the names on the document. And I said, well you know you can't tell me what she looked at, but that's what you said. And I don't recall you saying that after that's when you signed the documents. I don't remember that testimony at all.

(Quotation marks omitted.)

But the transcript shows that Wife *did* testify that they signed the document after the notary looked at their licenses; the trial court's recollection was incorrect. Of course, at the initial hearing, the trial court did not have the benefit of a transcript. In Wife's Rule 59 motion, Wife noted why the evidence was insufficient to support the trial court's finding there was "[n]o evidence" of signing before the notary, including the transcription of testimony, and the error of law in application of North Carolina General Statute § 10B-3 to the Agreement. Wife preserved these arguments before the trial court because she noted both her testimony and the correct law, as stated in *Moore v. Moore*, 108 N.C. App. 656, 424 S.E.2d 673, *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993), at the hearing. Wife's appeal was timely, since the order dismissing Wife's complaint was a final order from a bench trial which resolved all issues, and her Rule 59 motion was a proper motion which tolled the time for her appeal.[2]

Wife filed her notice of appeal of both orders within thirty days of the trial court's order denying her Rule 59 motion, so her appeal of both orders is timely. *See id.*

III. Acknowledgment of Agreement

[2] Due to the erroneous label by the trial court as a summary judgment order, Wife's brief substantively focuses on the law regarding acknowledgement of the Agreement and why summary judgment dismissing the case was inappropriate. Husband's brief focuses only on the timeliness of the appeal. Husband notes that he "believes that [Wife's] analysis regarding summary judgment is correct" but argues only that "a motion under Rule 59 was not the appropriate way for [Wife] to challenge the order granting summary judgment." Thus Husband tacitly concedes that the trial court's interpretation of the law regarding the acknowledgment of the Agreement was in error. Therefore, the central legal issue presented is whether the trial court erred in concluding the Agreement was void based upon lack of proper acknowledgement under North Carolina General Statute §§ 52-10 and 10B-3.

A. Standard of Review

Because the order on appeal is a final order from a bench trial, despite its label as a summary judgment order, our standard of review

2. In the hearing on the Rule 59 motion, the trial court did not consider Wife's substantive argument but denied the Rule 59 motion solely because the judgment "ended the case at the summary judgment state and not after a trial or a verdict" and Rule 59 "does not grant relief for summary judgment[.]"

> [i]n a bench trial in which the . . . court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable de novo.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation, quotation marks, and ellipses omitted). The finding of fact challenged here is "[n]o evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement." The challenged conclusion of law is that "[t]he Separation Agreement and Property Settlement is not a valid contract because it was not properly acknowledged."

B. Presumption of Regularity of Notarial Acts

We first note the cases and statutes governing notarial acts[3] and the presumption of regularity of notarial acts:

> In the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation, we recognize a presumption of regularity to notarial acts. N.C. Gen. Stat. § 10B–99 (2013). This presumption of regularity allows notarial acts to be upheld, provided there has been substantial compliance with the law. N.C. Gen. Stat. § 10B–99. Thus, the presumption of regularity acts to impute a substantial compliance component to notarial acts, including the administration of oaths.

In re Adoption of Baby Boy, 233 N.C. App. 493, 499–505, 757 S.E.2d 343, 347-50 (2014) (quotation marks omitted) (determining there was statutory compliance with administration of an oath where "[t]he notary was physically present when the oath was administered, aware of the circumstances, and thereby implicitly assented to its administration, which was done in her name. By these facts, it sufficiently appears that the administration of the oath was the act of the notary."). As there was

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3. "Notarial act, notary act, and notarization. -- The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under G.S. 10B-20(a)." N.C. Gen. Stat. § 10B-3(11) (2017).

no "evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation" and Husband never claimed that he did not sign the Agreement in the present of the notary, the Agreement itself should at the very least been accorded a presumption of regularity, and this would preclude the dismissal of Wife's complaint. *Id.*

North Carolina General Statute § 10B-3 sets forth the definitions applicable to Chapter 10B. *See* N.C. Gen. Stat. § 10B-3 (2017). An "acknowledgment" is defined as:

> A notarial act in which a notary certifies that at a single time and place all of the following occurred:
>
> a. An individual appeared in person before the notary and presented a record.
>
> b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
>
> c. The individual did either of the following:
>
> i. Indicated to the notary that the signature on the record was the individual's signature.
>
> ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.

N.C. Gen. Stat. § 10B-3(1). The portion of the document in question here is the "notarial certificate" or "certificate," defined as

> [t]he portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

N.C. Gen. Stat. § 10B-3(12).

Before the trial court, Husband's attorney argued that the notarial certificate was not proper because North Carolina General Statute § 10B-3 "section C2 has been satisfied, but I would say C1 and B have not been satisfied." Husband did not challenge the acknowledgment under § 10B-3(1)(a), "[a]n individual appeared in person before the notary and presented a record[;]" his counsel stated, "[a]rguably, that's occurred." N.C. Gen. Stat. § 10B-3(1)(a). Thus, Husband's argument was that the certificate failed because it did not show (1) Husband and Wife were "personally known to the notary or identified by the notary through satisfactory evidence[;]" and (2) they "[i]ndicated to the notary that the signature[s] on the record [were their] . . . signature[s]."

Here, the certificate on the Agreement reads,

> IN WITNESS WHEREOF, the parties have signed, sealed and acknowledged this Agreement in duplicate originals, one of which is retained by each of the parties hereto.
>
> [Husband's signature] JACOB MICHAEL HICKS (Husband)
>
> Sworn to and subscribed to before me, this the 14 day of May, 2009. [Notary seal.]
>
> [Signature of Monica R. Livingston in cursive and print]
>
> (Notary Public)
>
> My commission expires: Nov. 29, 2010

The quoted portion is repeated verbatim again with the Wife's name and signature.

We first note that North Carolina General Statute § 10B-3(1)(c) requires that the person signing the document must *either* "indicate[ ] to the notary that the signature on the record was the individual's signature" *or* "sign[] the record while in the physical presence of the notary and while being personally observed signing the record by the notary." N.C. Gen. Stat. § 10B-3(1)(c). In other words, there is no requirement to satisfy *both* "C2" and "C1" as Husband's counsel seemed to contend. Husband conceded that the parties had signed in the presence of the notary, satisfying subsection (c)(2), so there was no need for the acknowledgement to comply with subsection (c)(1) as well. *See* N.C. Gen. Stat. § 10B-3(c). Thus, despite Husband's counsel's statements, the only portion of the acknowledgement challenged by Husband was "B" that "[t]he individual was personally known to the notary or identified by the notary through satisfactory evidence." N.C. Gen. Stat. § 10B-3(1)(b).

The notarial certificate does not include as much detail or the exact wording as some commonly used forms, but it includes the substance required by North Carolina General Statute § 10B-3.[4] *See id.* The notary certified that the agreement was "sworn to and subscribed to before me" by the "parties," who were identified in the Agreement as Husband and Wife, on 14 May 2009. To "[s]ubscribe" the Agreement means to sign it. See Black's Law Dictionary 1655 (10th ed. 2009) (defining "subscribe" as "[t]o write (one's name) underneath; to put (one's signature) on a document").

4. The hearing transcript reflects that Husband's counsel presented the forms as used in her law office to the trial court as examples of proper certificates, but those forms are not in our record.

"[B]efore me" means that the parties signed in the presence of the notary. Further, any minor omissions or issues in the wording of a certificate are covered by North Carolina General Statute § 10B-40(a1)(1). "By making or giving a notarial certificate, *whether or not stated in the certificate*, a notary certifies . . . [a]s to an acknowledgment, *all those things described in G.S. 10B-3(1)*." N.C. Gen. Stat. §10B-40(a1)(1) (2017) (emphasis added). Based upon the certificate on the Agreement alone, the trial court erred in determining that the acknowledgement of the Agreement was not sufficient since it failed to consider the statutory presumption of regularity, especially since Husband never made any factual allegations of irregularity to rebut the presumption of regularity or contended the signature on the Agreement was not his. While Husband's answer included as an affirmative defense the allegation that the Agreement was void because it "was not properly acknowledged as required by NCGS 52-10.1[;]"he did not deny that he signed the Agreement before the notary or make any factual allegations about his claimed defect in the acknowledgement.

Despite Husband's failure to present any evidence to rebut the presumption of regularity of the acknowledgment, the trial court then called Wife to testify about the signing of the Agreement. Answering the trial court's questions, Wife testified:

> A. We came into the bank. We had to sit down for a couple of minutes. She called us up. She asked why we were there, got the information. She asked for both of our identifications.
>
> She looked through the document.
>
> . . . .
>
> A. Unh-hunh. And she asked for both of us to submit our licenses to her. She might have made a copy of those, but she compared those to --
>
> Q. (Interposing) Ma'am, you can't tell me what you think she did.
>
> A. OK. OK. She compared those to--
>
> Q. (Interposing) You can't tell me what you think she did.
>
> A. I know that she compared those to what--
>
> Q. (Interposing) How do you know that, ma'am?

A. Well, she looked at the document, and she looked at our licenses, and she looked at what the names were in the contract.

Q. Ma'am, you can't tell me what she looked at.

A. Oh. OK.

Q. I mean, you can assume, but I can't take your assumptions.

A. Well, she looked our licenses and made sure that they were us.

Q. Ma'am, I don't know that I can even take that testimony.[5]

A. OK.

Q. You definitely can tell me that she asked for your licenses and you gave them to her.

A. OK. She asked for our licenses, and we gave them to her.

Q. And you can't tell me what she did with–you can't tell me what she said. If she said what she was doing. You can't tell me what you assume she was doing.

A. OK. She did ask for our licenses, and we gave them to her.

Q. OK. And anything else?

A. *We had to sign.*

(Emphasis added). In summary, Wife testified that she and Husband went to a bank, presented their drivers licenses and the Agreement to the notary, and signed the Agreement after the notary had taken their

5. North Carolina General Statute § 10B-3(16) defines "[p]ersonal appearance and appear in person before a notary" as "[a]n individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process." N.C. Gen. Stat. § 10B-3(16). North Carolina General Statute § 10B-3(22) defines "[s]atisfactory evidence" as "[i]dentification of an individual based on either of the following: a. At least one current document issued by a federal, state, or federal or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual." N.C. Gen. Stat. § 10B-3(22). Wife's testimony shows that she and Husband "appear[e]d in person" before the notary, provided their drivers licenses as "[s]atisfactory evidence" of their identities and signed the Agreement. N.C. Gen. Stat. § 10B-3(16), (22).

licenses. Despite this evidence, the trial court found that "No evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement" even though Husband did not contest that they had signed in the presence of the notary. Further, the certificate itself stated that the parties had "subscribed" the Agreement "before" the notary.

And even if we were to treat the matter as a summary judgment motion, the result would be the same, based upon *Moore*. In Wife's argument before the trial court, Wife noted *Moore*, which held that the plaintiff husband had failed to rebut the presumption of regularity of the acknowledgment of a separation agreement despite his affidavit claiming that the notary was not in the room the entire time the documents were being signed:

> Plaintiff has failed to advance a genuine issue of material fact which would justify going forward with a trial on the issue of the validity of the separation agreement.
>
> Plaintiff's evidence does not overcome the presumption of legality of execution created by the notarization of the separation agreement. North Carolina recognizes a presumption in favor of the legality of an acknowledgment of a written instrument by a certifying officer. *To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred.* In *Skinner*, for example, the defendant challenged the plaintiff's verification of his Rule 11 complaint. This Court stated:
>
> > There was no showing that plaintiff did not in fact sign the verification, and nothing in the record suggests that the signature which appears thereon was not in fact his signature. The certificate to the verification signed by the notary public and attested by her seal certifies that the verification was sworn to and subscribed" before her, and nothing in the record impeaches that certification.
>
> *Here, plaintiff never asserts that the actual signature on the agreement is other than his own-he suggests only a technical violation of N.C.Gen.Stat. § 52-10.1. He does not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment.*

Moore, 108 N.C. App. at 658–59, 424 S.E.2d at 675 (emphasis added) (citations, quotations, and brackets omitted).

The trial court determined *Moore* did not support Wife's contentions, interjecting, "Well, let's stop for a second. That's talking about *Plaintiff's* evidence, alright?" (Emphasis added.) But in *Moore*, the legal positions of the parties and their titles as parties were opposite this case: the *plaintiff* was the "moving party" seeking to set aside the agreement based upon a defect in the acknowledgment of the separation agreement, just as *defendant* is in this case. *See id.* at 657, 424 S.E.2d at 674 ("Plaintiff-husband, William J. Moore, originally filed a declaratory judgment action on 18 June 1987 to have a separation agreement entered into with defendant-wife, Betty Evans Moore, declared null and void on the grounds that the agreement had not been properly acknowledged in violation of the requirements of N.C. Gen. Stat. § 52-10.1 and N.C. Gen. Stat. § 52-10(b). *Plaintiff claims the agreement violated these statutory provisions because a notary public did not witness him sign the agreement, nor did plaintiff acknowledge his signature to the notary.* Defendant denied the invalidity of the agreement and raised affirmative defenses of estoppel, waiver, and ratification. Defendant counterclaimed for specific performance of the agreement." (Emphasis added)). Thus, Wife was correct that *Moore* supported her argument: "[Husband's] evidence does not overcome the presumption of legality of execution created by the notarization of the separation agreement[,]" *id.* at 659, 424 S.E.2d at 675, because Husband presented no affidavit and no evidence to rebut the presumption. There was no showing that Husband did not sign the agreement, and nothing in the record suggests that the signature which appears on the agreement was not in fact his signature. The certificate to the verification signed by the notary public and attested by her seal certifies that the verification was "[s]worn to and subscribed to before" her, and nothing in the record impeaches that certification. Even considering the issue as a summary judgment motion, the trial court should have denied Husband's motion based upon his failure to rebut the presumption of regularity. *See id.* at 658–59, 424 S.E.2d at 675.

Because Husband presented no evidence to rebut the regularity of the notarization of the Agreement, and Wife's evidence, particularly the Agreement itself, supported the presumption of regularity of the notarization, the trial court erred in concluding as a matter of law that the Agreement was void because it was not properly acknowledged. We therefore reverse the trial court's order dismissing Wife's claims based upon the Agreement for this reason.

IV. Conclusion

Because we are reversing the order allowing Husband's motion to dismiss, we need not address Wife's argument regarding the denial of

her Rule 59 motion. The order is reversed and we remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges INMAN and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JEFFERY JAMAR BARRETT

No. COA19-79

Filed 18 June 2019

Evidence—reliability—McLeod factors—evidence found by tracking dog

In a prosecution for common law robbery, the trial court properly admitted evidence found by a tracking dog at the crime scene because the four-factor test from *State v. McLeod*, 196 N.C. 542 (1929), for establishing the tracking dog's reliability was met where—despite the absence of evidence showing that the dog was of pure blood—a police officer's sworn testimony established the dog's training, experience, and tracking abilities, which in turn corroborated other overwhelming evidence of Defendant's guilt.

Appeal by defendant from judgment entered by Judge Stanley L. Allen in Guilford County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sage A. Boyd, for the State.

James R. Parish for defendant-appellant.

TYSON, Judge.

Jeffery Jamar Barrett ("Defendant") appeals from a judgment entered following a jury's conviction for one count of common law robbery. We affirm the lower court's decision and find no error.

I. Background

A man entered into a Taco Bell restaurant located on Battleground Avenue in Greensboro and stole cash from the register on 8 February 2015. Greensboro police officers used Carlo, a trained tracking dog, to follow the thief's scent. Officer McNeal, the dog's handler at the time, testified to Carlo's 2,000 hours of training and to Carlo's more than 1,000 deployment searches.

Officer Douglas responded to the robbery by establishing a perimeter and looking for suspects. Officer McNeal and Carlo located a sweatshirt, a toboggan, gloves, and two bank bags. He observed Defendant walking down the street within the perimeter. Officer Douglas stopped Defendant, patted him down for weapons, and noticed copious amounts of cash in his pockets that was organized by its face value.

Officer Rodriguez collected the evidence, photographed the items found by Carlo, and took a swab of Defendant's DNA. Greensboro police officers sent the evidence and the DNA swab to the North Carolina State Crime Laboratory.

A forensic scientist at the crime lab generated a DNA profile from the swab and compared it to DNA found on the recovered items. She concluded that the DNA profile on the glove was consistent with two individuals and that Defendant could not be excluded as a contributor to the multiple major profiles.

Defendant also made a phone call while in custody, which Detective Tyndall subsequently reviewed. Defendant recalled the circumstances of his arrest for robbery on 8 February 2015 and discussed the shoes he had worn during the incident.

A jury convicted Defendant and returned a verdict of guilty to one count of common law robbery. He was sentenced to a minimum of fourteen months and a maximum of twenty-six months imprisonment. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Standard of Review

A trial court's determination of an expert witness's qualifications and admission of testimony is reviewed for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000).

IV. Issues

Defendant argues the trial court erred in allowing the introduction and admission of evidence found by a tracking dog.

V. Analysis

Ninety years ago, the Supreme Court of North Carolina laid out a four-factor test to establish reliability of a tracking dog in *State v. McLeod*:

> the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience [to be] reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

State v. McLeod, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929) (citations omitted).

Over time, certain elements stated in this standard rule have changed. The current analysis demonstrates "a decreasing emphasis on the requirement that the tracking dog be a pure blood bloodhound" in the first element of the test, "yet [it] continue[s] to require the dog to have training, experience, and proven ability in tracking." *State v. Green*, 76 N.C. App. 642, 645, 334 S.E.2d 263, 265 (1985).

In *State v. Rowland*, 263 N.C. 353, 139 S.E.2d 661 (1965), a police officer arrived with a tracking dog at the scene of a robbery. The dog followed a trail which led to the perpetrator of the crime. *Id.* at 355, 139 S.E.2d at 663. The defendant alleged the State failed to identify the dog as a purebred hound. *Id.* at 359, 139 S.E.2d at 665. The court held the dog had pedigreed himself through his abilities to track and find evidence, despite the State's failure to meet the first requisite of the *McLeod* four-factor test. *Id.* at 360, 139 S.E.2d at 666.

The Supreme Court decided "the conduct of the hound and other attendant circumstances, rather than the dog's family tree" are factors to the admissibility of the evidence. *Id.* at 359, 139 S.E.2d at 665. The evidence a tracking dog finds on the trail may be admitted, "*if* [the dog] is

shown to be naturally capable of following the human scent" and "*if* the evidence is corroborative of other evidence tending to show defendant's guilt." *Id.* (emphasis in original). *See also Green*, 76 N.C. App. 642, 334 S.E.2d 265 (upholding a defendant's conviction where a tracking dog has identified the perpetrator).

A. *Type of Hound*

Defendant objects to the use of the evidence found by Carlo because "[t]here was never any testimony as to what kind of dog Carlo was." Defendant asserts the State failed to lay a proper foundation for the "testimony of the 'expert' dog Carlo." However, Officer McNeal established that during the February robbery incident he responded and deployed a tracking dog. A tracking dog "looks for disturbance[s]" and has been "trained . . . to detect specific odors" including "human odors."

The 1929 *McLeod* test has been modified over time and courts have recently placed less emphasis on the breed of the dog and placed more emphasis on the dog's ability and training. Although the State failed to identify Carlo's breed and never proffered any evidence that Carlo was "of pure blood," the officer's sworn testimony elaborated on Carlo's training and ability which corroborated other evidence that tended to show Defendant's guilt. *See Rowland*, 263 N.C. at 359, 139 S.E.2d at 665; *McLeod*, 196 N.C. at 545, 146 S.E. at 411.

B. *Training and Experience*

Officer McNeal testified to Carlo's "training, experience and proven ability in tracking." *Green*, 76 N.C. App. at 645, 334 S.E.2d at 265. Officer McNeal explained that Carlo had received training locally and elaborated on the training process. He said the tracking dogs, including Carlo,

> are trained to differentiate in disturbances in the environment, such as broken grass blades, rocks that are kicked over. All of that creates an odor for the dog. In conjunction with skin cells and other odors that are falling off the person, the dog is trained to track that from the point where it starts to wherever the point of the odor is.

Officer McNeal testified Carlo had "probably more than 2,000 hours of training since [he] worked [with] him." Carlo alerts by "lay[ing] down over top of the article with the article between his two front paws with his nose as close to the object as he can." Carlo is certified annually by the International Police Work Dog Association to demonstrate "his proficiency" in detecting human odors on inanimate objects.

C. *Proven Ability*

Officer McNeal also explained that the tracking dogs work city-wide to respond to situations which require evidence to be located. Carlo had conducted over a thousand searches since he began working with Officer McNeal. During the 8 February 2015 robbery incident, Officer McNeal deployed the tracking dog to look for a disturbance in the area.

During this deployment, Carlo tracked from the back side of the Taco Bell to an old Sears Distribution Center parking lot where he discovered a sweatshirt, toboggan, gloves and two bank bags. Carlo alerted Officer McNeal that he smelled "recent human odor" and laid down over top of the sweatshirt, toboggan, and gloves with the articles between his front paws and his nose close to the articles, as he had been trained to do.

This testimony demonstrates Carlo had been sufficiently trained, had the appropriate ability to perform these tasks and had properly responded as trained. The trial court admitted the evidence, over objection, ruling that the proper foundation had been laid for the police tracking dog's training and reliability.

D. *Corroborating Evidence*

The State also introduced evidence which corroborated Defendant's guilt. Officer Douglas apprehended Defendant within the established perimeter from the site of the robbery. Defendant's pockets were "stuck open" with wads of cash and his clothing matched the 911 caller's description of the thief.

Defendant made a phone call in jail that indicated to Detective Tyndall the correct suspect had been apprehended. Defendant remarked on the circumstances of his arrest and described gray-green shoes he had worn during the robbery. The detective testified that the shoes Defendant described had been collected at the police station during the booking process. Defendant also stated on the telephone call, "I done thrown it away again . . . the same way I did when I went to Leesville, Louisiana." Defendant had been previously arrested and served a prison sentence for robbery in Leesville, Louisiana. Evidence and testimony presented at trial corroborated the results of Carlo's tracking.

Presuming *arguendo*, the trial court had erred in admitting testimony about the tracking dog's actions and the items found, the attendant circumstances and corroborating evidence presented at trial supported the jury's verdict finding Defendant guilty as the perpetrator.

The State presented other overwhelming evidence of Defendant's guilt. Any asserted error would be harmless.

VI. Conclusion

The State laid a proper foundation for admission into evidence the actions and results by Carlo, the tracking dog. Defendant has failed to show the trial court abused its discretion by admitting the evidence found by Carlo for the jury to consider.

Defendant received a fair trial, free from prejudicial error. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TANYA O. CABBAGESTALK, DEFENDANT

No. COA18-1267

Filed 18 June 2019

Search and Seizure—traffic stop—reasonable suspicion—no signs of impairment—no violation of traffic laws

A police officer lacked reasonable suspicion to stop defendant's car where he had seen defendant drinking beer earlier in the night, he subsequently saw her purchase a beer at a gas station and then get into her car, he did not observe any signs of impairment, and he did not observe any violation of traffic laws. The error in denying defendant's motion to suppress amounted to plain error because, without the evidence from the traffic stop, there would have been no evidence of criminal conduct.

Appeal by defendant from judgment entered on 11 April 2018 by Judge Claire V. Hill in Robeson County Superior Court. Heard in the Court of Appeals on 25 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepción, for the State.

Warren D. Hynson for Defendant-Appellant.

BROOK, Judge.

Tanya O. Cabbagestalk ("Defendant") appeals from the trial court's judgment entered following a jury trial. Defendant argues the trial court erred in denying her motion to suppress, because the police officer who stopped Defendant's car lacked reasonable suspicion. We agree. We therefore reverse the trial court's judgment.

I. Background

A. Procedural History

On 20 January 2017, Hoke County Sheriff's Officer Perry Thompson ("Officer Thompson"), who was then a sergeant with the Rowland Police Department, stopped Defendant and charged her with driving while impaired ("D.W.I.") in violation of N.C. Gen. Stat. § 20-138.1. In a bench trial held on 22 September 2017 in Robeson County District Court, the Honorable William J. Moore found Defendant guilty of driving while impaired. Following judgment entered in the district court, Defendant gave notice of appeal in open court for a trial *de novo* in the Robeson County Superior Court.

On 28 March 2018, Defendant filed a motion to suppress in Robeson County Superior Court. On 10 April 2018, the Honorable Claire V. Hill conducted an evidentiary hearing in open court without a jury, and heard arguments from the State and Defendant on Defendant's motion to suppress. Officer Thompson provided the sole testimony at the hearing.

Following the trial court's denial of the motion to suppress, the Honorable Gale M. Adams presided over a jury trial during the criminal session of the Robeson County Superior Court. Officer Thompson was again the State's sole witness at trial. Defense counsel did not object to the disputed evidence. Defendant moved to dismiss at the close of the State's evidence, which the trial court denied. The jury found Defendant guilty of driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1. Judge Adams imposed a Level Four punishment, sentencing Defendant to 120 days imprisonment, suspended upon 12 months of supervised probation, and ordering Defendant to complete 48 hours of community service and to complete a substance abuse program. She was also ordered to pay a community service fee of $250, and her license was revoked.

Based on the prior motion to suppress that was filed and on the judgment entered, Defendant gave notice of appeal in open court. Defendant

further expressly argued in her appellate brief that the denial of the motion to suppress constituted plain error.

B. Factual Background

On 20 January 2018, at "[a]pproximately" 9:00 p.m., Officer Thompson was on "routine patrol" with the Rowland Police Department when he observed Defendant "sitting on the porch" of a local residence where "everyone hangs out at," drinking a "Natural Ice . . . tall can" of beer. He had known Defendant for "approximately two years," because he had previously stopped her for driving while her license was revoked, and for an open container violation. Officer Thompson was confident it was the Defendant he observed that evening drinking beer on the porch, based on prior interactions. Although it was night, he could see her because a porch light and a street light were illuminating the area, and he was only approximately ten feet away.

During the suppression hearing, Officer Thompson testified that he saw Defendant at the BP store in Rowland "maybe 30 minutes to an hour later." Upon reviewing the citation he issued on cross-examination, however, he clarified that the citation reflected a stop time of "at or about 11:00 p.m." On redirect he confirmed that he saw her drinking at 9:00 p.m. and saw her an hour and a half later at the gas station, "[b]uying more beer."

At the BP store, Defendant went to the beer cooler, purchased another beer, paid for it, and returned to her vehicle. Prior to being placed in a brown bag, the beverage in her hand looked to Officer Thompson like a "Natural Ice, the Ice." Officer Thompson admitted that he did not observe Defendant stumbling or otherwise walking as though she was intoxicated. Moreover, Officer Thompson did not speak to Defendant at this point, or any point prior to the traffic stop.

When Defendant got back into her truck and left the gas station, Officer Thompson followed her. Defendant "took East Main Street all the way up to North MLK Street, and she made a right turn on North MLK Street." Officer Thompson admitted that Defendant drove "normal[ly]"; that is, she was not speeding, going too slowly, weaving, or swerving. Defendant also appeared to be wearing her seatbelt, and her lights were working. Officer Thompson did not observe Defendant drinking the beer she had purchased or violate any traffic laws, nor did he run her plates before stopping her.

After following her for two to three blocks, Officer Thompson activated his blue lights as Defendant turned right on North MLK Street.

Defendant pulled off to the side of the road without incident. Officer Thompson stated, "I stopped her because earlier that night I observed her drinking a beer. She went back in the store, bought more beer, and then decided to get under the wheel and drive."

During the stop, Officer Thompson noticed a "strong odor of alcohol" on Defendant's breath, which he continued to smell once Defendant was in the officer's patrol car. Defendant admitted she had been drinking and discussed "family problems." Officer Thompson saw an unopened beer in Defendant's car. He continued his investigation at that point, performing two roadside breath tests, obtaining further information about Defendant's driver's license, and writing the ticket—a process which "[took] 15 to 20 minutes."

Officer Thompson subsequently transported Defendant to the Robeson County Jail. Once at the jail, he performed another breath test with two separate "blows," the lowest reading of which was a 0.16, twice as high as the legal limit of 0.08. Following the testing, Officer Thompson completed a Driving While Impaired Report, and took Defendant before a magistrate to be charged.

II. Analysis

On appeal, Defendant argues the trial court lacked support for a necessary finding of fact and erred in denying her motion to suppress the evidence obtained by Officer Thompson as a result of the vehicle stop. Defendant further argues that such denial constituted plain error as, without Officer Thompson's testimony, the evidentiary basis for the jury's verdict would have been insufficient. We agree.

A. Standard of Review

Following a hearing on a motion to suppress, a trial judge "must set forth in the record [her] findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citation omitted). "This deference, however, is not without limitation. A reviewing court has the duty to ensure that a judicial officer does not abdicate his or her duty by merely ratifying the bare conclusions of affiants." *State v. Brown*, 248 N.C. App. 72, 74, 787 S.E.2d 81, 84 (2016) (internal marks and citation omitted).

"In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Brewington*, 170 N.C. App. 264, 271, 612 S.E.2d 648, 653 (2005) (citation omitted). If the findings are supported by competent evidence, they are conclusive on appeal. *State v. Campbell*, 359 N.C. 644, 661, 617 S.E.2d 1, 12 (2005).

> Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Crandell, 247 N.C. App. 771, 774, 786 S.E.2d 789, 792 (2016) (one italics added) (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted)).

A pretrial motion to suppress is insufficient to preserve for appeal the admissibility of evidence. *State v. Grooms*, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000). Our Supreme Court has held, however, that "to the extent [a] defendant fail[s] to preserve issues relating to [his] motion to suppress, we review for plain error" if the defendant "specifically and distinctly assign[s] plain error" on appeal. *State v. Waring*, 364 N.C. 443, 468, 508, 701 S.E.2d 615, 632, 656 (2010), *cert. denied*, 565 U.S. 832, 132 S. Ct. 132, 181 L. Ed.2d. 53 (2011). For error to constitute plain error, a defendant must

> demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

B. Motion to Suppress

Defendant first challenges the trial court's finding that she was seen drinking 30 to 60 minutes before driving. Relatedly, Defendant also challenges the trial court's denial of her motion to suppress the evidence obtained through Officer Thompson's traffic stop of her vehicle. She argues that Officer Thompson did not have a reasonable, articulable suspicion to stop Defendant, and thus it was error to admit evidence resulting from the stop. Finally, Defendant argues that the trial court's

denial of the motion to suppress constituted plain error as it had a probable impact on the jury's guilty verdict. We agree with Defendant in each instance.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. The North Carolina Constitution affords similar protection. N.C. Const. art. I, § 20. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008), *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed.2d 198 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed.2d 660, 667 (1979)). "Such stops have 'been historically viewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).' " *Id.*, 658 S.E.2d at 645 (quoting *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3rd Cir. 2006)). "[A] traffic stop is constitutional if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Id.* at 246-47, 658 S.E.2d at 645 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675, 145 L. Ed.2d 570, 576 (2000)). This reasonable suspicion must derive from more than an "inchoate and unparticularized suspicion or 'hunch[.]' " *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed.2d at 909.

In North Carolina, "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008).

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. This Court has determined that a reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.

Barnard, 362 N.C. at 247, 658 S.E.2d at 645 (citations, quotation marks, brackets, and ellipsis omitted).

Though not always reducible to a mechanically applied formula, case law provides useful guidance in ascertaining what constitutes

reasonable suspicion of criminal activity justifying a traffic stop. "To be sure, when a defendant does in fact commit a traffic violation, it is constitutional for the police to pull the defendant over." *State v. Johnson*, 370 N.C. 32, 38, 803 S.E.2d 137, 141 (2017). "But while an actual violation is sufficient, it is not necessary." *Id.* at 38, 803 S.E.2d at 141. The following circumstances have supported finding a reasonable suspicion of criminal activity even absent showing a traffic violation:

- Defendant constantly weaved within lane for three-quarters of a mile at 11:00 p.m. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012).
- Tipster anonymously complained about intoxicated person driving black, four-door Hyundai and defendant drove car matching that description 20 m.p.h. in 35 m.p.h. zone, stopped at intersection without stop sign or light for "longer than usual," continued to travel "well below" speed limit, stopped at train crossing for 15-20 seconds with no train coming, failed to pull over for approximately two minutes after officer turned on blue lights, and passed several safe places to pull over before defendant stopped his car in middle of the street. *State v. Mangum*, ___ N.C. App. ___, 795 S.E.2d 106, 109-110 (2016).
- Defendant followed exact pattern for purchasing drugs (previously observed by police officer) by driving into area adjacent to building and leaving two minutes later. *State v. Crandell*, ___ N.C. App. ___, 786 S.E.2d 789, 796 (2016).

However, when the basis for an officer's suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion. *See Brown v. Texas*, 443 U.S. 47, 48-49, 99 S. Ct. 2637, 2639, 61 L. Ed.2d 357, 360 (1979) (stop invalidated when based on officer observing defendant and another man "walking in opposite direction away from one another in an alley" in a neighborhood with "a high incidence of drug traffic"); *State v. Brown*, 217 N.C. App. 566, 572-73, 720 S.E.2d 446, 451 (2011), *review denied*, 365 N.C. 562, 742 S.E.2d 187 (2012) (stop invalidated when based on officer seeing car pull off to side of road approximately four hours after nearby unsolved robbery, hearing yelling and car doors slamming, and observing car rapidly accelerating but without violating traffic laws); *State v. Murray*, 192 N.C. App. 684, 666 S.E.2d 205 (2008) (stop invalidated

when based on officer observing motorist driving car consistent with traffic law and in a normal fashion at 3:41 a.m. in a high-crime area).

Here, Defendant argues first that the competent evidence does not support the trial court's Findings of Fact 5 in its order denying her motion to suppress. More specifically, Defendant challenges the underlined portion of Finding of Fact 5:

> 5. Sgt. Thompson was on routine patrol and saw the defendant drinking a tall can of beer on the porch of a house (where people would hang out) approximately 30 minutes to an hour before the time of the traffic stop[.]

(Emphasis added.)

Crediting Officer Thompson's testimony, as the trial court did, the record establishes that it was longer than "approximately 30 minutes to an hour" between the time Officer Thompson observed Defendant drinking a can of beer on the porch and when he pulled her car over later that evening. While he offered the 30 to 60 minute window on direct examination at the suppression hearing, he clarified on cross-examination that the timeframe was in fact approximately two hours, as reflected by the citation he issued to Defendant on the evening in question. On re-direct, moreover, Officer Thompson confirmed that it was at least an hour and a half between when he saw Defendant drinking and "buying more beer" at the gas station. The trial court's order denying the motion to suppress also finds that Officer Thompson "initiated the traffic stop at approximately 11:00 pm[,]" two hours after initially observing Defendant on the porch. This finding is supported by competent evidence and conflicts with the fifth finding of fact. The trial court's fifth finding of fact was for these reasons not supported by competent evidence, and is not binding on appeal. *See State v. Parker*, 137 N.C. App. 590, 598, 530 S.E.2d 297, 302 (2000).

We next consider whether, absent the evidentiary support of the fifth finding of fact, Officer Thompson had a reasonable, articulable suspicion to make the stop. Viewing the facts in the light most favorable to the State, the trial court concluded as a matter of law:

> Looking at the totality of the circumstances there was a reasonable, articulable suspicion that justified the traffic stop and, viewing all the facts and circumstances through a reasonably cautious officer, being guided by his experience and training, and prior knowledge of the Defendant.

The bulk of the evidence before the trial court at the suppression hearing belies this conclusion. Officer Thompson did not see Defendant stumble or otherwise appear impaired upon leaving the BP with a beer in a brown bag and entering her car. There was no evidence that Defendant drank from the beer she purchased.[1] Defendant did not violate any traffic laws prior to the stop. What is more, according to Officer Thompson's own testimony, Defendant's "[d]riving appeared normal" that evening. Defendant was not driving too fast, nor was she driving too slowly. She did not weave or swerve. She had no problem pulling over to the side of the road during the course of the traffic stop.

In contrast, the evidentiary basis for the stop was quite limited. Officer Thompson was clear on this point: "I stopped her because earlier that night I observed her drinking a beer. She went back in the store, bought more beer, and then decided to get under the wheel and drive."

The State also makes reference to Defendant's past criminal record for driving while license revoked and for an open container violation. Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State's argument. *See State v. Branch*, 162 N.C. App. 707, 713, 591 S.E.2d 923, 926 (2004), *rev'd on other grounds sub. nom. North Carolina v. Branch*, 546 U.S. 931, 163 L. Ed.2d 314 (2005) (prior knowledge that defendant's license had been revoked sufficient to justify license check but insufficient to justify dog sniff and subsequent search).

Considering the totality of the circumstances, there was no "pattern[] of operation of [a] certain kind[] of lawbreaker[,]" and "[f]rom these data" Officer Thompson's inferences and deductions went too far. *See United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed.2d 621, 629 (1981). Accordingly, we hold that the trial court erred in concluding that Officer Thompson had reasonable suspicion to stop Defendant's vehicle and thus erred in denying Defendant's motion to suppress.

Having determined that the motion to suppress was erroneously denied, we advance to the second step in our plain error review—whether this error had a probable impact on the jury's determination that Defendant was guilty. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Here, the answer is straightforward. If Defendant's motion to suppress

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1. In fact, at trial Officer Thompson confirmed that the beer was unopened at the time of the stop.

had been granted, there would have been no evidence showing criminal conduct on her part as Officer Thompson was the sole witness at trial, and all incriminating evidence was gathered by him as a result of the stop. Thus, the trial court's erroneous denial of Defendant's motion to suppress Officer Thompson's testimony under N.C. Gen. Stat. § 15A-977 had a probable impact on the jury's verdict. *See id.* Accordingly, the trial court's denial of Defendant's motion to suppress constituted plain error and reversal of the judgment entered upon the jury's verdict is required.

III. Conclusion

For the foregoing reasons, we reverse the trial court's order denying Defendant's motion to suppress and vacate the judgment entered upon a jury verdict based exclusively on evidence obtained through an unconstitutional stop.

ORDER REVERSED; JUDGMENT VACATED.

Judges INMAN and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
SHAWN PATRICK ELLIS, DEFENDANT

No. COA19-59

Filed 18 June 2019

Search and Seizure—knock and talk doctrine—curtilage of home—search around yard

Defendant was subjected to an unconstitutional warrantless search where a police officer attempted a "knock and talk" at the front door of his home but received no answer, then walked to the rear door of the home to try knocking, then walked to the front yard near the corner of the home opposite the driveway and smelled marijuana, and then peered between the slats of a padlocked crawl space area and observed a marijuana plant. The officer impermissibly invaded the home's curtilage after he received no answer at the front door, and the presence of a cobweb on the front door did not give him license to move around the yard at will.

Appeal by defendant from judgment entered 14 June 2018 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 7 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kirk R. Chrzanowski, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant.

ARROWOOD, Judge.

Shawn Patrick Ellis ("defendant") appeals the denial of his motion to suppress, and from a judgment entered based upon his guilty pleas to manufacturing marijuana, attempted trafficking of marijuana, possession of drug paraphernalia, possession with intent to sell and deliver marijuana, and maintaining a dwelling house for keeping and selling a controlled substance. Those pleas were entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) (hereinafter, "*Alford* plea"). For the following reasons, we reverse.

I. Background

On 9 September 2014, Cabarrus County Sheriff's Detectives Helms ("Detective Helms") and Kevin Klinglesmith ("Detective Klinglesmith") responded to a home off NC Highway 49 in reference to a felony larceny report involving the theft of a Bobcat earth moving equipment. The officers located the equipment at the home, and were informed by a witness there that the person who had stolen the equipment was at a house "across the street[.]" The house belonged to defendant.

The officers parked across the street from defendant's house and walked along the wood line to the right of the driveway. Detective Klinglesmith testified that the driveway was on the right side of the home, and the front door of the residence was "further to the right half" and was the door closest to the road. Detective Helms went to the front door and knocked, but no one responded. He noticed there was a large spider web present in the door frame.

Detective Klinglesmith went around to the right rear of the house behind the residence. He testified that he went to the rear of the house because the detectives were dealing with a felony suspect, and he believed the backyard was an access point, due to vehicles along the right side to the rear of the residence. There were no visible gates or "No Trespassing" signs surrounding the residence.

Detective Helms failed to get a response at the front door after knocking for several minutes, however, he saw a curtain in the front window move. Detective Helms radioed Detective Klinglesmith to tell him the curtain moved, and Detective Klinglesmith began to knock at the rear door for several minutes. He was also unsuccessful at getting anyone to answer the door.

When Detective Klinglesmith did not hear anything from the back of the house, or see anyone inside the home, he walked to the front yard near the left front corner of the residence. He still did not see or hear anyone from that vantage point. However, he was able to smell the odor of marijuana. Detective Klinglesmith called Detective Helms over to the front of the house and asked him if he noticed anything odd. Detective Helms also smelled marijuana.

Detective Klinglesmith heard a loud fan coming from a crawl space area and noticed the odor of the marijuana from that area. He noticed a light illuminating from a padlocked crawl space area. He testified that he "put [his] eye up to it without touching it . . . [he] could see between the slats" and observed what he believed to be a marijuana plant in a bucket inside the crawlspace. The detectives contacted vice and narcotics officers. Detective D.J. Miller of the Cabarrus County Sheriff's Office applied for and received a warrant authorizing the search of defendant's residence based solely upon the information obtained from Detectives Klinglesmith and Helms. The search warrant was issued at 11:25 a.m. and was executed within the hour. Various drugs and drug paraphernalia were seized from the premises.

On 29 September 2014, defendant was charged with manufacturing marijuana, trafficking in marijuana, possessing drug paraphernalia, possessing marijuana with intent to sell or deliver, maintaining a dwelling used for keeping and selling a controlled substance, and trafficking in opiates.

Prior to trial, defendant filed a motion to suppress "all evidence of any kind" including seized drugs, statements of the defendant, or any other witnesses present at the time of the search. A hearing was held on 10 May 2017 before the Honorable Martin B. McGee in Cabarrus County Superior Court. On 3 April 2018, the court issued a written order denying the motion. The pertinent findings of fact are as follows:

> 4. Detective Helms knocked numerous times at the front door but was unable to make contact with anyone inside the residence. . . .

5. After no contact was made knocking at the front door, Detective Helms noticed the front window curtain move. When that information was communicated to Detective Klinglesmith by radio, Detective Klinglesmith walked back up to the front of the residence. While Detective Helms was still trying to make contact, Detective Klinglesmith walked to the front yard near the left front corner of the [sic] to observe the unfolding situation. At that point, Detective Klinglesmith detected an odor of marijuana.

6. Detective Helms also independently noticed an odor of marijuana. While Detective Klinglesmith was standing on the side of the residence, he also heard a loud fan coming from the crawlspace area and noticed that the air conditioning units were off. He noted that the odor of marijuana was coming from that area. He also noticed a light on in the crawlspace area where the [marijuana] odor was emanating. There were two wooden doors with cracks that allowed Detective Klinglesmith to see inside without manipulating the doors. He observed in plain view a white five gallon bucket with a green leafy plant that was suspected to be marijuana. Detective Klinglesmith alerted Detective Helms and they left the premises to obtain a search warrant.

Based upon these findings of fact, the court made eight conclusions of law, including that:

6. . . . What the detectives smelled and saw given its exposure was not detected as part of a search. The smells and observations were in plain smell or view from locations in which the detectives had a right to be given all of the circumstances in this case.

Defendant, after reserving his right to appeal, entered *Alford* pleas to all but one of the charges. Following entry of judgment, defendant filed a written notice of appeal.

II. Discussion

Defendant argues the trial court erred in denying his motion to suppress because the court failed to take into account the limitations that apply when law enforcement officials enter private property to acquire

information. We agree. Pursuant to the precedent established by the United States Supreme Court in *Florida v. Jardines*, 569 U.S. 1, 185 L. Ed. 2d 495 (2013), as applied by recent decisions of this Court, we hold that the search without a warrant violated defendant's rights under the Fourth Amendment to the Constitution of the United States. Therefore, the trial court erred in denying defendant's motion to suppress the evidence seized pursuant to the search warrant.

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 reviewed *de novo*[.]" *State v. Franklin*, 224 N.C. App. 337, 346, 736 S.E.2d 218, 223 (2012), *aff'd by an equally divided court*, 367 N.C. 183, 752 S.E.2d 143 (2013) (quotations and citation omitted).

"The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991) (citation omitted).

> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

Jardines, 569 U.S. at 6, 185 L. Ed. 2d at 501 (internal citation and quotations omitted). North Carolina has extended this "first among equals" protection to the curtilage. *State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270, *writ denied*, *review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002).

> The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. [T]he curtilage is the area to which

> extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes. In North Carolina, curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.

Id. (internal quotations and citations omitted) (alteration in original).

In the present case the undisputed evidence establishes that all the facts, which formed the basis for the search warrant, were obtained while the officers were within the curtilage of defendant's home. The State relies upon the "knock and talk" exception in an attempt to salvage the actions of the detectives. It argues that the detective's actions in going around to the back door and to the left corner of the house were justified because those actions were an extension of a "knock and talk."

> "Knock and talk" is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant. That officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband does not taint the consent or render the procedure *per se* violative of the Fourth Amendment.

State v. Smith, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997). A knock and talk "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8, 185 L. Ed. 2d at 502 (internal quotations and citations omitted).

In *Jardines*, the United States Supreme Court held that officers conducted a search within the meaning of the Fourth Amendment when they attempted a knock and talk at a residence, but also brought a forensic narcotics dog onto the defendant's property to explore the areas around the home. *Id.* at 11-12, 185 L. Ed. 2d at 504. Thus, the evidence the trained police dog discovered was inadmissible because "the officers learned what they learned only by physically intruding on Jardines' property to gather evidence[.]" *Id.* at 11, 185 L. Ed. 2d at 504.

In the instant case, while there was no police dog accompanying the officers, the same standards apply. The detectives were not permitted to roam the property searching for something or someone after attempting a failed "knock and talk." Without a warrant, they could only "approach

the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8, 185 L. Ed. 2d at 502.

Here, the detectives overstayed their "knock and talk" welcome on the property. Detective Helms knocked on the front door, but, when no one answered, he remained. Further, Detective Klinglesmith walked around to the rear door and then to the left front corner of the yard. By moving away from the front door, and entering the sides of defendant's yard and approaching the back door, Detective Klinglesmith was moving into the curtilage of defendant's home without a warrant.

North Carolina courts have consistently applied these principles. For example, in *State v. Huddy*, 253 N.C. App 148, 799 S.E.2d 650 (2017), an officer was investigating a possible break-in and declined to knock on the front door as it was "covered in cobwebs and did not appear to be used as the main entrance to the house." *Id.* at 150, 799 S.E.2d at 653. The officer then "cleared" the sides of the house, opened a gate to a chain link fence in the backyard and approached a storm door not visible from the street, where he smelled marijuana. *Id.* This Court found that a search had occurred, as "law enforcement may not use a knock and talk as a pretext to search the home's curtilage[,]" and this doctrine "does not permit law enforcement to approach any exterior door to a home." *Id.* at __, 799 S.E.2d at 654 (internal quotations and citation omitted) (emphasis in original). An officer may only knock at the door that a "reasonably respectful citizen" unfamiliar with the home would believe is the door at which to knock. *Id.* He or she may not subjectively choose an alternate door, even if there are cobwebs on the front door.

This Court reached a similar conclusion in *State v. Stanley*, 250 N.C. App. 708, 817 S.E.2d 107 (2018). *Stanley* considered the legality of a knock and talk where officers walked into the backyard and knocked on the back door, rather than the front door, because they had seen an informant purchasing drugs at the back door. *Id.* at 709, 817 S.E.2d at 109. "[T]he fact that the resident of a home may choose to allow certain individuals to use a back or side door does not mean that similar permission is deemed to have been given generally to members of the public." *Id.* at 717, 817 S.E.2d at 113. In contrast, in *State v. Grice*, 367 N.C. 753, 767 S.E.2d 312 (2015), officers were lawfully permitted to use a door other than the front door for a knock and talk, in that case that front door was "inaccessible, covered with plastic, and obscured by furniture" and the side door "appeared to be used as the main entrance." *Id.* at 754, 767 S.E.2d at 314.

Here, defendant's front door was not obscured or covered with plastic. Instead, there was a cobweb. Per the trial court's findings of fact, "Detective Helms knocked numerous times at the front door but was unable to make contact" and observed a curtain beside the front door move. Neither of these facts constitutes an invitation to remain. If anything, these facts support the reasonable conclusion that the occupant saw the detectives outside and did not wish to speak with them, as is his right.

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.

Kentucky v. King, 563 U.S. 452, 469-70, 179 L. Ed. 2d 865, 881 (2011) (citation omitted). After noting the curtain moved, Detective Helms continued to attempt to make contact. The fact that no one inside the house chose to answer either door or yell out from within that they would presently open the doors indicates a clear choice to not speak to the detectives. As such, under the knock and talk exception, the detectives should have left the property at this time. Thus, all the facts obtained by the search of the curtilage after this point were improper.

The State also argues that Detective Klinglesmith was permitted to be in the yard due to a lack of "no trespassing" signs. In support of this contention, the State relies on *State v. Pasour*, 223 N.C. App. 175, 741 S.E.2d 323 (2012), in which the Court found that presence of a "no trespassing" sign may be evidence of a homeowner's expectation of privacy. *Id.* at 178-79, 741 S.E.2d at 326. However, the Court also found that the presence of a "no trespassing" sign is not dispositive. *Id.*

In *Pasour*, similar to the instant case, officers knocked on the front and side door of a residence, and when they received no response, they moved to the back of the residence where they discovered marijuana plants. *Id.* at 175-76, 741 S.E.2d at 324. This Court found that the homeowner had a reasonable expectation of privacy because there was no evidence that the plants could be seen from the front or the road, there was a "no trespassing" sign, there was nothing to suggest the common use of the rear door, and "there [was] no evidence in the record that suggests that the officers had reason to believe that knocking at [the] [d]efendant's back door would produce a response after knocking multiple times at his front and side doors had not." *Id.* at 179, 741 S.E.2d

at 326. While the evidence of a posted no trespassing sign may be evidence of a lack of consent, nothing in *Pasour* supports the State's attempted expansion of the argument that the lack of such a sign is tantamount to an invitation for someone to enter and linger in the curtilage of a residence.

While, in the present case, Detective Klinglesmith described seeing the crawl space and smelling the marijuana from his position in the front of the house, he also testified that he was in the yard at the left corner of the house, rather than on a porch when he made these observations. By moving away from the front door and entering the sides of defendant's yard, approaching the back door, Detective Klinglesmith moved onto the curtilage of defendant's home without a warrant. There is no evidence that the detectives saw or smelled marijuana on their approach to the residence, nor from the front door. It was only after Detective Klinglesmith invaded the curtilage and walked around the home that he smelled and saw it.

While there was some evidence that the rear door was being used by the occupants – the presence of the spider web at the front door and the vehicles parked in the backyard – that did not authorize the detective to approach the back door after failing to make contact at the front door. In addition, none of these facts supports the detective moving through the yard attempting to conduct surveillance. Similar to the detectives in *Pasour*, the detectives here had no evidence that by knocking on the back door someone would finally open the door.

In its conclusions of law, the trial court found that the odor and observation of the marijuana was in plain view from Detective Klinglesmith's location.

> In order for the plain view doctrine to apply, (1) the officer must have been in a place where he had a right to be when the evidence was discovered; (2) the evidence must have been discovered inadvertently; and (3) it must have been immediately apparent to the police that the items observed were evidence of a crime or contraband. The burden is on the State to establish all three prongs of the plain view doctrine.

State v. Lupek, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011) (internal citation omitted). The plain view doctrine does not apply here because Detective Klinglesmith was not in a place he was entitled to be when he discovered the marijuana.

Furthermore, even if he had been entitled to be in that section of the yard, the crawl space was blocked off in a way that suggested a private space. Here the State relies upon the fact that the detective could see the contraband through a slit in the basement door. In *State v. Tarantino*, 322 N.C. 386, 368 S.E.2d 588 (1988), our Supreme Court held that nothing "suggests that an expectation of privacy is eliminated by quarter-inch cracks in the back wall of an otherwise sealed building." *Id.* at 391, 368 S.E.2d at 591-92. In *Tarantino*, the officer obtained a warrant based on peering through cracks in a commercial building and observing marijuana inside. *Id.* at 388, 368 S.E.2d at 590. The building's front door had been padlocked, the back doors nailed shut, and the windows were boarded. *Id.* at 387, 368 S.E.2d at 590. Our Supreme Court held:

> [t]he building's padlocked front door, nailed back doors, and boarded windows indicate that defendant had a subjective expectation of privacy in his building's interior. This expectation was not unreasonable even though there were small cracks between the boards in the building's back wall. The presence of tiny cracks near the floor on the interior wall of a second-floor porch is not the kind of exposure which serves to eliminate a reasonable expectation of privacy.

Id. at 390, 368 S.E.2d at 591.

Here, Detective Klinglesmith testified that the crawl space had padlocks and that he "put [his] eye up to it without touching it . . . [he] could see between the slats" to see the marijuana plants. In its findings of fact, the trial court found that Detective Klinglesmith looked through "cracks" to see the plants. While it is unclear how large these "slats" or "cracks" were, the fact that the detective had to put his eye up to the crawl space to see the plants, along with the padlocks on the access door, suggests an area where defendant would expect an amount of privacy. Therefore, defendant had a reasonable expectation of privacy in his locked crawlspace, which was violated when Detective Klinglesmith looked inside without a warrant.

Given all the undisputed facts of this case, we hold that Detective Klinglesmith's actions in moving to the rear door, moving around the yard, and looking into the crawl space constituted an improper warrantless search under the Fourth Amendment. Therefore, the evidence obtained by virtue of the illegal search should have been suppressed. The trial court erred in denying the defendant's motion to suppress.

III. Conclusion

For all the foregoing reasons, we reverse the order denying the motion to suppress and judgment entered pursuant to defendant's *Alford* pleas.

REVERSED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
SHEKITA MONLEE PENDER, DEFENDANT

No. COA18-859

Filed 18 June 2019

Assault—with a deadly weapon inflicting serious injury—self-defense—from assaults not involving deadly force—jury instruction

In a prosecution for assault with a deadly weapon inflicting serious injury, it was not plain error for the trial court to instruct the jury on self-defense for assaults not involving deadly force while also instructing that a knife—which defendant struck an unarmed victim with—was a deadly weapon. Defendant was not entitled to a self-defense instruction for assaults involving deadly force because the evidence failed to show that she reasonably apprehended death or serious bodily injury when she stabbed the victim. Moreover, the trial court's jury instruction was more favorable to defendant and, therefore, did not prejudice her.

Appeal by Defendant from judgment entered 8 February 2018 by Judge Jeffery B. Foster in Wilson County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jess D. Mekeel, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for the Defendant.

DILLON, Judge.

Defendant Shekita Monlee Pender appeals from a judgment entered upon a jury's verdict finding her guilty of assault with a deadly weapon inflicting serious injury. We conclude that the trial court properly instructed the jury and that Defendant received a fair trial, free from reversible error.

I. Background

Defendant was in a physical altercation with another woman. At some point during the altercation, Defendant cut the other woman a number of times with a knife, requiring the woman to receive over one hundred (100) stitches. Defendant was indicted and tried for felony assault with a deadly weapon inflicting serious injury based on this altercation.

During the trial, the jury was instructed on the crime of assault with a deadly weapon inflicting serious injury. The jury was given a generic self-defense, pattern jury instruction. However, the jury was not given the self-defense, pattern jury instruction for assaults where deadly force is used.

The jury found Defendant guilty, and Defendant was sentenced in the presumptive range. Defendant gave notice of appeal in open court.

II. Analysis

Defendant argues that the trial court committed plain error by instructing the jury on the crime for which she was tried, assault with a deadly weapon inflicting serious injury, and that "[a] knife is a deadly weapon[,]" while only providing an instruction for self-defense specific to assaults not involving deadly force.

As Defendant failed to object to the jury instructions at trial, we review for plain error. *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In North Carolina, a defendant may be criminally excused from assaulting another if she acts in self-defense, so long as the force used to repel the attack is not excessive:

> If one is without fault in provoking, or engaging in, or continuing a difficulty with another, [s]he is privileged by the

> law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect [her]self from bodily injury or offensive physical contact at the hands of the other, even though [s]he is not thereby put in actual or apparent danger of death or great bodily harm.

State v. Anderson, 230 N.C. 54, 56, 51 S.E.2d 895, 897 (1949). And while a defendant may generally employ non-deadly force to protect her from "bodily injury or offensive contact," she "may employ *deadly* force in self-defense *only* if it reasonably appears to be necessary to protect against . . . *great* bodily injury" or "death[.]" *State v. Clay*, 297 N.C. 555, 562-63, 256 S.E.2d 176, 182 (1979) (emphasis added).

Recognizing that a defendant may only use deadly force to protect herself from great bodily injury or death, the North Carolina Pattern Jury Instructions provide two different sets of jury instructions for self-defense: Pattern Jury Instruction 308.40 and 308.45. NCPI-Criminal 308.40 provides, in pertinent part, that the use of non-deadly force is justified

> [i]f the circumstances, at the time the defendant acted, would cause a person of ordinary firmness to reasonably believe that such action was necessary or apparently necessary to protect that person from *bodily injury* or *offensive physical contact*[.]

(Emphasis added). Whereas, NCPI-Criminal 308.45 provides, in pertinent part, that the use of deadly force is justified

> [i]f the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from *imminent death* or *great bodily harm*.

(Emphasis added).

When the evidence, in the light most favorable to the defendant, supports a finding she acted in self-defense, the trial court *must* give the appropriate self-defense instruction(s). *See State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979) (holding that the instruction must be given where supported by the evidence); *Clay*, 297 N.C. at 565-66, 256 S.E.2d at 183 (holding that the *appropriate* instruction to be given depends on whether or not the defendant used deadly force). Of course, a trial judge is never required to give a particular self-defense

instruction if that instruction is not supported by the evidence. *See State v. McLawhorn*, 270 N.C. 622, 630, 155 S.E.2d 198, 204 (1967).

Therefore, a defendant is entitled to an instruction consistent with NCPI-Criminal 308.40 when it could be determined from the evidence that the defendant faced the threat of bodily injury or offensive contact *and* that defendant did not use deadly force or other force deemed excessive as a matter of law to repel the attack.[1] A defendant is *never* entitled to this instruction if the only conclusion from the evidence is that she used deadly force to repel an attack, as such use of force is excessive as a matter of law.[2]

And a defendant is entitled to an instruction consistent with NCPI-Criminal 308.45 where it could be determined from the evidence that the defendant faced a reasonable threat of serious bodily harm or death and that the defendant used deadly, or lesser, force to repel the attack.[3]

Thus, the relative inquiry is not whether the defendant had an intent to kill, but the nature of the underlying attack and how much force the defendant used in repelling the attack. *Clay*, 297 N.C. at 561, 256 S.E.2d at 181.[4]

The evidence in the present case, taken in the light most favorable to the State, is certainly sufficient to sustain Defendant's conviction: Defendant and the victim were fighting. At some point, Defendant left the fight to retrieve a knife; Defendant returned, swinging the knife; Defendant struck the victim with wounds requiring over one hundred

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1. *Clay*, 297 N.C. at 566, 256 S.E.2d at 183 (stating that if the weapon used by the defendant is not a deadly weapon per se, "the trial judge should instruct the jury that if they find that defendant assaulted the victim *but do not find that he used a deadly weapon*, that assault would be excused as being in self-defense if [the defendant reasonably feared] bodily injury or offensive physical contact.").

2. *Clay*, 297 N.C. at 566, 256 S.E.2d at 183 (stating that "[i]f the weapon used is a deadly weapon per se, no reference should be made at any point in the charge to 'bodily injury or offensive physical contact.' ").

3. *Clay*, 297 N.C. at 565-66, 256 S.E.2d at 183 (stating that "[i]n cases involving assault with a deadly weapon, trial judges should, in the charge, instruct that the assault would be excused [if the defendant reasonably believed the assault] was necessary to protect [herself] from death or great bodily harm.").

4. Our Supreme Court has found jury instructions erroneous when the trial court combined and conflated the concepts of "death or great bodily harm" and "bodily injury or offensive physical contact." *Clay*, 297 N.C. at 561, 256 S.E.2d at 181; *accord State v. Fletcher*, 268 N.C. 140, 142, 150 S.E.2d 54, 56 (1966) (holding a jury instruction regarding self-defense prejudicial because it improperly placed the burden on the defendant to show that he acted in self-defense of death or great bodily harm).

(100) stitches; another person was cut by the knife while trying to break up the fight; and at all times the victim was unarmed.

The evidence, taken in the light most favorable to Defendant, however, showed that she acted in self-defense. Specifically, in this light, the evidence showed as follows: During a heated argument, the victim struck Defendant first. Then after a calming down period, the victim again attacked Defendant, this time by cutting Defendant's arm with a "little pocketknife." Defendant grabbed the knife from the victim and, while the victim was unarmed, "cut [the victim]." The victim continued to fight Defendant until others intervened to stop the altercation.

The jury was given a self-defense instruction consistent with NCPI-Criminal 308.40, that Defendant's assault should be excused if the jury determined that Defendant faced the threat of "bodily injury or offensive physical contact" and did not use excessive force to repel the threat.

On appeal, Defendant argues that since the jury could have determined that the knife was a deadly weapon, she was entitled to an instruction consistent with NCPI-Criminal 308.45, which excuses an assault by the use of a deadly weapon when faced with a threat of death or *serious* bodily harm. However, viewing the evidence in the light most favorable to Defendant, we conclude that the evidence was not sufficient to support a finding that Defendant reasonably apprehended death or great bodily harm when she struck the victim with the knife. Therefore, the trial court did not err in failing to give the instruction.

Assuming *arguendo* that there was sufficient evidence from which the jury could conclude that Defendant reasonably feared *serious* bodily harm, as opposed to just fearing bodily injury or offensive contact, at the time she stabbed and cut the victim with the knife, we conclude that any error by the trial court in failing to give an instruction consistent with NCPI-Criminal 308.45 did not rise to the level of plain error. Indeed, our Supreme Court has held that such error is not prejudicial: an instruction consistent with NCPI-Criminal 308.40, even where a jury could determine that the defendant used a deadly weapon, is "more favorable than that which defendant was entitled." *Clay*, 297 N.C. at 565, 256 S.E.2d at 183. Based on the instruction actually given, assuming the other requirements of self-defense were met, the jury was free to excuse Defendant's assault even if they found the knife to be a deadly weapon by making a mere finding that Defendant feared bodily injury, a much lower threshold than serious bodily harm or death. *Id.*; *see also State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (concluding that a trial judge's "jury instruction concerning self-defense" did not amount to plain error

whereby it provided the jury with "a vehicle by which to acquit defendant that it would not otherwise have had.").[5]

III. Conclusion

It was not plain error for the trial court to instruct the jury on the crime of assault with a deadly weapon inflicting serious injury and on self-defense of assaults not involving deadly force.

NO ERROR.

Judges INMAN and HAMPSON concur.

DERRICK SYKES, PLAINTIFF
v.
EMMANUEL VIXAMAR AND PROGRESSIVE UNIVERSAL INSURANCE COMPANY, DEFENDANT-INTERVENOR, DEFENDANTS

No. COA18-525

Filed 18 June 2019

1. Hospitals and Other Medical Facilities—billing—interaction between fair medical billing statute and medical lien statute—personal injury case—hospital's medical lien—valid

In a personal injury case, where the hospital that treated plaintiff's injuries did not bill plaintiff's health insurer for his medical care but instead relied solely on a medical lien on plaintiff's potential judgment from the lawsuit, the interaction between the medical lien statute (N.C.G.S. § 44-49(a)) and the fair medical billing statute (N.C.G.S. § 131E-91(c), which prohibited hospitals from billing patients for charges that health insurance would have covered if the

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5. We acknowledge the State's argument concerning "invited error." At the charging conference, both Defendant and the State encouraged the trial court to use NCPI-Criminal 308.40. As such, the State argues that any error in not also giving NCPI-Criminal 308.45 was invited error, pursuant to Section 15A-1443(c) of our General Statutes. N.C. Gen. Stat. § 15A-1443(c) (2018). However, our Supreme Court has held that it is the duty of the trial court to give a specific self-defense instruction "where competent evidence of self-defense is presented at trial," regardless of "any specific request by the defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986). Thus, if the evidence supported a NCPI-Criminal 308.45 instruction, the trial court was required to give it, notwithstanding that Defendant did not ask for it.

hospital had timely submitted a claim) did not eliminate the hospital's right to collect payment through the lien. Therefore, the trial court did not err by admitting evidence of the hospital's lien and underlying medical charges where defendant-intervenor, in moving to exclude that evidence as irrelevant, erroneously argued that the two statutes' combined effect was to invalidate the lien.

2. Evidence—personal injury case—evidence challenging hospital's medical lien—admissibility

In a personal injury case where, to obtain payment on plaintiff's medical bill, the hospital that treated plaintiff's injuries relied solely on a statutory medical lien on his potential tort judgment, the trial court properly excluded evidence offered to show that N.C.G.S. § 131E-91(c) barred the hospital from collecting payment through the lien when, in fact, Section 131E-91(c) did not have that effect. Additionally, the evidence rule regarding satisfaction of medical charges for less than the full amount originally charged (N.C.G.S § 8-58.1(b)) did not apply to the evidence at issue.

Appeal by defendant from judgment entered 5 February 2018 by Judge Walter H. Godwin, Jr. in Nash County Superior Court. Heard in the Court of Appeals 30 January 2019.

Ricci Law Firm, P.A., by Meredith S. Hinton, for plaintiff-appellee.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Camilla F. DeBoard and Kara V. Bordman, for defendant-appellant.

Christopher R. Nichols; Kluttz, Reamer, Hayes, Adkins & Carter, by Michael S. Adkins; and The Law Offices of James Scott Farrin, by J. Gabe Talton, for amicus curiae North Carolina Advocates for Justice.

DIETZ, Judge.

Derrick Sykes was injured in a car accident and sought care at Nash Hospital. After learning that another driver likely was liable for Sykes's injuries, the hospital made a choice that is the heart of this appeal: it chose not to bill Sykes's health insurer for his medical care and instead to rely on a statutory medical lien on any payments Sykes received from the other driver.

That choice matters because there is a statute prohibiting hospitals from billing patients for charges that would have been covered by health insurance if the hospital had timely submitted a claim. *See* N.C. Gen. Stat. § 131E-91(c). The issue in this case is whether Section 131E-91(c) prevents a hospital from choosing to rely solely on a medical lien on a future liability judgment, rather than also billing the patient's health insurer.

As explained below, we hold that hospitals may make this choice without abandoning their medical liens. First, the text of the applicable statutes permits it. Second, a contrary interpretation would frustrate the purpose of Section 131E-91(c) by forcing patients to pay unnecessary deductibles and other charges upfront—even though the hospital would have been content to wait and recover those costs from a court judgment or settlement later.

Accordingly, the trial court did not err by permitting Sykes to introduce evidence of the hospital's lien and underlying medical charges, and by rejecting counter-evidence seeking to show that Section 131E-91(c) barred the hospital from billing Sykes directly for those charges.

Facts and Procedural History

In September 2015, Plaintiff Derrick Sykes and Defendant Emmanuel Vixamar were involved in a motor vehicle accident when Vixamar failed to stop at a red light and collided with the rear of Sykes's vehicle. Following the accident, Sykes sought medical treatment at Nash Hospital. The charges for Sykes's treatment at the hospital totaled $6,463.

Two months later, the hospital sent Sykes a letter and accompanying notice of medical lien informing Sykes that the hospital asserted a lien on any liability recovery, medical payments, or uninsured/underinsured motorist coverage. Sykes had health insurance through Blue Cross Blue Shield but the hospital did not submit the charges to Sykes's health insurer and did not seek to collect the charges directly from Sykes.

On 20 May 2016, Sykes filed this negligence action against Vixamar. Progressive Universal Insurance Company, who insured the owner of the vehicle that Vixamar was driving, later intervened as a defendant.

During discovery, the parties deposed Demetrius Hagins, a billing clerk at Nash Hospital. Progressive asked Hagins a series of questions concerning the hospital's decision to rely on the medical lien to recover for its medical services, rather than billing Sykes's health insurer:

> Q. With that lien, it means you will obtain funds based on the outcome of any lawsuit that he has or settlement, correct?

A. Correct.

. . .

Q. Okay. In the event that his recovery is less than the amount you have in this lien, which is $6,463, what happens to the remainder of the balance?

A. If it's less, we accept a pro rata share at settlement, and we adjust it off.

Q. Adjust it off in full?

A. No, we adjust the balance after the payment from the pro rata share.

. . .

Q. The outstanding balance, or the remainder of the bill, okay, what happens to the remainder of the bill for Mr. Sykes?

A. It is adjusted off. . . . We don't bill the patient.

Q. Okay. So the amount will be reduced to zero?

A. Yes.

Q. Okay. And if Mr. – if Mr. Sykes does not recover in this lawsuit, what happens – so a judgment or settlement of zero, what amount would be necessary to satisfy this September 15, 2015, bill?

. . .

Q. If he receives nothing from this –

. . .

A. We receive nothing.

. . .

Q. Okay. And so the amount is written off?

A. Yes.

. . .

Q. Okay. Why would it have to be adjusted off?

A. Timely filing.

Q. Because you can't bill the insured, correct?

A. Correct.

Before trial, the court heard the parties' evidentiary motions. Sykes moved to exclude "any and all testimony and hypotheticals from the Nash County billing clerk regarding potential negotiations of bills as speculative." Progressive moved to exclude any evidence about medical costs because, as a matter of law, the amount Sykes owes the hospital is "zero." Progressive asserted that the hospital never submitted the claim to Sykes's health insurer, which in turn meant that Sykes "cannot be billed directly" because of the patient protection provision in N.C. Gen. Stat. § 131E-91(c). Therefore, Progressive argued, "there is no valid lien."

Progressive also argued that "in the alternative let us provide testimony by Nash Hospital's representative." Progressive told the trial court that it would ask that representative whether it would be unlawful for the hospital to bill Sykes under N.C. Gen. Stat. § 131E-91 and "that would be [the] only question." Sykes's counsel responded, "If she asks that one question, we've got to ask him 50 other ones to get us back to the heart of the whole issue."

After reviewing a copy of Hagins's deposition, the hospital billing records, and the notice of lien, the trial court ruled that the Nash Hospital lien of $6,463 was admissible because "the notice of the medical lien [was] filed in a timely manner" and "therefore, the medical lien of $6,640 - $6,643 is what is due and owed." The trial court then ruled that "[a]ny testimony by the Nash Hospitals billing clerk is not going to be allowed," noting that "[i]t's a double-edged sword that's for sure."

At trial, Sykes introduced the statement of charges and the lien from Nash Hospital over Progressive's objection. Progressive sought to introduce portions of Hagins's deposition testimony to rebut the reasonableness of the lien amount, but the trial court reaffirmed its earlier ruling to exclude that evidence. During the jury charge, the trial court instructed the jury using the pattern jury instruction applicable where no evidence is offered to rebut the presumption that medical expenses are reasonable. Progressive again noted its objection to that instruction based on "not being allowed to put on rebuttal evidence."

The jury returned a verdict in favor of Sykes for $7,778, the total amount of the medical expenses presented at trial. The trial court entered judgment on the jury's verdict and Progressive timely appealed.

Analysis

I. Admissibility of Hospital Bill

[1] Progressive first argues that the trial court erred by admitting evidence of the medical bills Sykes incurred at Nash Hospital for treatment resulting from the accident. Progressive contends that the hospital was barred by law from billing Sykes for that medical treatment, which in turn meant Sykes could not recover those costs in the lawsuit. Thus, Progressive argues, evidence concerning the hospital's medical lien and corresponding bills was irrelevant and inadmissible as a matter of law.

Progressive's argument relies on the interactions between two statutes governing the payment and recovery of medical expenses. We briefly summarize these statutes for ease of understanding.

First, our State's medical lien statute creates a lien on any personal injury recovery "in favor of any person. . . to whom the person so recovering . . . may be indebted" for medical care "rendered in connection with the injury in compensation for which the damages have been recovered." N.C. Gen. Stat. § 44-49(a). Medical providers routinely use this statutory lien in personal injury cases to recover the amount owed for medical care from the judgment against the tortfeasor responsible for the injury.

Second, our State's fair medical billing statute provides that a hospital "shall not bill insured patients for charges that would have been covered by their insurance had the hospital or ambulatory surgical facility submitted the claim or other information required to process the claim within the allotted time requirements of the insurer." N.C. Gen. Stat. § 131E-91(c). This provision protects patients from being billed for charges that should have been covered by their health insurance.

Progressive contends that these two statutes, when combined, eliminate a hospital's medical lien any time the hospital fails to timely submit a claim to the patient's health insurer. This is so, Progressive asserts, because failing to timely submit the claim means the hospital cannot bill the patient. And, if the hospital cannot bill the patient, the patient cannot be "indebted" to the hospital—a requirement to assert a medical lien.

We reject this argument. At the time the hospital provided medical care to Sykes, it expected to be paid for that care—whether by Sykes himself, by his health insurer, or by the person who caused Sykes's injuries. All of these parties are responsible for paying for that care through some principle of contract or tort law. *See Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 123–26, 633 S.E.2d 113, 115–17 (2006)

(holding that the patient is required to pay medical expenses under a hospital's contract for medical care); *Estate of Bell v. Blue Cross and Blue Shield of North Carolina*, 109 N.C. App. 661, 666, 428 S.E.2d 270, 272 (1993) (holding that a health insurer's payment obligations are controlled by contract); *Nash Hospitals, Inc. v. State Farm Mut. Auto. Ins. Co.*, __ N.C. App. __, __, 803 S.E.2d 256, 260 (2017) (holding that a medical provider, through a medical lien, is entitled to its pro rata share of a patient's settlement with a tortfeasor).

To be sure, when the hospital submitted a notice of lien to Sykes, and chose not to submit the claim to Sykes's health insurer, the hospital narrowed the sources from which it could be paid—in effect abandoning its ability to seek payment from Sykes and his health insurer. But we reject Progressive's argument that, when the hospital made this choice, the fair medical billing statute wiped away the debt. The statute protects patients from being billed for care that would have been covered by the patient's health insurer. N.C. Gen. Stat. § 131E-91(c). It is not intended to force hospitals to bill health insurers when other, alternative sources of payment also are available to satisfy the debt. Here, because Sykes received services from the hospital for which the hospital expected to be paid, and because there are sources through which the hospital lawfully can be paid for those services (without billing Sykes directly), Sykes remains indebted for the hospital's services under the plain language of the medical lien statute. N.C. Gen. Stat. § 44-49(a).

Moreover, were we to interpret these statutes as Progressive requests, it would have the perverse effect of requiring hospitals to bill patients and their health insurers immediately, although there is another potential source of payment through the medical lien. This, in turn, would mean the fair medical billing statute—a statute designed to protect patients from unnecessary hospital bills—would instead force patients to pay deductibles and other charges upfront even though the hospital would have been content to wait and recover those costs solely from a liability judgment or settlement in the future. That is not what the text of the fair billing statute requires, and certainly not what the legislature intended.

Progressive also asserts that although "this is a case of first impression in North Carolina, other jurisdictions have specifically addressed the need for an underlying, continuing debt to maintain a valid lien." But all of the cases on which Progressive relies address a separate issue—which we discuss in more detail below—concerning a hospital's attempt to collect *more* through a medical lien than what the hospital otherwise would have received for providing that care. *See, e.g.*, *Morgan v. Saint*

Luke's Hospital of Kansas City, 403 S.W.3d 115, 119 (Mo. Ct. App. 2013); *Midwest Neurosurgery, P.C. v. State Farm Ins. Co.*, 686 N.W.2d 572, 577, 579 (Neb. 2004).

Progressive pays particular attention to *Dorr v. Sacred Heart Hospital*, 597 N.W.2d 462, 469–71 (Wis. Ct. App. 1999), which it claims "addressed identical facts to this Appeal." But *Dorr*, like the other cases Progressive cites, is readily distinguishable. As the Wisconsin Court of Appeals later explained in clarifying the *Dorr* holding, the contract between the hospital and health maintenance organization in that case included "a contracted 'per diem rate' flat fee arrangement that the hospital used to charge the HMO for treatment of HMO subscribers." *Laska v. Gen. Cas. Co. of Wisconsin*, 830 N.W.2d 252, 264 (Wis. Ct. App. 2013). "The hospital filed the lien against the patient's tort claim in an apparent attempt to recover the difference between the per diem rate the HMO agreed to reimburse and the price based on an itemized cost basis." *Id.* In other words, as with the other cases cited above, *Dorr* involved a hospital seeking to recover *more* than it had agreed by contract to charge for those medical services. In North Carolina, as in these other jurisdictions, defendants may introduce evidence showing that a hospital seeks more through its lien than it would have otherwise accepted from a patient or health insurer.

But that is not what Progressive sought to do in this case. Progressive does not contend that the lien amount is greater than what Sykes would have paid had Vixamar not been responsible for the injuries. Instead, Progressive asserts that, *by operation of law*, when a hospital provides notice of a statutory medical lien to a patient but does not timely submit the underlying charges to the patient's health insurer, the hospital abandons the medical lien. We reject this argument and hold that a medical lien remains valid even if the hospital fails to timely submit those charges to the patient's health insurer.

Of course, by choosing not to bill a patient's health insurer in these circumstances, the hospital takes the risk that, if the third party is not held liable or is judgment proof, the hospital will never be paid. But that is the hospital's choice to make. Our holding is merely that, when a hospital makes that choice, the interaction between the medical lien statute and fair billing statute does not eliminate the hospital's right to collect payment through a medical lien.

Finally, Progressive identifies several harmful policy consequences of the hospital's billing practices in this case. For example, Progressive argues that federal regulations stemming from the Affordable Care Act

require hospitals to bill uninsured patients "an average of the amounts billed to patients with health insurance." The implication (although Progressive does not state it expressly) is that hospitals will choose whether to bill a health insurer or to seek recovery solely through a medical lien in ways that inflate their average charges to health insurers, in turn inflating the amount they can bill uninsured patients. Whatever the merit of this claim, it is directed at the wrong branch of government. "This Court is an error-correcting body, not a policy-making or law-making one." *Davis v. Craven County ABC Bd.*, __ N.C. App. __, __, 814 S.E.2d 602, 605 (2018). Enacting policy rules to stem rising healthcare costs falls far outside the appropriate role of the courts.

II. Exclusion of Progressive's Billing Evidence

[2] Progressive next argues that the trial court improperly excluded its evidence challenging the reasonableness of the hospital's billing practices. We agree with Progressive's general statement of the law in this area. Indeed, to ensure that our holding above causes no confusion, we restate the long-standing evidentiary rule in these cases: Evidence that the hospital would accept less than the amount claimed in a medical lien to satisfy the underlying bill is admissible to challenge the reasonableness of the bill. *See* N.C. Gen. Stat. § 8-58.1(b) (the presumption of reasonableness of medical charges is rebutted by "sworn testimony that the charge for that provider's service . . . can be satisfied by a payment of an amount less than the amount charged"); *see also* N.C. Gen. Stat. § 8C-1, Rule 414. Defendants in these cases may seek discovery on this issue and courts should freely admit this evidence at trial.

The flaw in Progressive's argument is that it never sought to admit this sort of evidence. The evidence Progressive sought to introduce concerned the hospital's failure to timely bill Sykes's health insurer and the resulting impact of the fair medical billing statute. Progressive intended to use that evidence to suggest that the hospital's actual bill was "zero" because the law prohibited the hospital from ever charging Sykes for those services. The trial court properly excluded that evidence because, as explained above, the interaction between the medical lien statute and fair medical billing statute does not render the bill uncollectible through a lien on Sykes's tort judgment.[1]

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1. Because the trial court properly excluded this evidence, the court also properly used the pattern jury instruction which applies when no rebuttal evidence is presented, instead of the pattern instruction requested by Progressive, which applies when evidence is presented to rebut the reasonableness of the medical charges. *See* N.C.P.I. Civil 810.04C, 810.04D.

Conclusion

The trial court properly permitted Sykes to introduce evidence of the hospital's lien and underlying medical charges, and properly excluded counter-evidence seeking to show that the hospital was barred by statute from collecting those charges. We therefore find no error in the trial court's judgment.

NO ERROR.

Judges INMAN and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JUNE 2019)

CHARDE v. TOWN OF DAVIDSON No. 18-938	Mecklenburg (18CVS943)	Affirmed
FENNELL v. E. CAROLINA HEALTH No. 18-1096	Hertford (16CVS155)	AFFIRMED IN PART; NO ERROR IN PART.
IN RE A.L.L. No. 18-902	Beaufort (18JT17)	Affirmed
IN RE D.F.J. No. 18-1127	Buncombe (16JA108)	Affirmed
IN RE J.P. No. 18-1124	Wake (18SPC1725)	Affirmed
IN RE K.C.W. No. 18-927	New Hanover (16JT70)	Affirmed
IN RE K.M.B. No. 18-1215	Surry (17JT11-13)	Affirmed
IN RE K.S.A. No. 18-1305	Surry (10JT73)	Reversed
IN RE M.Y.-F.H. No. 18-1180	Iredell (15JT105) (15JT106) (15JT107)	Affirmed
STATE v. BARNETT No. 18-1183	Cherokee (17CRS426)	NO ERROR IN PART, NEW TRIAL IN PART, AND DISMISSED IN PART.
STATE v. GEORGE No. 19-117	Guilford (16CRS26239) (16CRS65787) (16CRS700971)	No Error
STATE v. GILCHRIST No. 18-479	Moore (14CRS52457-58)	No prejudicial error in part; No error in part.
STATE v. HAQQ No. 18-339	Catawba (14CRS54163)	No Error

STATE v. PADILLA-AMAYA No. 18-856	Wake (13CRS207134-35) (13CRS207221-22)	No Error in Part; Vacated and Remanded in Part
STATE v. RICHARDSON No. 18-855	Wake (17CRS89-90)	No Error
STATE v. SPARKS No. 18-1102	Harnett (15CRS51383)	Affirmed
STATE v. TYLER No. 18-1184	Columbus (15CRS51173) (15CRS51174)	No Error
STATE v. VAZQUEZ No. 18-1296	New Hanover (16CRS60151-53) (17CRS2657)	NO ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL ERROR.
STATE v. WARE No. 18-1185	Clay (15CRS61)	No Error
STATE v. YORK No. 18-554	Randolph (16CRS4)	No Error
WINSTON AFFORDABLE HOUS., L.L.C. v. ROBERTS No. 18-553	Forsyth (17CVD1108)	Affirmed

BOBBY G. BOLES, ET AL., PLAINTIFFS
v.
TOWN OF OAK ISLAND, DEFENDANT

No. COA18-806

Filed 2 July 2019

1. Cities and Towns—sewer treatment district—assessment of fees—service availability—statutory authority

A town exceeded its statutory authority—pursuant to a session law allowing the creation of a sewer treatment district and the imposition of fees for the "availability of" sewer service—where the town assessed fees to owners of undeveloped parcels, because the sewer system was not available and ready for immediate use by those owners without extensive and costly steps.

2. Appeal and Error—preservation of issues—motion to amend complaint—ruling not obtained

A property owner who failed to obtain a ruling on his motion to amend or supplement his complaint against a town (for claims related to the assessment of fees for sewer service availability) did not preserve for appellate review any issue regarding his motion.

Judge COLLINS concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 2 May 2018 by Judge James Ammons, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 17 January 2019.

Smith James Rowlett & Cohen LLP, by Norman B. Smith, for plaintiffs-appellants.

Parker, Poe, Adams, & Bernstein LLP, by Charles C. Meeker and Stephen V. Carey; and Crossley, McIntosh & Collier, by Brian E. Edes, for defendant-appellee.

ZACHARY, Judge.

Plaintiffs, owners of undeveloped parcels of property in Defendant Town of Oak Island, challenge the sewer service availability fees levied upon them pursuant to a 2004 local act enacted to help service the debt incurred in constructing Oak Island's sewer system. Plaintiffs argue that

the fees are unauthorized by statute, unconstitutional, and violative of certain tax principles. After careful review, we conclude that Oak Island exceeded its statutory authority by imposing the sewer service availability fees on Plaintiffs' undeveloped property that could not or does not benefit from the availability of Oak Island's sewer system. Accordingly, we reverse the trial court's order granting summary judgment in favor of Oak Island and remand for further proceedings.

I. Background

The Town of Oak Island constructed a sewer system at a cost of $140 million. In 2004, the General Assembly enacted a local act[1] designed to assist Oak Island[2] in reducing its resultant outstanding debt, which was approximately $117 million as of October 2017. 2004 N.C. Sess. Laws 117, ch. 96. Specifically, the General Assembly authorized Oak Island to "impose annual fees for the availability of sewer service within" its sewer treatment district. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 3. The Session Laws authorize Oak Island to impose such sewer service availability fees upon the "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment" within the district. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 4.

Oak Island's sewer lines run in front of each parcel of property on the island, both developed and undeveloped, and, according to Oak Island, its system "has the capacity and ability to serve all parcels, both developed and undeveloped." Oak Island began to assess sewer service availability fees against all properties within the district, both developed and undeveloped.

Beginning in fiscal year 2009,[3] owners of developed property began paying the availability fees via an additional charge reflected on their monthly sewer bills. Owners of undeveloped parcels began paying the availability fees on an annual basis in fiscal year 2010, with the fees appearing on their property tax bills. The total sewer service availability fees charged to each parcel thus far are as follows:

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1. "A local act refers to an act of the General Assembly that relates to one or more specific local governments." Frayda Bluestein, *Coates' Canons Blog: What Is A Local Act?*, UNC School of Government (April 6, 2010), https://canons.sog.unc.edu/what-is-a-local-act/.

2. The original 2004 Session Law applied only to Holden Beach, with the 2006 Session Law adding Oak Island to the same authority. 2006 N.C. Sess. Laws 85, 85, ch. 54, § 1. The 2010 Session Law added Caswell Beach. 2010 N.C. Sess. Laws 34, 34, ch. 29, § 1.

3. For the Town of Oak Island, a fiscal year runs from July 1 through June 30.

Fiscal Year	Developed	Undeveloped
2010	$733.26	$146.15
2011	$435.46	$146.15
2012	$324.63	$139.13
2013	$490.81	$576.00
2014	$657.61	$643.68
2015	$714.78	$719.31
2016	$559.74	$803.83
2017	$562.28	$803.83

These recurring sewer service availability fees are in addition to a one-time special assessment of $4,200.00, which was imposed upon all parcels of property at the outset of the sewer system's establishment. It is also noteworthy that for the years 2015 through 2017, owners of undeveloped lots were paying more than the owners of developed lots that were connected to and using the sewer system.

On 11 December 2015, Plaintiffs filed the instant action challenging Oak Island's statutory authority to assess the sewer service availability fees against Plaintiffs' undeveloped property. Plaintiffs sought to recover the fees paid from 2010 to 2014, and interest, together with a declaratory judgment that the fees are unlawful. On 21 April 2017, Plaintiffs moved to certify a class of all undeveloped parcel owners who have paid the sewer service availability fees since 2009.

The parties filed cross-motions for summary judgment in October 2017. Plaintiffs moved for summary judgment on the issue of liability only, while Oak Island moved for summary judgment on all issues. A hearing on the parties' summary judgment motions was held on 16 April 2018. At the outset of the hearing, Plaintiffs voluntarily dismissed their claim for declaratory judgment without prejudice, leaving only their claim for the recovery of fees paid from 2010 to 2014. At the end of the hearing, Plaintiffs orally moved to amend the pleadings pursuant to Rule 15(b) of the North Carolina Rules of Civil Procedure, or alternatively, to supplement their complaint pursuant to Rule 15(d), in order to bring claims for recovery of sewer service availability fees paid in fiscal years 2015 through 2017. Oak Island objected to the motion.

Without ruling on Plaintiffs' motion to amend, the trial court denied Plaintiffs' motion for partial summary judgment and granted Oak Island's motion for summary judgment. In light of these rulings, the trial court

also did not rule upon Plaintiffs' motion for class certification. On 2 May 2018, the trial court entered an order memorializing its decision and taxing the costs against Plaintiffs. Plaintiffs filed notice of appeal to this Court on 21 May 2018.

On appeal, Plaintiffs contend that the trial court erred by granting Oak Island's motion for summary judgment because (1) the statutory phrase "availability of sewer service" precludes Oak Island from assessing sewer service availability fees against undeveloped properties; (2) Oak Island provided a full credit or rebate of the availability fees to owners of developed parcels, thereby violating Plaintiffs' constitutional rights and certain tax principles; and (3) refunds were provided to owners of developed parcels in violation of N.C. Gen. Stat. § 105-380(a). Finally, Plaintiffs argue that the trial court erred in failing to grant their motion to amend the pleadings.

II. Discussion

a. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). Our standard of review on appeal from an order granting summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

b. Statutory Authority to Assess Sewer Service Availability Fees

[1] We first address Plaintiffs' argument that the trial court erred in granting summary judgment in favor of Oak Island because Oak Island exceeded its statutory authority under the Session Laws by assessing the sewer service availability fees against Plaintiffs' undeveloped properties. Specifically, Plaintiffs argue that their undeveloped properties are not ones that "could or do[] benefit from the availability" of Oak Island's sewage treatment services. We agree, and therefore reverse the trial court's order granting summary judgment in favor of Oak Island on this ground.

"As creations of the legislature, municipalities have only those powers delegated to them by the General Assembly." *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 16, 789 S.E.2d 454, 455 (2016). "The General Assembly delegates express power to municipalities by adopting an enabling statute, which includes implied powers essential to the exercise of those which are expressly conferred." *Id.* at 19,

789 S.E.2d at 457 (quotation marks and alteration omitted). Otherwise, "[a]ll acts beyond the scope of the powers granted to a municipality are invalid." *Id.*

"When determining the extent of legislative power conferred upon a municipality, the plain language of the enabling statute governs." *Id.* "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted).

In the instant case, although the Session Laws do not define the term "availability" for purposes of imposing the sewer service availability fees, it is clear that the enabling Session Laws do not, as a matter of law, apply to Plaintiffs' undeveloped property.

"In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017). The plain meaning of the unambiguous, undefined word "availability" is "the quality or state of being available." *Availability*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/availability (last visited May 31, 2019). "Available" means "present or ready for immediate use." *Available*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/available (last visited May 31, 2019).

As noted in Oak Island's answer to Plaintiffs' first set of interrogatories, in order to "benefit from the availability" of Oak Island's sewer system, the owner of an undeveloped parcel of property would first be required to (1) obtain the requisite building permits; (2) construct a dwelling or building with a sewer system connection on the property; (3) have the improvements pass municipal inspection; (4) obtain a plumbing permit; (5) submit an application for service; and (6) meet any additional requirements governing the improvement of property set forth in the Town of Oak Island Code of Ordinances. Should the system have the capacity to add and serve the parcel, an owner of undeveloped property who wished to connect to the system would also have to pay the requisite fees to Oak Island in order to obtain the various permits. The complex, costly additional requirements—many of them conditional—that the owner of an undeveloped lot must fulfill in order to benefit from Oak Island's sewer services foreclose any conclusion that such services are "present or ready for immediate use" by those owners.

Our conclusion is supported by *Ricks v. Town of Selma*, 99 N.C. App. 82, 392 S.E.2d 437 (1990), *disc. review improvidently allowed*, 328 N.C. 567, 402 S.E.2d 400 (1991), in which this Court addressed the validity of an availability charge in the context of water and sewer treatment services. At issue in *Ricks* was the validity of the defendant Town of Selma's ordinance that set "rates for . . . sewer service available but not received[.]" 99 N.C. App. at 84, 392 S.E.2d at 438. The plaintiffs were the owners of a 41-unit mobile-home park located inside the Town's limits, which utilized its own private septic tanks instead of the Town's sewer system. *Id.* at 83, 392 S.E.2d at 438. The Town assessed availability charges against the plaintiffs, who contended that the Town had exceeded the scope of its statutory authority, in that the plaintiffs were not using the Town's services. *Id.* at 84, 392 S.E.2d at 438-39. We disagreed.

The authorizing statute in *Ricks* permitted the Town to enact an ordinance "establish[ing] rates for the use of or the services furnished by any public enterprise." *Id.* at 84-85, 392 S.E.2d at 439 (quotation marks omitted) (citing N.C. Gen. Stat. § 160A-314(a)). The question presented thus was "whether making sewer service available is 'furnishing a service' within the meaning of the statute." *Id.* at 85, 392 S.E.2d at 439. We held that the Town's ordinance was statutorily authorized as against the plaintiffs, concluding that "a city's power to set rates for services furnished by a sewer system includes the power to charge for services available but not received," where the property is developed, but the owner chooses not to connect. *Id.* at 86, 392 S.E.2d at 440.

While the term "available" was not explicitly defined in *Ricks* or the relevant statute, the facts that were held to evidence "availability of service" are clearly distinguishable from those of the case at bar. In *Ricks*, the Town had extended water and sewer service to the plaintiffs' mobile home park; the plaintiffs *chose* to "tap[] onto the municipal water service, but . . . never connected any of their 41 housing units to the . . . sewer system[,]" preferring instead to use their existing septic tanks. *Id.* at 83, 392 S.E.2d at 438. In other words, the Town's sewer services were *present and ready for immediate use* by the *Ricks* plaintiffs, who simply opted not to connect to the system. Moreover, unlike the undeveloped property in the present case, the plaintiffs' property in *Ricks* was already developed and generating sewage, and the Town had authorized the units' connection to the system.

Our holding finds further support in the circumstances under which property may be subject to an "availability charge" pursuant to N.C. Gen. Stat. § 160A-317, which governs a municipality's authority

to require property owners to connect to its sewer facilities and to charge for such connections. Specifically, the statute authorizes municipalities to "require an owner of *developed property on which there are situated one or more residential dwelling units or commercial establishments* . . . to connect the owner's premises with the [city's] . . . sewer line." N.C. Gen. Stat. § 160A-317(a) (emphasis added). Alternatively, municipalities may subject such owners to "a periodic availability charge" in lieu of connection. *Id.*

The Session Laws' language "could . . . benefit from the availability of sewage treatment" follows the same logic of section 160A-317. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 4. The fact that it would be outside the scope of Oak Island's authority under N.C. Gen. Stat. § 160A-317 to charge Plaintiffs an "availability charge" for its sewer services suggests that those services are similarly not "available" to Plaintiffs for purposes of the Session Laws. *See, e.g.*, *In re Halifax Paper Co.*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963) ("[I]t is the duty of the courts to reconcile laws and adopt the construction of a statute which harmonizes it with other statutory provisions.").

Also instructive, though lacking precedential value, is *Holmes Harbor Sewer Dist. v. Holmes Harbor Home Bldg. LLC*, 123 P.3d 823 (Wash. 2005), in which the Washington Supreme Court directly addressed the meaning of "availability" of sewer services. 123 P.3d at 825-26. Similar to the statutory scheme at issue in this case, the Washington statute permitted the district to "fix[] rates and charges for furnishing sewer and drainage service and facilities to those to whom *service is available*." *Id.* at 824-25. The Washington Supreme Court held in favor of an owner of unimproved property who had refused to pay the availability charges. *Id.* at 827. Specifically, the Court concluded that "unimproved lots are not properties to which sewer service is available," and therefore, "the charges at issue [we]re not statutorily authorized."[4] *Id.* at 823.

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4. The dissent cites *Durango W. Metro. Dist. #1 v. HKS Joint Venture P'ship*, 793 P.2d 661 (1990), and *McMillan v. Texas Natural Res. Conservation Comm'n*, 983 S.W.2d 359 (1998), as instructive opinions from other jurisdictions, which stand for the contrary proposition. The holdings of those cases are misconstrued. The property owner in *Durango* had only argued (1) that the sewer district did not fall within the statutory definition of a "municipality," and thus lacked the authority to impose availability of service charges altogether, and (2) that the availability fees were subject to a statutory "fifty percent of . . . regular service charges" limitation. *Durango W. Metro. Dist. #1*, 793 P.2d at 663. The property owner did not argue that the district had exceeded its statutory authority by assessing availability fees against the plaintiff's vacant, unimproved property. In *McMillan*, the pertinent statute explicitly authorized the assessment of standby fees for available sewer services against "*undeveloped property*." *McMillan*, 983 S.W.2d at 361 (emphasis added).

As Oak Island did, the sewer district in *Holmes Harbor* initially charged a special assessment to all property owners of both improved and unimproved parcels and later imposed additional availability charges. The availability charges were assessed against unimproved properties, unconnected to the system and generating no sewage, as well as those developed, connected, and actually receiving services. Moreover, as here, owners of unimproved property had "no guaranteed right to connect to the sewer system." *Id.* at 824. Should there be sufficient capacity, the Washington sewer district reserved the right to authorize any new connections. However, "[b]efore authorizing connection, the [d]istrict [had to] approve the hookup application, and upon approval by the [d]istrict, property owners [then had to] pay for the installation of on-site facilities and connection to the sewer system." *Id.* at 827. Finding that the initial assessment had compensated the district for "the special benefit of potentially increased property values resulting from the construction of the sewer system," *id.* at 826 n.5, the Court concluded that justifying the availability charges would require more than a nebulous opportunity to connect to the system at some undetermined future date. *See id.* at 826-27. Accordingly, the Court held that sewer service was not available where "the properties at issue are not improved, are not connected to the sewer system, and have no guaranteed right to connect upon improvement." *Id.* at 827.

Similarly here, Plaintiffs' undeveloped properties are not ones that "*could or do[] benefit from the availability* of" Oak Island's sewer treatment services. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 4 (emphasis added). The undeveloped properties are not connected to or being served by the municipal sewer service, and "have no guaranteed right to connect." *Holmes Harbor*, 123 P.3d at 827. Thus, the sewer service is not available to the owners of such properties. Consequently, beyond the initial assessment imposed, Oak Island's additional and ongoing charges to Plaintiffs, as owners of undeveloped properties, for sewer service availability was not a valid exercise of statutory authority pursuant to Session Law 2004-96.

In light of our decision, we do not address Plaintiffs' additional arguments concerning the tax credit provided to developed property owners and not to undeveloped property owners.

c. Motions to Amend Pleadings

[2] Finally, Plaintiffs argue that the trial court erred by failing to grant their oral motions to amend or supplement their complaint pursuant to Rule 15(b) and (d) of the North Carolina Rules of Civil Procedure.

However, because Plaintiffs failed to obtain rulings on these motions, there is no judicial action for this Court to review at this time.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . 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). "It is also necessary for the complaining party to obtain a ruling upon the party's . . . motion." *Id.*

At the outset of the hearing, Plaintiffs took a voluntary dismissal of their declaratory judgment claim. At that point, Defendant noted that "[s]ince the damages requested are only from 2010 to 2014, now there's no request for beyond 2015." At the end of the hearing, Plaintiffs moved to amend their complaint, pursuant to Rule 15(b), to include damages for sewer service availability fees paid during fiscal years 2015 through 2017. Plaintiffs argued that damages for these years had been tried by consent because Oak Island's Exhibit D included sewer service availability fees charged to landowners for fiscal years 2010 through 2017. In the alternative, Plaintiffs argued that they should be allowed to supplement their complaint pursuant to Rule 15(d). Oak Island objected to Plaintiffs' motion to amend their complaint, arguing that it did not try the issue of damages in those years by consent.[5]

After the hearing, the trial court announced its decision to deny Plaintiffs' motion for partial summary judgment and grant Oak Island's motion for summary judgment. However, the trial court did not decide or rule upon Plaintiffs' Rule 15 motions. Because Plaintiffs did not obtain rulings upon their Rule 15 motions, they failed to preserve for appeal any arguments concerning the same. *See id.*; *Gilreath v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 294 (holding that the plaintiff's argument that the trial court erred in failing to grant the plaintiff's motion to strike paragraphs from affidavits was unpreserved because the plaintiff did not obtain a ruling on that motion), *aff'd per curiam*, 361 N.C. 109, 637 S.E.2d 537 (2006). These arguments are not before us at this time.

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5. Oak Island reminded the trial court that when Plaintiffs dismissed their declaratory judgment action, Oak Island had notified the court that damages for fiscal years 2015 through 2017 were no longer applicable. Oak Island also explained that Exhibit D was prepared in response to Plaintiffs' request for declaratory judgment, but, that it probably would not have submitted this exhibit had it known that Plaintiffs were going to dismiss their declaratory judgment claim.

III. Conclusion

The trial court's order granting summary judgment in favor of Oak Island is reversed and remanded.

REVERSED AND REMANDED.

Judge TYSON concurs.

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

COLLINS, Judge, concurs in parts and dissents in part.

Plaintiffs, owners of undeveloped parcels of property in the Town of Oak Island, challenge fees levied upon them by Defendant Town of Oak Island for payment of sewer system debt service, pursuant to a 1996 session law. Plaintiffs argue the fees are unauthorized by statute, unconstitutional, and violative of certain tax principles, and seek declaratory judgment and recovery of the fees. Because I conclude Plaintiffs' arguments lack merit, I would affirm the trial court's order granting summary judgment in favor of Defendant Town of Oak Island. I therefore respectfully dissent. However, I concur with the majority that Plaintiffs failed to preserve for our appellate review any issue regarding their oral motions to amend or supplement their complaint.

I. Procedural History

By Complaint filed 11 December 2015 and Amended Complaint filed 15 January 2016 (collectively Complaint), Plaintiffs, owners of undeveloped parcels of property in the Defendant Town of Oak Island (Town or Oak Island), challenged sewer district fees (Fee or Fees) Oak Island was collecting to pay debt service on its sewer system. Plaintiffs sought to recover Fees paid from 2010 to 2014, and declaratory judgment that the Fees are unlawful. Oak Island answered the Complaint, denied its material allegations, and moved to dismiss the Complaint. On 21 April 2017, Plaintiffs moved to certify a class of all undeveloped parcel owners who have paid Fees since 2009.

In October 2017, the parties filed cross-motions for summary judgment. Plaintiffs moved for summary judgment on the issues of liability only while Oak Island moved for summary judgment on all issues.

A hearing on the parties' summary judgment motions was held on 16 April 2018. At the outset of the hearing, Plaintiffs took a voluntary

dismissal without prejudice of their prayer for declaratory judgment, leaving only their claim for the recovery of Fees paid from 2010 to 2014.

At the end of the hearing, Plaintiffs orally moved to amend the pleadings under North Carolina Rules of Civil Procedure 15(b) and to supplement the complaint under N.C. R. Civ. P. 15(d) to bring claims for recovery of Fees paid in 2015, 2016, and 2017. Oak Island objected to the motion. Without ruling on Plaintiffs' motion to amend the pleadings, the trial court denied Plaintiffs' motion for partial summary judgment and granted Oak Island's motion for summary judgment. In light of these rulings, the trial court did not consider Plaintiffs' class certification motion. On 2 May 2018, the trial court entered an Order reflecting its ruling and taxing costs against Plaintiffs. Plaintiffs filed Notice of Appeal to this Court on 21 May 2018.

II. Factual Background

Oak Island constructed a sewer system at a cost of $140 million. As of October 2017, the principal amount of indebtedness for the system was approximately $117 million. Sewer lines run in front of each parcel of property on Oak Island, both developed and undeveloped, and the sewer system has the capacity and ability to serve all parcels of property on Oak Island.

Starting in 2004, the General Assembly adopted legislation to assist Oak Island and two other towns in amortizing their sewer system debt. Specifically, the General Assembly enacted three Session Laws authorizing the towns to create fee-supported sewer treatment districts and impose sewer district fees to pay the debt service on their sewer systems. A 2004 session law applied to Holden Beach. *See* 2004 N.C. Sess. Law 96 (2004). A 2006 session law added Oak Island to the sewer district fee authority previously granted to Holden Beach. *See* 2006 N.C. Sess. Law 54 (2006). A 2010 session law broadened the authority granted to include Caswell Beach. *See* 2010 N.C. Sess. Law 29 (2010).

The relevant portions of the 2006 session law applicable to Oak Island (Session Law) provide:

> SECTION 1. Fee-Supported District. – A municipality may create a fee-supported sewer treatment district for all properties that are or can be served by the sewage collection and treatment plant serving properties within the Town.
>
> . . . .

> SECTION 3. Imposition of Annual Fees. – The Town may impose annual fees for the availability of sewer service within the district. The Board shall set same on or before July 1 each year.
>
> SECTION 4. Fees. – The fees imposed by the municipality may not exceed the cost of providing the sewer collection facility within the municipality and the cost of the contract with a county to provide it with the facilities to transport, treat, and dispose of the municipality's effluent. Said fees shall be imposed on owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment.
>
> SECTION 5. Billing of Fees. – The municipality may include a fee imposed under this section on the property tax bill for each parcel of property lying within the municipal limits on which the fee is imposed. Said fee shall be collected in the same manner as provided for in the General Statutes for the collection of ad valorem taxes, and remedies available by statute for the collection of taxes shall apply to the collection of the sewer district fees.
>
> SECTION 6. Use of Fees. – The Town shall credit the fees collected within the district to a separate fund to be used only to pay the debt service for the sewer system. . . .

S.L. 2006-54 (amending S.L. 2004-96).[1]

Debt service on Oak Island's sewer system is paid from (1) assessments paid by all parcel owners, (2) monthly fees paid by developed parcel owners currently using the system, and (3) yearly fees paid by undeveloped parcel owners. Starting in fiscal year 2009,[2] owners of developed parcels began paying debt service fees via a monthly charge for basic sewer service, covering debt service and operating costs, along with a usage charge for service over 4,000 gallons per month. In fiscal year 2010, owners of undeveloped parcels began paying sewer district Fees once a year, with the Fee appearing on their yearly property tax bill.

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1. The relevant text of S.L. 2006-54 appears in the body of S.L. 2004-96. The text of S.L. 2006-54 indicates that Section 8 of S.L. 2004-96 reads as rewritten: "SECTION 8. This act applies only within the ~~Town of Holden Beach~~ Towns of Holden Beach and Oak Island."

2. "Fiscal year 2009" means the time period of 1 July 2008 through 30 June 2009. Other fiscal year references are computed the same way.

Even though owners of developed parcels pay debt service fees on a monthly basis, a yearly sewer district Fee also appears on their annual property tax bill. This Fee is credited back on the same annual property tax bill such that owners of developed parcels are not double-billed for debt service payments. By collecting debt service fees from developed parcel owners monthly, Oak Island pays down the sewer system debt faster than if it collected the sewer district Fees on a yearly basis.

The debt service payments paid by each type of parcel during the years at issue[3] are as follows:

Fiscal Year	Developed	Undeveloped
2010	$733.26	$146.15
2011	$435.46	$146.15
2012	$324.63	$139.13
2013	$490.81	$576.00
2014	$657.61	$643.68

III. Issues

On appeal, Plaintiffs assert the trial court erred by (1) failing to grant Plaintiffs' motion to amend their Complaint; (2) failing to grant Plaintiffs' motion to supplement their Complaint; (3) granting Defendant's motion for summary judgment because the term "availability of sewer service" in the Session Law cannot be harmonized with N.C. Gen. Stat. § 160A-317(a); (4) granting Defendant's motion for summary judgment because Defendant provided a full credit or rebate of the sewer district fee to owners of developed parcels, thereby violating Plaintiffs' constitutional rights and certain tax principles; and (5) granting Defendant's motion for summary judgment because refunds were provided to owners of developed parcels in violation of N.C. Gen. Stat. § 105-380(a).

IV. Standard of Review

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

3. Plaintiffs failed to obtain rulings on their oral motions to amend their complaint under Rule 15(b) or supplement their complaint under Rule 15(d) of the Rules of Civil Procedure to bring claims for recovery of Fees paid in 2015, 2016, and 2017. Accordingly, these arguments are not preserved for our appellate review. *See* Section V.A. Therefore, the only issue before this court is Plaintiffs' complaint for recovery of Fees paid during the years 2010-14.

any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018). Our standard of review of an appeal from an order granting summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Moreover, appellate review of constitutional challenges is *de novo*. *See generally Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015).

V. Discussion

A. Motions to Amend or Supplement Complaint

Because Plaintiffs failed to obtain rulings on their oral motions to amend their complaint under Rule 15(b) or supplement their complaint under Rule 15(d) of the Rules of Civil Procedure to bring claims for recovery of Fees paid in 2015, 2016, and 2017, I agree with the majority that these arguments are not preserved for our appellate review. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review . . . [i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *Gilreath v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 294 (2006) (holding plaintiff failed to preserve an argument that the trial court erred in failing to grant plaintiff's motion to strike paragraphs from affidavits because plaintiff failed to obtain a ruling on the motion).

Therefore, the only issue before this court is Plaintiffs' complaint for recovery of Fees paid during the years 2010-14.

B. Statutory Authority to Assess Sewer District Fees

Plaintiffs advance several arguments as to why Oak Island lacked the statutory authority to impose the Fees upon owners of undeveloped parcels. I address and reject each argument.

Meaning of the term "availability of service"

The Session Law authorizes Oak Island to "create a fee-supported sewer treatment district for all properties that are or can be served by the sewage collection and treatment plant serving properties within the Town." S.L. 2006-54 § 1. Annual fees may be imposed "for the availability of sewer service within the district." S.L. 2006-54 § 3. "Said fees shall be imposed on owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment." S.L. 2006-54 § 4. Plaintiffs argue that the term "availability of sewer service" does not relate to owners whose parcels are undeveloped in that "service is not available" to them because they must take additional steps to connect to the sewer system. Plaintiffs misconstrue the plain language of the Session Law.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "The best indicia of that intent are the language of the statute . . . , the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). Thus, "[i]n resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Tr. of the N.C. Local Gov't. Emp. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998) (quotation marks and citation omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted).

While the Session Law does not define the term "availability," the ordinary meaning of "availability" is the state of being "present or ready for immediate use[.]" *Availability*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/availability (last visited April 16, 2019); *see Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017) ("In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning."). The Session Law authorizes the imposition of fees "for the availability of sewer service *within the district*." S.L. 2006-54 § 3 (emphasis added). The district is comprised of "all properties that *are or can be served* by the sewage collection and treatment plant serving properties within the Town." S.L. 2006-54 § 1 (emphasis added). Thus, the Session Law authorizes Oak Island to impose fees for the sewer service's presence or readiness for use by all properties that are or can be served by the Town's sewage collection and treatment plant.

Oak Island's Chief Financial Officer, David Hatten, stated in his uncontradicted affidavit that Oak Island installed a sewer system and that "[s]ewer lines run in front of each parcel on Oak Island, both developed and undeveloped. Oak Island's sewer system has the capacity and ability to serve all parcels both developed and undeveloped." These undisputed averments compel the conclusion that the sewer service is present or ready for immediate use by all properties that are or can be served by the Town's sewage collection and treatment plant, including undeveloped parcels of property. Plaintiffs' parcels, while not presently served by the Town's sewage collection and treatment plant, "can be

served" by the Town's sewage collection and treatment plant when they are connected to the sewer lines in the future.

Moreover, the Session Law contemplates the levying of fees upon owners of undeveloped parcels of property that indirectly benefit from the sewer system but are not currently connected to the system, and that could directly benefit from the system upon connection. Furthermore, as explained at oral argument, parcels which can never be developed — and thus can never be served by the sewage collection and treatment plant — can be exempted from paying Fees.

Plaintiffs propose construing the statute to require that a parcel be developed and presently able to connect to the sewer system before Fees can be imposed. Plaintiffs' interpretation would require terms be added to the Session Law, while rendering the terms "can be served [,]" "within the district[,]" and "parcel of property that could . . . benefit" superfluous. Such statutory construction is not permitted, because "[i]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (internal citations and quotation marks omitted). We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because "it is always presumed that the legislature acted with care and deliberation . . . ." *Batts v. Batts*, 160 N.C. App. 554, 557, 586 S.E.2d 550, 553 (2003) (quotation marks and citation omitted).

As the plain language of the Session Law authorizes Oak Island to impose Fees upon all owners of developed and undeveloped parcels of property within the Town of Oak Island's fee-supported sewer district as a result of sewer service being available within the district, Oak Island was authorized to impose Fees upon Plaintiffs.

This conclusion comports with *Ricks v. Town of Selma*, 99 N.C. App. 82, 392 S.E.2d 437 (1990), wherein this Court concluded that a town could "set an availability charge for water or sewer service available but not received." *Id.* at 84, 392 S.E.2d at 438-39. The town had the statutory authority to establish rates " 'for the use of or the services furnished by any public enterprise.' " *Id.* at 84-85, 392 S.E.2d at 439 (quoting N.C. Gen. Stat. § 160A-311(2)). " 'Public enterprise' " included " '[s]ewage collection.' " *Id.* (quoting N.C. Gen. Stat. § 160A-311(3)). The question was "whether making sewer service available is 'furnishing a service' within the meaning of the statute[.]" *Ricks*, 99 N.C. at 85, 392 S.E.2d at 439.

The town had extended water and sewer service to plaintiffs' property and, thus, "[b]oth water and sewer service from the Town of Selma were available to plaintiffs' property." *Id.* at 83, 392 S.E.2d at 438. Plaintiffs did not tap into the municipal sewer system, choosing instead to continue to use their private septic tank. This Court concluded that by making sewer service available, i.e., extending the sewer service to the property, the city had furnished a service, thus authorizing it to set a rate for this service. *Id.* at 85, 392 S.E.2d at 439.

Just as the Town of Selma extended sewer service to plaintiffs' property in *Ricks*, Oak Island has extended sewer service to all parcels on Oak Island, including Plaintiffs' properties. Thus, as in *Ricks*, sewer service was available to all parcels in Oak Island, including Plaintiffs' parcels. Moreover, unlike in *Ricks* where the Court was interpreting the scope of the rate-setting authority of a broadly applicable statute, in this case, the narrowly applicable Session Law specifically granted Oak Island the authority to impose Fees upon Plaintiffs' as owners of parcels of property that can be served by the Town's sewage collection and treatment plant and that could benefit from the availability of sewage treatment. S.L. 2006-54 §§ 1, 4.

Plaintiffs rely heavily upon *Holmes Harbor Sewer Dist. v. Holmes Harbor Home Bldg. LLC*, 123 P.3d 823 (Wash. 2005), wherein the court concluded that a statute authorizing water-sewer districts to charge rates for sewer service and facilities did not allow a district to assess monthly fees on undeveloped properties. *Id.* at 827. Such reliance is misplaced.

The statute at issue allowed a district to " 'fix[] rates and charges for furnishing sewer and drainage service and facilities to those *to whom* service is available . . . .' " *Id.* at 824-25 (quoting RCW 57.08.081(1)) (emphasis added). The court concluded that the text of the statute required "districts to furnish some level of sewer and drainage service" to an individual in order to impose rates and charges. *Holmes*, 123 P.3d at 825. The court then analyzed the statutory framework governing the general powers of water-sewer districts as well as the district's resolution governing the use of the system which provided, "Nothing in this Resolution is intended, nor shall it be construed, to grant to any person or entity any right to connect to the Public Sewer System" to determine to whom service was available. *Id.* at 824.

In holding that RCW 57.08.081(1) did not give the district the authority to assess monthly fees against undeveloped properties, the court reasoned,

> [t]hough the legislature may not have intended that a physical connection be made for sewer service to be available, the language of RCW 57.08.081(1) requires that some level of service be furnished. The statutory framework governing water-sewer districts also requires more than an uncertain opportunity for an unimproved property to connect to the system, especially in this case where under the resolution the property owners have no right or duty to connect.

Id. at 826.

Holmes Harbor is not binding on this Court and is nonetheless distinguishable from the present case. Unlike the plain language of the statute in *Holmes Harbor*, which only authorized charges to be assessed against individuals to whom sewer service was being furnished, the plain language of the Session Law in this case authorizes Fees to be imposed for the general availability of sewer service within the district, and specifically authorizes the district to include parcels of property that are not presently served by the Town's sewage collection and treatment plant, but could be.

Moreover, while the State of Washington's statutory framework informed the court's interpretation of "*to whom* service is available" and, thus, when an individual could be charged for sewer service, this Court need not engage in statutory interpretation of the Session Law's language, as it plainly authorizes Oak Island to impose Fees upon all owners of developed and undeveloped parcels of property within the Town's fee-supported sewer district as a result of sewer service being available within the district. *See Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) ("If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.").

Furthermore, while opinions from other jurisdictions interpreting forms of the word "available" in light of their own statutory schemes and case law may be instructive, *see*, *i.e.*, *Durango W. Metro D. No. 1 v. HKS Joint Venture P'ship*, 793 P.2d 661 (Colo. App. 1990) (concluding the district could charge an availability of service fee for water and sewer services to vacant unimproved lots within the district); *McMillan v. Texas Nat. Res. Conservation Comm'n*, 983 S.W.2d 359 (Tex. App. 1998) (holding standby fees for available water and sewer services could be charged even though lots were not connected to the water and sewer mains), they are not necessarily persuasive, as is the case with *Holmes*

Harbor, and they are not binding on this Court. What is binding on this Court is the plain meaning of the Session Law, in keeping with North Carolina case law, which compels a conclusion that Oak Island was authorized to collect Fees from Plaintiffs.

Harmony with N.C. Gen. Stat. § 160A-317(a)

Plaintiffs next argue that the Session Law's term "availability of sewer service" is not in harmony with the terms of N.C. Gen. Stat. § 160A-317(a), which governs the power of a city to require connections to water or sewer service. Plaintiffs assert that because § 160A-317(a) only requires an owner of developed property to connect the owner's premises to a sewer line, or pay a fee in lieu thereof, the Session Law may only require an owner of a developed property to pay a sewer debt fee. Plaintiffs' argument lacks merit.

When statutes "deal with the same subject matter, they must be construed *in pari materia*, and harmonized to give effect to each." *Gravel Co. v. Taylor*, 269 N.C. 617, 620, 153 S.E.2d 19, 21 (1967). "When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction." *State ex rel. Utilities Comm'n. v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citations omitted).

Even assuming, for this discussion's sake, the Session Law and N.C. Gen. Stat. § 160A-317(a) deal with the same general subject matter – the regulation of town sewer systems – each law addresses a different, specific matter regarding such regulation, and each law is clear and understandable on its face. Thus, no construction is needed to give effect to each.

The Session Law addresses Oak Island's authority to charge land owners Fees to pay for sewer debt service. The law specifically allows the creation of a fee-supported, as opposed to use-supported, sewer treatment district for "all properties that are or can be served by the sewage collection and treatment plant" and to "impose annual fees for the availability of sewer service" upon "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment." S.L. 2006-54 §§ 1, 3, 4.

N.C. Gen. Stat. § 160A-317 addresses a city's authority to require connections to water or sewer service and charge for such connections. The law specifically allows a city to require "an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments . . . to connect the owner's premises

with the water or sewer line or both, and may fix charges for the connections." N.C. Gen. Stat. § 160A-317(a). The statute further allows the city to "require payment of a periodic availability charge" in lieu of requiring connection. *Id.*

While N.C. Gen. Stat. § 160A-317 applies only to "an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments[,]" the Session Law lacks such limiting language, and explicitly applies to "all properties that are or can be served by the sewage collection and treatment plant" and to "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment." S.L. 2006-54 §§ 1, 4.

Had the legislature intended for the Session Law to impose annual fees for the availability of sewer service within the district only upon owners of developed property, the legislature could have mirrored the language in N.C. Gen. Stat. § 160A-317(a) when drafting the Session Law, making it applicable only to "an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments . . . ." N.C. Gen. Stat. § 160A-317(a). But the legislature did not do so, and we will not read language into the Session Law that is not reflected therein. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (We "presum[e] that the legislature carefully chose each word used.") (citation omitted).

I thus conclude that the Session Law granted Oak Island the statutory authority to impose the Fees upon owners of undeveloped parcels.

C. No "Full Credit or Rebate" of Fees

Plaintiffs next argue "it was error to grant Defendant's motion for summary judgment for the reason that Defendant provided a full credit or rebate of the sewer district fee to taxpayers on developed lots" thereby: (1) denying Plaintiffs the equal protection of the law, (2) taking Plaintiffs' private property for public use without just compensation, (3) violating the requirement for just and equitable taxation, (4) violating the requirement for exclusive public purpose of taxes, and (5) violating the principle of uniformity of taxation. I address each argument in turn.

Equal Protection

Plaintiffs argue they were denied equal protection of the law "because [D]efendant provided a full credit or rebate of the sewer district fee to taxpayers on developed lots[.]" Plaintiffs more specifically argue, "[t]here could be no reasonable basis for the classifications of improved and unimproved properties, and for the consequently differential

treatment of them, the unimproved properties being required to pay, and the improved properties being totally subject to refund."[4]

But, as Plaintiffs conceded at oral argument and this opinion details above, Defendant did not provide a full credit or rebate of the Fees to owners of developed lots. Owners of developed parcels paid sewer debt service fees on a monthly basis throughout the year, but were also charged the yearly Fee on their year-end tax bill. Those owners received a credit in the amount of the Fee on their year-end tax bill to avoid double-billing them for sewer debt service payments.

Plaintiffs' equal protection argument thus fails.

Taking Without Just Compensation

Plaintiffs next argue that the Fee imposed on undeveloped property owners is a taking of private property for public use without just compensation, in violation of Article I, Section 19 of the North Carolina Constitution. Plaintiffs argue that "[t]o lay a burden on one group of taxpayers for the benefit solely of another group of taxpayers, is a clear violation of the principle prohibiting taking of private property for public use without just compensation, and is contrary to Section 19."

Plaintiffs' argument again fails because, as described above, owners of developed parcels were not given full refunds of the Fees. To the extent Plaintiffs are arguing that *any* Fees imposed on the undeveloped property owners are takings, irrespective of the Fees imposed on developed property owners, this argument too fails.

The Federal Takings of the Fifth Amendment of the United States Constitution forbids the taking of private property by the government without just compensation. *Sullivan v. Pender Cty.*, 196 N.C. App. 726, 731, 676 S.E.2d 69, 73 (2009) (quotation marks and citations omitted). "[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989) (citations omitted).

"[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *United States v. Sperry*

4. Plaintiffs make no equal protection argument based on any difference in the amount of sewer debt service fees charged to the developed and undeveloped parcel owners or the methods used to collect the fees. Those arguments are thus not before us.

Corp., 493 U.S. 52, 63 (1989). Moreover, a user fee need not "be precisely calibrated to the use that a party makes of Government services. . . . All that we have required is that the user fee be a fair approximation of the cost of benefits supplied." *Id.* at 60 (internal quotation marks and citation omitted); *see Massachusetts v. United States*, 435 U.S. 444, 468 (1978) (holding that a federal fee imposed on civil aircraft was a fair approximation of the cost of the benefits supplied where "[e]very aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States . . . [a]nd even those aircraft, if there are any, that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed and in that the provision of the services makes the airways safer for all users").

The Fee in this case is not a taking because it is a "reasonable user fee" "imposed for the reimbursement of the cost of government services" and is a fair approximation of the cost of benefits supplied. *Sperry*, 493 U.S. at 63. The Session Law specifies that the Fees "may not exceed the cost of providing the sewer collection facility within the municipality and the cost of the contract with a county to provide it with the facilities to transport, treat, and dispose of the municipality's effluent." S.L. 2006-54 § 4. Furthermore, the Session Law requires Oak Island to "credit the fees collected within the District to a separate fund to be used only to pay the debt service of the sewer system." *Id.* at § 6. The Session Law is clear, and Plaintiffs make no argument to the contrary, that the fees are being "imposed for the reimbursement of the cost of government services." *Sperry*, 493 U.S. at 63.

Moreover, Plaintiffs are directly and indirectly benefited by Oak Island's comprehensive sewer system. Sewer lines are present in front of each parcel of property and are ready for immediate use when Plaintiffs choose to connect to the system. Furthermore, Plaintiffs benefit now and in the future from the installation and maintenance of Oak Island's comprehensive sewer system which helps prevent and eliminate hazardous pollution. As our Supreme Court explained in *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928),

> It is a matter of common knowledge that odor from human excrement in a fairly thickly settled community will affect all around, the shifting wind makes it offensive in the entire district. The water and sewer eliminates this condition not only the annoyance, but the danger that comes from the fly feeding on filth and carrying the germ and thus pollute and

> poison food and drink. A water and sewer system eliminates the breeding places. It is a well known medical fact that filth breeds typhoid fever and the fly carries the germ. *See Storm v. Wrightsville Beach*, [189 N.C. 679, 128 S.E. 17 (1925)]. . . . Water, sewer, drainage and screening have been of untold value to the human family.

Id. at 731, 143 S.E. at 534-35; *see also Board of Water & Sewer Comm'rs of the City of Mobile v. Yarbrough*, 662 So.2d 251, 254 (Ala. 1995) ("The citizens . . . are directly or indirectly affected by the results of the pollution of [public] waters and the beneficial results to be obtained by the elimination of the pollution will be a public benefit to the entire community and citizens thereof.").

Because the Fees are user fees for benefits Plaintiffs received, Plaintiffs' takings argument also fails.

Tax-based Arguments

Plaintiffs next argue that the Fee is actually a "true tax and subject to all of the principles to taxation." Based on this premise, Plaintiffs argue that the Fee violates Article V, Sections 2(1) and 2(2) of the North Carolina Constitution, which relate to the power of taxation, and N.C. Gen. Stat. § l05-380(a), which relates to tax refunds.

Our Supreme Court has recognized that a local assessment for public improvements is not a tax, as taxes are levied for purposes of general revenue. *S. Ry. Co. v. City of Raleigh*, 9 N.C. App. 305, 176 S.E.2d 21 (1970).

> "[L]ocal assessments . . . are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit. These assessments, it has been suggested, proceed upon the theory that when a local improvement enhances the value of neighboring property, it is reasonable and competent for the Legislature to provide that such property shall pay for the improvement."

Id. at 309, 176 S.E.2d at 23 (quoting *Tarboro v. Forbes*, 185 N.C. 59, 61, 116 S.E. 81, 82 (1923); *see also Kenilworth v. Hyder*, 197 N.C. 85, 90, 147 S.E. 736, 738 (1929) ("Provisions relating to taxation generally are uniformly held not applicable to local assessments or special taxation for improvements.").

Here, the Session Law creates a fee-supported sewer district for Oak Island. The Fees are specifically allocated to pay down the debt on Oak Island's sewer system, which provides a purely local improvement to the residents of Oak Island and helps a limited class of citizens by providing them with benefits different from those of the general public. Because those living in Oak Island receive a special, distinct benefit in exchange for paying the Fees, the Fees are not being collected for general revenue purposes. Accordingly, the Fees are not taxes in the meaning of the North Carolina Constitution.

Because the Fees are not taxes, Plaintiffs' tax-based arguments also fail.

Conclusion

I conclude there is no merit to Plaintiffs' arguments that the Fees are unauthorized by statute, unconstitutional, and violative of certain tax principles. As I conclude there is no genuine issue as to any material fact and Oak Island is entitled to judgment as a matter of law, I would affirm the trial court's order granting summary judgment in favor of Oak Island.

MUSSELWHITE v. CHESHIRE

[266 N.C. App. 166 (2019)]

MICHAEL MUSSELWHITE, PLAINTIFF
v.
L. BRIAN CHESHIRE, DEFENDANT

No. COA18-1083

Filed 2 July 2019

1. Appeal and Error—abandonment of issues—challenged findings of fact—sufficiency of evidence

In an appeal from an order involuntarily dismissing plaintiff's claims against his former business partner, where plaintiff's brief challenged nineteen findings of fact in the order but raised arguments regarding only two of those findings, any arguments against the other seventeen findings were deemed abandoned under Appellate Rule 28(b)(6). Additionally, the two findings that plaintiff did address did not justify reversal where one was immaterial to the issues on appeal and the other was supported by competent evidence.

2. Fraud—claims against former co-franchisee—inducement to execute buyout of corporate interests—involuntary dismissal

In a lawsuit between former co-franchisees who owned and operated restaurant franchises through two limited liability corporations (LLCs), the trial court properly dismissed plaintiff's fraud claims with prejudice pursuant to Civil Procedure Rule 41(b). Plaintiff alleged that defendant fraudulently induced him to execute an agreement—in which plaintiff sold back his interests in the LLCs—by telling him that the restaurant chain required plaintiff to divest his LLC interests, but plaintiff's only evidence to support this allegation was his own uncorroborated testimony. Additionally, defendant's other alleged misrepresentations to plaintiff—that the parties "just had to get some agreement on paper" to appease the restaurant chain and that "everything would be okay" if they did so—were not actionable as fraud.

3. Contracts—claims against former co-franchisee—unilateral mistake—mutual mistake—agreement divesting corporate interests—involuntary dismissal

In a dispute between former co-franchisees for a restaurant chain, the trial court—pursuant to Civil Procedure Rule 41(b)—properly dismissed plaintiff's action seeking to set aside an agreement in which plaintiff sold back his interests in the parties' two

limited liability corporations (LLCs). Plaintiff did not show a right to relief based on unilateral mistake because he failed to show that defendant defrauded him or subjected him to imposition, undue influence, or other oppressive circumstances when the parties executed the agreement. Also, plaintiff did not show a right to relief based on mutual mistake where defendant denied operating on a mistaken belief (namely, that the restaurant chain required plaintiff to divest his LLC interests) when executing the agreement.

4. Fiduciary Relationship—co-members of limited liability corporation—breach of fiduciary duty—not actionable

In an action between former co-members of two limited liability corporations, plaintiff's claim for breach of a fiduciary duty was properly dismissed with prejudice pursuant to Civil Procedure Rule 41(b), because members of a North Carolina limited liability corporation do not owe fiduciary duties to each other.

5. Contracts—express contract—unjust enrichment claim—not actionable

In a dispute between former co-franchisees for a restaurant chain, where plaintiff executed an express contract agreeing to divest himself of his interests in the parties' two limited liability corporations (LLCs) in exchange for financial benefits, the trial court properly dismissed plaintiff's unjust enrichment claim pursuant to Civil Procedure Rule 41(b).

6. Contracts—breach—implied covenant of good faith and fair dealing—involuntary dismissal—proper

In a dispute between former co-franchisees for a restaurant chain, where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations in exchange for various financial benefits, the trial court properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim for breach of the implied covenant of good faith and fair dealing. The record showed that plaintiff received the benefits he bargained for under the contract.

7. Contracts—former business partners—agreement divesting corporate interests—unconscionability—involuntary dismissal—proper

In a dispute between former business partners, where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations (LLCs), the trial court

properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim alleging unconscionability. The record showed that the parties negotiated the contract upon the same information and on equal terms, plaintiff understood what he was signing, and plaintiff received hefty financial benefits in exchange for his LLC interests.

8. Trusts—constructive—dispute between former business partners—involuntary dismissal—proper

In a dispute between former co-franchisees for a restaurant chain, plaintiff's cause of action for a constructive trust was properly dismissed pursuant to Civil Procedure Rule 41(b) where the trial court properly determined that defendant neither defrauded plaintiff nor breached a fiduciary duty owed to plaintiff.

Appeal by Plaintiff from order entered 14 February 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2019.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for Plaintiff-Appellant.

Shipman & Wright, LLP, by James T. Moore, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff appeals from an order dismissing his claims with prejudice pursuant to North Carolina Rule of Civil Procedure 41(b). Plaintiff contends that the trial court erred by making unsupported findings of fact and erroneous conclusions of law in determining that Plaintiff had not shown a right to relief on his various causes of action. We affirm.

I. Background

Plaintiff worked in the foodservice industry from the 1970s until 2015, when the transaction at issue in this case took place. From 1994 to 2015, Plaintiff worked at and managed a number of restaurants affiliated with Smithfield's Chicken 'N Bar-B-Q ("Smithfield's"), a restaurant chain owned by Mid-Atlantic Restaurant Corporation ("MARC") and managed by Smithfield Management Corporation ("SMC") and, later, Cary Keisler, Inc.

Plaintiff and Defendant have had a personal and professional relationship that began when they met while working together in the mid-1970s. In the late 1990s, Plaintiff approached Defendant about

partnering to purchase and thereafter operate a Smithfield's franchise in Ogden. Defendant agreed, and the parties created two entities to own (Flamingo Properties, LLC) and operate (Whiteshire Foods, Inc.) the restaurant. Flamingo Properties purchased the real property, and Whiteshire Foods acquired the franchise and rented the property from Flamingo Properties.

Each of the parties owned a 50% interest in each entity. As with the other restaurants subsequently purchased as described below, Plaintiff was responsible for managing the Ogden restaurant and liaising with Smithfield's corporate management at SMC/Cary Keisler, and Defendant provided the collateral necessary to secure financing to purchase the property (which was also secured by personal guarantees from both Plaintiff and Defendant) but otherwise had a largely passive role in the joint ventures.

Several years later, through Flamingo Properties, the parties purchased another property in Wilmington, and Whiteshire Foods began to operate a Smithfield's franchise thereupon pursuant to a franchise agreement with Smithfield's. In 2007, the parties created Flamingo South, LLC (together with Flamingo Properties, the "LLCs"), for the purpose of acquiring and operating another Smithfield's restaurant in Leland. As with Flamingo Properties, each of the parties owned a 50% interest in Flamingo South. Flamingo South purchased the Leland property, and the parties began operating a Smithfield's franchise thereupon in 2008 through a separate operating entity they created and pursuant to a franchise agreement with Smithfield's. Flamingo South purchased another property in Shallotte in 2013, and the parties began operating another Smithfield's franchise thereupon in 2014 through another operating entity they created and pursuant to a franchise agreement with Smithfield's.

In 2010, Smithfield's sent a notice to the parties that their franchises were not being operated in compliance with the applicable franchise agreements as required. Plaintiff responded to Smithfield's that he would address the deficiencies.

In early February 2015, the parties met with David Harris, a Cary Keisler executive, who told them that their franchises were not being operated in compliance with the applicable franchise agreements. Rather than invoke Smithfield's rights to terminate the franchises, Harris proposed (1) purchasing the Leland and Shallotte franchises from the operating entities, and renting those properties from the LLCs, and (2) allowing the parties (through the relevant operating entities) to continue

to operate the Ogden and Wilmington franchises, contingent upon Plaintiff's increased attention to the operational deficiencies in those locations. The parties agreed to Harris' proposed deal.

In late May 2015, Harris visited the Ogden and Wilmington franchises, and found them in unacceptably-poor condition. On 23 May 2015, Harris met with Plaintiff at the Ogden franchise, and physically barred Plaintiff from the premises, telling Plaintiff that (1) the Ogden franchise was terminated effective immediately, (2) Plaintiff was to have no further contact with Smithfield's or its employees, and further communication with Smithfield's would have to be through Defendant, and (3) Plaintiff would get no "golden parachute" from the company. Plaintiff contacted Defendant the same day and told him about the incident. On 26 May 2015, Smithfield's formally notified the parties by letter that the parties' remaining franchises were being terminated.

Defendant decided to end his business relationship with Plaintiff. Defendant consulted Jeffrey Keeter, the attorney to the parties' joint ventures, and Keeter advised Defendant to try to buy Plaintiff out of his interests in the LLCs. Defendant and Plaintiff met multiple times and negotiated the terms of Plaintiff's buyout, by which Plaintiff agreed to assign his interests in the LLCs back to the LLCs in exchange for a promissory note signed by the LLCs entitling Plaintiff to (1) $375,000 paid in monthly payments over five years, (2) car and car insurance payments for two years, (3) health insurance payments for two years, and (4) cellular telephone payments for two years. Defendant had Keeter draft a Membership Redemption Agreement providing for the assignment of the LLC interests in exchange for the consideration described above, including a promissory note entitling Plaintiff to $375,000 in payments from the LLCs over a period of 60 months (collectively, the "Redemption Agreement"). Keeter reviewed the Redemption Agreement with Plaintiff, explained the legal effect of the Redemption Agreement to Plaintiff, and asked Plaintiff whether he had any questions about the Redemption Agreement; Plaintiff told Keeter that he had none. The parties executed the Redemption Agreement on 29 May 2015, which contained a merger clause stating that it comprised the entire agreement between the parties.

At no time prior to executing the Redemption Agreement did Plaintiff contact Harris or anyone else at Smithfield's to inquire as to what Smithfield's might do if Plaintiff retained an interest in the LLCs. Plaintiff has received all benefits contemplated by the Redemption Agreement.

Plaintiff filed a complaint against Defendant and the LLCs on 26 January 2016 bringing causes of action for breach of contract, fraud

and misrepresentation, constructive fraud, breach of fiduciary duty, unjust enrichment, unfair and deceptive trade acts, and breach of the implied covenant of good faith and fair dealing in connection with the Redemption Agreement transaction. Plaintiff also purported to bring causes of action for specific performance and constructive trust, and filed a notice of *lis pendens* against the land held by the LLCs. Distilled to its essence, the complaint alleged that Plaintiff was tricked by Defendant into believing that Smithfield's had told Defendant that Plaintiff was required to divest himself of his interests in the LLCs, and that in inducing Plaintiff to execute the Redemption Agreement, Defendant had represented to him that the Redemption Agreement was a meaningless transaction necessary to appease Smithfield's that Plaintiff was no longer involved with what had been the parties' joint venture.

On 2 May 2016, Defendant and the LLCs moved to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2016). On 6 July 2016, Defendant withdrew the Rule 12 motion in his individual capacity, and on 12 July 2016 the trial court granted the LLCs' Rule 12 motion, leaving only Plaintiff's causes of action as alleged against Defendant personally. The 12 July 2016 order also struck the notices of *lis pendens* filed by Plaintiff.

On 29 July 2016, Defendant answered, asserted a number of affirmative defenses, and filed counterclaims against Plaintiff for breach of contract and breach of fiduciary duty. Plaintiff replied to Defendant's counterclaims on 2 and 9 September 2016.

On 27 February 2017, following discovery, Defendant moved the trial court under N.C. Gen. Stat. § 1A-1, Rule 56 (2017), for summary judgment. Plaintiff then moved the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 15 (2017), for leave to amend his complaint and reply to Defendant's counterclaims on 22 May 2017.

On 15 August 2017, the trial court ruled on Defendant's Rule 56 motion, granting Defendant summary judgment as to Plaintiff's cause of action for unfair and deceptive trade acts, but denying Defendant's motion as to Plaintiff's other causes of action. On 18 December 2017, based on agreement of the parties, the trial court granted Plaintiff's motion to amend the complaint, and set the matter for bench trial. Plaintiff's amended complaint added causes of action for fraud in the inducement, mutual mistake, unilateral mistake, and unconscionability.

On 22 December 2017, Defendant moved to dismiss Plaintiff's amended complaint under N.C. Gen. Stat. § 1A-1, Rules 9(b) and 12(b)(6) (2017), and again moved the trial court for summary judgment under Rule 56. The trial court denied Defendant's motions on 7 February 2018.

A trial on the issues was held on 12 February 2018, and on 14 February 2018 the trial court entered an order dismissing all of Plaintiff's causes of action with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (2018). The trial court concluded that Plaintiff had not shown a right to relief under any of his causes of action, and that Plaintiff had ratified the Redemption Agreement by accepting the benefits thereof after learning that Smithfield's had not required Plaintiff to divest himself of his interests in the LLCs. Defendant voluntarily dismissed his counterclaims pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) and (c) (2018), the following day. Plaintiff timely appealed.

II. Discussion

On appeal, Plaintiff contends that the trial court erred by (1) making findings of fact unsupported by competent evidence in the record and (2) making erroneous conclusions of law in dismissing Plaintiff's causes of action sounding in fraud, mistake, breach of fiduciary duty, unjust enrichment, constructive trust, breach of the implied covenant of good faith and fair dealing, and unconscionability.

a. Standard of Review

Rule 41(b)—pursuant to which the trial court involuntarily dismissed Plaintiff's causes of action—reads in relevant part as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

N.C. Gen. Stat. § 1A-1, Rule 41(b).

Our Supreme Court has elaborated:

> [T]he trial judge has the power under Rule 41(b) to adjudicate the case on the merits at the conclusion of the plaintiff's evidence; and is not obliged to consider plaintiff's evidence in a light most favorable to plaintiff as he would have to do in a jury case. . . . When a motion to dismiss

> pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony.

Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 305 N.C. 633, 639-40, 291 S.E.2d 137, 141 (1982) (internal quotation marks and citations omitted).

We review a trial court's dismissal under Rule 41(b) to determine (1) whether the trial court's findings of fact are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and the judgment. *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010). The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support findings to the contrary. *McNeely v. S. Ry. Co.*, 19 N.C. App. 502, 505, 199 S.E.2d 164, 167 (1973). Where findings of fact are not disputed on appeal, we deem them supported by competent evidence, and they are binding on appeal. *State v. McLamb*, 186 N.C. App. 124, 125, 649 S.E.2d 902, 903 (2007). We review the trial court's conclusions of law *de novo*. *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

b. Findings of Fact

[1] Plaintiff first argues that the trial court made a number of findings of fact that are unsupported by competent evidence in the record. In his brief, Plaintiff "specifically assigns error" in a single sentence to a list of 19 of the trial court's findings of fact, but provides no rationale as to why Plaintiff believes any of those findings, except for findings of fact 24 and 31, were erroneous. Although Plaintiff elsewhere in his brief again mentions findings of fact 25, 33, 39, and 43, Plaintiff does not explain why these findings are erroneous, and even cites to one of them to support his own argument, *see* Appellant's Brief, at 16 ("The Court's finding of fact 25 backs up this contention."). Accordingly, Plaintiff's arguments regarding all but findings of fact 24 and 31 are deemed abandoned. N.C. R. App. P. 28(b)(6) (2018) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Cox v. Cox*, 238 N.C. App. 22, 29, 768 S.E.2d 308, 313 (2014) ("As to the remaining findings of fact listed in this subsection of defendant's argument, defendant does not specifically support her challenge with any contention, and we deem those arguments abandoned.").

We conclude that finding of fact 24—to wit, that the Leland and Shallotte franchises were underperforming and that Plaintiff was not properly overseeing the franchises generally—is not material to any of the trial court's legal conclusions appealed by Plaintiff, and as such, cannot be the basis for reversal. *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) ("Immaterial findings of fact are to be disregarded."). Plaintiff's argument regarding finding of fact 24 is accordingly unavailing.

The contested portion of finding of fact 31 states that "Defendant stood to lose substantially more in the event of a loan default and foreclosure, having placed his separately owned property and cash as collateral." This finding is supported by Plaintiff's own testimony that it was Defendant who provided the collateral necessary to obtain financing for the parties' joint ventures, and that Defendant would be most impacted in the event of foreclosure.

Plaintiff argues that he "stood to lose his entire income" in such a scenario, which he considers "substantially more," ostensibly on a relative basis. But Plaintiff's reading of finding of fact 31 misconstrues the finding. The trial court found that Defendant stood to lose more than Plaintiff, without any qualifier that it calculated the values of the parties' prospective individual losses in relation to the parties' individual wealth or other individual income. Thus, assuming *arguendo* that finding of fact 31 is not immaterial to the trial court's conclusions of law, we conclude that it is supported by competent evidence in the record.

Accordingly, the trial court's relevant findings of fact are supported by competent record evidence, and are thus binding for purposes of our analysis.[1]

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1. In the section of his brief regarding the trial court's findings of fact, Plaintiff also argues that "nowhere in the findings of fact is the most crucial portion of the case," i.e., "whether or not [Defendant] made specific representations to [Plaintiff which] induced [Plaintiff] to sign the Redemption Agreement." A trial court's failure to find a fact is not error unless the fact is necessary to support the trial court's order. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 217, 195 S.E.2d 514, 516 (1973) ("When findings of fact sufficient to determine the entire controversy are made by the court, failure to find other facts is not error."). As such, we address Plaintiff's argument in section II(c), in which we analyze the trial court's conclusions of law that Plaintiff did not show a right to relief on his causes of action sounding in fraud.

c. Fraud

[2] Although Plaintiff has appealed the dismissal of his causes of action for both fraud and misrepresentation[2] and fraud in the inducement, both causes of action concern Plaintiff's allegation that Defendant told Plaintiff that Smithfield's required Plaintiff to divest his LLC interests, which Plaintiff alleges fraudulently induced Plaintiff to execute the Redemption Agreement. Under North Carolina law, a plaintiff bringing causes of action under either fraud and misrepresentation or fraud in the inducement theories are required to convince the fact finder to find that the defendant falsely represented or concealed a material fact.[3] Since (1) the alleged facts underlying both of the fraud-based causes of action here before us are the same, (2) both causes of action require the fact finder to find that the defendant falsely represented or concealed a material fact, and (3) as discussed below, we discern no error from the trial court's failure to find that Defendant falsely represented or concealed anything from Plaintiff and thus discern no error with respect to the dismissal of either of the fraud-based causes of action, we analyze Plaintiff's fraud-based causes of action together as a cause of action alleging fraud.

"To establish a claim for fraud, plaintiff must show that: (1) defendant[] made a representation of a material past or existing fact; (2) the representation was false; (3) defendant[] knew the representation was false or made it recklessly without regard to its truth or falsity; (4) the representation was made with the intention that it would be relied upon; (5) plaintiff did rely on it and that her reliance was reasonable; and (6) plaintiff suffered damages because of her reliance." *Broughton*, 161 N.C. App. at 31, 588 S.E.2d at 29 (citation omitted).

In support of his argument that the trial court erred in dismissing his fraud-based causes of action, Plaintiff points to three alleged misrepresentations by which he argues Defendant fraudulently caused him to enter into the Redemption Agreement: (1) Defendant's telling Plaintiff that Smithfield's required Plaintiff to divest his interests in the LLCs, (2) that the parties "just had to get some agreement on paper" in order

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2. North Carolina courts analyze a cause of action alleging fraud and misrepresentation as a cause of action alleging fraud. *See, e.g.*, *Folmar v. Kesiah*, 235 N.C. App. 20, 25, 760 S.E.2d 365, 367 (2014) (analyzing the plaintiff's "fraud and misrepresentation claim" as alleging fraud).

3. *Compare Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 31, 588 S.E.2d 20, 29 (2003) (elements of fraud), *with Harton v. Harton*, 81 N.C. App. 295, 298-99, 344 S.E.2d 117, 119-20 (1986) (elements of fraud in the inducement).

to appease Smithfield's, and (3) that "everything would be okay" if they did so.

Regarding the second and third alleged misrepresentations, such statements are not actionable as fraud because neither are a representation of a material past or existing fact upon which Plaintiff could have reasonably relied. *See Broughton*, 161 N.C. App. at 31, 588 S.E.2d at 29 ("To establish a claim for fraud, plaintiff must show that: (1) defendants made a representation of a material past or existing fact; . . . [and] (5) plaintiff did rely on [the representation] and that her reliance was reasonable" (citation omitted)); *see also State v. Williams*, 98 N.C. App. 274, 280, 390 S.E.2d 746, 749 (1990) (in the securities fraud context, a fact is material when "there is a substantial likelihood that a reasonable [purchaser] would consider [the fact] important in deciding" whether or not to make the purchase (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))).

Regarding the first alleged misrepresentation, Plaintiff asserts on appeal that "it is uncontested that [Defendant] represent[ed] to [Plaintiff]: (1) that [Plaintiff] would have to divest his interest in both the businesses and land-holding entities in order for the businesses to continue[.]" But Plaintiff's assertion is not accurate. The record shows that Defendant, in his answer, denied Plaintiff's allegation that Defendant made such a representation to Plaintiff, and Defendant argues on appeal that the only evidence that such a statement was made is Plaintiff's own testimony. Plaintiff does not rebut Defendant's argument in a reply brief, *see* N.C. R. App. P. 28(h), by citing to record evidence that corroborates Plaintiff's testimony, and our review of the record reveals none.

It was the trial court's prerogative to weigh all of the evidence and to decide whether it was convinced that Defendant made such a statement to Plaintiff.[4] *See In re Patron*, 250 N.C. App. 375, 384, 792 S.E.2d 853, 860 (2016) ("[W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable

4. Plaintiff argues in his brief that Defendant told Keeter that Plaintiff "had to be out of both the restaurants and land ownership" in an attempt to support his fraud arguments. But because Plaintiff does not allege that Plaintiff relied upon the alleged statement to Keeter—let alone that Plaintiff did so reasonably—this alleged statement cannot be actionable as fraud. *Broughton*, 161 N.C. App. at 31, 588 S.E.2d at 29 ("To establish a claim for fraud, plaintiff must show that: . . . (4) the representation was made with the intention that it would be relied upon; [and] (5) plaintiff did rely on it and that her reliance was reasonable." (citation omitted)).

inferences to be drawn therefrom[.]" (citation omitted)). Moreover, it was within the trial court's discretion to determine Plaintiff's testimony was not credible, and to decline to find facts based upon Plaintiff's testimony. *See id.* (holding no error for failure to find a fact, reasoning that "[i]f the trial court did not make a finding of fact with regards to Appellant's self-defense claim, it simply means that the trial court was not convinced that it was valid."); *see also Agee v. Thomasville Furniture Prods.*, 119 N.C. App. 77, 83, 457 S.E.2d 886, 890 (1995) (holding trial court's finding of the absence of a fact testified to by the plaintiff was supported by competent evidence where the trial court found the plaintiff not credible).

As such, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his fraud-based causes of action.

d. Mistake

[3] Plaintiff argues that the trial court erred by dismissing Plaintiff's causes of action seeking to set aside the Redemption Agreement under the doctrines of unilateral mistake and mutual mistake.

i. Unilateral mistake

Under the doctrine of unilateral mistake, a contract may be avoided when one party makes a mistake induced by "fraud, imposition, undue influence, or like oppressive circumstances" attributable to his counterparty. *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 136, 217 S.E.2d 551, 560 (1975).

As explained above, we discern no error in the trial court's conclusion that Plaintiff has not shown that Defendant defrauded him. Plaintiff makes no argument that he was subjected to imposition or undue influence, and his arguments regarding other oppressive circumstances—e.g., that Plaintiff was placed under duress by virtue of Defendant's alleged misrepresentation, and that Defendant breached a fiduciary duty owed to him—are unavailing as a matter of law. *See Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 705 (1971) (duress requires wrongful act of another); Section II(e)(i) *infra* (holding no breach of fiduciary duty). Accordingly, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief under the doctrine of unilateral mistake.

ii. Mutual mistake

Under the doctrine of mutual mistake, "a contract may be avoided on the ground of mutual mistake of fact when there is a mutual mistake

of the parties as to an existing or past fact that is material and enters into and forms the basis of the contract or is 'of the essence of the agreement.' " *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998) (citation omitted). Plaintiff argues that Defendant "was mistakenly operating under the fact that Smithfield had directed him that [Plaintiff] could no longer be involved in the business in any capacity, even as landlord." Plaintiff thus alleges a mistake as to an existing or past fact—i.e., that Smithfield's had directed Defendant that Plaintiff could not hold interests in the LLCs going forward—which became a mutual mistake of fact that formed the "entire basis of signing the [Redemption] Agreement" when Defendant communicated that fact to Plaintiff in negotiating the Redemption Agreement.

But the trial court did not find that Defendant believed that Smithfield's had given him any direction about Plaintiff's involvement with the LLCs, let alone that Defendant told Plaintiff that he had been so directed. Before the trial court, Defendant gave the following testimony:

> Q. You never told [Plaintiff] that Mr. Harris told you that [Plaintiff] had to get out of the real estate LLCs, did you?
>
> A. No, sir.

As finder of fact, the trial court was free to believe Defendant's testimony. And as discussed above in section II(c), the trial court was also free to disbelieve the only evidence to the contrary: Plaintiff's own testimony. Since a fact finder's determinations regarding weight and credibility of evidence are conclusive on appeal, *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 806, 323 S.E.2d 368, 369 (1984) ("It is not for us, as an appellate court, to determine the weight and credibility to be given evidence in the record."), by believing Defendant and disbelieving Plaintiff, the trial court conclusively rejected Plaintiff's argument that there was a mutual mistake as to a past or existing fact here.

We accordingly conclude that the trial court did not err in determining that Plaintiff had not shown a right to relief under the doctrine of mutual mistake.

e. Plaintiff's Remaining Causes of Action

Plaintiff also argues that the trial court erred by dismissing Plaintiff's causes of action alleging breach of fiduciary duty, unjust enrichment, breach of the implied covenant of good faith and fair dealing, unconscionability, and constructive trust.

i. Breach of fiduciary duty

[4] The elements of a breach of fiduciary duty cause of action are: (1) a fiduciary relationship existed between the parties; (2) the defendant breached the fiduciary duty owed to the plaintiff; and (3) the breach proximately caused the plaintiff injury. *See Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013). Members of a North Carolina limited liability company, like the parties to this lawsuit, do not owe fiduciary duties to each other that can be breached. *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009) ("Members of a limited liability company are like shareholders in a corporation in that members do not owe a fiduciary duty to each other or to the company."). Accordingly, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his cause of action alleging breach of fiduciary duty.

ii. Unjust enrichment

[5] "The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor." *Krawiec v. Manly*, 370 N.C. 602, 615, 811 S.E.2d 542, 551 (2018) (citation omitted). However, where "a contract exists between the parties, the law will not imply a contract." *Se. Shelter Corp. v. Btu, Inc.*, 154 N.C. App. 321, 331, 572 S.E.2d 200, 207 (2002). Because Plaintiff and Defendant are contractual counterparties, the trial court did not err in determining that Plaintiff did not show a right to relief on his unjust enrichment cause of action.

iii. Breach of implied covenant of good faith and fair dealing

[6] "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted). But Plaintiff makes no allegation that he has been deprived of the benefits of the Redemption Agreement. Indeed, the record shows that Plaintiff admitted that he has received the benefits bargained for, including cashing every one of the checks remitted to him by the LLCs in accordance with the Redemption Agreement's provisions.

Since the record does not reflect that Plaintiff was deprived of the benefits of the Redemption Agreement, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his cause of action alleging breach of the implied covenant of good faith and fair dealing.

iv. Unconscionability

> **[7]** A court will find a contract to be unconscionable only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. An inquiry into unconscionability requires that a court consider all the facts and circumstances of a particular case, and if the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable. . . . A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability. . . . [P]rocedural unconscionability involves bargaining naughtiness in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power. Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms.

Tillman v. Commer. Credit Loans, Inc., 362 N.C. 93, 101-03, 655 S.E.2d 362, 369-70 (2008) (internal quotation marks, brackets, and citations omitted), *abrogated as discussed in Torrence v. Nationwide Budget Fin.*, 232 N.C. App. 306, 322-23, 753 S.E.2d 802, 811-12 (2014).

Plaintiff's sole argument in support of his unconscionability cause of action is that signing the Redemption Agreement caused him to earn less than he allegedly would have earned had he not done so. "The question of unconscionability is determined as of the date the contract was executed[,]" *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 212, 652 S.E.2d 701, 712 (2007), meaning that a court will not adjudge a contract based upon how uncertain events unfolded following the contract's execution. As such, even presuming that Plaintiff established at trial that the LLCs brought in income following the Redemption Agreement's execution sufficient to render the bargain Plaintiff made relatively uneconomical, a bad bargain does not render a contract unconscionable absent evidence that the contract was tainted by, e.g., unequal bargaining positions, oppression, and the like. *See Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 90, 721 S.E.2d 712, 722 (2012) ("People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain." (citation omitted)).

The record here shows that Plaintiff negotiated the Redemption Agreement with Defendant based upon the same information and upon equal terms, that Plaintiff admitted that the terms of the contract were all true and that he understood what he was signing, and that Plaintiff walked away with hundreds of thousands of dollars and various benefits guaranteed in exchange for his share of the LLCs' uncertain future profits.

We accordingly conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his unconscionability cause of action.

v. Constructive trust

[8] As the trial court correctly noted, a constructive trust is a remedy, not a cause of action, and is "merely a procedural device by which a court of equity may rectify certain wrongs." *Weatherford v. Keenan*, 128 N.C. App. 178, 179, 493 S.E.2d 812, 813 (1997) (citation omitted); *see Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (1999) ("Courts of equity will impose a constructive trust to prevent the unjust enrichment of the holder of the legal title to property acquired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." (citation omitted)). Since, as discussed above, we conclude that the trial court did not err by determining that Plaintiff has not shown any fraud or breach of fiduciary duty by Defendant, and since we discern no other circumstances justifying the imposition of a constructive trust upon Defendant, we conclude that the trial court did not err in dismissing Plaintiff's cause of action for constructive trust.

f. Ratification

Because we conclude that the trial court did not err in determining that Plaintiff has not shown any right to relief, we need not address Defendant's affirmative defense of ratification.

III. Conclusion

Because we conclude that the trial court did not err in its findings of fact or in determining that Plaintiff did not show a right to relief under any of his various causes of action, we affirm.

AFFIRMED.

Judges BRYANT and STROUD concur.

PARKER v. COLSON

[266 N.C. App. 182 (2019)]

TERRY PARKER, PLAINTIFF
v.
HENRY COLSON, BARBARA COLSON MYERS, AND VICKIE COLSON, DEFENDANTS

No. COA18-145

Filed 2 July 2019

1. Animals—dog attacks—negligence per se—violation of municipal ordinance—vicious animals—keeping or causing to be kept

There was a genuine issue of material fact as to whether defendant homeowner violated a municipal ordinance regarding the keeping of vicious animals when her brother let his pit bulls (which had attacked another person the previous month) out of their enclosure, resulting in an attack upon plaintiff pedestrian. A fact-finder could conclude that defendant caused the dogs to be kept pursuant to the ordinance by providing the dogs—which were boarded on her sister's next-door property, which had no running water or electricity—with electricity for cooling and water, by storing their food in her house, and by sometimes feeding and caring for the dogs herself.

2. Animals—dog attacks—negligence per se—violation of municipal ordinance—unrestrained dogs

In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on a per se negligence claim that was based on an alleged municipal ordinance violation. The ordinance made it unlawful for any person to "cause, permit, or allow" a dog to be away from the owner's premises unrestrained, but defendant was not present on the premises when her brother let his dogs out of their enclosure.

3. Animals—dog attacks—negligence per se—violation of municipal ordinance—general liability—no duty of care

In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on a per se negligence claim that was based on an alleged municipal ordinance violation. The ordinance, which made the custodian of every animal liable for the animal, imposed no duty of care on custodians and thus could not serve as the basis for a negligence per se claim.

4. Animals—dog attacks—premises liability—dogs kept on sister's next-door property—sufficiency of control

PARKER v. COLSON

[266 N.C. App. 182 (2019)]

In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on plaintiff pedestrian's common law negligence claim that was based on premises liability. There was no evidence that defendant homeowner—who helped to provide food, water, and electricity for her brother's pit bulls, which were kept on their sister's next-door property—exercised any control over the manner in which the dogs were enclosed or released from their enclosure. Furthermore, the attack did not occur on defendant's property.

Appeal by Plaintiff from order entered 31 March 2016 by Judge Mary Ann Tally in Anson County Superior Court. Heard in the Court of Appeals 22 August 2018.

Hunter & Everage, PLLC, by Charles Ali Everage, for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by John P. Barringer and Meredith L. Cushing, for defendant-appellee.

MURPHY, Judge.

Plaintiff, Terry Parker ("Parker"), challenges the trial court's order granting summary judgment to Defendant, Barbara Colson Myers ("Myers"), on Parker's negligence *per se* claim based upon three municipal ordinances and negligence claim based on a theory of premises liability. We hold the trial court erred in granting Myers's motion for summary judgment on Parker's negligence *per se* claim based on Wadesboro Ordinance § 4-4, but affirm the trial court's order granting Myers's motion for summary judgment on the negligence *per se* claim based on Wadesboro Ordinances §§ 4-7 and 4-31. Additionally, we affirm the trial court's order granting Myers's motion for summary judgment on Parker's negligence claim based on a theory of premises liability.

BACKGROUND

Myers is the sole owner of a residential home and the parcel of land upon which it sits at 914 Dora Street in Wadesboro. Immediately adjacent to Myers's parcel of land is a parcel owned by Myers's sister, Vickie Colson ("Vickie"). On Vickie's property at 916 Dora Street sits a little stone house that was uninhabitable and boarded up, with no running water or electricity. There is no fence separating the two parcels. Neither property is the primary residence of either sister. Myers's

primary residence is in Texas, and Vickie's primary residence is in South Carolina. However, at all relevant times, the two sisters and their brother, Henry Colson ("Henry"), all had keys and full access to Myers's home and both parcels of land.

Henry resided in Charlotte and ran a pitbull breeding "business." Henry's girlfriend told him that he could not continue to board his two pitbulls at her residence due to insurance concerns. Henry told his sisters that he would be moving the two dogs to Wadesboro and selling any puppies born on the property. An enclosure was built to board the two dogs on Vickie's property. Myers's home was used to store the food for the dogs, and, since Vickie's property had no running water or electricity, it was also used to provide water and electricity to care for the dogs. In 2013, none of the siblings resided primarily in Wadesboro, despite the dogs being boarded there. Henry would drive from Charlotte only twice a week to feed the dogs; however, when Myers occasionally visited Wadesboro, she would provide the food and water for the dogs.

During one of Myers's visits to her home in Wadesboro, Myers let the two dogs out of their enclosure to roam free in the yard. While the dogs were out of the enclosure, Parker's brother, Tommy Parker ("Tommy"), was walking along Dora Street. Myers yelled at Tommy not to come into the yard because the dogs were roaming free. Hearing Myers yell, the two dogs "just took off." The dogs chased Tommy and "jumped on him," causing a wound that drew blood.

Approximately one month later on 30 August 2013, the date in question, the dogs were let out of the enclosure by Henry and were drinking water from the faucet located on Myers's property. At this time, Parker was walking down the street where the properties were located. While walking, Parker observed the two dogs run from Myers's property towards him. The dogs attacked, leaving Parker hospitalized for 13 days with severe and permanent injuries to his legs.

Parker subsequently brought a personal injury action against Henry, Vickie, and Myers in Anson County Superior Court, the procedural history of which we outlined in *Parker v. Colson*, ___ N.C. App. ___, 795 S.E.2d 654, 2017 WL 490487 (2017) (unpublished):

> In his complaint, [Parker] asserted claims grounded in strict liability and negligence *per se*. [Myers] subsequently filed a motion to dismiss [Parker's] claims against her pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 14 October 2015, the trial court granted [Myers's] motion as to [Parker's] claim based on strict

> liability but denied the motion as to the claim based on negligence *per se*.
>
> On or about 21 January 2016, [Myers] filed a motion for summary judgment as to the remaining claims against her. [Parker] subsequently filed a cross-motion for partial summary judgment against all of the defendants on the issue of negligence *per se*. A hearing was held before the Honorable Mary Ann Tally on 28 March 2016 in connection with the pending motions. On 31 March 2016, the trial court issued an order (1) granting [Parker's] motion for summary judgment on the issue of negligence *per se* as to Henry and Vickie; and (2) granting [Myers's] motion for summary judgment, thereby dismissing all remaining claims against her.

Id. at *1. Parker now appeals the trial court's order granting Myers's motion for summary judgment.

ANALYSIS

A. Standard of Review

Our standard of review for an order granting summary judgment is well established:

> [We] review[] a trial court's entry of summary judgment de novo. 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. The moving party has the burden to show the lack of a triable issue of fact and to show that he is entitled to judgment as a matter of law.

Ron Medlin Constr. v. Harris, 364 N.C. 577, 580, 704 S.E.2d 486, 488 (2010) (citations and internal quotation marks omitted). Through this filter, we examine the forecast of evidence and the claims asserted by Parker.

B. Negligence *Per Se*

Parker contends the trial court erred in granting Myers's motion for summary judgment on his claims for negligence *per se* for violations of

§§ 4-4, 4-7, and 4-31 of Wadesboro Code of Ordinances. We discuss each in turn.

"A public safety statute [or ordinance] is one imposing upon the defendant a specific duty for the protection of others." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (citation, alteration, and internal quotation marks omitted). A violation of a public safety statute or ordinance constitutes negligence *per se*, unless the statute or ordinance indicates otherwise. *Id.* Accordingly, "[a] member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator." *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994). Under such a claim, "[t]he statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply – proof of the breach of the statute is proof of negligence." *Carr v. Murrows Transfer, Inc.*, 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964). "But causal connection between the violation and the injury or damage sustained must be shown; that is to say, proximate cause must be established." *Id.*

The rules and canons of construction and interpretation of statutes apply equally to municipal ordinances. *Woodhouse v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980).

1. Wadesboro Ordinance § 4-4

[1] Wadesboro Ordinance § 4-4 states:

> It shall be unlawful for any person within the town to keep or cause to be kept any vicious animal unless such vicious animal is confined within a secure building or enclosure, or under restraint.

A "vicious animal" is defined in Wadesboro Ordinance § 4-1 as "any animal that has made an attack on a human being by biting or in any manner causing abrasions or cuts of the skin or one which without provocation attacks other pets." "Under restraint" is defined under Wadesboro Ordinance § 4-1 as follows:

> *Restraint.* An animal is under restraint if:
>
> (1) It is controlled by means of a chain, leash or other like device;
>
> (2) It is at a heel position with the custodian and is obedient to his [or her] commands;

(3) It is in the immediate vicinity of and visible to the custodian and is under his direct voice control and obedient to his command;

(4) It is on or within a vehicle being driven or parked; or

(5) It is within a secure enclosure.

Parker contends there were genuine issues of material fact in that (1) § 4-4 was a public safety ordinance imposing a special duty upon Myers for the protection of others, (2) Parker was a member of the class intended to be protected by the ordinance, and (3) he sustained injuries that were proximately caused by Myers's breach of the ordinance. We agree.

In determining whether an ordinance is a public safety ordinance, we look to whether it is "designed for the protection of life or limb" and "imposes a duty upon members of society to uphold that protection." *State v. Powell*, 336 N.C. 762, 768-69, 446 S.E.2d 26, 29 (1994). This determination is a question of law. In *Powell*, a municipal ordinance provided that "no dog shall be left unattended outdoors unless it is restrained and restricted to the owner's property by a tether, rope, chain, fence or other device." *Id.* at 769, 446 S.E.2d at 30. Our Supreme Court held that the ordinance served the dual purpose of protecting persons as well as property, stating, "the life and limb of pedestrians, joggers, and the public at large are protected by this ordinance . . . by confining the dogs to the owner's property while providing, in some cases, an adequate fence to keep animals and children from accessing the lot and being exposed to the dogs." *Id.* Here, Ordinance § 4-4 is designed for similar purposes. By making it unlawful for a person to keep or cause to be kept a vicious animal unless confined or under restraint as designated, the ordinance protects the public and passersby from any danger posed by vicious animals. Moreover, it imposes a special duty to confine or restrain a vicious animal that they keep or cause to be kept. For these reasons, § 4-4 is a safety ordinance that imposes a special duty upon persons who keep animals within the town.

Next, we consider whether Parker was a member of the class intended to be protected by the ordinance. The evidence forecasted at summary judgment showed that Parker was walking along Dora Street in Wadesboro when the two dogs ran towards and attacked him, causing severe injuries. Parker was a pedestrian and member of the general public, so he is within the intended protected class.

Having determined that § 4-4 is a public safety ordinance and that Parker was a member of the group intended to be protected by the

ordinance, we must next determine whether there was a genuine issue of fact as to Myers's violation of the ordinance that proximately caused Parker's injuries.

Myers does not contest that the two dogs were not confined or under restraint within the meaning of Ordinances §§ 4-1 and 4-4 and were vicious animals under Ordinance § 4-1. Rather, she argues that she could not violate the statute, as she was not "an 'owner' or 'keeper' of the dogs . . . and therefore could not 'keep or cause to be kept' the dogs in question." Myers's argument fails to consider the plain language of the ordinance. There is no language in § 4-4 to indicate that the ordinance only applies to owners of a vicious animal. Moreover, the ordinance does not limit liability to only "keepers" – it expressly states "it shall be unlawful for any person . . . to keep *or cause to be kept* any vicious animal unless . . . ." The ordinance applies not only to those persons who keep a vicious animal themselves, but also persons who cause the vicious animal to be kept. To accept Myers's argument that the statute only applies to owners or keepers would be to render the phrase "cause to be kept" redundant and surplusage. *See Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) ("The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant.").

Taking the evidence in the light most favorable to Parker, there is a genuine issue of fact as to whether Myers caused the two dogs to be kept. Henry stated that the food for the dogs was stored in Myers's house and that the water for the dogs to drink and the electricity to cool the dogs during the hot summer months came from Myers's home with both her knowledge and acquiescence. The food storage, water, and electricity were critical to the keeping of the dogs, as Vickie's home on the property where the dogs were housed was boarded up, with no running water or electricity. Indeed, when Henry was asked whether he could have kept the dogs in their kennel at this location without the use of Myers's home for food storage, water, and electricity, he stated, "No. I couldn't." Additionally, when Myers visited Wadesboro, she would feed and care for the dogs herself so that Henry did not have to drive from Charlotte to Wadesboro. This forecasted evidence, taken in the light most favorable to Parker, shows that Myers's role in keeping the dogs went beyond mere knowledge of their keeping and raises a genuine issue of whether Myers caused the dogs to be kept under the language of Ordinance § 4-4. Because there was a genuine issue of fact as to whether Myers violated Ordinance § 4-4 when she caused to be kept a vicious animal that was not confined within a secure building or enclosure or under

restraint, and whether this violation proximately caused the injuries inflicted upon Parker, the trial court erred in granting Myers's motion for summary judgment on Parker's negligence *per se* claim based on Ordinance § 4-4.

2. Wadesboro Ordinance § 4-7

[2] Wadesboro Ordinance § 4-7 states:

> It shall be unlawful for any person within the town to cause, permit, or allow a dog to be away from the premises of the owner, or to be in a public place, or on any public property in the town, unless such dog is under restraint.

For the same reasons that we concluded that § 4-4 is a public safety ordinance and that Parker was a member of the class intended to be protected by the ordinance, we conclude the same of § 4-7. This ordinance, requiring any dog to be restrained when away from the premises of the owner, in a public place, or public property in the town parallels the ordinance in *Powell* that our Supreme Court concluded "protects people generally by confining the dogs to the owner's property while providing, in some cases, an adequate fence to keep animals and children from accessing the lot and being exposed to the dogs." *Powell*, 336 N.C. at 769, 446 S.E.2d at 30. Parker, as a passerby, was a member of the class of "pedestrians, joggers, and the public at large [to be] protected by this ordinance . . . ." *Id.*

Parker, however, fails to forecast evidence that raises a genuine issue of material fact as to whether Myers violated this ordinance. There is a violation of § 4-7 where an individual causes, permits, or allows a dog to be away from the owner's premises or in any of the listed premises unless under restraint. Therefore, based on the plain language of the ordinance, it must be the act or failure to act by the alleged individual that leads to the dog being away from an owner's premises or in a public place or public property while unrestrained. Here, even taking the evidence in the light most favorable to Parker, there was no such act or omission by Myers that caused, permitted, or allowed the two dogs to be away from Vickie's property on the day in question. Henry was the only individual on the premises that day, and he was the only individual who caused, permitted, or allowed the two dogs to be away from their enclosure and Vickie's property without restraint.

The trial court did not err in granting summary judgment in Myers's favor on Parker's negligence *per se* claim based upon Ordinance § 4-7.

3. Wadesboro Ordinance § 4-31

[3] Wadesboro Ordinance § 4-31 states:

> The custodian of every animal shall be responsible for the care, licensing, vaccination and behavior of such animal.

Custodian is defined under the Municipal Code as "the person owning, keeping, having charge of, sheltering, feeding, harboring, or taking care of any animal, or is otherwise the keeper of an animal. A custodian is not necessarily the owner."

We need not determine whether there was a genuine issue as to whether Myers was a custodian within the meaning of the ordinance, as Ordinance § 4-31 cannot serve as a predicate ordinance upon which a claim of negligence *per se* is based. To establish a negligence *per se* claim, the ordinance must impose *a specific duty* upon a defendant for the protection of others. *Stein*, 360 N.C. at 326, 626 S.E.2d at 266. However, § 4-31 imposes no duty of care on any alleged custodian. Rather, it merely makes a statement of liability without respect to a standard of care to which an individual must abide. Without a standard of care set by the ordinance, there can be no breach of the ordinance to constitute negligence *per se*. *See Carr*, 262 N.C. at 554, 138 S.E.2d at 231 ("The distinction, between a violation of a statute or ordinance which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances."). There was no evidence presented that Myers breached this ordinance, and summary judgment based upon this claim was appropriately granted.

C. Premises Liability

[4] Parker also contends the trial court erred in granting Myers's motion for summary judgment on his common law negligence claim. We disagree.

Parker argues that "[c]ommon law has recognized in dog bite cases a negligence claim under the theory of premises liability against a non-owner of the dogs" and cites *Holcomb v. Colonial Assoc., L.L.C.*, 358 N.C. 501, 507, 597 S.E.2d 710, 714 (2004), for this proposition. While Parker is correct that a common law negligence claim may be brought against a non-owner of a dog who injures a plaintiff, he erroneously asserts this doctrine's applicability in the case before us.

In *Holcomb*, our Supreme Court addressed "the issue of whether a landlord can be held liable for negligence when his tenant's dogs injure

a third party." *Holcomb*, 358 N.C. at 503, 597 S.E.2d at 712. In *Holcomb*, defendant Olson resided as a tenant in a home situated on thirteen acres owned by defendant Colonial; Management Associates managed the property for Colonial. *Id.* The plaintiff was a demolition contractor who visited the rental homes on the property to provide Colonial with an estimate for demolition. *Id.* at 504, 597 S.E.2d at 713. One of Olson's two dogs, which Management permitted Olson to keep, lunged at the plaintiff, causing him injuries. *Id.*

Our Supreme Court first noted that "[t]he fact that we recognize a strict liability cause of action against owners and keepers of vicious animals . . . does not preclude a party from alleging negligence (a different cause of action) against a party who may or may not be an owner or keeper of an animal." *Id.* at 507, 597 S.E.2d at 714 (2004). "Under a premises liability theory, the *Holcomb* Court [then] held that the landlord could be held liable because the 'lease provision granted [landlord] sufficient control *to remove the danger* posed by [tenant]'s dogs.' " *Stephens v. Covington*, 232 N.C. App. 497, 499, 754 S.E.2d 253, 255 (2014) (citing *Holcomb*, 358 N.C. at 508-09, 597 S.E.2d at 715). Thus, *Holcomb* and the cases following it make clear that the crux of imposing liability on a landowner for injuries inflicted on a third person by a dog attack under a theory of premises liability is whether the landlord had "sufficient control to remove the danger posed by [the tenant's] dog." *Holcomb*, 358 N.C. at 508-09, 597 S.E.2d at 715; *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255 ("[I]t was still clear from [*Holcomb*] that it was not merely the landlord's control of the property, but particularly the landlord's sufficient control to remove the danger posed which resulted in the landlord's liability." (citation and internal quotation marks omitted)).

Even taken in the light most favorable to Parker, there is no evidence Myers exercised sufficient control to remove the danger posed by Henry's dogs. Vickie owned the property where the dogs' enclosure was located, meaning Myers exercised no control over the manner in which the dogs were housed or enclosed. Moreover, Myers exercised no control over the manner in which the dogs were released from that enclosure or whether they were under restraint when released by Henry. Significantly, the attack did not occur on the property owned by Myers. Such circumstances are fundamentally different from those cases cited by *Holcomb* where a landlord had the power to control the harboring of a dog on the landlord's property.[1] Without a forecast of evidence that

1. *See Batra v. Clark*, 110 S.W.3d 126, 129–30 (Tex.App.-Houston 1st Dist. 2003); *see also Uccello v. Laudenslayer*, 44 Cal.App.3d 504, 514, 118 Cal.Rptr. 741, 747 (1975) (holding the landowner had control via the power "to order his tenant to cease harboring the dog

Myers exercised sufficient control to remove the danger posed by the two dogs, Parker's negligence claim based upon a theory of premises liability fails. The trial court did not err in granting Myers's summary judgment on this theory of liability.

CONCLUSION

With respect to Parker's negligence *per se* claim based on Ordinance § 4-4, Myers failed to show that there was no genuine issue of material fact and that she is entitled to judgment as a matter of law. The trial court erred in granting Myers's motion for summary judgment on this claim. The forecasted evidence, however, failed to raise a genuine issue as to whether Myers violated Ordinance § 4-7, and Ordinance § 4-31 fails to establish a standard of care upon which a claim of negligence *per se* can be based. The trial court did not err in granting Myers's motion for summary judgment on Parker's negligence *per se* claim based on these two ordinances. The trial court also did not err in granting Myers's motion for summary judgment on Parker's negligence claim. We reverse in part and remand and affirm in part.

REVERSED IN PART AND REMANDED; AFFIRMED IN PART.

Judges STROUD and ZACHARY concur.

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under pain of having the tenancy terminated"); *Shields v. Wagman*, 350 Md. 666, 684, 714 A.2d 881, 889–90 (1998) (holding the landowner could exercise control over his tenant's dog by refusing to renew a month-to-month lease agreement); *McCullough v. Bozarth*, 232 Neb. 714, 724–25, 442 N.W.2d 201, 208 (1989) (holding liability may be imposed on a landlord where, "by the terms of the lease, [the landlord] had the power to control the harboring of a dog by the tenant and neglected to exercise that power").

STATE v. CAGLE

[266 N.C. App. 193 (2019)]

STATE OF NORTH CAROLINA
v.
RANDY STEVEN CAGLE, DEFENDANT

No. COA18-720

Filed 2 July 2019

1. Homicide—jury instructions—specific intent—final mandate

In defendant's trial for murder, the trial court did not err by declining to include defendant's requested instruction on specific intent in the final mandate to the jury. Defendant had requested an instruction on his mental condition, and the trial court gave the pattern instruction on voluntary intoxication and its effect on specific intent twice (once for each of the two victims)—and that instruction was not required to be restated in the final mandate.

2. Homicide—jury instructions—request for special instruction—premeditation and deliberation

In defendant's trial for murder, the trial court properly denied defendant's request for a special jury instruction on premeditation and deliberation (which was based on language from a state supreme court opinion) and instead gave the pattern jury instructions on premeditation and deliberation. The instruction was a correct statement of law and embraced the substance of defendant's requested instruction.

3. Homicide—prosecutor's closing arguments—describing defendant as evil—disparaging defendant's expert witnesses

In defendant's trial for murder, the trial court was not required to intervene ex mero motu when the prosecutor described defendant as evil and disparaged his witnesses during closing arguments. North Carolina appellate courts have declined to reverse convictions based on closing arguments referring to defendants as evil, and it was proper for the prosecutor to highlight the potential bias that could result from defendant's expert witnesses being paid for testifying. Even if the prosecutor's reference to the expert witnesses as "hacks" was improper, it was not prejudicial.

Appeal by defendant from judgment entered 18 July 2016 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 30 January 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

BERGER, Judge.

On July 18, 2016, Randy Steven Cagle ("Defendant") was found guilty for the murder of both Tyrone Marshall ("Marshall") and Davida Stancil ("Stancil"). Defendant appeals, arguing that the trial court erred when it did not: (1) include the specific intent jury instruction in the final mandate; (2) instruct the jury with Defendant's requested instruction on deliberation; and (3) intervene *ex mero motu* to strike statements made by the prosecutor during closing arguments. We find no error.

Factual and Procedural Background

On the afternoon of May 7, 2011, Defendant purchased approximately $20.00 of cocaine from Marshall. Defendant called Marshall to complain about the product, and Marshall went to see Defendant at his home. Once Marshall was inside Defendant's home, a fight ensued and Marshall was fatally beaten and stabbed. Defendant then went outside to Marshall's car. Stancil was waiting in the passenger seat with her seat belt still buckled. Defendant broke the passenger window of the vehicle with a baseball bat and fatally stabbed Stancil.

Defendant attempted to dispose of the evidence of his crime by driving Marshall's car about three-tenths of a mile away from his home and abandoning it. Defendant also attempted to clean the crime scene with bleach, and hid two knives under the sink, burned some of Stancil's belongings, and washed his clothes.

The following day, Marshall's abandoned car was found. His body was in the car's backseat and Stancil's body was in the front passenger seat with her seat belt still buckled. Stancil had twenty puncture wounds to her head, jaw, neck, chest and abdomen; defensive wounds on her hands and forearms; and her seatbelt had puncture damage as well. There was broken glass from the passenger window on the driver's seat, and shards of tinted glass were found at Defendant's home. Marshall had puncture wounds to the back of his head, and a very large, gaping wound on the front of his neck.

Defendant was arrested, and on June 6, 2011, he was indicted on two counts of first degree murder. Prior to his arrest, a detective conducted a pat down search and noticed one of Defendant's fingers "had a small cut," but otherwise he had no wounds or bruising.

The State held a Rule 24 hearing on June 28 and announced that it would seek the death penalty. Prior to trial, Defendant filed notice of his intent to introduce evidence of self-defense, mental infirmity, diminished capacity, involuntary intoxication, and/or voluntary intoxication. Defendant also requested before trial that the jury be instructed with additional language on premeditation and deliberation and on specific intent. Defendant's requests were denied.

At trial, Defendant's mental state at the time of the murders was at issue. Multiple medical experts testified and provided their opinions.

During the jury charge conference, the trial court denied Defendant's renewed request for the special instruction concerning Defendant's mental capacity, but did include Defendant's requested instruction on voluntary intoxication. The trial court also denied Defendant's renewed request for a special instruction on premeditation and deliberation, but did not prevent Defendant from arguing Defendant's requested instruction to the jury.

After closing arguments had concluded, Defendant was convicted of two counts of first degree murder. Following the guilt/innocence phase, a capital sentencing hearing was held, and the jury returned recommendations of life imprisonment for both counts. The trial court imposed two consecutive sentences of life without parole.

Defendant timely appeals, arguing that the trial court erred when it: (1) did not give the requested instruction on specific intent in the final mandate; (2) did not give the requested instruction on premeditation and deliberation; and (3) did not intervene *ex mero motu* during the prosecutor's closing argument. We find no error.

I. Jury Instructions

Defendant first contends that the trial court erred when it did not include the specific intent instruction in its final mandate to the jury, and when it did not give his requested instruction on premeditation and deliberation. We disagree.

"Whether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *State v. Lewis*, 346 N.C. 141,

145, 484 S.E.2d 379, 381 (1997) (citations, quotation marks, and brackets omitted). "[W]hen a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith." *State v. Daughtry*, 340 N.C. 488, 516, 459 S.E.2d 747, 761 (1995) (citation and quotation marks omitted). However,

> [a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(a)(2).

If an instructional error is not preserved below, it nevertheless may be reviewed for plain error "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citations and quotation marks omitted)).

Finally, "[a]n instruction to a jury will not be viewed in isolation, but rather must be considered in the context of the entire charge. Instructions that as a whole present the law fairly and accurately to the jury will be upheld." *State v. Roache*, 358 N.C. 243, 303, 595 S.E.2d 381, 419 (2004) (citations omitted).

A. Specific Intent Instruction

[1] Defendant argues that the trial court erred when it did not include the specific intent instruction in the final mandate. Defendant contends in the alternative that if we determine that this issue was not properly preserved, the trial court's failure to include a specific intent instruction in the final mandate constitutes plain error.

Defendant had filed a request for a special instruction on July 6, 2016, in which he requested that additional language regarding specific intent be added to the pattern jury instruction for first degree murder. However, in this request, Defendant did not ask for that special instruction to be included in the final mandate. During the charge conference, Defendant renewed his special instruction request, which was denied. Again, Defendant did not request that the specific intent instruction be included in the final mandate. Moreover, after the trial court had instructed the jury, and upon the trial court's inquiry as to whether either party had any objections to the instructions as given, Defendant did not object on the grounds that the trial court should have included the specific intent instruction in its final mandate. Because Defendant did not object on the grounds that the specific intent instruction should have been included in the final mandate during either the charge conference or after the jury had been charged, Defendant has not properly preserved this issue for appellate review pursuant to Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure.

However, because this error was not preserved, we must determine whether "the trial court committed plain error in omitting specific intent from the final mandate." Defendant argues that the trial court's error had a probable impact on the jury's finding that he was guilty because, "[h]ad one juror been in doubt about [Defendant's] ability to form specific intent, the result of this case could have been a verdict of second-degree murder." We disagree and do not find plain error.

In North Carolina, it is not necessarily error for the trial court to exclude a portion of a requested jury instruction in its final mandate where this exclusion "could not have created confusion in the minds of the jurors as to the State's burden of proof." *State v. Pittman*, 332 N.C. 244, 258-59, 420 S.E.2d 437, 445 (1992). Additionally, when the trial court includes in its jury charge "an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill," it need "not include a similar charge in its final mandate." *Id.* at 258, 420 S.E.2d at 445. Thus, when the trial court gives "the substance of the instruction defendant requested," omission of the

requested instruction from the final mandate does not necessarily constitute plain error. *Daughtry*, 340 N.C. at 516, 459 S.E.2d at 761.

In the present case, Defendant requested an instruction before trial on his mental condition at the time the crime was alleged to have been committed and the effect that voluntary intoxication could have on his ability to form specific intent. When the trial court charged the jury, it gave the North Carolina Pattern Instruction 305.11 on voluntary intoxication and its effect on specific intent twice, once for each of the two victims. This particular instruction does not require that the trial court restate the instruction on specific intent in the final mandate, and the trial court did not err in excluding it from the final mandate.

Moreover, this Court has addressed this allegation of error before, and we are bound by precedent. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

In *State v. Storm*, this Court reviewed for plain error the exclusion from the final mandate of an instruction that the jury could consider defendant's mental condition with regard to his ability to formulate specific intent. *State v. Storm*, 228 N.C. App. 272, 743 S.E.2d 713 (2013). This Court stated:

> In *State v. Pittman*, 332 N.C. 244, 420 S.E.2d 437 (1992), our Supreme Court held that the trial court did not err by denying defendant's request to include an instruction on diminished capacity in its final mandate. *Id.* at 258-59, 420 S.E.2d at 445. Examining the charge as a whole, the Supreme Court determined that the jury could not have been confused as to the State's burden of proof because "[t]he court included in its charge an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill." *Id.* Similarly in *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), when the trial court gave the substance of the instruction defendant requested, the omission of a final mandate including a voluntary intoxication instruction did not constitute plain error. *Id.* at 516, 459 S.E.2d at 761.

Storm, 228 N.C. App. at 276, 743 S.E.2d at 716.

This reasoning and conclusion applies to the error alleged by Defendant here, and we are therefore compelled to come to the same conclusion:

> Examining the jury instructions as a whole, the trial court's instructions do not constitute plain error. Following the instructions on first-degree and second-degree murder, the trial court charged the jury on diminished capacity and voluntary intoxication. The trial court's instruction followed the pattern jury instructions and the trial court gave the instruction twice, once for diminished capacity and once for voluntary intoxication. The voluntary intoxication and diminished capacity instructions each contained mandates, stating that if the jury "[had] reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder," they were not to return a verdict of guilty of first-degree murder. These instructions appropriately state the law on diminished capacity and voluntary intoxication. *See State v. Carroll*, 356 N.C. 526, 539-40, 573 S.E.2d 899, 909 (2002) (finding no plain error where the trial court gave pattern jury instructions on diminished capacity). Based upon the facts of this case and considering the trial court's jury instructions as a whole, defendant cannot meet his high burden of showing that the trial court committed plain error.

Id. at 276-77, 743 S.E.2d at 717.

Thus, the trial court did not err in excluding the specific intent instruction from the instruction's final mandate. Accordingly, the trial court did not err and Defendant cannot argue plain error.

B. Premeditation and Deliberation Instruction

[2] Defendant next argues that he was prejudiced by the trial court's failure to give his requested instruction on premeditation and deliberation drawn from *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). Defendant specifically requested that the following suggested language from *State v. Buchanan* be included in his requested instruction: "for the premeditation the killer asks himself the question, 'Shall I kill him?'. The intent to kill aspect of the crime is found in the answer, 'Yes, I shall.' The deliberation part of the crime requires a thought like, 'Wait, what about the consequences? Well, I'll do it anyway.' " *State v. Buchanan*, 287 N.C. 408, 418, 215 S.E.2d 80, 86 (1975) (citation omitted). We disagree.

Whether the trial court instructs the jury using the pattern jury instructions or "using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *Lewis*, 346 N.C. at 145, 484 S.E.2d at 381 (citation omitted). "As this Court has previously stated, the trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *Id.* (*purgandum*). Furthermore,

> [t]his Court has consistently held that a trial court is not required to give a defendant's requested instruction verbatim. Rather, when the defendant's request is correct in law and supported by the evidence, the court must give the instruction in substance. This rule applies even when the requested instructions are based on language from opinions of the Supreme Court of North Carolina.

State v. Hobbs, ___ N.C. App. ___, ___, 817 S.E.2d 779, 784-85 (2018) (citations and brackets omitted).

> In defining deliberation, this Court has held that deliberation means that defendant carried out the intent to kill in a cool state of blood, not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. Further, this Court stated that deliberation does not require brooding or reflection for any applicable length of time but connotes the execution of an intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design.

Lewis, 346 N.C. at 146, 484 S.E.2d at 381-82 (*purgandum*). "Premeditation and deliberation are ordinarily not susceptible to proof by direct evidence and therefore must usually be proven by circumstantial evidence." *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (citation and quotation marks omitted).

Here, Defendant filed a request for a special jury instruction on premeditation and deliberation, based on *Buchanan*, which was denied. Defendant specifically argues that, unlike his requested instruction, the pattern jury instruction neither adequately defines deliberation nor adequately addresses the requirement that, a defendant must have been able to consider the consequences of his actions for guilt to be established. Defendant requested the following instruction:

> The required intent to kill must be turned over in the mind in order for the mental process of premeditation and deliberation to transpire. You may think of premeditation as the killer asking himself the question, "Shall I kill?," however long this process takes. Deliberation is then found in a process like asking, "Wait, what about the consequences? Well, I'll do it anyway." Unless the state proves to you beyond a reasonable doubt that the defendant was able to and did in fact engage in both processes, you must find the defendant not guilty of first degree murder on the basis of premeditation and deliberation.

The request for this instruction was denied, and the trial court instructed the jury on deliberation and premeditation using North Carolina Pattern Instruction 206.10, which states in pertinent part:

> . . . the State must prove to you . . . beyond a reasonable doubt . . .
>
> Fifth, that the Defendant acted with deliberation, which means that the Defendant acted while the Defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused, violent passion, it is immaterial that the Defendant was in a state of passion or excited when the intent was carried into effect.
>
> Members of the jury, neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by Mr. Marshall; conduct of the Defendant before, during, and after the killing; threats and declarations of the Defendant; use of grossly excessive force; infliction of lethal wounds after Mr. Marshall is felled; brutal or vicious circumstances of the killing; manner in – manner in which or means by which the killing was done; ill will between the parties.

Defendant takes issue with the fact that the trial court's instruction did not "explain[ ] what deliberation means." However, "[t]he trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the

law to the evidence bearing upon the elements of the crime charged." *Lewis*, 346 N.C. at 145, 484 S.E.2d at 381 (citations and quotation marks omitted).

The trial court made a reasoned decision to use the pattern instruction on deliberation, which defined and provided examples of deliberation. Moreover, because the trial court's instruction on deliberation was a correct statement of the law arising from the evidence presented, comported with the pattern jury instruction, and embraced the substance of Defendant's requested instruction, we find no error.

Defendant also asserts that he is entitled to a new trial because he was prejudiced by the omission of his requested instruction. In support of his argument, Defendant cites to North Carolina General Statute Section 15A-1443, which states:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.
>
> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(a), (b) (2017).

Defendant contends that he was prejudiced by the trial court's failure to provide his requested instruction on deliberation because it was relevant to his defense. He further asserts that "if even one juror had reasonable doubt, based on the evidence, that [Defendant] was unable to deliberate his actions and consider the consequences of them, the outcome of the trial might have been different." However, Defendant cannot show prejudice because we have determined that the trial court did not err.

"The nature and number of the victim's wounds is another indicator of premeditation and deliberation. 'The premise of [this] theory of premeditation and deliberation is that when numerous wounds are inflicted,

the defendant has the opportunity to premeditate and deliberate from one blow to the next.' " *Leazer*, 353 N.C. at 239, 539 S.E.2d at 926 (quoting *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653 (1987)) (brackets omitted). At trial, it was revealed that Marshall had multiple lethal and nonlethal injuries, including stab wounds, cuts and punctures, and multiple blunt-force injuries on his head, chest, back, abdomen, arms, and hands. After inflicting these injuries to Marshall, Defendant walked outside and towards Marshall's vehicle. Defendant broke the passenger window and stabbed Stancil twenty times in her head, jaw, neck, chest, and abdomen while she was still seated in the vehicle. Stancil also had at least eight severe defensive wounds on her hands and forearms. "No matter what defendant's intent may have been before he inflicted the first wound, there was adequate time between each blow for defendant to have premeditated and deliberated his actions." *Leazer*, 353 N.C. at 239, 539 S.E.2d at 926. There was such a quantum of evidence from which the jury could find premeditation and deliberation that Defendant would be unable to show prejudice, regardless of which definition was used.

Furthermore, Section 15A-1443(b) is inapplicable because Defendant did not raise any constitutional issues with these jury instructions, either during the jury charge conference or after the charge had been given to the jury. "It is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citation and quotation marks omitted). Thus, any constitutional issues Defendant has raised for the first time on appeal were not preserved for appellate review. *See* N.C.R. App. P. 10(a)(2).

II. Closing Arguments

[3] Defendant further contends that the trial court should have intervened *ex mero motu* to strike statements made by the prosecutor during closing arguments that described Defendant as evil and disparaged Defendant's witnesses. We disagree.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in

> order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

> [W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial.

State v. Huey, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Only where this Court "finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." *Id.* (emphasis added). To establish prejudice, the "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Waring*, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010). Also, when this Court is asked to determine the impropriety of a prosecutor's argument, such that it may violate a defendant's right to a fair trial, "[f]air consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994) (citation and quotation marks omitted).

> A well-reasoned, well-articulated closing argument can be a critical part of winning a case. However, such argument, no matter how effective, must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

State v. Matthews, 358 N.C. 102, 112, 591 S.E.2d 535, 542 (2004) (citation omitted). Furthermore, an argument must avoid base tactics such as "arguing a witness is lying solely on the basis that he will be compensated." *Huey*, 370 N.C. at 187, 804 S.E.2d at 474.

Defendant first contends that it was grossly improper for the prosecutor to refer to Defendant as evil during closing arguments. However,

"[t]he appellate courts of this State have declined to reverse convictions based on closing arguments referring to defendants [as "vile", "amoral", "wicked", and "evil"] or similar language." *State v. Bullock*, 178 N.C. App. 460, 475, 631 S.E.2d 868, 878 (2006) (citing *State v. Flowers*, 347 N.C. 1, 37-38, 489 S.E.2d 391, 412 (1997); *State v. Larrimore*, 340 N.C. 119, 163, 456 S.E.2d 789, 812-13 (1995); *State v. Riley*, 137 N.C. App. 403, 412-13, 528 S.E.2d 590, 596-597 (2000); *State v. Frazier*, 121 N.C. App. 1, 16, 464 S.E.2d 490, 498 (1995)).

Here, Defendant challenges the prosecutor's use of the word evil during the following parts of closing arguments:

> Evil at his core, his rotten core, evil, and there's no other way to explain what you have seen over the last week and a half but his evil. You cannot butcher two people, butcher them, cover yourself in their life's blood, and then twenty-four hours later sit in an interview with two investigators and laugh and joke. There's no other word for it than evil.
>
> . . . .
>
> The problem with evil is that when you look into the abyss of human evil, the darkness, it is frightening. It is disturbing. And reasonable, good people don't want to admit that that kind of evil walks among us.
>
> There's a saying that when you look into the abyss, you look into the darkness of human evil, the problem is that the abyss looks back into you. And so good people had rather not look at that evil, and so they invent terms like broken brain and they invent excuses like my family and drugs and they invent all kinds of other excuses like, "Well, if my wife had just picked up the phone, I would have told the truth." That's the problem with evil is that good, reasonable people won't – don't want to look at it.
>
> Now, I'm not gonna stand up here and you (*sic*) that Chartier, Wilson, and Hilkey are nothing but hacks in it for the money. I will say, though, that they make a pretty good living making excuses for evil. I'm not saying they're bad people. As a matter of fact, I'm saying they're probably good people that don't want to admit that human evil exists, that this kind of human evil exists, so that in their minds, there's got to be some other excuse.

The prosecutor's reference to either what was shown to the jury during the trial, or to the Defendant himself, as evil was not so grossly

improper that the trial court should have intervened *ex mero motu*. Because North Carolina appellate courts have "declined to reverse convictions based on closing arguments referring to defendants" as "evil," *Bullock*, 178 N.C. App. at 475, 631 S.E.2d at 878, we decline to depart from these prior holdings. Accordingly, the trial court did not err when it declined to intervene *ex mero motu* in the prosecutor's closing argument.

Defendant further contends that it was grossly improper for the prosecutor to refer to Defendant's witnesses as "hacks" during closing arguments. However, "it is proper for an attorney to point out potential bias resulting from payment a witness received or would receive for his services, while it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay." *Huey*, 370 N.C. at 183, 804 S.E.2d at 471-72 (citation omitted). While it is improper for a prosecutor to strongly insinuate that "the defendant's expert would say anything to get paid," it is "not so grossly improper as to require *ex mero motu* intervention." *State v. Duke*, 360 N.C. 110, 129-30, 623 S.E.2d 11, 24 (2005) (citing *State v. Rogers*, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002)). Similarly, referring to a witness as a "$15,000 man" during closing arguments is improper, but not "grossly improper" requiring *ex mero motu* intervention by the trial court. *Duke*, 360 N.C. at 130, 623 S.E.2d at 24.

Here, Defendant challenges the statement above, in which the prosecutor said, "Chartier, Wilson, and Hilkey are nothing but hacks in it for the money. I will say, though, that they make a pretty good living making excuses for evil." Even if we were to assume that reference to Defendant's witnesses as "hacks" was improper, "in determining whether argument was grossly improper, this Court considers the context in which the remarks were made, . . . as well as their brevity relative to the closing argument as a whole." *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (citation and quotation marks omitted).

After reviewing the prosecutor's closing argument as a whole, this single phrase is not sufficient reason for us to disturb Defendant's judgment. Moreover, "[a]n attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C. Gen. Stat. § 15A-1230(a) (2017). During trial, all three doctors testified to the amount of money each had made in the past year testifying as an expert witness. Thus, the prosecutor was highlighting a fact in evidence that could have an effect on a witness' credibility. Therefore, while the prosecutor's reference to Defendant's witnesses as "hacks" was improper, it was not prejudicial or "so grossly improper

as to impede the defendant's right to a fair trial." *Huey*, 370 N.C. at 179, 804 S.E.2d at 469. Thus, the trial court did not err when it did not intervene *ex mero motu* in the prosecutor's closing argument. Accordingly, we find no error.

Conclusion

For the reasons stated above, we find that the trial court did not err.

NO ERROR.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
STEPHEN TREY FUTRELLE, DEFENDANT

No. COA18-1289

Filed 2 July 2019

Jurisdiction—bill of information—waiver of indictment—section 15A-642(c)—signature of counsel

The trial court lacked jurisdiction to enter judgment on two offenses charged in a bill of information where the bill's waiver of indictment was not signed by defense counsel as required by N.C.G.S. § 15A-642(c).

Appeal by Defendant from order entered 2 May 2018 by Judge R. Allen Baddour, Jr. in Orange County Superior Court. Heard in the Court of Appeals 9 May 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

MURPHY, Judge.

Defendant, Stephen Trey Futrelle, filed a *Motion for Appropriate Relief* ("MAR") in Superior Court, alleging the trial court lacked subject

matter jurisdiction to enter judgment based upon his plea of guilty to felony possession of a Schedule I controlled substance and misdemeanor possession of more than one-half ounce, but less than one and one-half ounces, of marijuana. Defendant argues the bill of information charging him with these two offenses was invalid because the waiver of indictment contained therein was not signed by his attorney as required by N.C.G.S. § 15A-642(c). We agree and vacate the trial court's order denying Defendant's MAR.

BACKGROUND

Defendant was arrested on 23 August 2014 in Orange County for felony possession of MDMA, a Schedule I controlled substance, and misdemeanor possession of more than one-half ounce, but less than one and one-half ounces, of marijuana. On 7 January 2015, Defendant was charged with these two offenses by bill of information. The bill of information contained a waiver of indictment, which was signed by the prosecutor for the State and Defendant. Defendant's attorney did not sign the waiver of indictment included in the bill of information.

Defendant later pled guilty to the two offenses charged, and the trial court accepted Defendant's plea. The trial court entered a conditional discharge on 7 January 2015 and placed Defendant on supervised probation for 12 months. The conditions of Defendant's probation were twice modified, in May and October 2015. On 31 March 2017, judgment was entered on the two offenses, and the trial court imposed a suspended sentence, placing Defendant on supervised probation for 12 months. Defendant completed probation on 31 March 2018.

On 13 April 2018, Defendant filed an MAR claiming the Superior Court lacked jurisdiction to enter judgment on the two offenses because the bill of information was invalid due to the absence of his counsel's signature. The trial court denied Defendant's MAR, making the following conclusions of law:

> 1. The purpose of NCGS 15A-642 is to ensure that defendants not indicted by the grand jury only appear by bill of information and waiver of the grand jury indictment with the advice and consent of counsel.
>
> 2. Defendant signed the bill of information and though counsel did not, it is clear that the case proceeded with the advice and consent of counsel, as the Transcript of Plea and Conditional Discharge were all executed on the same day (January 7, 2015).

3. These documents, when read together, clearly indicate that the information was executed knowingly and voluntarily.

4. The statutory requirements have been substantially met.

We allowed Defendant's petition for writ of certiorari for the purpose of reviewing the trial court's order denying Defendant's MAR.

ANALYSIS

Defendant argues the trial court erred in concluding that the requirements set by N.C.G.S. § 15A-642 for a valid waiver of indictment were satisfied in this case. He contends that without a valid waiver of indictment, the Superior Court lacked jurisdiction to enter judgment on the two offenses. We agree.

Under N.C.G.S. § 15A-1415, a "defendant may assert by a motion for appropriate relief" that "[t]he trial court lacked jurisdiction over the person of the defendant or over the subject matter." N.C.G.S. § 15A-1415(b) (2017). "When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and internal quotation marks omitted).

The North Carolina Constitution provides that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases." N.C. Const. art. I, § 22. Thus, "[t]he pleading in felony cases and misdemeanor cases initiated in the [S]uperior [C]ourt division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in G.S. § 15A-642. If there is a waiver, the pleading must be an information." N.C.G.S. § 15A-923(a) (2017).

N.C.G.S. § 15A-642 proscribes when an indictment may be waived and the requirements for a valid waiver. The "[i]ndictment may not be waived in a capital case or in a case in which the defendant is not represented by counsel." N.C.G.S. § 15A-642(b) (2017). Additionally, the waiver "must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information." N.C.G.S. § 15A-642(c) (2017). Therefore, in a non-capital case in which a defendant is represented by counsel, a waiver of indictment

is not valid unless it is (1) in writing, (2) signed by the defendant, (3) signed by his or her attorney, and (4) attached to or executed upon the bill of information.

The statutory requirements of N.C.G.S. § 15A-642 are "intended to carry out the constitutional mandate of Article I, Section 22" and are "jurisdictional and mandatory." *State v. Nixon*, ___ N.C. App. ___, ___, 823 S.E.2d 689, 692 (2019). In *Nixon*, the bill of indictment "contain[ed] absolutely no language waiving indictment and no waiver appear[ed] to be attached or included in the Record . . . ." *Id.* In *State v. Neville*, 108 N.C. App. 330, 423 S.E.2d 496 (1992), neither the "defendant nor his attorney signed the waiver of a Bill of Indictment attached to the Bill of Information . . . ." *Id.* at 332, 423 S.E.2d at 497. In both cases, we held that the absence of a valid waiver under N.C.G.S. § 15A-642 deprived the trial court of jurisdiction to accept the defendants' guilty pleas and to enter judgment. *Id.* at 333, 423 S.E.2d at 497; *Nixon*, ___ N.C. App. at ___, 823 S.E.2d at 692.

Here, the bill of information contained a waiver of indictment that was in writing and signed by Defendant; however, the waiver of indictment was not signed by Defendant's attorney. The absence of Defendant's attorney's signature on the waiver of indictment attached to the bill of information violates the requirements of N.C.G.S. § 15A-642. The trial court concluded that, despite the absence of Defendant's attorney's signature on the waiver of indictment, "the statutory requirements have been substantially met." This conclusion ignores the plain language of the statute, which clearly and unambiguously states the "[w]aiver of indictment *must* be . . . signed by the defendant *and his attorney*." N.C.G.S. § 15A-642(c) (2017) (emphasis added). The statute makes no exception for its requirement of a signature by a defendant's attorney, nor does the statute contain language that this requirement can be "substantially met." Rather, this requirement, and all others in N.C.G.S. § 15A-642(c), are "mandatory." *Nixon*, ___ N.C. App. at ___, 823 S.E.2d at 692. The waiver of indictment was thus rendered invalid without Defendant's attorney's signature, depriving the trial court of jurisdiction to accept Defendant's guilty plea and enter judgment. The trial court erred in denying Defendant's MAR.

CONCLUSION

The absence of Defendant's attorney's signature on the waiver of indictment attached to the bill of information rendered the waiver invalid, thus depriving the Superior Court of jurisdiction. Accordingly, we reverse the trial court's order denying Defendant's MAR on this

ground and remand with instructions to grant the MAR and vacate the judgment. We need not reach, and accordingly dismiss, Defendant's motion to arrest judgment made in the alternative.

REVERSED AND REMANDED; DISMISSED.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
BENJAMIN CURTIS LANKFORD, DEFENDANT

No. COA18-854

Filed 2 July 2019

Criminal Law—motion to withdraw guilty plea—filed after sentence known—standard—manifest injustice

The correct standard for analyzing a trial court's denial of a motion to withdraw a plea when a defendant has been informed of his or her sentence but the sentence has not yet been entered is whether manifest injustice will result if the motion is denied—not the more lenient standard stated in *State v. Handy*, 326 N.C. 532 (1990), which permits withdrawal of a plea upon any fair and just reason put forth by a defendant. In this case, the trial court's denial of defendant's motion to withdraw his plea of no contest—in which nine charges were dismissed in exchange for his plea to three charges—did not cause defendant manifest injustice where defendant was competently represented by counsel, he had already received some benefits from the plea, and his reconsideration was not an outright claim of actual innocence.

Appeal by Defendant from judgment entered 13 February 2018 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 12 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory Agan, for the State.

Meghan Adelle Jones for defendant-appellant.

MURPHY, Judge.

Where a defendant moves to withdraw his plea of guilty or no contest before sentencing but after he has been informed of his sentence by the presiding judge, such motion need only be granted where a trial court's denial would result in a manifest injustice. Here, Defendant, Benjamin Curtis Lankford, moved to withdraw his plea of no contest more than two months after he was told his sentence by the trial court. The trial court's denial of Defendant's motion did not result in a manifest injustice, and is affirmed.

BACKGROUND

Defendant was indicted for fleeing to elude arrest, speeding, driving left of center, driving while license revoked, and attaining the status of habitual felon. On 3 February 2018, Defendant entered a plea of no contest to the charges of fleeing to elude arrest, driving while license revoked, and attaining habitual felon status. Nine other charges were dismissed in exchange for his plea. At this hearing, Defendant was advised that he would "be sentenced as a habitual felon at a Class D, prior record level VI, at the lowest end of the mitigated range not less than 77 months nor more than 105 months in the North Carolina Department of Adult Corrections." Defendant was granted pretrial release, and the matter was continued until 2 April 2018, when judgment was to be entered. Defendant failed to appear for his scheduled sentencing hearing, and an order for his arrest was issued on 9 April 2018.

On 8 May 2018, Defendant appeared before the Superior Court on a motion to withdraw his no contest plea. Defendant explained that he believed his plea agreement included a provision that allowed him to amend his plea "if there was any evidence that was brought forth of this case[,]" and that he wished to withdraw his plea. Defendant also told the trial court, "I'm not guilty of these charges that they've charged me with[.]" Defendant's counsel asked to respond to his client's statements and argued "the State could prove absolutely and without a doubt in [trial counsel's] opinion" that Defendant was guilty as charged. Defendant's counsel explained that Defendant was not claiming innocence regarding the charges he had pled to, but was "talking about the possession of a firearm by a felon [charge], one of the cases that would be dismissed [under his plea agreement]." Counsel further expressed that he had advised Defendant against filing a motion to withdraw his plea, and that, if the trial court granted the motion, counsel would need to withdraw his representation because there would be "a conflict that couldn't never [sic] be solved."

The trial court found that Defendant had received competent legal representation and had not been coerced into entering his original plea of no contest. Subsequently, the trial court concluded there was no fair and just reason that Defendant should be permitted to withdraw his plea and denied Defendant's motion to do so. The trial court entered judgment upon the plea of no contest and sentenced Defendant, as previously announced, to an active term of 77 to 105 months.

ANALYSIS

In his only argument on appeal, Defendant argues the trial court erred in denying his motion to withdraw his plea of no contest. Defendant contends the trial court was required to grant his motion because he presented a fair and just reason for withdrawal and the State did not allege or show any substantial prejudice which would have been caused by the withdrawal.

"While there is no absolute right to withdrawal of a guilty plea, withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted with liberality[.]" *State v. Handy*, 326 N.C. 532, 537, 391 S.E.2d 159, 161-62 (1990) (internal citations omitted).

> In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason. On the other hand, where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice.

Id. at 536, 391 S.E.2d at 161 (quoting *State v. Olish*, 164 W.Va. 712, 715, 266 S.E.2d 134, 136 (1980)). Here, Defendant had not yet been sentenced, but had known his sentence for nearly three months before he moved to withdraw his plea of no contest.

During his February hearing, Defendant was advised by the trial court that he would "be sentenced as a habitual felon at a Class D, prior record level VI, at the lowest end of the mitigated range not less than 77 months nor more than 105 months in the North Carolina Department of Adult Corrections." We find this situation different from that in *Handy*, where the defendant attempted to withdraw his guilty plea before he became aware of his sentence. Indeed, in every case the parties cite in their briefs, and all of the cases found in our independent analysis of this issue, the defendant moved to withdraw his plea before he knew his sentence. *See*, *e.g.*, *Handy*, 326 N.C. at 534-35, 391 S.E.2d at 160; *State*

v. Meyer, 330 N.C. 738, 740, 412 S.E.2d 339, 340 (1992); *State v. Deal*, 99 N.C. App. 456, 457, 393 S.E.2d 317, 317 (1990). Whether to grant the level of deference from *Handy* in a case where the defendant moves to withdraw his plea prior to sentencing but after learning his sentence is a matter of first impression.

In *Handy*, the North Carolina Supreme Court reasoned: "A fundamental distinction exists between situations in which a defendant pleads guilty but changes his mind and seeks to withdraw the plea before sentencing and in which a defendant only attempts to withdraw the guilty plea after he hears and is dissatisfied with the sentence." *Handy*, 326 N.C. at 536, 391 S.E.2d at 161. In so reasoning, our Supreme Court recognized some key differences between these two situations:

> First, once sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and therefore wish to have it set aside. Second, at the time the sentence is imposed, other portions of the plea bargain agreement will often be performed by the prosecutor, such as the dismissal of additional charges or the return or destruction of physical evidence, all of which may be difficult to undo if the defendant later attacks his guilty plea. Finally, a higher post-sentence standard for withdrawal is required by the settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea.
>
> These considerations are not present where the defendant seeks to withdraw the guilty plea prior to sentencing.

Id. at 537, 391 S.E.2d at 161 (citing *Olish*, 164 W.Va. at 716, 266 S.E.2d at 136 (citation omitted)).[1] All three considerations are present here,

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1. We recognize that the *Olish* case, which underlies *Handy*, relies upon a since-supplanted federal standard in which "[A] motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; **but to correct manifest injustice** the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." *See* Fed. R. Crim. P. 32 advisory committee's notes (1983) (emphasis added). Since *Olish* was decided, the "manifest injustice" language has been removed, and a defendant may withdraw a guilty or nolo contendere plea "after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2) (2019). In amending the rule, the Advisory Committee hoped to "avoid[] language [regarding manifest injustice] which has been a cause of unnecessary confusion." Fed. R. Crim. P. 32 advisory committee's notes (1983). However, *Handy* has not been overruled or distinguished by our Supreme Court, or the Supreme Court of the United

where Defendant already knew his sentence but was granted a continuance and presentence release. We hold that in such cases it is appropriate to review the trial court's denial of Defendant's motion only to determine whether it amounted to a manifest injustice, and not according to the "any fair and just reason" standard.

Inevitably, we look to similar factors to those described in our existing caselaw to determine whether a denial would amount to a manifest injustice. As is discussed in greater detail below, Defendant had already received part of the benefit of his plea agreement by the time he moved to withdraw it, did not protest his innocence of the charges to which he had already pled guilty, and failed to provide the trial court any other reason why his withdrawal was imperative. The trial court's denial of Defendant's motion does not amount to a manifest injustice.

Even assuming *arguendo* the fair and just standard does apply, Defendant's argument on appeal fails. We "must look to the facts of each case to determine whether a defendant has come forward with a fair and just reason to allow withdrawal of his guilty pleas." *Meyer*, 330 N.C. at 743-44, 412 S.E.2d at 343. Some factors we have considered are "whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. Here, after a careful review of the record before us, we cannot conclude Defendant offered a fair and just reason for withdrawing his plea, let alone that the trial court's denial of Defendant's motion resulted in a manifest injustice.

Regarding a protestation of innocence, Defendant told the trial court, "I'm not guilty of these charges that they've charged me with[.]" Although at first glance this appears to be a protestation of innocence, upon reading the entire record we cannot determine with clarity whether Defendant was claiming actual innocence of the charges to which he had pled no contest. After Defendant claimed he was not guilty of the charges, his counsel explained to the trial court, "he's talking about the possession of a firearm by a felon [charge], one of the cases that would be dismissed [under his plea agreement]." The closest Defendant comes to protesting his innocence of the charges to which he initially pled was explaining, "I just feel like if everything is brought out in every

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States, since it was published, and we remain bound by its holding. *See, e.g.*, *Mahoney v. Ronnie's Road Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997).

case that every officer has charged me with, I know what I'm guilty of and I know what I'm not guilty of. I'm not guilty of all these charges." Reviewing the entire record, we are not convinced Defendant protested his innocence of the relevant charges in his motion to withdraw his plea.

As for the temporal factor, Defendant moved to withdraw his plea approximately ten weeks after he initially entered it. The timing of a motion for withdrawal in relation to the initial plea has received considerable attention by our appellate courts. For example, the defendant in *Handy*—who was allowed to withdraw his plea—moved to withdraw his plea less than 24 hours after he initially entered it. *Handy*, 326 N.C. at 534-35, 391 S.E.2d at 160. In *Meyer*, on the other hand, the defendant's motion to withdraw was denied in part because it was made almost four months after the defendant initially entered his plea. *Meyer*, 330 N.C. at 744, 412 S.E.2d at 343. However, in our Court's first case applying *Handy*, we reasoned "[a]lthough [the defendant] did not attempt to revoke his plea for over four months, this appears to have resulted from his erroneous expectations and lack of communication with his attorney." *Deal*, 99 N.C. App. at 464, 393 S.E.2d at 321 (reversing the trial court's denial of the defendant's motion to withdraw his plea). Even in applying the "fair and just reason" analysis *arguendo*, we would consider the unique fact that Defendant knew what his sentence would be when he moved to withdraw his plea, which demonstrates that his motion did not come "at a very early stage of the proceedings," as was the case in *Handy*, 326 N.C. at 537, 391 S.E.2d at 161-62. The timing of Defendant's motion to withdraw neither bolsters nor subverts his argument that he presented a fair and just reason.

Finally, Defendant argues his counsel was incompetent in representing him during the hearing regarding his motion to withdraw. We are admittedly concerned with defense counsel's balancing of his duty of candor to the tribunal with that of zealous representation during the withdrawal hearing, where he interrupted Defendant on multiple occasions and described to the trial court why he had advised Defendant against attempting to withdraw his plea. However, the record does not indicate Defendant's counsel provided incompetent representation throughout the process. Counsel filed Defendant's motion to withdraw his plea—despite the counselor's personal belief that the motion was meritless—and timely notice of appeal. Defendant was represented by competent counsel at all relevant times throughout this process.

In sum, Defendant did not suffer a manifest injustice when the trial court denied his motion to withdraw his no contest plea. Even applying the less deferential standard described by our Supreme Court in *Handy*,

we would not hold Defendant met his burden of showing that his motion to withdraw was made for a "fair and just reason." We affirm the trial court's denial of Defendant's motion to withdraw his plea.

CONCLUSION

The trial court's denial of Defendant's motion to withdraw his plea of no contest did not cause Defendant to suffer a manifest injustice. Furthermore, Defendant did not present the trial court with a fair and just reason to grant his motion.

AFFIRMED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
EDWARD HAMILTON SOUTHERLAND

No. COA18-1134

Filed 2 July 2019

Indecent Liberties—with a child—attempt—steps beyond mere preparation—delivery of a letter

The State presented sufficient evidence from which a reasonable inference of defendant's guilt of taking or attempting to take indecent liberties with a child could be made, where defendant, a sixty-nine-year-old man, attempted to deliver a letter to an eleven-year-old child specifically requesting to have sex with her.

Appeal by defendant from judgment entered 21 February 2018 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Sarah Holladay for defendant-appellant.

BRYANT, Judge.

Where the evidence, when taken in the light most favorable to the State, was sufficient to show defendant attempted to engage in indecent liberties with a minor child, the trial court did not err in denying defendant's motion to dismiss.

On 21 February 2018, defendant Edward Hamilton Southerland, an elderly man, was tried by a jury and convicted in New Hanover County Superior Court before the Honorable R. Kent Harrell, Judge presiding, on the charge of taking indecent liberties with a child, eleven-year-old A.G.

The State presented evidence that A.G. and her grandmother went to University Arms Apartments to visit a relative. Defendant, who lived in the apartment across from A.G.'s relative, frequently interacted with A.G. and her grandmother, when they came to visit the relative.

On 27 February 2017, defendant gave A.G.'s grandmother a sealed envelope and directed her to deliver it to A.G. A.G.'s name was written on the front of the envelope. In the letter, defendant stated to A.G.:

> Dear [A.G.],
>
> Have you ever been offered something and not followed up on "it," only to wonder what would have happened "if" I had? That's how I have felt about the three balloons you gave me for my birthday, last year.
>
> When you moved, every day I think of you and those balloons. I miss you so much, yet the only thing I have are my memories of you. That makes me feel like the lonely old man that I am. I don't want to feel that way and the only thing that makes me feel young and alive is to wonder what "it" would be like to have sex with you. I'm within sight of being seventy years old and in good health. The only thing I need is a very pretty girl who knows me and likes me. Therefore, the only girl I could possibly like is you.

Defendant wrote at the bottom of the letter to A.G., "[p]lease do me the honor of having sex with me and help me to feel young again. Love, Mr. Ed[.]"

The next day, A.G.'s grandmother read the letter and immediately called the police. Detective Justin Ovaska of the Wilmington Police Department read the letter and went to defendant's apartment where defendant admitted that he wrote the letter to A.G.

At the close of the State's evidence, defendant moved to dismiss arguing that the State did not present substantial evidence that he was actually or constructively in the presence of A.G. Defendant's motion was denied. Defendant took the stand and testified that he "was so tired and lonely from trying to get help [for his post-traumatic stress disorder] that [he] just sat down and wrote [A.G.] a letter." After defendant rested his case, he renewed his motion to dismiss which the trial court denied.

Defendant was found guilty of taking indecent liberties with a child. The trial court sentenced defendant in accordance with the jury verdict, and defendant was ordered to register as a sex offender for thirty years. On 22 February 2018, defendant filed his notice of appeal.

On appeal, defendant argues the trial court erred by denying his motion to dismiss the charge of indecent liberties because the State did not present substantial evidence to support that he was "with" A.G. or that he took steps beyond mere preparation to complete the act. After careful consideration, we disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "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) (quotation marks omitted).

> When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. All evidence actually

> admitted, both competent and incompetent, which is favorable to the State must be considered

State v. Bullard, 312 N.C. 129, 160, 322 S.E.2d 370, 387–88 (1984) (internal citations and quotation marks omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (internal citations and quotation marks omitted).

In the instant case, defendant was indicted for taking indecent liberties with a child in violation of section 14-202.1(a)(1) of our General Statutes. To be convicted of taking indecent liberties with a child: 1) the defendant must be at least sixteen years old, 2) the child must be under the age of sixteen, and 3) the defendant is at least five years older than the child in question. N.C. Gen. Stat. § 14-202.1(a) (2017). Additionally, a defendant is guilty of taking indecent liberties with a child under subsection (a)(1) if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" *Id.* § 14-202.1(a)(1).

As defendant was convicted for indecent acts by delivery of a letter, our analysis, in this case, is controlled by *State v. McClary*, 198 N.C. App. 169, 173, 679 S.E.2d 414, 417 (2009). In *McClary*, the defendant delivered a sexually explicit letter to a fifteen-year-old requesting to have sex, and this Court considered whether the delivery of the letter with sexual language constituted a willful taking, or the attempt to take, indecent liberties with a child to withstand a motion to dismiss. This Court explained that:

> [i]ndecent liberties are defined as such liberties as the common sense of society would regard as indecent and improper. Neither a completed sex act nor an offensive

> touching of the victim are required to violate the statute. This Court has specifically rejected the argument that the utterance of 'mere words,' no matter how reprehensible, does not constitute the taking of an indecent liberty with a child.
>
> The State is required to show that the action by the defendant was for the purpose of arousing or gratifying sexual desire. *[A] variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor.* Moreover, the variety of acts included under the statute demonstrate that the scope of the statute's protection is to encompass more types of deviant behavior and *provide children with broader protection than that available under statutes proscribing other sexual acts.*

Id. at 173–74, 679 S.E.2d at 417–18 (emphasis added) (internal citations and quotation marks omitted). This Court held that the State presented substantial evidence and stated, the "[d]efendant's actions of overtly soliciting sexual acts from [the victim] through the sexually explicit language contained in the letter [fell] within the broad category of behavior that the common sense of society would regard as indecent and improper." *Id.* at 174, 679 S.E.2d at 418.

Similarly, the delivery of a letter in *McClary* —the act found to be in violation of the statute—is indistinguishable as a matter of law from the act in the instant case. Here, the State's evidence established that defendant, who was sixty-nine years old, wrote a letter to A.G., an eleven-year-old, requesting sex to make him "feel young again" and attempted to deliver the letter to A.G. through her grandmother. A.G.'s grandmother testified that the sealed envelope from defendant was addressed to A.G. and that defendant specifically asked her to give the letter to A.G. Based on the evidence, we conclude that an attempt to carry out defendant's ultimate desired act—having sex with A.G.—was made upon delivery of the letter.

We mirror the sentiments of the *McClary* Court in finding that "the completion of defendant's ultimate desired act, [i.e.,] having sexual intercourse and oral sex [with the victim], was not required in order to allow the jury to reasonably infer that defendant's acts of writing and delivering the letter [to the victim] were for the purpose of arousing or gratifying sexual desire." *Id.* at 174, 679 S.E.2d at 418; *see also* N.C.G.S. § 14-202.1 (attempts to take as well as a completed act of taking indecent liberties with children are punishable the same by law). We recognize

that had A.G.'s grandmother not opened the letter and called the police, defendant's letter would have been successfully delivered to his intended recipient, A.G., and thus as in *McClary*, the evidence was sufficient to allow the jury to reasonably infer that defendant acted beyond mere words by delivering the letter expressing his intent to gratify his sexual desire.

Defendant argues that since he "gave his letter to an adult," the act did not constitute a violation under N.C.G.S. § 14-202.1. because A.G. did not receive the letter and he never "saw, heard, touched, or communicated with A.G." However, we reject his argument: as our Supreme Court has previously stated, "the statute does not contain any language requiring . . . the State prove that a touching occurred. Rather, the State *need only* prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire." *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180–81 (1990) (emphasis added).

As our Court noted in *McClary*:

> The requirement that defendant's actions were for the purpose of arousing or gratifying sexual desire may be inferred from the evidence of the defendant's actions. In *State v. McClees*, this Court held that the defendant's act of secretly videotaping an undressed child was for the purpose of arousing or gratifying sexual desire even though no evidence was presented showing that the defendant ever actually viewed the video. Thus, the completion of the defendant's ultimate desired act, watching the video tape, was not required in order to allow the jury to reasonably infer that the defendant's acts of secretly setting up the video camera and arranging for the child to undress directly in front of the camera were for the purpose of arousing or gratifying sexual desire.

McClary, 198 N.C. App. at 174, 679 S.E.2d at 418 (internal citations and quotation marks omitted) (citing *State v. McClees*, 108 N.C. App. 648, 654–55, 424 S.E.2d 687, 690–91 (1993)). Therefore, we hold that defendant's actions in sending a letter with a specific request for delivery to A.G.—clearly expressing a desire to have sex with an underage child—was an attempt to take indecent liberties with a child under the statute.

Accordingly, based on the evidence presented at trial, when viewed in the light most favorable to the State, the trial court properly denied defendant's motion to dismiss as the State presented substantial

evidence to support each element of taking or attempting to take indecent liberties with a child.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
HARVEY LEE STEVENS, JR., DEFENDANT

No. COA17-584

Filed 2 July 2019

Statutes of Limitation and Repose—criminal—misdemeanors—tolling—by valid criminal pleadings

The two-year statute of limitations for misdemeanors (N.C.G.S. § 15-1) did not bar prosecution where defendant was issued a citation for two counts of misdemeanor death by motor vehicle, a misdemeanor statement of charges was filed a little less than two years later, and a grand jury made a presentment and returned an indictment several months after the statement of charges while the action was pending in district court. The valid criminal pleadings (the citation and statement of charges) tolled the statute of limitations, so it was permissible for defendant to be indicted in superior court more than two years after he committed the offenses.

Appeal by the State from order entered 14 February 2017 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State-appellant.

Blair E. Cody, III for defendant-appellee.

MURPHY, Judge.

Defendant, Harvey Lee Stevens, Jr., was charged by citation for two counts of misdemeanor death by motor vehicle. The State subsequently filed a misdemeanor statement of charges charging Defendant

with the same two offenses. While this action was pending in District Court, the grand jury made a presentment and subsequently returned an indictment for two counts of misdemeanor death by motor vehicle. Defendant moved to dismiss the charges in Superior Court, arguing the presentment and indictment were returned more than two years after the commission of the offense in violation of the statute of limitations for misdemeanors in N.C.G.S. § 15-1. The trial court allowed Defendant's motion.

A citation and misdemeanor statement of charges, as valid criminal pleadings, toll the two-year statute of limitations for misdemeanors set out in N.C.G.S. § 15-1. The statute of limitations remains tolled by the criminal pleadings while that action is pending. When a presentment and indictment are returned in Superior Court during the tolling period, N.C.G.S. § 15-1 does not bar prosecution based upon the indictment. We reverse the trial court's order allowing Defendant's motion to dismiss.

BACKGROUND

On 24 December 2013, Defendant was charged by *Citation* and *Magistrate's Order* with two counts of misdemeanor death by motor vehicle arising out of an accident on Interstate 40 in Catawba County. Defendant's case was pending in Catawba County District Court from this time until 21 December 2015, when a *Misdemeanor Statement of Charges* was filed charging Defendant with two counts of misdemeanor death by motor vehicle. The matter was continued in District Court on 3 March 2016 to 23 June 2016.

Before Defendant's charges were heard in the District Court on 23 June 2016, the grand jury in Catawba County made a *Presentment* for the two counts of misdemeanor death by motor vehicle on 7 March 2016 and subsequently returned an *Indictment* for the same charges on 21 March 2016. Defendant filed a *Motion to Dismiss* in Catawba County Superior Court, arguing "the statute of limitations ha[d] run" on the two offenses. The trial court allowed Defendant's motion, concluding the Defendant was charged with the two offenses by indictment "after the two[-]year statute of limitations had run" and that the "statute of limitations bars further prosecution on the Defendant." The State timely appealed.

ANALYSIS

The State argues the trial court erred in concluding the 21 March 2016 indictment charging Defendant with two counts of misdemeanor death by motor vehicle was returned after the two-year statute of

limitations. More specifically, it argues the statute of limitations from the date of offense was tolled by the misdemeanor statement of charges at the time the indictment was issued. Accordingly, it asserts it was not barred from issuing the indictment. We agree.

The State does not challenge any findings of fact in the trial court's order, so those findings of fact are binding on appeal. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 632-33, 669 S.E.2d at 294. Whether a defendant is entitled to dismissal of the charges against him or her is a conclusion of law. *Id.* at 632, 669 S.E.2d at 294.

N.C.G.S. § 15-1 sets forth the statute of limitations for misdemeanors. The version of the statute in effect from 1943 to 2017, the relevant time period for the events occurring herein, stated that "all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards[.]"[1] N.C.G.S. § 15-1 (2015). In *State v. Curtis*, 371 N.C. 355, 817 S.E.2d 187 (2018), our Supreme Court addressed the types of criminal pleadings required to toll the two-year statute of limitations in this version of the statute. In *Curtis*, the defendant was issued a citation for driving while impaired, and a magistrate's order was issued on that charge (among others). *Id.* at 356, 817 S.E.2d at 187-88. Over two years later, the defendant objected to trial on citation and moved to dismiss the charges. *Id.* at 356, 817 S.E.2d at 188. "In her motion [the] defendant argued that, because she was filing a pretrial objection . . . to trial on citation, the State typically would be required by the statute to file a statement of charges; however, because [N.C.G.S §] 15-1 establishes a two-year statute of limitations for misdemeanors, [the] defendant contended that her charges must be dismissed instead." *Id.*

Our Supreme Court disagreed with this argument and reversed the trial court's order allowing the defendant's motion to dismiss. It found that the citation, as a valid criminal pleading, tolled the two-year statute of limitations set out in N.C.G.S. § 15-1. The Court reasoned:

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1. N.C.G.S. § 15-1 has since been amended to provide that "all misdemeanors except malicious misdemeanors, shall be charged within two years after the commission of the same, and not afterwards." Act of Oct. 5, 2017, ch. 212, sec. 5.3, 2017 N.C. Sess. Laws 1565, 1579 (codified at N.C.G.S. § 15-1 (2017)).

> That citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the district court to try defendant for the misdemeanor crime charged. In light of our decision in *Underwood*, the changes to criminal procedure and to our court system since the enactment of section 15-1, as well as our understanding of the general purpose of a criminal statute of limitations, we hold that the citation issued to defendant tolled the statute of limitations here. We cannot conclude that the General Assembly intended the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations.

Id. at 362, 817 S.E.2d at 191.

In the case before us, a citation was issued on 24 December 2013 for two counts of misdemeanor death by motor vehicle, and a misdemeanor statement of charges was filed on 21 December 2015. As valid criminal pleadings under N.C.G.S. § 15A-921 that conveyed jurisdiction to the District Court, *Curtis* makes clear that this citation, and subsequently the misdemeanor statement of charges, tolled the two-year statute of limitations under N.C.G.S. § 15-1. Yet, this case presents an additional question not directly addressed in *Curtis*: whether the State may prosecute an offense in Superior Court upon an indictment returned more than two years after the commission of the offense but while a valid criminal pleading has tolled the statute of limitations. Defendant argues the indictment was a new criminal pleading that "annulled the criminal process initially instituted in District Court" and that, because it was returned more than two years after the commission of the offense, prosecution based on the indictment was barred by the statute of limitations. In contrast, the State argues "the statute of limitations was tolled by the citation and statement of charges and [it] was not barred from later seeking an indictment" while the statute of limitations was tolled by an active case in District Court. We agree with the State.

To "toll" the statute of limitations means to arrest or suspend the running of the time period in the statute of limitations. *See State v. Underwood*, 244 N.C. 68, 70, 92 S.E.2d 461, 463 (1956) (describing tolling as arresting the statute of limitations). In other words, the statute of limitations ceases to run while it is tolled. *See*, *e.g.*, *Chardon v. Fumero Soto*, 462 U.S. 650, 652, 77 L. Ed. 2d 74, 78 n.1 (1983) (describing tolling "to mean that, during the relevant period, the statute of limitations ceases to run"). Moreover, the statute of limitation continues to be tolled "as long as the action is alive . . . ." *See Long v. Fink*, 80 N.C. App. 482, 485, 342 S.E.2d 557, 559 (1986).

The citation and magistrate's order for two counts of misdemeanor death by motor vehicle commenced an action in District Court and, for the reasons discussed above, tolled the two-year statute of limitations in N.C.G.S. § 15-1. The misdemeanor statement of charges continued to toll the statute of limitations. While that action based upon the misdemeanor statement of charges was pending, the statute of limitations remained tolled. The statute of limitations was suspended and ceased to run during the pendency of this action. When the presentment was made and subsequent indictment was returned in Superior Court, the action based upon the original citation and magistrate's order and the later misdemeanor statement of charges was still pending. There is nothing in the record to indicate that action had been dismissed or abandoned by the State when the presentment and indictment were returned. Thus, at the time the Superior Court obtained jurisdiction through the presentment and indictment, the statute of limitations in N.C.G.S. § 15-1 was suspended and could not bar prosecution.

Defendant argues that the presentment and indictment initiated a new proceeding and "annulled the criminal process" in District Court based on the citation. Accordingly, he argues the two-year statute of limitations was not tolled when the Superior Court obtained jurisdiction through the presentment and indictment and barred prosecution. This argument is unavailing. The Superior Court may acquire jurisdiction of a misdemeanor "in any action *already properly pending in the [D]istrict [C]ourt* if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court." *State v. Gunter*, 111 N.C. App. 621, 624, 433 S.E.2d. 191, 193 (1993) (emphasis added); *see also State v. Cole*, ___ N.C. App. ___, 822 S.E.2d 456 (2018) (Superior Court held concurrent jurisdiction with the District Court over a DWI charge when the grand jury returned a presentment and subsequent indictment). If an action in District Court was properly pending, as it was here, the statute of limitations continued to be tolled.

CONCLUSION

The statute of limitations in N.C.G.S. § 15-1 was tolled at the time the grand jury returned a presentment and subsequent indictment and, therefore, did not bar prosecution based on this indictment in Superior Court. We reverse the trial court's order allowing Defendant's motion to dismiss.

REVERSED AND REMANDED.

Judges DIETZ and ZACHARY concur.

WELLS FARGO BANK, N.A., PLAINTIFF
v.
FRANCES J. STOCKS, IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF LEWIS H. STOCKS AKA LEWIS H. STOCKS, III, TIA M. STOCKS AND JEREMY B. WILKINS, IN HIS CAPACITY AS COMMISSIONER, DEFENDANTS

No. COA18-1171

Filed 2 July 2019

1. Appeal and Error—interlocutory orders—substantial right—judicial foreclosure of party's home

A partial summary judgment order directing the judicial sale of defendant's home was immediately appealable as affecting a substantial right that would be lost absent appellate review.

2. Statutes of Limitation and Repose—applicable limitations period—action for reformation and judicial foreclosure—defective deed of trust

Where defendant executed a deed of trust that, due to an error, failed to secure her debt to a bank, the bank's action for reformation of the deed and judicial foreclosure of defendant's home was time barred because the statute of limitations for actions based upon sealed instruments or instruments conveying a real property interest (N.C.G.S § 1-47(2)) applied rather than the statute of limitations for claims arising from mistake (N.C.G.S § 1-52(9)), and the bank filed its action two years after the limitations period had expired (or twelve years after defendant executed the deed).

3. Judicial Sales—defective deed of trust—unsecured promissory note—claim for judicial foreclosure—invalid

The trial court erred in granting summary judgment in favor of a bank on its claim for judicial sale of defendant's home because, due to an error, defendant executed a deed of trust that failed to secure her debt to the bank.

Judge ARROWOOD dissenting.

Appeal by Defendant Tia M. Stocks from summary judgment entered 25 April 2018 by Judge Henry W. Hight in Wake County Superior Court. Heard in the Court of Appeals 25 April 2019.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and Aleksandra E. Anderson, for Plaintiff-Appellee.

Janvier Law Firm, PLLC, by Kathleen O'Malley, for Defendant-Appellant Tia M. Stocks.

Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Douglas D. Noreen and Rebecca H. Ugolick, for Defendant-Appellant Frances J. Stocks, in his Capacity as the executor of the estate of Lewis H. Stocks.

No brief filed by Defendant Jeremy B. Wilkins.

INMAN, Judge.

Defendant-Appellant Tia M. Stocks ("Ms. Stocks") appeals from the trial court's entry of summary judgment reforming a deed of trust and ordering judicial foreclosure in favor of Plaintiff-Appellee Wells Fargo, N.A. ("Wells Fargo"). Following careful review, we reverse the trial court's entry of summary judgment and hold Wells Fargo's reformation action is barred by the applicable statute of limitations.

I. Factual and Procedural History

On 22 March 2002, Ms. Stocks' father, Lewis H. Stocks ("Mr. Stocks"), executed a Limited Power of Attorney naming Ms. Stocks attorney-in-fact for the limited purpose of executing certain documents necessary to purchase a house in Garner, North Carolina (the "Property"), for Ms. Stocks' use as a residence. Mr. Stocks arranged to purchase the property through a loan with First Union National Bank ("First Union"), and a general warranty deed conveying the Property to Ms. Stocks—as sole owner—was filed on 26 March 2002. Consistent with her father's loan arrangement, Ms. Stocks executed a promissory note as attorney-in-fact for Mr. Stocks in First Union's favor in the amount of $88,184.50 (the "First Note") on 27 March 2002; she also recorded a deed of trust for that amount (together with the First Note as the "First Loan") that same day, which named herself and her father as borrowers and listed First Union as the beneficiary.

Before the First Note was paid off, First Union became Wachovia; Wachovia, in turn, became holder of the First Note. In late 2004, Mr. Stocks sought to refinance the First Loan with Wachovia and, on 12 January 2005, executed a new promissory note for $83,034.00 in Wachovia's favor (the "Note"). Ms. Stocks was not named as a borrower on the Note. On 19 January 2005, Ms. Stocks executed a new deed of trust with Wachovia under seal (the "Deed of Trust"), listing her as the borrower and stating

she was "indebted to [Wachovia] in the principal sum of U.S.$ 83034.00 which indebtedness is evidenced by Borrower's Note dated 01/12/05." Because Ms. Stocks was not a signatory to or debtor under the Note, the language of the Deed of Trust mistakenly secured a non-existent debt. Ms. Stocks, however, made payments on the Note.

By 2016, Wachovia had merged with Wells Fargo, Mr. Stocks had passed away, and Ms. Stocks had ceased paying the Note. Wells Fargo sent a right to cure letter to Mr. Stocks' estate (the "Estate") on 2 March 2016, but no further payments were forthcoming. Wells Fargo thereafter commenced non-judicial foreclosure proceedings on the Property; during the course of those proceedings, Wells Fargo learned for the first time that, because of the mistake in the Deed of Trust, the Note was not secured by the Property.

To correct the error, Wells Fargo filed a complaint on 26 May 2017 requesting reformation of the Deed of Trust and a judicial sale of the Property; in the alternative, Wells Fargo requested imposition of an equitable lien on the Property. The complaint also alleged a breach of contract against the Estate for its default on the Note, as well as claims for quiet title and declaratory judgment that would establish the Deed of Trust as a valid lien on the Property as security for the Note.[1]

Ms. Stocks filed an answer to Wells Fargo's complaint asserting the statute of limitations as a defense to reformation. The Estate filed its answer and crossclaims against Ms. Stocks for breach of contract, unjust enrichment, and unfair and deceptive trade practices. Following further pleading and discovery, Wells Fargo moved for summary judgment on all claims.

At the summary judgment hearing, Wells Fargo contended that Ms. Stocks' statute of limitations defense, premised on Section 1-52(9), failed as a matter of law. That statute, which applies to claims arising from mistake, does not begin to run until the claimant "actually learns of [the mistake's] existence or should have discovered the mistake in the exercise of due diligence[,]" *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244, 768 S.E.2d 604, 608 (2015) (citation omitted), and Wells Fargo asserted that Ms. Stocks had failed to forecast any evidence demonstrating that the mistake was or should have been discovered

1. Defendant Jeremy B. Wilkins was named in Wells Fargo's complaint for the sole purpose of allowing the trial court to appoint him as commissioner over any subsequent judicial foreclosure sale. He has not made an appearance in this appeal and is not discussed in the parties' arguments; as a result, we omit him from further discussion.

more than three years prior to suit. Counsel for Ms. Stocks argued that Wells Fargo should have discovered the mistake at the time the Deed of Trust was executed. The trial court rejected Ms. Stocks' statute of limitations argument and entered summary judgment for Wells Fargo on its claims for reformation and judicial foreclosure. Ms. Stocks appeals.

II. Analysis

A. Appellate Jurisdiction

[1] The trial court's summary judgment order did not fully resolve Wells Fargo's claims against the Estate or the Estate's crossclaims against Ms. Stocks; as a result, it is an interlocutory order. *See Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981). Such an order is immediately appealable if it "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) (citation omitted); *see also* N.C. Gen. Stat. §§ 7A-27(a)(3)(a) and 1-277(a) (2017). "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. Whether a substantial right is affected is determined on a case-by-case basis, and should be strictly construed." *Alexander Hamilton Life Ins. Co. of America v. J & H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 701, 543 S.E.2d 898, 900 (2001) (citations omitted).

Ms. Stocks argues that because the summary judgment orders the sale of her primary residence, if the appeal is not heard and the foreclosure moves forward, she may lose her home permanently prior to any appeal from final judgment. Wells Fargo and the Estate present no argument to the contrary. We hold the summary judgment order directing the judicial sale of Ms. Stocks' home affects a substantial right subject to appellate review. *Cf. Soares v. Soares*, 86 N.C. App. 369, 370, 357 S.E.2d 418, 418 (1987) (holding an interlocutory order in a divorce action that directed the sale of the marital home involved a substantial right subject to immediate appeal).

B. Standard of Review

We review the grant of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). This standard of review also encompasses the application of the appropriate statute of limitations where the relevant facts are undisputed. *McKoy v. Beasley*, 213 N.C. App. 258, 262, 712 S.E.2d 712, 715 (2011).

C. Applicable Statute of Limitations

[2] The parties noted in their briefs that resolution of this appeal requires consideration of two different statutes of limitations. The first, Section 1-52(9), provides a three-year limitation on actions "[f]or relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2017). The second statute, Section 1-47(2), provides a ten-year limitation on actions "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto." N.C. Gen. Stat. § 1-47(2) (2017). Although both statutes were mentioned as potentially applicable in the hearing before the trial court, substantive argument below focused only on Section 1-52(9).

On appeal, Ms. Stocks argues that she raised a genuine issue of material fact as to when Wells Fargo should have discovered the mistake in the Deed of Trust, and, as a result, whether the three-year statute of limitations in Section 1-52(9) bars Wells Fargo's reformation claim. She bases this argument on evidence tending to show that: (1) Wachovia (now Wells Fargo) drafted other documents, simultaneous with the Deed of Trust, that properly described Mr. and Ms. Stocks' relationships with Wachovia; and (2) no Wachovia representative was present when Ms. Stocks signed the Deed of Trust. The trial court may very well have been correct in rejecting that argument, as the evidence cited does not suggest the existence of "facts and circumstances sufficient to put [Wells Fargo] on inquiry which, if pursued, would lead to the discovery of the facts constituting the [mistake]." *Coleman*, 239 N.C. App. at 245, 768 S.E.2d at 609 (citations omitted). We do not resolve whether the trial court properly concluded Ms. Stocks' limitations defense under Section 1-52(9) failed as a matter of law, however, because precedent established after the trial court's ruling, and before this Court's appellate review, held that Section 1-52(9) does not apply to a claim to reform a deed of trust based on mistake.

After the trial court granted summary judgment in favor of Wells Fargo, this Court issued its opinion in *Nationstar Mortgage, LLC v. Dean*, ___ N.C. App. ___, 820 S.E.2d 854 (2018), holding that a claim to reform a deed of trust on grounds of mistake is subject to the ten-year statute of limitations found in Section 1-47(2), *not* Section 1-52(9). ___ N.C. App. at ___, 820 S.E.2d at 860.

Neither party disputes that *Nationstar Mortgage* and Section 1-47(2) govern this appeal. In its principal brief, appellee Wells Fargo expressly

argues that "the applicable statute of limitations here as prescribed by *Nationstar Mortgage* is the ten-year statute under [Section] 1-47(2)." Although Ms. Stocks argued in her principal appellate brief that our consideration of the applicable statute of limitations should be limited to Section 1-52(9), she addressed Wells Fargo's contention in her reply brief by positing that if Wells Fargo is correct that the ten-year statute of limitations applies, Section 1-47(2) bars Wells Fargo's claim.

Consistent with *Nationstar Mortgage*, we hold that Section 1-47(2) governs Wells Fargo's reformation claim. Thus, although the trial court may very well have properly determined that Section 1-52(9) did not bar summary judgment in favor of Wells Fargo, that determination is immaterial if, following *Nationstar Mortgage*, Section 1-47(2) applies to the exclusion of Section 1-52(9).

In *Nationstar Mortgage*, a married couple defaulted on a loan secured by a deed of trust; however, the deed of trust was recorded without a legal description of the real property it encumbered. ___ N.C. App. at ___, 820 S.E.2d at 856-57. Nationstar, the servicer of the defaulted loan, brought a declaratory judgment and reformation action on the ground of mistake, requesting the trial court reform the deed of trust to accurately describe the real property. *Id.* at ___, 820 S.E.2d at 857. The borrowers raised a statute of limitations defense, but the trial court rejected that defense and entered summary judgment reforming the deed of trust. *Id.* at ___, 820 S.E.2d at 858. On appeal, the borrowers argued that Nationstar's claim was barred by Section 1-52(9), while Nationstar asserted the ten-year statute of limitations in Section 1-47(2) controlled. *Id.* at ___, 820 S.E.2d at 860.

To resolve that dispute, this Court looked to the "well-stablished canons of statutory construction," and observed that " '[w]hen two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control.' " *Id.* at ___, 820 S.E.2d at 860 (quoting *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993)). After acknowledging the deed of trust in question was "clearly a sealed instrument . . . 'of conveyance of an interest in real property[,]' " we held that "[a]s between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to Nationstar's reformation claim under the ten-year limitations period." *Id.* at ___, 820 S.E.2d at 860 (quoting N.C. Gen. Stat. § 1-47(2)).

Given that "where two statutes deal with the same subject matter, the more specific statute *will prevail over* the more general one," *Fowler*, 334 N.C. at 349, 435 S.E.2d at 532 (emphasis added), and *Nationstar Mortgage*, relying on that canon, expressly held that "[a]s between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to Nationstar's reformation claim[,]" ___ N.C. App. at ___, 820 S.E.2d at 860, we hold that Section 1-47(2) applies to Wells Fargo's claim while Section 1-52(9) does not.[2] We note that neither the parties nor the trial court had the benefit of this Court's decision in *Nationstar Mortgage* when the matter was resolved below.

D. Accrual of the Limitations Period Provided by Section 1-47(2)

Having held that the ten-year statute of limitations provided by Section 1-47(2) applies to Wells Fargo's reformation claim, we must now determine whether that claim was brought within the limitations period.

North Carolina common law provides that, for statute of limitations purposes, "a cause of action accrues at the time the injury occurs[,] . . . *even when the injured party is unaware that the injury exists*[.]" *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 492, 329 S.E.2d 350, 353 (1985) (citations omitted) (emphasis added). In other words, "[a] cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citations omitted). This common law rule may be modified by express statutory language delaying accrual until the party discovers or reasonably should discover the injury or mistake giving rise to the cause of action. *See, e.g.*, *Pembee Mfg. Corp.*, 313 N.C. at 492, 329 S.E.2d at 353 (noting that the common law rule ordinarily applies but recognizing that the discovery provisions found in various subsections of Section 1-52 modify the common law by delaying accrual until the injury is discovered or reasonably should

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2. We read *Nationstar Mortgage* to hold that Section 1-47(2) applies to the exclusion of 1-52(9) with respect to claims for reforming a sealed instrument based on mistake. The parties do not identify, and we have not found, any cases holding that more than one statute of limitations can apply to a claim. Nor have we located any decisions holding that where one statute of limitations—established by law as applicable to the action—has run on a claim, a different statute of limitations may step in and save the cause of action. Such paucity is not entirely surprising, given "that statutes of limitations are inflexible and unyielding[,]" and seek "to afford security against demands . . . . This security must be jealously guarded[.]" *King v. Albemarle Hosp. Auth.*, 370 N.C. 467, 470, 809 S.E.2d 847, 848 (2018) (internal quotation marks and citations omitted). We note that Wells Fargo's appellate brief speaks in exclusive terms when it states "the applicable statute of limitations here as prescribed by *Nationstar Mortgage* is the ten-year statute under [Section] 1-47(2)."

have been discovered); *Leonard v. England*, 115 N.C. App. 103, 107, 445 S.E.2d 50, 52 (1994) (observing that Section 1-52(16)'s "discovery" provisions extend the statute of limitations by delaying accrual "until bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant" (citation and internal quotation marks omitted)).

Although Section 1-52(9) contains language modifying the common law accrual rule, Section 1-47(2) does not. Thus, the common law rule applies to reformation actions governed by Section 1-47(2). *Pembee Mfg. Corp.*, 313 N.C. at 492, 329 S.E.2d at 353. And, when tasked in *Nationstar Mortgage* with determining whether the action to reform a deed of trust for mistake was brought within the ten-year limitations period, this Court held that claim accrued not at the time the mistake in the deed of trust was discovered, but when the deed of trust itself was executed. ___ N.C. App. at ___, 820 S.E.2d at 860 ("No genuine issue of material fact exists that Nationstar filed its verified complaint on 26 June 2013, which is within ten years *of the execution of* the First South Deed of Trust on 1 June 2004." (emphasis added)). Consistent with the application of Section 1-47(2) in *Nationstar Mortgage*, we hold that Wells Fargo's claim accrued on—and the statute of limitations runs from—the date the Deed of Trust was executed. *See id.* at ___, 820 S.E.2d at 860; *see also* 66 Am. Jur. 2d Reformation of Instruments § 89 ("[S]ome states apply the general rule that the statute commences to run at the accrual of the cause of action [for reformation on grounds of mistake], that is, at the date of the execution or delivery of the instrument, sometimes on the theory that the statute has made no [discovery] exception in this class of cases.").

It is undisputed that the Deed of Trust was executed by Ms. Stocks in January 2005 and that Wells Fargo filed its complaint twelve years later, on 26 May 2017. Wells Fargo's claim for reformation, then, was filed two years after the limitations period provided by Section 1-47(2) had expired. *See Nationstar Mortgage*, ___ N.C. App. at ___, 820 S.E.2d at 860. As a result, Wells Fargo's reformation claim is time barred.

Our dissenting colleague would not consider whether Section 1-47(2) bars Wells Fargo's claim because Ms. Stocks, the appellant, did not present this argument in her principal brief. The dissent cites well-established authority that it is not the role of the appellate court to create an argument for the appellant, and that a reply brief cannot correct deficiencies in the principal brief. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); *Cox v. Town of Oriental*, 234 N.C. App. 675, 678, 759 S.E.2d 388, 390 (2014). But the procedural posture

of the issue before us is different and such that we cannot ignore it. That is because Wells Fargo's principal brief asserted that the limitations period provided by Section 1-47(2)—and not Section 1-52(9)—applies here, contending that question is ripe for consideration on appeal. The argument raised by Ms. Stocks in reply—that if Wells Fargo was correct about the applicable statute, it nonetheless barred Wells Fargo's claim—was responsive to Wells Fargo's argument. Rule 28(h) of the North Carolina Rules of Appellate Procedure provides that a reply brief shall be limited to "a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief." N.C. R. App. P. 28(h) (2019). Ms. Stock's reply brief did not violate the rule, and we should not ignore her argument.

The trial court's entry of summary judgment in favor of Wells Fargo on this claim is reversed.

E. Judicial Sale

[3] Because the unreformed Deed of Trust fails to secure the Note, Wells Fargo's claim for judicial sale cannot stand. *See*, *e.g.*, *United States Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 727, 800 S.E.2d 412, 416 (2017) (recognizing that a valid claim for judicial foreclosure requires "a debt, default on the debt, a deed of trust securing the debt, and the plaintiff's right to enforce the deed of trust" (citation omitted)). Entry of summary judgment on this claim in favor of Wells Fargo is similarly reversed.

III. CONCLUSION

For the foregoing reasons, the trial court's entry of summary judgment in favor of Wells Fargo on its claims for reformation and judicial foreclosure is reversed. This matter is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge BROOK concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent.

Tia M. Stocks ("defendant-appellant") argues on appeal that the trial court erred by granting summary judgment in plaintiff's favor because

she raised a genuine issue of material fact as to when Wells Fargo Bank, N.A. ("plaintiff") should have discovered the mistake in the deed of trust. As a result, she argues, there is a genuine issue of material fact as to whether the action is time barred under N.C. Gen. Stat. § 1-52(9) (2017). However, the majority concludes it does not need to resolve defendant-appellant's argument as raised on appeal because, subsequent to the trial court's summary judgment order, this Court decided *Nationstar Mortg., LLC v. Dean*, 261 N.C. App. 375, 820 S.E.2d 854 (2018), wherein our court determined N.C. Gen. Stat. § 1-52(9) does not apply to a claim to reform a deed of trust based on mistake.

In *Nationstar Mortg., LLC*, our Court considered whether the three-year statute of limitations in N.C. Gen. Stat. § 1-52(9) for claims based in "fraud or mistake" or the ten-year statute of limitations in N.C. Gen. Stat. § 1-47(2) (2017), for actions "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto[,]" applies to a claim to reform a deed of trust based on mistake. *Nationstar Mortg., LLC*, 261 N.C. App. at 383, 820 S.E.2d at 860. Our Court explained that, although the statute of limitations in both N.C. Gen. Stat. §§ 1-47(2) and 1-52(9) could apply to the facts before the court, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Id.* The Court then determined, without citing any supporting justification, that "[a]s between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to" a reformation claim involving a deed of trust that is "clearly a sealed instrument . . . 'of conveyance of an interest in real property[.]' " *Id.* at 384, 820 S.E. 2d at 860.

Applying *Nationstar Mortg., LLC*'s holding to the case at bar, the majority concludes that, because N.C. Gen. Stat. § 1-52(9) does not apply to a claim to reform a deed of trust based on mistake, it will consider defendant-appellant's arguments in light of N.C. Gen. Stat. § 1-47(2). I disagree with the majority's approach. It is well-established that "[i]t is not the role of the appellate court . . . to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); *see* N.C.R. App. Pro. 28(b)(6) (2019) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Therefore, because the appellant did not raise the issue analyzed by the majority—whether there is a genuine issue of material fact as to whether the action is time barred under N.C. Gen. Stat. § 1-47(2)—we should not address it on appeal. Furthermore, in her opening brief, defendant-appellant specifically

argues the opposite, maintaining that N.C. Gen. Stat. § 1-47(2) is not the relevant statute of limitations. Thus, any argument otherwise has been waived.

Additionally, *Nationstar Mortg., LLC* was published prior to defendant's filing of her principal brief, and she even cites to it to define reformation, and to discuss, in a footnote, whether reformation of a deed of trust is an issue for the court or the jury. Nevertheless, she does *not* argue that our Court should consider this case in light of the ten-year statute of limitations in N.C. Gen. Stat. § 1-47(2), as described by *Nationstar Mortg., LLC*. Thus, I contend it is not proper for us to consider the argument posited by the majority on appeal.

Despite her argument in her opening brief, I do note that defendant's reply brief does argue that plaintiff's claim for reformation is barred under *both* N.C. Gen. Stat. §§ 1-47(2) and 1-52(9). Even so, this argument is not properly before our Court because "[a] reply brief does not serve as a way to correct deficiencies in the principal brief." *Cox v. Town of Oriental*, 234 N.C. App. 675, 679, 759 S.E.2d 388, 390 (2014) (alteration in original) (citation and quotation marks omitted). Accordingly, I dissent.

Furthermore, I believe it is problematic to determine that claims cannot be brought under N.C. Gen. Stat. § 1-52(9) in actions arising out of a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto. Under North Carolina law, a cause of action based on fraud or mistake does not accrue until the aggrieved party discovers the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9); *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (2004) ("The Supreme Court of our State has held in numerous cases that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence." (citation and quotation marks omitted)). However, under *Nationstar Mortg. LLC*, a cause of action based on fraud or mistake cannot be brought after ten years even if the underlying fraud or mistake would not have been reasonably discovered during that time.

I do not believe this result was the intent of N.C. Gen. Stat. § 1-47(2), where both our General Assembly and judiciary have emphasized the importance of protecting defrauded parties, or those injured by a mistake, by holding that a cause of action for these injuries does not accrue until the discovery of the fraud or mistake in the exercise of reasonable diligence. After all, determining "[w]hen plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is" not a

matter of law, but, rather, "a question of fact to be resolved by the jury." *Hunter*, 162 N.C. App. at 486, 593 S.E.2d at 601 (alteration in original) (citation and internal quotation marks omitted). Thus, I believe it runs counter to logic and our case law interpreting N.C. Gen. Stat. § 1-52(9) to bar an action for mistake or fraud from accruing after ten years pursuant to N.C. Gen. Stat. § 1-47(2) simply because the document at issue is a sealed instrument or an instrument of conveyance of an interest in real property.

For the foregoing reasons, I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JULY 2019)

ATKINS v. TOWN OF WAKE FOREST No. 18-1167	Wake (16CVS14254)	Affirmed
COOPER v. ISMAIL No. 18-1166	New Hanover (13CVD1585)	Affirmed in part; Dismissed in part.
IN RE DAVIS No. 18-882	Davidson (15SP567)	Affirmed
IN RE K.W. No. 19-164	Burke (18SPC50079)	Affirmed
IN RE MADARA No. 19-26	Mecklenburg (18CVS15381)	Reversed and Remanded
JOHNSON v. PG MGMT. GRP., LLC No. 18-1262	Mecklenburg (17CVS3348)	Affirmed
MORTON v. COMBS No. 18-689	Pitt (12CVD2096)	Affirmed
ONIZUK v. ONIZUK No. 18-461	Craven (16CVD319)	Affirmed in Part; Reversed in Part; and Remanded.
SOLESBEE v. BROWN No. 18-842	Buncombe (15SP16)	Affirmed
STATE v. BAIR No. 18-830	Haywood (16CRS52442) (16CRS763)	No Error
STATE v. BLAKESLEE No. 18-974	Pitt (15CRS59761)	Affirmed in Part; Reversed in Part; Remanded for Further Proceedings
STATE v. BUNCH No. 18-1287	Lincoln (16CRS52376) (17CRS161)	No Error
STATE v. CAMPBELL No. 18-883	New Hanover (17CRS52696) (17CRS52933)	Affirmed
STATE v. CHERRY No. 18-619	Durham (16CRS54432)	No Error

STATE v. FOSTER No. 18-975	Pitt (15CRS3582) (15CRS58947)	AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.
STATE v. GOFORTH No. 18-851	Iredell (15CRS55301)	Affirmed
STATE v. GUTIERREZ No. 18-733	Gaston (16CRS64486-87)	No Error
STATE v. HARRIS No. 18-952	Granville (02CRS51192)	Reversed
STATE v. MILLER No. 18-1041	Forsyth (17CRS1516) (17CRS52826)	No Error
STATE v. MILLER No. 18-904	Alamance (17CRS1643-44)	NO ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. RADFORD No. 18-609	Jackson (16CRS51386)	Affirmed in part; Vacated in part and remanded for resentencing.
STATE v. REAVES-SPELLER No. 18-972	Pitt (17CRS1092)	AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.
STATE v. SCOTT No. 19-61	Guilford (18CRS24282) (18CRS68561-65)	No Error
STATE v. STARK No. 18-802	Forsyth (16CRS53157)	Affirmed in Part; No Plain Error in Part; Dismissed in Part.
STATE v. STEVENS No. 18-983	New Hanover (11CRS57565) (16CRS56954)	Affirmed
STATE v. WINFIELD No. 19-56	Edgecombe (16CRS53420) (18CRS105-08)	Affirmed in part; dismissed in part.

WALLACE v. WALLACE No. 19-77	Cabarrus (16CVD1863)	Dismissed

BUNTING v. BUNTING

[266 N.C. App. 243 (2019)]

CHRISTY KING BUNTING, PLAINTIFF
v.
MICHAEL JOE BUNTING, DEFENDANT

No. COA18-839

Filed 16 July 2019

1. Domestic Violence—harassment—substantial emotional distress—text messages—no legitimate purpose

Defendant placed plaintiff in fear of continued harassment, rising to such a level as to inflict substantial emotional distress, where he sent her six text messages despite a court order that he have no contact with her as a result of his prolonged egregious behavior. Defendant had no custodial rights to the children, so his text messages allegedly concerning their children served no legitimate purpose.

2. Domestic Violence—harassment—substantial emotional distress—text messages—sufficiency of evidence—terror and lifestyle alterations

There was sufficient evidence that defendant's text messages to plaintiff caused her substantial emotional distress where there was a long history of abuse by defendant and where plaintiff testified that defendant's repeated contact caused her to feel terror, to change her housing arrangements, and to alter her daily routine.

3. Domestic Violence—acts of domestic violence—support for conclusion of law—violation of no-contact order—text messages

The trial court's findings of fact supported its conclusion that defendant committed acts of domestic violence against plaintiff where there was a long history of domestic violence, including threats to kill plaintiff, and defendant violated a no-contact order by sending plaintiff six text messages that caused her to fear for her safety.

Appeal by Defendant from Order entered 24 January 2018 by Judge Brian DeSoto in Pitt County District Court. Heard in the Court of Appeals 13 February 2019.

No brief filed by Plaintiff-Appellee.

The Duke Law Firm NC, by W. Gregory Duke, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from entry of a Domestic Violence Protective Order. Defendant contends that the trial court erred by entering the Domestic Violence Protective Order because (1) text messages he sent to Plaintiff did not constitute harassment as the messages served a legitimate purpose; (2) there was no evidence that Plaintiff suffered from substantial emotional distress; and (3) the trial court's conclusion of law that Defendant committed acts of domestic violence was erroneous and not supported by adequate findings of fact. Defendant's arguments lack merit and we affirm.

I. Background and Procedural History

Plaintiff Christy King Bunting and Defendant Michael Joe Bunting were divorced in 2008 after ten years of marriage. Two children were born of the marriage.

There is a long and detailed history of domestic violence by Defendant against Plaintiff, with entry of multiple domestic violence protective orders ("DVPO") against Defendant, dating back to 2008. On 29 May 2008, the court entered an ex parte DVPO against Defendant which remained in effect until 9 June 2008. The court found that Defendant threatened to kill Plaintiff if she tried to take their children from him after Plaintiff told Defendant that she wanted a divorce. This DVPO allowed communications between Defendant and Plaintiff only if the communications concerned the welfare of their children and were communicated through a third party.

On 8 July 2008, the court entered a DVPO against Defendant which remained in effect until 29 May 2009. The court found that Defendant threatened to kill Plaintiff. This DVPO allowed communications between Defendant and Plaintiff only if the communications concerned the welfare of their children and were communicated through a third party. On or about 16 December 2008, Defendant and Plaintiff entered into a Consent Order which included provisions for custody of the children.

Plaintiff filed a Motion for Contempt Against Defendant for violating the 8 July 2008 DVPO,[1] which was heard on or about 23 June 2009. On or about 1 July 2009, Defendant was arrested and charged with violating the 8 July 2008 DVPO. Defendant's violations took place over the course

1. The Record on Appeal does not contain the motion, but does contain an Order Modifying Custody entered 31 January 2012 which makes findings of fact regarding this motion and the trial court's disposition of this motion.

of three days, from 5 May 2009 through 7 May 2009, during which time Defendant threatened Plaintiff and told Plaintiff, "I will kill you;" refused to return the oldest child to Plaintiff after Plaintiff allowed Defendant extra visitation with the child; called Plaintiff between 15-20 times and left voice messages for Plaintiff, cursing her and telling her that the children hated her; and kidnapped the youngest child, hid from the police for three days, and told Plaintiff she would not get the child back. On 2 July 2009, the court entered an Order for Contempt, granting Plaintiff's 23 June 2009 motion for contempt and advising Defendant that he could purge his contempt by, *inter alia*, "ceas[ing] and desist[ing] any and all future behavior that would constitute a violation of the Domestic Violence Protective Order."

On 26 August 2009, Defendant was found guilty of violating the 8 July 2008 DVPO which was in place at the date and time of his offenses on 5 May 2009 through 7 May 2009. The court again ordered Defendant to comply with the DVPO and not to assault or threaten Plaintiff. On 25 September 2009, the court issued an order denying Defendant's motion to return weapons surrendered under a domestic violence protective order.[2]

On 15 October 2009, the court entered a second Order for Contempt against Defendant. The court ordered Defendant to refrain from making derogatory comments about Plaintiff in the presence of the children and "to cease engaging in behaviors that have a negative impact on the emotional health of the children . . . ." The order further required Defendant to "immediately engage the services of a medical or psychological professional[,] . . . [and] to obtain counseling to aid him in dealing with [his] anger and frustration issues and in controlling his impulsive behavior."

On 27 January 2010, the court entered an *ex parte* DVPO against Defendant which remained in effect until 6 February 2010. The court found that Defendant "repeatedly sent voicemails to the [P]laintiff containing threatening language" and "threatened to shoot the [P]laintiff." The court also found that Defendant was "previously involuntarily committed . . . for threatening suicide." The court ordered Defendant to stay away from "any place the [P]laintiff is" and to stay away from the children's school. This order allowed communications between Defendant and Plaintiff only if the communications concerned the welfare of their children and were communicated through a third party.

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2. The court issued three subsequent orders denying Defendant's motions to return weapons surrendered under a domestic violence protective order on 1 May 2015, 15 May 2015, and 19 February 2016.

On 20 May 2010, the court entered a DVPO against Defendant which remained in effect until 26 January 2011. The court found that Defendant threatened to seriously injure or kill Plaintiff, and concluded that there was a danger of serious and immediate injury to Plaintiff. The court ordered Defendant to "comply fully with all prior custody orders between the parties." The court included an attachment which stated,

> Email or Text communication between the parties for the sole purposes of facilitating the exchange of the minor children, to share necesary information about the minor children, or in case of an emergency involving the minor children DOES NOT VIOLATE THE "NO CONTACT" PROVISION OF THE [DVPO]. Communication between the parties on any subject other than that of the minor children SHALL BE PROHIBITED AND DOES CONSTITUTE A VIOLATION OF THE "NO CONTACT" PROVISION.

The court further ordered the parties to communicate exclusively via email or text message, and banned the use of third parties, with the exception of their respective attorneys, to communicate with one another.

On 3 June 2010, Defendant was arrested and charged with violating the 20 May 2010 DVPO. On 16 June 2010, after Defendant committed another violation of the 20 May 2010 DVPO, a third Order for Contempt was entered against Defendant. The court found that Defendant "has continued to make derogatory comments about the Plaintiff or the Plaintiff's parenting skills in the presence of the minor children[,] . . . [and] has engaged in such harassment and behaviors that have caused the Plaintiff to fear for her personal safety and that of the children . . . ." On 15 September 2010, Defendant pled guilty to two violations of the DVPO and received an 18-month suspended sentence. Defendant was again ordered to comply with all terms and conditions of the DVPO then in place.

On 1 February 2011, the court renewed the DVPO against Defendant until 26 January 2012. The court added a provision which allowed Defendant to attend the children's school activities; however, the court reaffirmed the prohibition against Defendant having contact with Plaintiff at a school activity, and barred Defendant from speaking with or approaching the children at a school activity.

On 18 August 2011, Plaintiff filed a Motion to Modify Custody to Terminate or Require Defendant's Visitation to be Supervised. This motion was based on "Defendant's continued violation of this Court's orders and because of the ongoing psychological and emotional damage

to the minor children caused by the Defendant's behavior." Defendant, who was incarcerated at this time, requested two continuances and the court granted both. The court continued the hearing until 15 November 2011 and ordered Defendant to have no written or verbal contact with the children or with Plaintiff until the 15 November 2011 hearing. While incarcerated for violating the 1 February 2011 DVPO, Defendant continued to contact Plaintiff and the children. Defendant made phone calls to the children, and also sent numerous letters to the oldest child which referenced Plaintiff in a derogatory manner.

On 20 January 2012, the court entered an order renewing the DVPO against Defendant until 26 January 2013, finding that there was a felony DVPO violation pending in Superior Court.

On 31 January 2012, the court entered an Order Modifying Custody ("Custody Order") which contained 20 detailed findings of fact. The court found an extensive history of domestic violence by Defendant against Plaintiff. The court also found that "Defendant's behavior had caused the minor children to experience stress and anxiety[;]" that Defendant admitted that he talks to the children about their mother because "he thinks they need to know the truth about her[;]" and that Defendant thinks the children do not need therapy because therapy "just makes things worse."

The court further found that Defendant has acted in ways "to harass the Plaintiff, causing her significant emotional stress, and to negatively impact her relationship with the minor children and has engaged in a lengthy and persistent campaign to alienate the minor children from the Plaintiff." The court found that "Defendant has been repeatedly ordered by this Court to refrain from [his] actions and behavior[,] . . . he has completely ignored said orders and warnings[,] . . . and instead appears to have escalated said behavior and has on more than one occasion expressed his disdain for the orders of this court." The Custody Order required Defendant to complete a psychological evaluation and provide the results to the court; enroll in and complete counseling with a licensed therapist; and remain in therapy until such time as the therapist releases him from therapy and recommends that Defendant should be allowed to resume unsupervised visitation with the children.

The Custody Order granted Plaintiff sole legal and physical custody of the children, and allowed Defendant to have one, two-hour supervised visit per month with the children at The Family Center. It required The Family Center staff to supervise the exchange of the children at the visits so that Plaintiff would not have contact with Defendant. The Custody Order also included a no-contact provision (the "Provision")

which declared, "other than the two hours of supervised visitation with the minor children . . . the *Defendant shall have no written, verbal, telephonic, or electronic contact with the minor children or the Plaintiff*." (emphasis added)

On 11 January 2013, the court entered an order renewing the DVPO against Defendant until 20 January 2015. The court found that "there have been ongoing incidents since 2008 and a criminal matter [against Defendant] is set for 31 January 2013."

On 9 September 2015, the court entered an *ex parte* DVPO against Defendant which remained in effect until 19 September 2015. The court found that Defendant has a "significant DVPO violation history" and that "Defendant appears to be noncompliant with [the] custody order addressing contact with the Plaintiff." The court also found that Defendant threatened to use a deadly weapon against Plaintiff; made threats to seriously injure or kill Plaintiff; and made serious threats to commit suicide in the past. The court ordered Defendant to comply with the Custody Order.

On 2 October 2015, the court entered a DVPO against Defendant which remained in effect until 1 October 2016. The court ordered Defendant to have no contact with Plaintiff, except through an attorney, and specifically removed language from the order which would have allowed Defendant to communicate with Plaintiff if the communications regarded the welfare of the children. The court found that Defendant called Plaintiff several times and wrote Plaintiff a letter, in violation of the Custody Order. The court again ordered Defendant to comply with the Custody Order.

On 31 July 2017, Plaintiff filed a complaint and motion for a DVPO against Defendant alleging that he sent her six text messages, the texts were unsolicited and had become more frequent and accusatory in tone, the texts were in violation of the no-contact Provision in the Custody Order, and the text messages caused her distress, anxiety, and fear, in light of the "tortuous history" of abuse by Defendant against Plaintiff and their children. Upon review of Plaintiff's complaint and motion, the trial court entered an *ex parte* DVPO against Defendant. On 24 January 2018, following a hearing, the trial court entered a Domestic Violence Protective Order (the "Order"). From entry of the Order, Defendant appeals.

II. Discussion

On appeal, Defendant argues that (1) the six text messages he sent to Plaintiff did not constitute harassment because the text messages,

that discussed the children, served a legitimate purpose; (2) there was no evidence that Plaintiff suffered from substantial emotional distress; and (3) the trial court's conclusion of law that Defendant committed acts of domestic violence was erroneous and not supported by adequate findings of fact.

A. Standard of Review

"When the trial court sits without a jury regarding a DVPO, 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. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Kennedy v. Morgan*, 221 N.C. App. 219, 220-21, 726 S.E.2d 193, 195 (2012) (citation omitted). The trial court's "conclusions of law are reviewable *de novo* on appeal." *Wornstaff v. Wornstaff*, 179 N.C. App. 516, 520-21, 634 S.E.2d 567, 570 (2006) (quotation marks and citation omitted).

B. Domestic Violence Protective Orders

"Any person residing in this State may seek relief under . . . Chapter [50B] by filing a civil action or by filing a motion in any existing action filed under Chapter [50B] of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person." N.C. Gen. Stat. § 50B-2(a) (2018). " 'If the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence.' " *Kennedy*, 221 N.C. App. at 221, 726 S.E.2d at 195 (quoting N.C. Gen. Stat. § 50B-3(a) (2011)). "Although N.C. Gen. Stat. § 50B-3(a) states that the trial court must 'find' that an act of domestic violence has occurred, in fact this is a conclusion of law[.]" *Id.* at 223 n.2, 726 S.E.2d at 196 n.2. Domestic violence is defined as "[p]lacing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in [N.C. Gen. Stat. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress . . . ." N.C. Gen. Stat. § 50B-1(a)(2) (2018).

C. Fear of Continued Harassment

[1] Defendant first argues that the six text messages he sent to Plaintiff did not place Plaintiff in fear of continued harassment because the text messages, that discussed the children, served a legitimate purpose. Defendant's argument is meritless.

Harassment is defined as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2018). "The plain language of the statute requires the trial court to apply only a subjective test to determine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances." *Wornstaff*, 179 N.C. App. at 518-19, 634 S.E.2d at 569. Defendant does not contest that the texts he sent Plaintiff were (1) knowing; (2) directed at Plaintiff; and (3) tormented, terrorized, or terrified Plaintiff. Defendant does argue that the text messages served a legitimate purpose. Whether conduct served a legitimate purpose is a factual inquiry. *See State v. Wooten*, 206 N.C. App. 494, 501, 696 S.E.2d 570, 575-76 (2010) (examining the circumstances surrounding faxes defendant sent the victim and concluding that, despite defendant's contention that the faxes were sent in reply to correspondence from public officials, the communications served no legitimate purpose).

From 2007 through 2012, Plaintiff obtained four DVPOs against Defendant. Plaintiff renewed those four DVPOs when allowed, and obtained new DVPOs when the original orders and their renewals expired. Throughout this time period, Defendant repeatedly violated the DVPOs in numerous ways, including by contacting Plaintiff via phone calls, emails, text messages, and by showing up in-person. Prior to entry of the Custody Order, Defendant was permitted to contact Plaintiff if the communications were in regard to their children. However, over the course of five years, Defendant violated the various protective orders and restrictions on his contact, and was held in contempt for refusing to obey court orders.

In 2012, after Defendant committed additional violations of the DVPO that was in place at the time, Plaintiff was granted sole legal and physical custody of the children. The Custody Order and no-contact Provision prohibited Defendant from contacting Plaintiff in any manner, and prohibited Defendant from contacting the children in any manner outside of the one, two-hour supervised visit per month. Further, the court found that Defendant "disregarded all Orders of this Court. . . [and] has been repeatedly ordered by the Court to refrain from the actions and behaviors in which he has continued to engage[.]" The court also found that Defendant "has completely ignored said orders and warnings and the recommendations of the [child's psychologist], and instead appears to have escalated said behavior and has on more than one occasion expressed his disdain for the orders of this court."

As Defendant was under a court order to have no contact with Plaintiff as a result of his prolonged egregious behavior, and because Defendant had no custody of the children, Defendant's text messages to Plaintiff allegedly concerning their children were in direct violation of the court's order and did not serve a legitimate purpose. *See Wooten*, 206 N.C. App at 501, 696 S.E.2d at 575-76; *see also Stancill v. Stancill*, 241 N.C. App. 529, 542-43, 773 S.E.2d 890, 899 (2015) (concluding that defendant's text messages to plaintiff regarding aggressive negotiations of a shared property settlement were not for a legitimate purpose and amounted to harassment). Defendant's argument is overruled.

D. Emotional Distress

[2] Defendant next argues that there was no evidence that Plaintiff suffered from substantial emotional distress as a result of the six text messages, and thus there was no competent evidence to support the trial court's findings of fact that Defendant's harassment of Plaintiff inflicted substantial emotional distress. This argument too is unavailing.

Upon review of a trial court's findings of fact, "we are strictly limited to determining whether the . . . underlying findings of fact are supported by competent evidence . . . ." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted). Competent evidence, in the form of victim testimony and a detailed history of domestic violence, supports a court's finding that an act of domestic violence occurred. *Thomas v. Williams*, 242 N.C. App. 236, 773 S.E.2d 900 (2015). "Substantial emotional distress" is defined as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A(b)(4) (2018).

In *Thomas*, there was sufficient evidence that plaintiff suffered substantial emotional distress as a result of a voice mail defendant left plaintiff. *Thomas*, 242 N.C. App. at 244, 773 S.E.2d at 905. Plaintiff ended her relationship with defendant after only a few weeks, as she was afraid of defendant; defendant continued to contact plaintiff, despite her requests that he stop, which caused plaintiff to file a complaint and motion for DVPO. *Id.* at 237, 773 S.E.2d at 901-02. Defendant continued to contact plaintiff, and was arrested for stalking. Following his arrest, defendant called plaintiff and left her a voicemail wherein he stated, "you put me through hell. Now it's your turn." *Id.* at 238, 773 S.E.2d at 902. At the DVPO hearing, plaintiff testified that the voicemail caused her to experience distress and trouble sleeping, and caused her to have to leave her new job several times to deal with the defendant's actions. *Id.* This

Court concluded that plaintiff's testimony, combined with defendant's repeated unwelcome contact, was sufficient competent evidence that defendant caused plaintiff substantial emotional distress. *Id.* at 244, 773 S.E.2d at 905.

As in *Thomas*, there is sufficient competent evidence in this case that Plaintiff suffered substantial emotional distress as a result of Defendant's text messages. Like in *Thomas*, Plaintiff testified about her fear of Defendant, and that Defendant's text messages caused her anxiety and distress. Plaintiff testified that Defendant's text messages made her feel "worried about what's going to happen . . . . I mean he's repeatedly said he was going to kill me. He's kidnapped [the youngest child]. He's beaten [the oldest child]. I just -- I'm worried about my whole household whenever I get these. I don't know what's happening, if he's watching us, if he's trying to follow us. He's followed me in his truck before and tried to run me off the road. I just have to be concerned."

Plaintiff acknowledged that Defendant's texts, on their face, could appear "benign" if one did not know of Defendant's history of abuse against Plaintiff. However, Plaintiff testified that Defendant's texts make her feel "like [Defendant] is . . . after me or something bad is going to happen when I hear from him." She testified,

> I don't go anywhere without looking around, being aware of my surroundings, being aware of exits and entrances and how I'm going to get from one place to another. Where I live is not somewhere you can easily get to. I have large dogs, I have a security light, security system. I just put a lot of things in place to protect myself and the children.

She further explained that "the first place I moved had a garage and a fence so I could be totally surrounded."

Plaintiff received one of the six text messages from Defendant while she was out shopping for the children. She testified that, upon receiving the text, "I put everything down and ran to my car and I sent the messages to -- one to my uncle and I sent one to [my lawyer's] office and I sent one to my friend and then I got in my car and started driving until I had to pick [the oldest child] up." Plaintiff explained that, when she receives a communication from Defendant, it is her practice to forward it to "at least 2 people immediately in case something happens and so they can help me calm down. I go into a state of alarm, and usually do not feel at ease until I can get home and have the children there with me."

As in *Thomas*, where the defendant's repeated unwelcome contact, combined with the plaintiff's lifestyle alteration and her testimony that

she lived in fear of the defendant, was sufficient evidence to show that the plaintiff experienced substantial emotional distress, here, Plaintiff's testimony that Defendant's repeated contact caused her to feel terror, to change her housing arrangements, and to alter her daily routine is sufficient evidence of substantial emotional distress. *Thomas*, 242 N.C. App. at 244, 773 S.E.2d at 905. Defendant's argument is without merit.

E. Adequate Findings of Fact

[3] Defendant finally argues that the trial court's conclusion of law that Defendant committed acts of domestic violence was erroneous and not supported by adequate findings of fact. We disagree.

"[W]e are strictly limited to determining whether the . . . 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." *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quotation marks and citation omitted).

In support of its conclusion that Defendant committed acts of domestic violence against Plaintiff, the trial court found as follows:

> The Defendant has a history of domestic violence against the Plaintiff including threats to kill her and convictions for violating a Domestic Violence Order of Protection. On January 31, 2012 the Honorable David Leech ordered that Defendant shall have no written, verbal, telephonic, or electronic contact with Plaintiff. Despite Judge Leech's Order and against Plaintiff's wishes, Defendant sent Plaintiff six text messages between December 5, 2016 and July 25, 2017. Defendant's text messages have caused Plaintiff to fear for [her] safety. Plaintiff feels as if the Defendant is watching her and she has to constantly be aware of her surroundings.

Defendant argues that these findings do not support the trial court's conclusion that Defendant committed acts of domestic violence because it is analogous to the "vague finding of a general history of abuse" in *Kennedy* that was insufficient to support the conclusion of law that defendant committed an act of domestic violence. *Kennedy*, 221 N.C. App. at 223, 726 S.E.2d at 196.

In *Kennedy*, the trial court found, "after a long history of abuse plaintiff . . . remains afraid of the defendant who tries to intimidate her—surveillance on her house at late hours, making the plaintiff and her neighbors apprehensive." *Id.* at 220, 726 S.E.2d at 196 (brackets

omitted). However, this Court determined the specific dates and facts concerning the "long history of abuse" were unclear, but that it was "clear that defendant's recent act of hiring a PI service, and not the history of abuse, was the basis for the trial court's decision to enter the DVPO[.]" *Id.* at 223, 726 S.E.2d at 196 (quotation marks and brackets omitted). This Court thus concluded that "a vague finding of a general 'history of abuse' is not a finding of an 'act of domestic violence' as defined by N.C. Gen. Stat. § 50B-3(a)." *Id.*

Unlike in *Kennedy*, Plaintiff provided detailed evidence, as recited throughout this opinion, to support the court's findings that "Defendant has a history of domestic violence against the Plaintiff including threats to kill her and convictions for violating a DVPO" and that Defendant was to have no contact with Plaintiff or the children, per court order. Plaintiff provided the trial court with exact dates, court documents, therapist notes, and psychiatric recommendations regarding Defendant's abusive conduct.

Based on the copious, detailed evidence before it, the trial court made specific findings regarding Defendant's history of domestic violence against Plaintiff and Defendant's repeated harassment of Plaintiff in violation of a court order. The trial court's findings were supported by competent evidence, and the findings supported the conclusion of law that Defendant committed acts of domestic violence.

III. Conclusion

There was competent evidence to support the trial court's findings of fact that Defendant placed Plaintiff in fear of continued harassment that rose to such a level as to inflict substantial emotional distress. Moreover, the findings of fact support the ultimate conclusion of law that Defendant committed acts of domestic violence against Plaintiff. The trial court's Order is affirmed.

AFFIRMED.

Judges DILLON and INMAN concur.

CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC, PLAINTIFF
v.
RESCO PRODUCTS, INC. AND PIEDMONT MINERALS COMPANY, INC., DEFENDANTS

No. COA19-76

Filed 16 July 2019

1. Torts, Other—interference with prospective economic advantage—Noerr-Pennington doctrine—applicability

A real estate company's claim for tortious interference with prospective economic advantage was not subject to the *Noerr-Pennington* doctrine—which provides immunity for certain petitioning activities undertaken by businesses, absent a bad faith motive to thwart competition—where the claim was not based on anti-competitive activities, since the parties were not competitors in the marketplace, and the complaint's allegations that defendants, owners of real property adjacent to a proposed development, made misrepresentations to a town planning board that induced a third party developer to back out of the deal, did not show that defendants were entitled to immunity as a matter of law.

2. Torts, Other—interference with prospective economic advantage—misrepresentations—ultrahazardous activity—actionability

A real estate company's claim that defendants—owners of property adjacent to a proposed development—tortiously interfered with prospective economic advantage by making misrepresentations to a town planning board (that caused a third party developer to back out of the deal) was not precluded even though the misrepresentations related to blasting, an activity that is deemed ultrahazardous under North Carolina law.

3. Torts, Other—interference with prospective economic advantage—contractual modifications—sufficiency of pleadings

A real estate company pleaded sufficient allegations to support a claim for tortious interference with prospective economic advantage against defendants, owners of property adjacent to a proposed development, based on allegedly intentional misrepresentations to a town planning board that induced a third party developer to back out of a deal, thereby harming plaintiff real estate company. Although the alleged interference caused the third party developer to modify an existing contract by terminating a second phase of the overall project rather than cancelling the entire agreement, the tort

applies equally to modifications of an existing contract and to prevention or termination of a contract.

Appeal by Plaintiff from order entered 1 October 2018 by Judge Michael J. O'Foghludha in Orange County Superior Court. Heard in the Court of Appeals 22 May 2019.

Manning Fulton & Skinner, P.A., by Charles L. Steel, IV, and J. Whitfield Gibson, for the Plaintiff-Appellant.

McGuireWoods LLP, by Abbey M. Krysak, for the Defendants-Appellees.

BROOK, Judge.

Plaintiff appeals the dismissal of its complaint by the trial court. Because the trial court dismissed Plaintiff's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, our recitation of the facts is based on the allegations in Plaintiff's complaint.

I. Background

A. Factual Background

Plaintiff Cheryl Lloyd Humphrey Land Investment Company, LLC ("Plaintiff") is a limited liability company that owns real estate in Orange County, North Carolina. In the summer of 2013, Plaintiff entered negotiations with Braddock Park Homes, Inc. ("Braddock Park Homes") to sell Braddock Park Homes approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road in Hillsborough, North Carolina. Braddock Park Homes planned to develop a 118 unit townhome subdivision similar in style to the existing Braddock Park townhome development located in Hillsborough. However, the proposed development could not be completed as planned unless the Town of Hillsborough ("the Town") agreed to annex the property and make certain zoning changes.

A series of meetings took place in the fall of 2013 in which the Town and its planning board considered whether to annex and re-zone the property as proposed. Defendants Resco Products, Inc. and Piedmont Minerals Company, Inc. ("Defendants"), owners of real property adjacent to the proposed development, participated in these meetings, opposing approval of the project by the Town. During the course of these proceedings, Defendants made various representations to the Town and

its planning board regarding the dangers posed by fly rock, air blasts, and ground vibrations resulting from their operations of a mine on land adjacent to the proposed townhome development and, specifically, blasting conducted at the mine. Despite Defendants' opposition to the project, however, the meetings before the Town and its planning board culminated in the Town approving Braddock Park Homes's request that the property be annexed by the Town, and making the required zoning changes.

After securing approval of the project from the Town, Plaintiff entered into a Purchase and Sale Agreement ("the Agreement") with Braddock Park Homes, the negotiation of which had been ongoing throughout the time of the proceedings before the Town and its planning board in fall of 2013 and early 2014. Defendants were aware of these negotiations.

The Agreement Plaintiff entered into with Braddock Park Homes contemplated two development phases. In Phase I, Braddock Park Homes agreed to purchase approximately 41 acres of real estate from Plaintiff for $85,000 per acre. In Phase II, Braddock Park Homes was granted a "free look" for a specified period of time to purchase an additional 5.5 acres, which was directly adjacent to land owned by Defendants, near the location of their mining operation. Under the Agreement, Braddock Park Homes enjoyed the right to terminate Phase II of the project. Although Phase I was consummated, Braddock Park Homes exercised its right to modify the Agreement on 9 October 2014, terminating Phase II. Braddock Park Homes cited the representations made by Defendants to the Town during the approval process as the reason for terminating Phase II.

B. Procedural History

On 27 October 2017, Plaintiff initiated this action. In its complaint, Plaintiff alleges a single cause of action for tortious interference with prospective economic advantage. Plaintiff's claim for tortious interference with prospective economic advantage is based on representations made by Defendants to the Town and its planning board during the approval process. Plaintiff asserts that these representations were in fact misrepresentations, and that these misrepresentations were made by Defendants maliciously, intentionally, and without justification, proximately resulting in the termination by Braddock Park Homes of Phase II of the Agreement, and injuring Plaintiff in an amount equal to the $85,000 per acre price of Phase I.

In lieu of an answer, Defendants filed a motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The motion came on for hearing before the Honorable Michael J. O'Foghludha in Orange County Superior Court on 1 October 2018. The trial court granted Defendants' motion in an order entered the same day. Plaintiff entered timely notice of appeal on 29 October 2018.

II. Analysis

A. Standard of Review

A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure "tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory." *Cage v. Colonial Bldg. Co., Inc.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (internal marks and citation omitted). A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it "appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970).

Our review of the decision by a trial court to grant a motion to dismiss under Rule 12(b)(6) is *de novo*. *Ventriglia v. Deese*, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819–20 (2008). In determining 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[,] . . . [we] must construe the complaint liberally[.]" *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014) (internal marks and citation omitted). We will not affirm the dismissal of a complaint under Rule 12(b)(6) "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." *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004) (internal marks and citation omitted).

B. The *Noerr-Pennington* Doctrine

[1] This appeal first presents the question of the applicability of the *Noerr-Pennington* doctrine. Defendants contend that the trial court did not err in concluding that Plaintiffs' complaint fails to state a claim upon which relief can be granted because the allegations in Plaintiffs' complaint are insufficient, as a matter of law, under the *Noerr-Pennington* doctrine. We disagree.

i. Introduction

We note at the outset that this case is not a dispute between competitors in the marketplace, nor does it arise in a context in which concerns about the consolidation of market power detrimentally impacting consumers animate a statutory or regulatory framework under which any claim at issue in this case arises. In the discussion that follows we summarize the origins of the *Noerr-Pennington* doctrine and its application in North Carolina. We go on to hold that the *Noerr-Pennington* doctrine does not apply to this case. Accordingly, we reject the argument that the complaint fails to state a claim upon which relief can be granted under the *Noerr-Pennington* doctrine.

ii. The Origins of the *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine originates from the U.S. Supreme Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961) ("*Noerr*"), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed.2d 626 (1965) ("*Pennington*"), which are together its namesake. In *Noerr*, the Supreme Court held that the First Amendment protects businesses when they engage in certain petitioning activities, such as initiating litigation, providing them with immunity from antitrust liability when their conduct is aimed at influencing governmental action and their petitioning activity otherwise potentially violates §§ 1 and 2 of the Sherman Act, which proscribe conspiracies to restrain trade and attempts to impose monopolies, respectively. *See* 365 U.S. at 135-37, 81 S. Ct. at 528-29. *Pennington* then reiterated the core teaching of *Noerr*: that immunity from antitrust liability under the First Amendment exists for "concerted effort[s] to influence public officials regardless of intent or purpose." 381 U.S. at 670, 85 S. Ct. at 1593.

However, the Supreme Court in *Noerr* recognized an exception to this immunity where the conduct at issue is a "mere sham," such as where an anti-competitive publicity campaign, while "ostensibly directed toward influencing governmental action, is . . . actually nothing more than an attempt to interfere directly with the business relationships of a competitor[.]" 365 U.S. at 144, 81 S. Ct. at 533. For example, for the "sham" exception to the doctrine to apply to a lawsuit it "must be objectively baseless and must conceal an attempt to interfere directly with the business relationships of a competitor"; that is, "the plaintiff must have brought baseless claims in an attempt to thwart competition (i.e., in bad faith)." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,

572 U.S. 545, 556, 134 S. Ct. 1749, 1757, 188 L. Ed.2d 816 (2014) (internal marks and citation omitted).

iii. The Application of the *Noerr-Pennington* Doctrine in North Carolina

This Court has addressed the applicability of the *Noerr-Pennington* doctrine three times previously. The first was *Reichhold Chemicals, Inc. v. Goel*, 146 N.C. App. 137, 555 S.E.2d 281 (2001). *Reichhold Chemicals* involved the departure of an expert in the field of moisture cured polyurethane adhesives from the employ of the plaintiff, a business competing in the adhesives space, and the subsequent engagement of this expert, the defendant, by a direct competitor of the plaintiff in the adhesives business, who was not a party to the appeal to this Court. *Id.* at 142-43, 555 S.E.2d at 284-85.

We observed in *Reichhold Chemicals* that the Supreme Court's decision in *Noerr* was based "on the First Amendment right to petition and . . . federal antitrust law." *Id.* at 148, 555 S.E.2d at 288. Rejecting the plaintiff's challenge to the sufficiency of the pleading of the defendant's counterclaims based on the *Noerr-Pennington* doctrine, we reasoned that the defendant's counterclaims did not interfere with the plaintiff's First Amendment rights to seek redress from the government for the harms it allegedly suffered as a result of its competitor's conduct. *Id.* The defendant, therefore, was not required to supplement the pleadings in his counterclaim by including allegations that, if proven, would establish that the sham exception under the *Noerr-Pennington* doctrine applied. *See id.* We instead concluded that the *Noerr-Pennington* doctrine itself did not apply, refusing to accept the argument that the failure to plead through the exception to *Noerr-Pennington* immunity was fatal to the defendant's counter-complaint. *See id.* (observing that "even if plaintiff's suit against [its competitor] was objectively reasonable, plaintiff could still be liable for tortious interference" to the defendant).

We addressed the *Noerr-Pennington* doctrine for a second time in *Good Hope Hosp., Inc. v. NC Dep't of Health and Hum. Sevs.*, 174 N.C. App. 266, 620 S.E.2d 873 (2005). *Good Hope Hosp.* involved a Certificate of Need ("CON") issued by the North Carolina Department of Health and Human Services ("the Department") to one of the plaintiffs, a hospital, to build a replacement facility roughly three miles from its existing facility. *Id.* at 268, 620 S.E.2d at 876-77. After the CON was issued by the Department, the plaintiff entered a joint venture with a hospital group, and through this joint venture applied for a second CON, this time for a larger facility, in a different location than the replacement facility that

had initially been approved. *Id.* at 268, 620 S.E.2d at 877. The application for this second CON was not approved, and the plaintiff-hospital and plaintiff-hospital group, along with the municipality where the second, larger proposed facility was to be located, sought a declaratory judgment that the proposed, larger facility was not subject to the CON approval requirements under the Department's purview. *Id.* at 269, 620 S.E.2d at 877. They also filed various claims against the Department and another hospital that had opposed approval of the second facility, including claims for tortious interference with contract, tortious interference with prospective economic advantage, a conspiracy in restraint of trade under N.C. Gen. Stat. § 75–1, unfair and deceptive trade practices under N.C. Gen. Stat. § 75–1.1, and common law unfair competition. *Id.*

In *Good Hope Hosp.*, we held that the *Noerr-Pennington* doctrine applied. *Id.* at 275, 620 S.E.2d at 881. Observing that numerous federal courts, including the Fourth Circuit, had applied the *Noerr-Pennington* doctrine, we noted in particular that *Noerr-Pennington* immunity had been recognized by the federal courts to be applicable "in the context of certificate of need cases." *Id.* at 276, 620 S.E.2d at 881. In holding the doctrine applicable, we affirmed the trial court's dismissal of the plaintiffs' claims on the basis of the *Noerr-Pennington* doctrine because the plaintiffs' complaint did not contain allegations that, if proven, would establish that their lawsuit was not a "mere sham," thus falling within the exception to *Noerr-Pennington* immunity. *Id.* at 276-78, 620 S.E.2d at 881-82. We went on to explain that in CON cases implicating *Noerr-Pennington* immunity, the allegations in the plaintiff's complaint must "show one of three things":

> (1) defendant's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) defendant engaged in a pattern of petitions before the Department without regard to the merit of the petitions; or (3) defendant's misrepresentations before the Department deprived the entire CON proceeding of its legitimacy.

Id. at 276, 620 S.E.2d at 882 (internal marks omitted). Because a review of the complaint revealed no allegations that, if proven, would establish that the sham exception applied, we affirmed the trial court's dismissal of the complaint on the basis of *Noerr-Pennington* immunity. *Id.* at 277-78, 620 S.E.2d at 882.

Good Hope Hosp. was not this Court's last word on the applicability of the *Noerr-Pennington* doctrine in North Carolina state courts.

See North Carolina Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 220 N.C. App. 212, 725 S.E.2d 638 (2012), *rev'd in part on other grounds*, 366 N.C. 505, 742 S.E.2d 781 (2013). *Cully's Motorcross* involved the denial of an insurance claim on a policy covering a historic building that burned under circumstances considered suspicious by the plaintiff, the defendants' insurance company. *Id.* at 214-15, 725 S.E.2d at 640-41. Based on the circumstances surrounding the purchase of the building and the fire that destroyed it, the insurance company made a report to law enforcement, and one of the defendants was arrested and charged with obtaining property by false pretenses on the basis of this report. *Id.* at 215, 725 S.E.2d at 641. Thereafter, the insured who was arrested and charged criminally, one of the defendants, asserted a counterclaim against the insurance company, for malicious prosecution. *Id.* at 215, 725 S.E.2d at 641. The criminal charge against this defendant was later dismissed. *Id.*

After a bench trial but before the court entered a judgment, the plaintiff moved for a new trial or, in the alternative, a judgment that it enjoyed *Noerr-Pennington* immunity as a defense to the malicious prosecution claim. *Id.* at 215-16, 725 S.E.2d at 641. The trial court denied the motion, finding the plaintiff liable for malicious prosecution, and awarding the defendants damages and costs, including treble damages and attorney's fees. *Id.* at 215-16, 725 S.E.2d at 641.

We rejected the plaintiff's argument on appeal that the trial court erred in denying the motion for new trial or for judgment as a matter of law on the issue of *Noerr-Pennington* immunity. *Id.* at 232, 725 S.E.2d at 650. We clarified that our decision in *Reichhold Chemicals* was based on the objective reasonableness of the defendant's counterclaims, which did not need to be pleaded through the sham exception to *Noerr-Pennington* immunity where the doctrine did not apply. *Id.* at 231-32, 725 S.E.2d at 650. We reasoned that the trial court's ruling on the motion for a new trial or for judgment as a matter of law based on the *Noerr-Pennington* doctrine was not error because the trial court's basis for concluding that the doctrine did not apply – that the claim for malicious prosecution was asserted without probable cause – was sound. *Id.* at 232, 725 S.E.2d at 650. We therefore affirmed the trial court's conclusion that the doctrine did not apply to the facts before us, despite our holding in *Good Hope Hosp.*, that the doctrine is applicable in North Carolina state courts. *See id.*

iv. Applicability of the *Noerr-Pennington* Doctrine to the Present Case

As noted previously, the present case is not a dispute between competitors in the marketplace, nor does it arise in the CON context, where concerns about the consolidation of market power detrimentally impacting consumers inform decisions by the Department to approve or deny a CON. There is no cause of action pleaded by Plaintiff or Defendants for a conspiracy in restraint of trade under N.C. Gen. Stat. § 75–1, unfair and deceptive practices under N.C. Gen. Stat. § 75–1.1, common law unfair competition, or any other anti-competitive-related harm proscribed by law. Instead, Plaintiff's sole cause of action involves various alleged misrepresentations made by Defendants to the Town about the dangers posed by fly rock, air blasts, and ground vibrations created by the mining operation conducted by Defendants on the property adjacent to the proposed townhome development, including both the approximately 41 acres in Phase I, the sale of which was consummated, and the 5.5 acres in Phase II, which Plaintiff alleges Defendants' "malicious[], intentional[], and [] [un]justifi[ed] misrepresent[ations]" rendered significantly less valuable that it would have been, were it not for these alleged misrepresentations.

We hold that the *Noerr-Pennington* doctrine does not apply to the facts as alleged in Plaintiff's complaint, which we consider true on review of a trial court's decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See, e.g.*, *Hinson*, 232 N.C. App. at 208, 753 S.E.2d at 826 ("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.") (internal marks and citation omitted). The absence of allegations in Plaintiff's complaint pleading the cause of action for tortious interference with prospective economic advantage into the "sham" exception to the *Noerr-Pennington* doctrine is not a defect of the complaint, much less one warranting dismissal of the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). This is the case because the allegations in the complaint do not show that Defendants, as a matter of law, enjoy *Noerr-Pennington* immunity from Plaintiff's claim for tortious interference with prospective economic advantage. To be sure, the question would be closer if there were an allegation that actionable anti-competitive-related harms resulted from petitioning activity protected by the First Amendment. However, no such allegation has been made in this case, and there does not appear to be support for such an allegation in the record before us. Accordingly, we conclude that, on the facts of the complaint, the *Noerr-Pennington* doctrine does not apply.

C. The Alleged Misrepresentations

[2] The alleged misrepresentations at issue present a question of first impression under North Carolina law; namely, whether misrepresentations about the dangers of an activity North Carolina law regards as ultrahazardous—indeed, the only activity regarded by North Carolina law as ultrahazardous—can be overstated and, in their overstatement, become actionable misrepresentations upon which a cause of action for tortious interference with prospective economic advantage can be predicated. We hold that they can.

North Carolina law has recognized blasting activities as ultrahazardous since the Supreme Court's decision in *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963). The Supreme Court in *Blythe* identified blasting as "intrinsically dangerous," reasoning that the impossibility of "predict[ing] with certainty the extent or severity of [resulting] consequences" rendered blasting ultrahazardous. *Id.* at 74, 131 S.E.2d at 904. The Supreme Court held that a rule of strict liability applies to actionable harms resulting from blasting. *Id.* Numerous subsequent decisions by the Supreme Court have reiterated the holding of *Blythe*. *See, e.g.*, *Trull v. Carolina-Virginia Well Co.*, 264 N.C. 687, 691, 142 S.E.2d 622, 624 (1965) ("[O]ne who is lawfully engaged in blasting operations is liable without regard to whether he has been negligent, if by reason of the blasting he causes direct injury to neighboring property or premises"); *Falls Sales Co. v. Bd. of Transp.*, 292 N.C. 437, 442, 233 S.E.2d 569, 572 (1977) ("We have held that blasting is an . . . [ultrahazardous] activity and that persons using explosives are strictly liable for damages proximately caused by an explosion"); *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991) ("Parties whose blasting proximately causes injury are held strictly liable for damages . . . largely because reasonable care cannot eliminate the risk of serious harm."). Blasting is the only ultrahazardous activity under North Carolina law. *See Jones v. Willamette Indus.*, 120 N.C. App. 591, 596, 463 S.E.2d 294, 298 (1995); *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 311 n. 2, 511 S.E.2d 313, 317 n. 2 (1999); *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000); *Harris v. Tri-Arc Food Sys.*, 165 N.C. App. 495, 499, 598 S.E.2d 644, 647 (2004); *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 183 N.C. App. 66, 69, 644 S.E.2d 16, 19 (2007).

The alleged misrepresentations in this case involve the very dangers North Carolina law guards against in its recognition of blasting as ultrahazardous. However, Defendants, the parties engaged in the blasting activities at issue, cite the ultrahazardous nature of their activities as the

reason Plaintiff's claim cannot succeed, unlike in the more typical case, where the plaintiff will be relieved of proving an element of his or her case – breach of a duty of reasonable care – against a defendant engaged in blasting activities. Citing the numerous decisions by the Supreme Court reiterating the principle that no amount of reasonable care can "eliminate the risk of serious harm" accompanying an ultrahazardous activity such as blasting, *see Woodson*, 329 N.C. at 350, 407 S.E.2d at 234, Defendants contend that these risks simply cannot be overstated to an extent that they constitute actionable misrepresentations upon which a claim for tortious interference with prospective economic advantage can be based. We disagree.[1]

It does not follow that simply because no amount of reasonable care eliminates the risk of serious harm from blasting it is impossible, as a matter of law, to overstate the risks of harm from blasting. The former principle is a proposition stating the rationale for imposing strict liability for injuries resulting from blasting; it does not mean that the dangers inherent in the activity cannot be described – or mis-described. And it does not mean that an injury resulting from such mis-description, as is alleged in this case, is not actionable. Similarly, the principle that no amount of reasonable care eliminates the risk of serious harm from blasting does not imply that detrimental reliance on a misrepresentation of the risk of this ultrahazardous activity could not be the basis for recovery on a fraud claim, or for challenging the validity of a contract, a party's consent to which was procured by fraud. We hold that a claim that has as an element the truthfulness of a representation about an activity North Carolina law regards as ultrahazardous can survive a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure even though the content of the representation relates to an activity regarded by the law as ultrahazardous. Success on Plaintiff's claim for tortious interference with prospective economic advantage thus is not precluded by the content of Defendants' representations to the Town, notwithstanding the rule of strict liability applicable to cases in which injury is alleged to result from an ultrahazardous activity.

D. Tortious Interference with Prospective Economic Advantage

[3] A number of arguments raised by the parties relate to whether the cause of action for tortious interference with prospective economic advantage was properly pleaded by Plaintiff. In a related vein,

1. We also note that the Town apparently did not credit Defendants' alleged misrepresentations, approving the Braddock Park Homes development project despite their vocal opposition to approval of the project.

Defendants argue that facts alleged in the complaint, if established, foreclose the possibility of Plaintiff's success at trial. We disagree, and hold that the claim for tortious interference with prospective economic advantage was properly pleaded, and that the facts alleged in Plaintiff's complaint do not foreclose the possibility of Plaintiff's success at trial.

Generally speaking, "[a]n action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiff[] from entering into a contract with a third party." *Walker v. Sloan*, 137 N.C. App. 387, 392-93, 529 S.E.2d 236, 241 (2000). Tortious interference with prospective economic advantage

> arises when a party interferes with a business relationship by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights.

Beverage Sys. of the Carolinas v. Assoc. Beverage Repair et al., 368 N.C. 693, 701, 784 S.E.2d 457, 463 (2016) (internal marks and citation omitted). Stating a claim for tortious interference with prospective economic advantage requires that the plaintiff "allege facts [] show[ing] that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them[,] which contract would have ensued but for the interference." *Walker*, 137 N.C. App. at 393, 529 S.E.2d at 242.

In its complaint, Plaintiff alleges as follows:

> 17. In the summer of 2013, the Plaintiff began negotiations with Braddock Park Homes, Inc., to sell that entity approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road, Hillsborough, North Carolina.
>
> . . .
>
> 29. At the time Defendants made [certain] malicious misrepresentations to the Town of Hillsborough, it was aware that the Plaintiff was negotiating with Braddock Park Homes for the townhome development project.
>
> 30. On February 28, 2014, the Plaintiff entered into a Purchase and Sale Agreement with Braddock Park Homes, Inc., whereby the Plaintiff agreed to sell Braddock Park Homes, Inc. approximately 41 acres of real property

located in Orange Groves and Enoe Mountain Road, Hillsborough, North Carolina at $85,000 per acre.

31. The February 28, 2014 Purchase and Sale Agreement contained a provision that gave Braddock Home a specified period of time for a "free look" at Phase II (Section B) of the project, which was the 5.5 acres located adjacent to Defendants' Hillsborough Mine, due to the request of the Defendants to deny the approval of that Phase of the project due to the potential threat of damage to health, safety and welfare of future residents of Enoe Mountain Village due to fly rock, nitrogen and structural damage from the operations of the Defendant's Hillsborough Mine.

32. The February 29, 2014 [*sic*] Purchase and Sale Agreement further gave Braddock Park Homes, Inc. the right, subject to Plaintiff's acceptance, to terminate Phase II of the Town Home Project from the contract if this threat of liability was not removed to its satisfaction.

33. On October 9, 2014, Braddock Park Homes, Inc. exercised its right to modify the Purchase and Sale Agreement and terminate Phase II (Parcel B-3) from the Agreement, citing dangers of foundation damage to homes, fly rock from blasting and nitrogen dangers to future inhabitants based on the Defendants misrepresentation to the Town of Hillsborough.

34. The Defendants' malicious misrepresentations to the Town of Hillsborough were without justification in that at the time they were made, the Defendants were required by their September 11, 2013 Permit to take measures to prevent physical hazard to any neighboring dwelling house if their mining excavation came within 300 feet thereof, regardless of the cost of doing so.

35. The Defendants intentionally induced Braddock Park, Inc. not to enter into a contract for the purchase of Phase II of the Town Home Project by making these intentional misrepresentations to the Town of Hillsborough.

36. The Defendants' malicious misrepresentations to the Town of Hillsborough were without justification in that at the time they were made the Defendants had no evidence that the blasting operations from their Hillsborough Mine

had endangered persons or neighboring property from fly rock or excessive air blasts or ground violations.

37. The Defendants' interference with the Plaintiff's pending contract with Braddock Park Homes, Inc. was without justification in that the Defendants' motives were not reasonably related to the protection of the legitimate business interest of the Defendants.

38. In making these intentional misrepresentations, the Defendants acted without justification, not in the legitimate exercise of Defendants' own rights, but with design to injure Plaintiff or obtain some advantage at their expense.

39. By virtue of their malicious misrepresentations made to the Town of Hillsborough, the Defendants induced Braddock Park Homes, Inc. not to perform Phase II of the Purchase and Sale Agreement so that the Defendants could purchase the 5.5 acre tract adjacent to their property at a substantially discounted price.

40. Subsequent to the town's approval of the Town Home Project, the Defendant did in fact offer to purchase the 5.5 acre tract located adjacent to its Hillsborough Mine far below the fair market value for the Property.

41. By virtue of their intentional and malicious misrepresentations made to the Town of Hillsborough, the Defendants tortuously interfered with the Plaintiff's economic advantage by inducing Braddock Park Homes, Inc. not to perform Phase 2 of the Town Home Project.

42. But for the intentional misrepresentations of the Defendants, Braddock Park Homes, Inc. would not have modified the February 29, 2014 Purchase and Sale Agreement to eliminate Phase II of the Town Home Project.

43. By virtue of the Defendants' tortious interference with the Plaintiff's prospective economic advantage, the Plaintiff has suffered damages in the amount of $467,755.

Our review of the allegations in Plaintiff's complaint confirms that Plaintiff has alleged (1) the existence of a valid business relationship; (2) interference with that business relationship by an outsider; (3) the absence of a legitimate justification for the alleged interference by the outsider; (4) malice by the outsider in engaging in the alleged

interference; (5) causation from the alleged interference resulting in damages to Plaintiff; and (6) damages suffered by Plaintiff to a sum certain, $467,755. These allegations are adequate to make out a cause of action for tortious interference with prospective economic advantage.

Defendants argue that Plaintiff has not adequately pleaded a claim for tortious interference with prospective economic advantage because the alleged interference did not induce Braddock Park Homes to refrain from entering into a new contract with Plaintiff but instead only induced Braddock Park Homes to exercise its modification rights to back out of Phase II of its multi-phase development deal with Plaintiff. Defendants suggest that it would be an expansion of the tort of tortious interference with prospective economic advantage under North Carolina law "to include . . . modifications in addition to prevented contracts and contract breaches." We disagree.

The tort of tortious interference with prospective economic advantage under North Carolina law not only embraces instances in which "the defendant . . . induce[s] a third party to refrain from entering into a contract with the plaintiff," *see MCL Automotive v. Town of Southern Pines*, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010), it also extends to inducement by a third party, the outsider, of a party to a contract "to terminate or fail to renew [that] contract," *see Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 317, 498 S.E.2d 841, 850 (1998). The reason the difference between the interference preventing a new contract from being made, resulting in the cancellation or termination of an existing agreement, or prompting a party to an existing agreement to allow the agreement to expire rather than renew it for an additional term, is not a meaningful one as this element relates to a party's liability, is that in all three variations, the requirement is met that the prospective economic advantage with which the outsider interferes is substantial enough to permit recovery, and not a "mere expectancy," which has been held to be insufficient. *See Beverage Sys. of the Carolinas*, 368 N.C. at 701, 784 S.E.2d at 463.

Similarly, the difference between a party to an agreement exercising modification rights in a multi-phase development deal to terminate one part of a multi-part agreement, as is alleged to have occurred in this case, and the party canceling the entire agreement, is not relevant to whether the third party whose interference resulted in the choice to terminate the contract is liable for tortious interference with the prospective economic advantage derived from one or all phases of the multi-part agreement. As we observed in *Reichhold Chemicals*, "[i]nducing a person not to enter into a contract is as much a tort as interference with an

established contract." 146 N.C. App. at 151, 555 S.E.2d at 290. So too is inducing a person or entity to terminate a contract, *see Smith*, 129 N.C. App. at 317, 498 S.E.2d at 850, such as in this case, by allegedly inducing a third party not to consummate a later phase of a multi-phase development deal, regardless of whether the contractual vehicle defeating the prospective economic advantage is denominated a termination, cancellation, prevention, rescission, or other language of similar import and effect. Accordingly, we hold that the tort of tortious interference with prospective economic advantage under North Carolina law includes contractual modifications equivalent in effect to terminations of parts of multi-part agreements.

III. Conclusion

We reverse and remand the trial court's dismissal of Plaintiff's complaint for failure to state a claim upon which relief can be granted for three reasons. First, the allegations in the complaint do not establish the *Noerr-Pennington* doctrine applies to this case to bar Plaintiff's claims. Second, the alleged misrepresentations are actionable under North Carolina law even though their content relates to activity regarded by the law as ultrahazardous. Third, the cause of action for tortious interference with prospective economic advantage alleged in Plaintiff's complaint is properly pleaded, and this tort includes terminations of parts of multi-part agreements.

REVERSED AND REMANDED.

Judges STROUD and HAMPSON concur.

COATES v. DURHAM CTY.

[266 N.C. App. 271 (2019)]

RHONDA COATES, TIMOTHY ELLIS, PATRICK AND MARIE MAHONEY, KENNETH PRICE, BRYAN AND ANGELA SARVIS, JAMES VENTRILLA, AND JAMES WOLAK, PETITIONERS

v.

DURHAM COUNTY, A NORTH CAROLINA COUNTY, AND HUBRICH CONTRACTING, INC., A NORTH CAROLINA CORPORATION, RESPONDENTS

No. COA18-1298

Filed 16 July 2019

Appeal and Error—interlocutory appeal—reversal of special-use permit—remand for rehearing—substantial right

The trial court's order—which reversed the decision of a city-county Board of Adjustment allowing a special-use permit for a middle school and instructed the Board to reopen the public hearing on the matter—was interlocutory because it remanded the case to a municipal body for further proceedings. The appeal was dismissed where the building contractor failed to show a substantial right would be lost absent appellate review.

Appeal by Respondent Hubrich Contracting, Inc. from Order entered 28 August 2018 by Judge G. Bryan Collins in Durham County Superior Court. Heard in the Court of Appeals 8 May 2019.

Brown & Bunch, PLLC, by LeAnn Nease Brown, for petitioners-appellees.

Morningstar Law Group, by Jeffrey L. Roether and Patrick L. Byker, for respondent-appellant Hubrich Contracting, Inc.

HAMPSON, Judge.

Hubrich Contracting, Inc. (Respondent) appeals from an Order reversing the decision of the Durham City-County Board of Adjustment (BOA) to grant a Minor Special-Use Permit (Permit) to Respondent. We, however, determine the Order that Respondent appeals from is an interlocutory order that does not affect a substantial right of Respondent. Therefore, we dismiss this appeal.

Factual and Procedural Background

On 7 November 2016, Respondent commenced this proceeding by filing an application for the Permit with the Durham City-County

Planning Department, which Permit would allow Respondent to construct a middle school on certain property in Durham County. Following a hearing before the BOA on 28 February 2017, the BOA issued an order granting the Permit on 28 March 2017. On 25 April 2017, Rhonda Coates, Timothy Ellis, Patrick and Marie Mahoney, Kenneth Price, Bryan and Angela Sarvis, James Ventrilla, and James Wolak (Petitioners) petitioned the Durham County Superior Court for review by way of a writ of *certiorari*. The Durham County Superior Court granted Petitioners' petition on 25 April 2017 and ordered a hearing.

The hearing occurred on 11 September 2017, and after the hearing concluded, the presiding judge took the matter under advisement. On 28 August 2018, the trial court entered its Final Order and Judgment (Order). In its Order, the trial court reversed the BOA's decision to grant the Permit to Respondent and remanded the matter to the BOA with instructions to, *inter alia*, reopen the public hearing on Respondent's application for the Permit. Respondent appeals from this Order.

Jurisdiction

Although neither party raises this issue, we must address whether this appeal is properly before this Court. *See Akers v. City of Mount Airy*, 175 N.C. App. 777, 778, 625 S.E.2d 145, 146 (2006) ("[When faced with] a jurisdictional issue, this Court has an obligation to address the issue *sua sponte* regardless [of] whether it is raised by the parties." (citation omitted)). Indeed, Respondent contends as grounds for appellate review that the Order "is a final judgment . . . and therefore is appealable to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)." We disagree.

"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." *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (citation omitted).

> [T]his Court has consistently held that an order by a superior court, sitting in an appellate capacity, that remands to a municipal body for additional proceedings is not immediately appealable. *See, e.g., Heritage Pointe Builders [v. N.C. Licensing Bd. of General Contractors]*, 120 N.C. App. [502,] 504, 462 S.E.2d [696,] 698 (1995) (appeal of superior court's remand to a licensing board for rehearing dismissed as interlocutory); *Jennewein v. City Council of the City of Wilmington*, 46 N.C. App. 324, 326, 264 S.E.2d

802, 803 (1980) (appeal of superior court's remand to a city council for a *de novo* hearing dismissed as interlocutory).

Akers, 175 N.C. App. at 779-80, 625 S.E.2d at 146-47 (appeal of superior court's remand to a board of commissioners for further proceedings dismissed as interlocutory).

Here, Respondent appeals from an Order reversing the BOA's decision to grant Respondent the Permit. In its Order, the trial court instructs the BOA to reopen the public hearing on Respondent's application for the Permit after following certain notice procedures and orders the BOA to conduct a new hearing on Respondent's application. Because this Order "remands to a municipal body for additional proceedings[,]" this appeal is interlocutory. *See id.* (citations omitted).

A party may appeal an interlocutory order if either: (1) the trial court certifies there is no just reason to delay appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) if delaying the appeal would affect a substantial right. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations omitted). Here, the trial court's Order does not contain a Rule 54(b) certification; therefore, we consider whether the Order affects a substantial right of Respondent.

A substantial right has consistently been defined as "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, quotation marks, and brackets omitted). The burden is on the appellant to establish 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*, 115 N.C. App. at 379, 444 S.E.2d at 253 (citation and quotation marks omitted). Further, "[i]t is not the duty of this Court to construct arguments for or find support for [the] appellant's right to appeal from an interlocutory order[.]" *Id.* at 380, 444 S.E.2d at 254 (citations omitted).

As discussed *supra*, Respondent's appeal is interlocutory, and in its brief, Respondent offers no substantial right that would be affected absent a review prior to a final determination on the merits. However, Rule 28(b)(4) of our Rules of Appellate Procedure requires that "[w]hen an appeal is interlocutory, the statement [of the grounds for appellate review in the appellant's brief] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4). Our Court has noted

that in the context of interlocutory appeals, a violation of Rule 28(b)(4) is jurisdictional and requires dismissal. *See Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 96 (2015) ("[W]hen 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.").

At oral argument, when confronted with the possibility that this Order was interlocutory, Respondent offered two arguments in support of finding a substantial right. Respondent first contended that "it [was] simply a matter of time" that would be lost if its appeal was dismissed. However, our Court has recognized that "avoidance of a rehearing or trial is not a 'substantial right' entitling a party to an immediate appeal." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983) (citation omitted).

Respondent next asserted that *PHG Asheville, LLC v. City of Asheville*, ___ N.C. App. ___, 822 S.E.2d 79 (2018), requires us to address the merits of this appeal because, according to Respondent, that case involved an appeal from a superior court order reversing a city council's decision to deny the petitioner's application for a conditional-use permit and our Court reached the merits of the appeal. However, Respondent overlooks a crucial distinction between *PHG Asheville, LLC* and the case *sub judice*. In *PHG Asheville, LLC*, the City of Asheville appealed the superior court's order "conclud[ing] the [c]ity's decision to deny [p]etitioner a [conditional-use permit] was arbitrary and capricious, and [the superior court] reversed and remanded the matter with *an order to the [c]ity [c]ouncil to grant [p]etitioner's requested [conditional-use permit.]*" *Id.* at ___, 822 S.E.2d at 83 (emphasis added). Therefore, the superior court's order in *PHG Asheville, LLC* was a final order because it directed the city council to grant the conditional-use permit, which "[left] nothing to be judicially determined between [the parties] in the [quasi-judicial proceeding]." *See Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). Here, the trial court's Order did not direct the BOA to either grant or deny Petitioner's application for the Permit; therefore, *PHG Asheville, LLC* is inapplicable.

Consequently, because the trial court's Order reversed the BOA's grant of the Permit and remanded the case to the BOA for further proceedings, this appeal is interlocutory. Further, Respondent has failed to show that a substantial right would be lost absent appeal. Therefore, we

must dismiss this appeal. *See Akers*, 175 N.C. App. at 779-80, 625 S.E.2d at 146-47 (citations omitted).

Conclusion

Accordingly, for the foregoing reasons, we dismiss the appeal for lack of appellate jurisdiction.

APPEAL DISMISSED.

Judges STROUD and YOUNG concur.

GARY DELLINGER, VIRGINIA DELLINGER AND TIMOTHY S. DELLINGER, PETITIONERS
v.
LINCOLN COUNTY, LINCOLN COUNTY BOARD OF COMMISSIONERS AND STRATA SOLAR, LLC, RESPONDENTS, AND MARK MORGAN, BRIDGETTE MORGAN, TIMOTHY MOONEY, NADINE MOONEY, ANDREW SCHOTT, WENDY SCHOTT, ROBERT BONNER, MICHELLE BONNER, JEFFREY DELUCA, LISA DELUCA, MARTHA MCLEAN, CHARLEEN MONTGOMERY, ROBERT MONTGOMERY, DAVID WARD, INTERVENOR RESPONDENTS

No. COA18-1080

Filed 16 July 2019

1. Zoning—standing—mootness—denial of conditional use permit—withdrawal of permit application

An appeal of a county board of commissioners' denial of a conditional use permit was not moot even though the company that had applied for the permit withdrew its application. Because the owners of the property continued to seek appellate review and issuance of a conditional use permit for their property, the Court of Appeals retained subject matter jurisdiction.

2. Zoning—conditional use permit—due process—right to impartial hearing—bias of commissioner

Petitioner property owners' due process rights to an impartial hearing were violated where one of the county commissioners who voted on their conditional use permit had opposed the proposed solar farm before serving as a county commissioner (including contributing money to efforts against the solar farm) and demonstrated his bias during the hearing by actively opposing the permit before the board.

3. Zoning—conditional use permit—prima facie showing—rebuttal

Intervenors who opposed a conditional use permit for a solar farm on petitioner property owners' land failed to present sufficient evidence to rebut petitioners' prima facie showing of entitlement to issuance of the permit. Even though the intervenors presented the testimony of a certified real estate appraiser regarding injury to the value of nearby property, petitioners' evidence challenged and contradicted that evidence.

Judge BERGER concurring in separate opinion.

Appeal by petitioners from order entered 21 May 2018 by Judge Karen Eady-Williams in Lincoln County Superior Court. Heard in the Court of Appeals 23 April 2019.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for petitioner-appellants.

The Deaton Law Firm, PLLC, by Wesley L. Deaton, Megan H. Gilbert and Jacob R. Glass, for respondent-appellee Lincoln County and Lincoln County Board of Commissioners.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and Sean A. McLeod, for intervenor respondent-appellees.

TYSON, Judge.

Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger ("Petitioners") appeal from an order affirming the quasi-judicial decision of the Lincoln County Board of Commissioners ("the Board") to deny the issuance of a conditional use permit. We reverse and remand.

I. Background

This case returns to this Court a second time. *Dellinger v. Lincoln Cty.*, 248 N.C. App. 317, 789 S.E.2d 21, *disc. review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016). A more detailed recitation of the facts of this matter can be found in this Court's opinion from the first appeal. *Id.* at 318-21, 789 S.E.2d at 24-25.

Petitioners own approximately fifty-four acres of real property located in Lincoln County, North Carolina. In 2013, Petitioners

contracted with Strata Solar, LLC ("Strata") to lease a portion of the property for the installation of a solar farm. Strata applied for a conditional use permit, which the Board denied. On appeal, the superior court concluded the Board did not make sufficient findings of fact concerning the impact of the proposed solar farm on surrounding property values, and remanded the matter to the Board to make additional findings. After remand, the superior court affirmed the Board's decision, which had concluded Strata had failed to provide substantial, material, and competent evidence that the proposed solar farm would not substantially injure the value of adjoining or abutting property.

On appeal, this Court concluded Petitioner had "produced substantial, material, and competent evidence to establish its *prima facie* case of entitlement for issuance of the conditional use permit." *Id.* at 327, 789 S.E.2d at 29. This Court also concluded the Board had "incorrectly implemented a 'burden of persuasion' upon Strata Solar after . . . it presented a *prima facie* case, rather than shifting the burden to the Intervenors-Respondents to produce rebuttal evidence contra to overcome Strata Solar's entitlement to the conditional use permit." *Id.* at 330, 789 S.E.2d at 30. This Court unanimously reversed the superior court's order and remanded the matter for further proceedings. *Id.* at 330-31, 789 S.E.2d at 31. The Intervenors filed a petition for discretionary review with the Supreme Court, which was denied. *Dellinger v. Lincoln Cty.*, 360 N.C. 190, 794 S.E.2d 324 (2016).

Upon remand, the Intervenors filed a motion to dismiss for lack of subject matter jurisdiction, due to Strata exiting from the solar farm project on Petitioners' land. Strata had sent notice of its intention to withdraw its application for the conditional use permit in February 2017. The superior court denied Intervenors' motion and remanded the matter to the Board, in accordance with this Court's opinion. Intervenors filed another motion to dismiss before the Board, which was also denied.

The Intervenors filed a motion to recuse Commissioner Mitchem. Petitioners filed a motion to recuse Commissioner Permenter. The Board denied both of the motions. The Board concluded Petitioners had established a *prima facie* case of entitlement to a conditional use permit, but the Intervenors had produced sufficient evidence *contra* to overcome it. By a 4-1 vote, the Board denied the application for the conditional use permit.

Petitioners appealed to the superior court. The superior court affirmed the Board's denial of Petitioners' motion to recuse Commissioner Permenter. The superior court concluded the Intervenors had presented

competent, material, and substantial evidence to rebut Petitioner's *prima facie* case and the Board's decision to deny the application for the conditional use permit was not arbitrary and capricious. The superior court affirmed the Board's decision. Petitioners appeal.

II. Jurisdiction

[1] Intervenors argue this matter should be dismissed for lack of subject matter jurisdiction, as Strata's withdrawal of its application renders this matter moot. This issue was raised before and denied by both the superior court and the Board. Intervenors failed to appeal the Board's denial of their motion to dismiss when this matter again returned to the superior court. Intervenors filed neither a motion to dismiss, a cross-appeal, nor a petition for writ of certiorari in this Court. However, "a party may present for review the question of subject matter jurisdiction by raising the issue in his brief." *Carter v. N.C. State Bd. for Prof'l Eng'rs*, 86 N.C. App. 308, 310, 357 S.E.2d 705, 706 (1987) (citing N.C. R. App. P. 10(a)).

N.C. Gen. Stat. § 160A-388, applied to counties under § 153A-345.1(a), provides that "[e]very quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2017). This statute includes judicial review for the grant or denial of conditional use permits. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980).

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citation omitted). N.C. Gen. Stat. § 160A-393 grants standing to "any person" who "[h]as an ownership interest in the property that is the subject of the decision being appealed" as well as "an applicant before the decision-making board whose decision is being appealed." N.C. Gen. Stat. § 160A-393(d)(1) (2017).

"Additionally, it is the general rule that once jurisdiction attaches, it will not be ousted by subsequent events." *Finks v. Middleton*, 251 N.C. App. 401, 408, 795 S.E.2d 789, 795 (2016) (citation and internal quotation marks omitted). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778-79 (2009) (citation omitted).

Both Strata and Petitioners had standing to appeal the quasi-judicial decision of the Board. N.C. Gen. Stat. § 160A-393(d)(1). Because Petitioners, as owners of the property, continue to seek appellate review and issuance of a conditional use permit for their property, this Court retains subject matter jurisdiction, and this matter is not moot. *See Finks*, 251 N.C. App. at 408, 795 S.E.2d at 795.

The order from the superior court is a final judgment and provides Petitioners with an appeal of right to this Court. N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Petitioners argue: (1) the denial of Petitioners' motion to recuse Commissioner Permenter deprived Petitioners of their constitutional right to a quasi-judicial proceeding before a fair and impartial decision-maker; and, (2) the Intervenors failed to produce competent, material, and substantial evidence contra to overcome Petitioners' *prima facie* showing of an entitlement to a conditional use permit.

IV. Standard of Review

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. of Aldermen*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000) (citation omitted). Its decisions are reviewable by the superior court sitting "as an appellate court, and not as a trier of facts." *Id.* (citations omitted).

"When a party alleges an error of law in the [Board's] decision, the reviewing court examines the record *de novo*, considering the matter anew." *Humane Soc'y of Moore Cty. v. Town of S. Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (citations omitted). Whether competent, material, and substantial evidence was presented is a question of law, which is reviewed *de novo*. *Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013). "The [county's] ultimate decision about how to weigh that evidence is subject to whole record review." *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012).

"This Court's task on review of the superior court's order is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 23, 539 S.E.2d 18, 20 (2000) (citations and internal quotation marks omitted).

V. Analysis

A. Due Process Rights

[2] Petitioners assert the superior court erred by holding Petitioners' due process rights to an impartial hearing were not prejudiced by the participation, advocacy, and vote by Commissioner Permenter. We agree.

> A member of any board exercising quasi-judicial functions . . . shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision-maker. Impermissible violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter.

N.C. Gen. Stat. §160A-388(e)(2) (2017).

"Governing bodies sitting in a quasi-judicial capacity are performing as judges and must be neutral, impartial, and base their decisions solely upon the evidence submitted." *PHG Asheville, LLC v. City of Asheville*, __ N.C. App. __, __, 822 S.E.2d 79, 85 (2018) (citation omitted). Board members acting in a quasi-judicial capacity are held to a high standard: "[n]eutrality and the appearance of neutrality are equally critical in maintaining the integrity of our judicial and quasi-judicial processes." *Handy v. PPG Indus.*, 154 N.C. App. 311, 321, 571 S.E.2d 853, 860 (2002).

A party who asserts a board member is biased against them may move for recusal. The burden is on the moving party to prove that, objectively, the grounds for disqualification exist. *See JWL Invs., Inc. v. Guilford Cty. Bd. of Adjustment*, 133 N.C. App. 426, 430, 515 S.E.2d 715, 718 (1999); *In re Ezzell*, 113 N.C. App. 388, 394, 438 S.E.2d 482, 485 (1994).

There is a "presumption of honesty and integrity in those serving as adjudicators on a quasi-judicial tribunal," but that presumption does not preclude a showing of demonstrated bias, mandating recusal. *In re N. Wilkesboro Speedway, Inc.*, 158 N.C. App. 669, 675, 582 S.E.2d 39, 43 (2003) (citations and internal quotation marks omitted).

> Bias has been defined as a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. Bias can refer to preconceptions about facts, policy or law; a person, group or object;

> or a personal interest in the outcome of some determination. However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way.

Id. at 676, 582 S.E.2d at 43 (citing *Smith v. Richmond Cty. Bd. of Educ.*, 150 N.C. App. 291, 299, 563 S.E.2d 258, 265-66 (2002), *overruled on other grounds*, *N.C. Dept. of Env't and Nat. Res. v. Carroll*, 388 N.C. 649, 599 S.E.2d 649 (2004)).

"[E]xposure to rumors is not, in and of itself, cause to believe that Board members have been biased" *Evers v. Pender Cty. Bd. of Educ.*, 104 N.C. App. 1, 16, 407 S.E.2d 879, 887 (1991). Also, "mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of Board members at a later adversary hearing." *Id.* at 18, 407 S.E.2d at 888 (citation omitted).

Richard Permenter was elected to the Board in November 2016. At the 5 June 2017 Board meeting, in response to Petitioner's challenge, he asserted, "I believe I absolutely can make a decision based on the evidence and I do not have nor do I approach this with a closed mind."

However, he also admitted that:

> During the initial application several years back and the later appeal, perhaps as recently as two years ago *I assisted in opposing the solar farm. I contributed financially. I expressed my opinion to others* and had discussions with both those in favor and those opposed to the matter. All of these actions took place while I was a private citizen. (Emphasis supplied).

Appellees argue Permenter had not demonstrated any bias *since becoming a commissioner*. However, the existence of bias alone can be disqualifying. The question is whether or not Permenter was able to set aside his previous "knowledge and preconceptions" regarding the case. *See Smith*, 150 N.C. App. at 299, 563 S.E.2d at 266.

Petitioners clearly demonstrated Permenter's bias based upon his actively opposing this specific conditional use application and appeal in the past, committing money to the cause of preventing them from obtaining the conditional use permit, and openly communicating his opposition to others. Permenter's bias is not based upon his general discussion of or attitude toward solar farms or conditional use permits, but his position, contributions, and activities involving the grant or denial

of *this* conditional use permit for Petitioner's proposed solar farm. Permenter's activities and positions proved he had a "commitment" to "decide the case in a particular way" or had a "financial interest in the outcome of the matter," mandating recusal. *See id.* at 299, 563 S.E.2d at 265-66; N.C. Gen. Stat. § 160A-388(e)(2).

The Intervenors assert Permenter's bias, and his refusal to recuse in light of a filed motion, is harmless error due to the Board's vote being 4-1 to deny the Dellingers' petition. We disagree.

During the 5 June 2017 Board meeting and while sitting on the Board hearing the matter, Permenter advocated and presented ten pages worth of his "condensed evidence" in an attempt to rebut Petitioners' *prima facie* case. This submission was made after another commissioner had already made a motion to deny the conditional use permit and had read the proposed order on the record. The "condensed evidence" advocated and presented by Permenter was biased, one-sided, and incomplete. "In quasi-judicial proceedings, no board or council member should appear to be an advocate for nor adopt an adversarial position to a party, bring in extraneous or incompetent evidence, or rely upon *ex parte* communications when making their decision." *PHG Asheville*, __ N.C. App. at __, 822 S.E.2d at 85.

As outlined below, a review of the whole record reveals insufficient evidence *contra* was presented to rebut Petitioners' *prima facie* showing. Permenter's biased recitation of his "condensed evidence" could have influenced the votes of the two other commissioners who also voted against issuing the permit after his presentation.

Permenter's bias and commitment to deny Petitioners' request for a conditional use permit is sufficient basis to reverse and remand. The error to allow his continued advocacy and involvement in sitting and ruling as a judge in the quasi-judicial process is compounded by the insufficient rebuttal evidence from Intervenors.

B. Failure to Rebut Prima Facie Case

[3] The Lincoln County Unified Development Ordinance requires an applicant to meet four conditions to be issued a conditional use permit:

> (1) The use will not materially endanger the public health or safety if located where proposed and developed according to the plan;
>
> (2) The use meets all required conditions and specifications;

> (3) The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity; and
>
> (4) The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the approved Land Development Plan for the area in question.

Dellinger, 248 N.C. App. at 319, 789 S.E.2d at 24.

As stipulated and noted in the prior opinion, Petitioner's compliance with conditions (1), (2), and (4) are not disputed. In the prior appeal, this Court also concluded Petitioners had met their *prima facie* showing on condition (3) to warrant entitlement to a conditional use permit. *Id.* at 327, 789 S.E.2d at 29. Both the Board and the superior court acknowledged Petitioners had carried their burden to warrant issuance of the permit.

The remaining question is whether the Intervenors produced sufficient evidence *contra* to rebut Petitioners' *prima facie* showing.

"[G]overnmental restrictions on the use of land are construed strictly in favor of the free use of real property." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Humble Oil & Ref. Co. v. Bd. of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

"Material evidence has been recognized by this Court to mean [e]vidence having some logical connection with the facts of consequence or issues. Substantial evidence has been defined to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *PHG Asheville*, __ N.C. App. at __, 822 S.E.2d at 84 (quoting *Innovative 55, LLC v. Robeson Cty.*, __ N.C. App. __, __, 801 S.E.2d 671, 676 (2017)) (internal quotation marks omitted).

In concluding the Intervenors presented and carried their burden of sufficient evidence to rebut Petitioners' *prima facie* showing of entitlement to issuance, and that the proposed solar farm would materially and substantially injure the value of adjoining or abutting property, the Board relied upon the following evidence, which had been introduced at the previous hearing.

Geoffrey Zawtocki, a certified real estate appraiser, presented written and testimonial evidence of 42 other solar energy sites in North Carolina. He compared the average median housing values, housing density, and household income within a one-mile radius of those 42 solar farms to those values within a one-mile radius of the proposed site. Zawtocki stated the proposed project was "not typical" to the comparables because of the higher median housing values, housing density, and household income in the area surrounding the proposed site.

Zawtocki presented evidence of Tusquittee Trace, a 15-lot subdivision in Clay County, North Carolina. Sales of the lots were slow, due to the 2008 housing crash and following financial crisis, but three lots were sold between 2009 and 2010. In 2011, a solar farm was constructed and no further lots were sold. The solar farm can be seen on the road leading up to the subdivision, and is visible from some of the lots. Zawtocki testified the potential buyers wanted unimpaired views.

Zawtocki presented evidence of reduced property tax assessments in Clay County. In 2011, when residents voiced their concerns over the effect of adjoining or abutting solar farms, the Board of Equalization reduced the proposed assessments on nineteen properties by approximately 30%. Twelve of these nineteen addresses were located in Tusquittee Trace.

Zawtocki also provided evidence of a residential community located in Elgin, South Carolina, which has median home values comparable to the communities surrounding the proposed site. In 2010, Verizon built a call center facility along the road leading to the community. Using a matched pair sales analysis, of the sales that occurred prior to the call center being built, all had experienced appreciation, ranging between 9.6 to 27.5%. Of the five matched sales occurring after the call center was built, all had experienced depreciation, ranging from 10.7 to 23%. Zawtocki concluded the only change affecting the housing values, other than overall market or competitive forces, was the addition of the call center.

Martha McLean testified that she owned property on Burton Lane, which would adjoin the proposed solar farm. Prior to Petitioner's application for a conditional use permit, McLean and her husband had entered into a contract to sell the property for $200,000.00. When the

purchasers were informed of the proposed solar farm, they terminated their contract to purchase the property. McLean has not had any subsequent interest in the property.

The superior court reviewed the Board's conclusion under the "whole record test." Petitioners assert the opponents failed to present competent, material, and substantial evidence, which would necessitate a *de novo* review. Respondents assert N.C. Gen. Stat. § 160A-393(k)(3), applicable to counties through N.C. Gen. Stat. § 153A-349, provides that competent evidence "shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection[.]" N.C. Gen. Stat. § 160A-393(k)(3) (2017). Petitioners did not object to the evidence above.

Even if the evidence presented is deemed competent, Intervenors failed to present substantial evidence *contra* to carry their burden to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. "[T]he superior court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Little River, LLC v. Lee Cty.*, __ N.C. App. __, __, 809 S.E.2d 42, 50 (2017) (citing *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). The Board and the superior court wholly and erroneously ignored competent, material, and substantial evidence that challenged and contradicted the Intervenors' rebuttal burden.

The written reports produced for the Intervenors negate a conclusion that they carried their burden and presented substantial and material evidence to rebut Petitioner's *prima facie* case. Concerning the solar farm in Clay County, it is undisputed that no zoning, setback, landscaping, or other restrictions existed to regulate the appearance of solar farms at the time of its construction.

Half of the interviewed real estate agents in Clay County opined that a properly buffered and concealed solar farm would not affect the property values. In their opinion, value would only be impacted by a view impaired by, and not by the mere presence of, a solar farm.

Zawtocki, in an effort to analogize the proposed solar farm to the one in Clay County, provided renderings of the proposed solar farm in which it, and the chain-link fence surrounding it, were extremely visible. These renderings wholly ignored the proposed landscaping and buffering Petitioners had included in their application. Commissioner Mitchem referred to these non-landscaped chain-link fence renderings as "misleading."

Concerning the use of Clay County property tax records to support a decline in valuation, "[o]ur Supreme Court has held that *ad valorem* tax records are not competent to establish the market value of real property." *Edwards v. Edwards*, 251 N.C. App. 549, 551, 795 S.E.2d 823, 825 (2017) (citing *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 332-33, 23 S.E.2d 32, 36 (1942); *Bunn v. Harris*, 216 N.C. 366, 373, 5 S.E.2d 149, 153 (1939); *Hamilton v. Seaboard*, 150 N.C. 193, 194, 63 S.E. 730, 730 (1909); *Cardwell v. Mebane*, 68 N.C. 485, 487 (1873)).

The admitted opinions and reports of the expert appraisers were also misconstrued or ignored. The appraisers for Petitioners and for Intervenors all concluded in their written reports that the presence of a solar farm does not affect the value of homes valued in the range of $220,000.00 to $240,000.00. This unanimous market data refutes Ms. McLean's testimony concerning the effect of the proposed solar farm on the sale of her property, as her home is valued in or near that range. Petitioners' expert testified that single market transactions are insufficient to establish market values. Ms. McLean's testimony of a single market transaction is insufficient to rebut the otherwise unanimous market data.

Fred Beck, a certified real estate appraiser, opined the proposed solar farm would impact property values. When questioned about his and other appraisers' previous, opposing assertions, he responded:

> We can match pairs. I can prove anything. Mr. Kirkland can prove anything. Damon can prove anything that you want to.
>
> Logic would tell you that this is going to hurt these people's value.
>
> . . .
>
> And my common sense tells me, after being in this business for 30 years, my heart and my common sense tells me that this is going to hurt these people, and it's going to hurt them badly.

Though Mr. Beck qualifies as an expert on real estate valuation, his "mere expression of [personal] opinion" is insufficient to impeach or rebut the quantitative analysis contained in the written reports, one of which he produced. S*ee Cumulus Broad., LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 430, 638 S.E.2d 12, 17 (2006).

"Speculative opinions that merely assert generalized fears about the effects of granting a conditional use permit for development are not

considered substantial evidence to support the findings [to deny the permit]." *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 631, 589 S.E.2d at 167. "Without specific, competent evidence to support [Mr. Beck's] generalized fears, this evidence does not rebut Petitioner's *prima facie* showing." *Little River, LLC*, __ N.C. App. at __, 809 S.E.2d at 50.

The evidence presented by the Intervenors and relied upon by the Board in denying Petitioners' conditional use permit under condition (3), "[t]he use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity" is insufficient to rebut Petitioners' *prima facie* showing of entitlement to issuance of the permit. *Id.*

VI. Conclusion

Petitioners clearly demonstrated Commissioner Permenter's bias to mandate recusal based upon his actively opposing the application, committing money to the cause of defeating the application for this solar farm, and openly communicating his fixed opposition on this application to others. Permenter assumed the role of an advocate at the quasi-judicial hearing by presenting ten pages worth of "condensed evidence" in an attempt to rebut Petitioners' *prima facie* case while also sitting, discussing, and voting on Petitioners' application.

The evidence presented by the Intervenors failed to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. Because the superior court and Board concluded Petitioners have made a *prima facie* showing on all four conditions, as set forth in the ordinance, we reverse the trial court's order and remand for issuance of Petitioners' conditional use permit. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER concurs with separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority but write separately concerning Commissioner Permenter's pre-oath activity.

The majority rightly focused on the actions of Commissioner Permenter *during the hearing* that support a finding of bias in this

case. However, the majority additionally concluded that Commissioner Permenter's conduct prior to joining the Board was also disqualifying.

I do not agree that the actions of a candidate or private citizen, prior to taking office, could alone establish bias and disqualify him from performing his duties as an elected official. Civic engagement has long been a hallmark of our country. Exchange of information in the marketplace of ideas is critical to fostering discussion and shaping the future. A candidate's expression of a particular viewpoint made prior to taking office should not prohibit him as an elected official from discharging his duty to thoughtfully consider matters that come before him after taking an oath of office.

An opinion voiced in an unofficial capacity, however forceful or persuasive, does not in itself hamstring one's ability to be impartial. In response to the Majority Opinion, the prudent candidate for commissioner will hide behind the phrase, "I am sorry, but I am not permitted to discuss my position on the issues or matters, which may come before me in a quasi-judicial setting." Commissioner races will become as boring as judicial races.

Every elected official was at one point a candidate, and every candidate was once a private citizen with beliefs about what is best for his community. Candidates should be encouraged to state their positions on issues of public importance, and this Court should not preclude candidates from sharing their ideas in the public square.

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.

Republican Party of Minn. v. White, 536 U.S. 765, 781-82 (2002) (citations and quotation marks omitted).

Citizens should be knowledgeable about issues that have or will affect their community, and they should be encouraged to share that knowledge. Labeling an elected official as biased based upon communications made before taking office curtails public involvement and threatens free speech.

IN RE ADOPTION OF K.L.J. AND K.P.J.

No. COA17-1390-2

Filed 16 July 2019

1. Native Americans—Indian Child Welfare Act—jurisdiction—status as wards—adoption proceeding

The trial court did not err by asserting jurisdiction over an adoption of Indian children where the children were not wards of the Tribal Court and did not meet other criteria in the Indian Child Welfare Act (25 U.S.C. § 1911(a)). There was no evidence that the children received housing or other protections and necessities from the Tribe, and their aunt, who previously had custody of the children, had sought and obtained guardians for them from the courts of North Carolina.

2. Native Americans—Indian Child Welfare Act—Tribal Court's order—full faith and credit—authentication—due process

The trial court did not err by declining to give full faith and credit to a Tribal Court's purported order stating that it had exclusive jurisdiction over two Indian children as wards of their tribe, where the order was not properly authenticated and any hearing from which the purported order originated was conducted without notice or an opportunity to be heard—both as to the legal guardians who sought to adopt the children and to the children themselves.

Judge ARROWOOD concurring in the result without separate opinion.

Appeal by Proposed Intervenor from disposition order entered 18 August 2018 by Judge Melinda H. Crouch in New Hanover County District Court. Originally scheduled for hearing in the Court of Appeals 7 August 2018. By order issued 27 July 2018, this Court dismissed this appeal pursuant to Rule 37(a) of our Rules of Appellate Procedure. Upon review granted by the Supreme Court of North Carolina and by order dated 5 December 2018, the Supreme Court vacated our order dismissing the appeal, and remanded to the Court of Appeals with special instructions. Heard in the Court of Appeals 28 March 2019.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for the intervenor-appellant.

Bobby D. Mills for the petitioners-appellees.

LeeAnne Quattrucci for the Guardian Ad Litem.

MURPHY, Judge.

The New Hanover County District Court ("the District Court") did not err in asserting jurisdiction over the adoption of two "Indian children," K.L.J. and K.P.J., subject to the federal Indian Child Welfare Act ("ICWA"). Additionally, the District Court did not err in electing not to give full faith and credit to the Cheyenne River Sioux Tribal Court's ("Tribal Court") determination that Appellant is an "Indian Custodian," as defined by ICWA, entitled to the return of the two children. We affirm the District Court's *Order and Judgment*.

BACKGROUND

This is an appeal from the District Court's *Order and Judgment* entering Decrees of Adoption declaring both K.L.J. and K.P.J. adopted by the Petitioners-Appellees. Both children were born in South Dakota—K.L.J. in 2006 and K.P.J. in 2009—to a father who is a member of the Cheyenne River Sioux Tribe and are, themselves, members of the same. Shortly after K.P.J. was born the Minnehaha Department of Social Services in Sioux Falls, South Dakota took custody of both children due to their parents' drug and alcohol abuse. K.L.J. and K.P.J.'s biological parents had their parental rights to the children terminated in 2011. Pursuant to ICWA, the Tribal Court assumed jurisdiction over the children's custody proceeding and placed them in the care of "paternal aunt, Jean Coffman," the Appellant in this matter, ordering the children's case closed and dismissed.

About three months later, Appellant entered into a *Temporary Guardianship Agreement* in New Hanover County wherein both children were placed with Appellees, the Petitioners below, for six months or "as long as necessary, beginning on [17 January] 2013." Subsequently, Appellees were appointed K.L.J. and K.P.J.'s legal guardians by the Clerk of Superior Court of New Hanover County ("the Clerk"). In November 2015, Appellees filed petitions in New Hanover County to adopt K.L.J. and K.P.J.

Neither Appellant nor the Cheyenne River Sioux Tribe were served with the adoption petitions or given notice of the filings at the time they were made. However, two weeks after filing, Appellees served the Tribe with copies of the petitions by certified mail pursuant to an order of the

Clerk. Part of this notice advised the Tribal Court that, if it wished "to participate [in the adoption proceedings, it was] required and directed to make defense of such pleadings by filing a response to the petition . . . within thirty (30) days of the receipt [of] this notice in order to participate in and to receive further notice of the proceedings[.]" The Tribal Court did not take any action relating to the adoption proceeding within the thirty-day period.

Two months after filing the adoption petitions, Appellees—at the request of the Clerk of Court—gave formal notice to Appellant, who then attempted to intervene in the adoption by requesting "the immediate return of the minor Indian Child[ren] to her physical custody pursuant to the Tribal Custody Order . . . ." Appellant also moved to vacate New Hanover's order appointing Appellees as guardians of K.L.J. and K.P.J. At a hearing before the Clerk in March 2016, Appellant's motion was denied, and the matter was transferred to District Court to resolve the issue of whether North Carolina has jurisdiction over the adoption. The hearing in District Court was held on 16 June 2016.

Prior to the hearing in District Court, Appellant filed an ex parte motion with the Tribal Court on 2 May 2016, in which she asked it to assert jurisdiction over the adoption of K.L.J. and K.P.J. The record also includes what appears to be a faxed copy of what purports to be an *Order of Jurisdiction* issued by the Tribal Court in response to Appellant's 2 May 2016 motion wherein the Tribal Court asserts: (1) K.L.J. and K.P.J. are "Wards of the Cheyenne River Sioux Tribe until the age of 18 years;" (2) Appellant is the children's "Indian Custodian[;]" and (3) that it has "exclusive jurisdiction according to ICWA[.]" Both Appellant's motion and the faxed copy of the Tribal Court's *Order of Jurisdiction* are included in the Record as "Proposed Intervenor's Exhibits for June [16,] 2016 District Court hearing[.]" Neither was admitted into evidence during the 16 June 2016 hearing after Appellees objected to their admission.

After hearing arguments from both parties, the District Court entered Findings of Fact and Conclusions of Law on the record and memorialized in an *Order and Judgment* filed 18 August 2016. In relevant part, the District Court concluded "[t]hat this Court has jurisdiction to enter orders with regards to the adoption," and ordered "[t]hat Decrees of Adoption are hereby entered as to [K.P.J.] and [K.L.J.]"

ANALYSIS

In light of our Supreme Court's 5 December 2018 order, the two issues before us are: (1) whether it was error for the District Court to assert jurisdiction over an adoption of "Indian children" covered by ICWA, and

(2) whether the District Court erred in failing to give full faith and credit to the Tribal Court's purported 2016 determination that Appellant is an "Indian Custodian" of the children entitled to their return.

"In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *In re: K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007). Similarly, "We review *de novo* the issue of whether a trial court has properly extended full faith and credit to a foreign judgment." *Marlin Leasing Corp. v. Essa*, ___ N.C. App. ___, ___, 823 S.E.2d 659, 662-63 (2019) (citing *Tropic Leisure Corp. v. Hailey*, 251 N.C. App. 915, 917, 796 S.E.2d 129, 131 (2017), *appeal dismissed and disc. review denied*, 369 N.C. 754, 799 S.E.2d 868, *cert. denied*, ___ U.S. ___, 199 L. Ed. 2d 385 (2017)). After exhaustive review of the record, we affirm the District Court's *Order and Judgment* declaring K.L.J. and K.P.J. the adoptive children of the Appellees.

A. Subject Matter Jurisdiction

[1] Appellant contends the District Court erred in asserting jurisdiction over an adoption of "Indian children" because the tribal court initially exercising jurisdiction continued to assert jurisdiction. However, the Tribal Court did not continue to assert jurisdiction so much as it reasserted jurisdiction during the pendency of this action. Given our standard of review, we must determine de novo whether the District Court erred in concluding "grounds exist sufficient to give [the District Court] jurisdiction over this matter to enter an order approving the adoption of these children by the [Appellees]."

In relevant part, ICWA establishes a tribal court will have exclusive jurisdiction:

> [A]s to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S.C. § 1911(a) (2019). This provision grants tribal courts exclusive jurisdiction over child custody proceedings in three instances: (1) over an Indian child who resides within the reservation; (2) over an Indian child domiciled within the reservation; and (3) over an Indian child who is a ward of the tribal court. Here, the children did not reside on the reservation and were not domiciled therein at the time this matter arose, so the only way the Tribal Court could have exclusive jurisdiction over this

matter is if the children were its wards. Based on the record, we cannot conclude the children were wards of the Tribal Court and hold the provisions of ICWA do not grant the Tribal Court exclusive jurisdiction over the adoption of K.L.J. and K.P.J.

ICWA and the related sections of the Code of Federal Regulations do not instruct as to who should make a finding regarding a child's status as a tribal court's ward and North Carolina does not use the term "ward" in the context of adoptions.[1] Black's Law Dictionary defines a "ward" as "a person, usu[ally] a minor, who is under a guardian's charge or protection." *Ward*, Black's Law Dictionary (11th ed. 2019). More specifically, Black's defines "ward of the state" as "[s]omeone who is housed by, and receives protection and necessities from, the government." *Ward of the State*, Black's Law Dictionary (11th ed. 2019). For purposes of ICWA, we adopt this definition for the term "Tribal Court Ward." Applying this definition to the relevant provision of ICWA, once a child has stopped being housed by or provided protections and necessities from the tribe, she will cease being its ward for purposes of 25 U.S.C. § 1911(a).

In 2011, South Dakota DSS was granted full custody of the children. In 2012, the Tribe was granted renewed jurisdiction over the children's case and placed the children in the care of their "paternal aunt," Appellant. There is no evidence the children ever made the reservation their domicile or residence after that point in time, nor is there evidence the Tribe housed them or provided protections or necessities thereafter. In fact, the Appellant sought and obtained guardians for the children from the courts of North Carolina. Having lived most of their life outside the Tribe's reservation and without provision of protections and necessities therefrom, we hold K.L.J. and K.P.J. were not wards of the Tribal Court. The Tribal Court cannot assert exclusive jurisdiction over this matter under 25 U.S.C. § 1911(a).

Appellant's argument that the children are Tribal Court wards is based entirely upon the Tribal Court's *Order of Jurisdiction*. In an order purportedly entered two days prior to the District Court's adoption order, the Tribal Court concluded it had exclusive jurisdiction over the children as "Wards of the Cheyenne River Sioux Tribe until the age of 18 years[.]" Appellant argues the District Court disregarded that Order despite ICWA's mandate that our State's courts "shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian

1. In contrast, effective 12 December 2016, "The Indian Tribe of which it is believed the child is a member . . . determines whether the child is a member of the Tribe[,]" and "[that] determination . . . is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law." 25 C.F.R. § 23.108(a)-(b) (2016).

tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. § 1911(d) (2019). However, as is described in greater detail below, the Order in question was not authenticated and there is nothing in the record to assure us of (1) its validity or (2) compliance with the Due Process Clause. The District Court did not err in asserting subject matter jurisdiction over the adoption of K.L.J. and K.P.J.

B. Full Faith and Credit

[2] Under ICWA, every state "shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. § 1911(d). The District Court seemingly disregarded the Tribal Court's purported 14 June 2016 *Order of Jurisdiction* in reaching its decision in this matter and did not adopt the conclusions therein. Importantly, the Tribal Court concluded (1) K.L.J. and K.P.J. were wards of the tribal court and (2) Appellant was their "Indian Custodian," and therefore entitled to the children's return. The District Court concluded otherwise, and Appellant argues it erred in failing to give full faith and credit to the Tribal Court's *Order of Jurisdiction*.

"We review *de novo* the issue of whether a trial court has properly extended full faith and credit to a foreign judgment." *Marlin Leasing Corp.*, ___ N.C. App. at ___, 823 S.E.2d at 662-63. In deciding what weight, if any, we must give the Tribal Court's *Order of Jurisdiction*, we are persuaded by our caselaw regarding foreign judgments. "[A] foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state[.]" *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc.*, 113 N.C. App. 476, 478, 439 S.E.2d 221, 223, *disc. review denied*, 336 N.C. 314, 445 S.E.2d 392 (1994). "The [Uniform Enforcement of Foreign Judgments Act ("UEFJA")] 'governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina.' " *Tropic Leisure Corp.*, 251 N.C. App. at 917, 796 S.E.2d at 131 (citing *Lumbermans Fin., LLC v. Poccia*, 228 N.C.App. 67, 70, 743 S.E.2d 677, 679 (2013)).

Under the UEFJA, to domesticate a foreign judgment the party seeking to enforce the judgment "must file a properly authenticated foreign judgment with the office of the [C]lerk of [S]uperior [C]ourt in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part and setting forth the amount remaining to be paid on the judgment." *Id.*; *see*

N.C.G.S. § 1C–1703(a) (2017). Here, no such filing was made with any North Carolina court—including ours—and the only copy of the Tribal Court's purported Order we have is the unauthenticated copy included in the Record as part of the "Proposed Intervenor's Exhibits for June 15, 2016 District Court hearing[.]"

As in *Tropic Leisure Corp.*, we are concerned about the Due Process implications of giving full faith and credit to the Tribal Court's Order. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32 (1976) (internal citation and quotation marks omitted). There is nothing in the record indicating Appellees were given notice of the Tribal Court proceedings or an opportunity to be heard in the Tribal Court. Indeed, Appellees made this argument at the 16 June 2016 hearing, and the Order was not admitted as a result. Additionally, the interests of K.L.J. and K.P.J. were not represented in the Tribal Court by a Guardian Ad Litem, and the juveniles were not afforded Due Process at the alleged 14 June 2016 hearing in the Tribal Court.

We hold the District Court did not err in its treatment of the Tribal Court's purported 14 June 2016 *Order of Jurisdiction*, which was not presented as a properly authenticated document. To the extent a hearing was conducted in the Tribal Court, we hold it did not comply with the basic tenants of our Due Process jurisprudence because no party besides Appellant was given notice of the proceeding or an opportunity to be heard. In addition to the parties, K.L.J. and K.P.J. were not afforded Due Process at the alleged 14 June 2016 Tribal Court hearing. Due Process will not allow the best interests of the children to be silenced.

CONCLUSION

The District Court did not err in asserting jurisdiction over the adoption of K.L.J. and K.P.J. because the relevant section of ICWA and associated regulations did not confer exclusive jurisdiction upon the Tribal Court. Additionally, the District Court did not err in failing to give full faith and credit to an unauthenticated order purportedly entered by the Tribal Court two days prior to the hearing at issue without providing Due Process to the Appellees or the unrepresented children.

AFFIRMED.

Chief Judge McGEE concurs.

Judge ARROWOOD concurs in the result without separate opinion.

MARTIN v. MARTIN

[266 N.C. App. 296 (2019)]

ERIN LYNN MARTIN, PLAINTIFF
v.
SHAWN MICHAEL MARTIN, DEFENDANT

No. COA18-465-2

Filed 16 July 2019

1. Domestic Violence—notice of allegations—adequacy

The trial court erred by admitting testimony supporting allegations of domestic violence by defendant-husband that were not pleaded in plaintiff-wife's complaint. Civil Procedure Rule 8 requires that defendants receive adequate notice of the allegations against them, and the complaint gave defendant no notice that his aggressive driving would be at issue in the hearing.

2. Domestic Violence—sufficiency of findings—anger, fear, and email hacking

The trial court's findings of fact that defendant-husband had a "flashpoint" temper, that plaintiff-wife feared what defendant might do, and that defendant hacked into plaintiff's email did not support a conclusion that defendant had committed an act of domestic violence.

Appeal by defendant from orders entered 12 September 2017 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 31 October 2018. Petition for Rehearing allowed 8 February 2019. The following opinion supersedes and replaces the prior opinion filed 18 December 2018.

Gailor Hunt Jenkins Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton and Stephanie J. Gibbs, for plaintiff-appellee.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia J. Jurney and Kristin H. Ruth, for defendant-appellant.

ZACHARY, Judge.

Shawn Michael Martin ("Defendant-Husband") appeals from a Domestic Violence Order of Protection and an Amended Domestic Violence Order of Protection. For the reasons stated herein, we reverse the orders entered against Defendant-Husband.

I. Background

Erin Lynn Martin ("Plaintiff-Wife") and Defendant-Husband are the parents of two minor children. The family moved to North Carolina from the State of Washington on 29 May 2017.

About a month later, on 3 July 2017, Plaintiff-Wife filed a Complaint and Motion for Domestic Violence Protective Order alleging that Defendant-Husband committed acts of domestic violence against Plaintiff-Wife and their children. That same day, the trial court entered an Ex Parte Domestic Violence Order of Protection. Defendant-Husband filed an answer on 23 August 2017 denying all allegations of domestic violence.

Plaintiff-Wife's motion was heard on 12 September 2017 before the Honorable Margaret P. Eagles in Wake County District Court. Following the hearing, the trial court entered a Domestic Violence Order of Protection against Defendant-Husband. Shortly thereafter, the parties came to an agreement concerning custody of the children, and the trial court entered an Amended Domestic Violence Order of Protection. The trial court granted temporary legal and physical custody of the children to Plaintiff-Wife and visitation privileges to Defendant-Husband. Defendant-Husband timely appealed two days later, on 14 September 2017.

At the time of the hearing, dual custody proceedings were pending in Washington and in North Carolina. The Washington custody proceeding was scheduled for 21 September 2017, nine days after the domestic violence protective orders were filed. On 17 April 2018, the trial court entered a consent order settling the record on appeal, but no information concerning subsequent custody proceedings in either state was included in the record.

In his brief to this Court, Defendant-Husband asserted that we have "never addressed whether a plaintiff seeking a protective order may present evidence of specific acts not raised in any court filing prior to trial," allegations of which the defendant received no notice. Plaintiff-Wife did not dispute Defendant-Husband's assertion that this case presented an issue of first impression, but argued that Defendant-Husband's due process rights were not violated by any alleged lack of notice.

This Court issued its opinion in this case on 18 December 2018, concluding that the trial court violated Defendant-Husband's due process rights "by allowing Plaintiff-Wife to present evidence of alleged acts of domestic violence not specifically pleaded in her Complaint."

Martin v. Martin, ___ N.C. App. ___, ___, 822 S.E.2d 756, 758 (2018) ("*Martin I*"). Accordingly, we reversed the domestic violence protective orders entered against Defendant-Husband and remanded this matter to the trial court for further proceedings. *Id.* at ___, 822 S.E.2d at 762. After the mandate issued, but within the time allowed by N.C.R. App. P. 31, Plaintiff-Wife filed a petition for rehearing, requesting that the Court reconsider its ruling in light of *Jarrett v. Jarrett*, 249 N.C. App. 269, 790 S.E.2d 883, *disc. review denied*, 369 N.C. 194, 793 S.E.2d 259 (2016), in which this Court addressed the sufficiency of notice of domestic violence allegations.[1] We allowed Plaintiff-Wife's petition for rehearing on 8 February 2019. This opinion replaces and supersedes *Martin I*; therefore, we will reconsider the issues raised in the parties' briefs.

II. Discussion

Defendant-Husband argues that the trial court erred by: (1) allowing Plaintiff-Wife to present evidence of alleged incidents of domestic violence of which Defendant-Husband did not receive notice before trial, in violation of his due process rights; (2) "entering a domestic violence protective order against Defendant[-Husband] without concluding as a matter of law that an act of domestic violence had occurred"; and (3) entering a child custody order when the trial court lacked subject matter jurisdiction to do so.

A. Unpleaded Allegations of Domestic Violence

[1] Defendant-Husband first argues on appeal that the trial court erred by admitting testimony supporting allegations of domestic violence not pleaded in Plaintiff-Wife's complaint, and that the admission of that testimony violated his due process rights.

"[A]ppellate courts must avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (quotation marks omitted), *reconsideration denied*, 359 N.C. 633, 613 S.E.2d 691 (2005). The question of whether a trial court can properly admit evidence in support of unpleaded allegations of domestic violence may be answered by reference to our Rules of Civil Procedure.

North Carolina remains a notice-pleading state, which means that a pleading filed in this state must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or

1. Neither party cited *Jarrett* in their briefs to this Court.

occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2017). "A complaint is adequate, under notice pleading, if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial." *Burgess v. Busby*, 142 N.C. App. 393, 399, 544 S.E.2d 4, 7, *disc. review improvidently allowed*, 354 N.C. 351, 553 S.E.2d 679 (2001). While Rule 8 "does not require detailed fact pleading, . . . it does require a certain degree of specificity . . . [, and] sufficient detail must be given so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for [relief]." *Manning v. Manning*, 20 N.C. App. 149, 154, 201 S.E.2d 46, 50 (1973).

This Court has previously recognized that the entry of a domestic violence protective order "involves both legal and non-legal collateral consequences." *Mannise v. Harrell*, 249 N.C. App. 322, 332, 791 S.E.2d 653, 660 (2016). For instance, "[a] domestic violence protective order may . . . place restrictions on where a defendant may or may not be located, or what personal property a defendant may possess or use." *Id.* Additionally, the existence of a prior domestic violence protective order may be "consider[ed] . . . by the trial court in any custody action involving [the] [d]efendant." *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001).

The defendant may also suffer "non-legal collateral consequences" as a result of "the stigma that is likely to attach to a person judicially determined to have committed domestic abuse." *Id.* at 437, 549 S.E.2d at 914 (brackets and quotation marks omitted). For example, this Court has recognized that "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a domestic violence protective order." *Id.* (brackets omitted). Because of the potential significant and lasting adverse collateral consequences faced by those against whom a domestic violence protective order is entered, it is imperative that a defendant receive adequate notice of the allegations in the complaint.

A trial court does not err by admitting evidence in support of unpleaded domestic violence allegations, so long as the allegations in the complaint provide sufficient notice of the nature and basis of any unpleaded allegations. *See Jarrett*, 249 N.C. App. at 276-77, 790 S.E.2d at 888. For instance, in *Jarrett*, the plaintiff filed a complaint on 20 July 2015 alleging domestic violence and claiming that in May 2015, the defendant "followed [the plaintiff] on the highway, cut her off, and

slammed on his brakes." *Id.* at 276, 790 S.E.2d at 888. The defendant had also committed similar incidents of aggressive driving in March and June of 2015; however, the plaintiff's complaint only alleged the May 2015 incident. *Id.* The plaintiff did file an amended complaint on 24 July 2015 alleging the March and June incidents, but did not serve the defendant with the amended complaint until the day of the hearing. *Id.* at 277, 790 S.E.2d at 888. At the hearing, the plaintiff testified about all three incidents of aggressive driving. *Id.* at 276, 790 S.E.2d at 888. The defendant argued to this Court that the trial court should not have permitted the plaintiff to testify about alleged incidents of domestic violence not pleaded in her original complaint. *Id.* However, applying Rule 8, this Court concluded that the "plaintiff's 20 July 2015 complaint gave [the] defendant sufficient notice of the nature and basis of her claim." *Id.* at 277, 790 S.E.2d at 888. Indeed, the defendant did "not argue that he was unable to prepare a responsive pleading or that he was unable to prepare for the hearing." *Id.* Thus, the plaintiff's allegation of one incident of aggressive driving in July 2015 provided the defendant with sufficient notice of the plaintiff's unpleaded allegations arising from similar incidents in March and June 2015, as his aggressive driving was the nature and basis of the plaintiff's complaint.

In this case, the trial court found, in both of its domestic violence protective orders, that Defendant-Husband placed Plaintiff-Wife in fear of imminent bodily injury and continued harassment that rose to such a level as to inflict substantial emotional distress. Specifically, the trial court found that

> defendant was listening to plaintiff outside her bedroom door, then after plaintiff locked the door, defendant repeatedly pounded on the door and broke into plaintiff's bedroom, causing her fear of physical assault; on 6/30/2017, defendant threw keys at plaintiff and yelled profanity at her; defendant has a "flashpoint" temper (per testimony) and engages in excessively aggressive driving while plaintiff and children are in the car, causing plaintiff fear; plaintiff was afraid of defendant and what he might do; since the filing of DVPO, defendant has hacked into plaintiff's email account, which has caused her emotional distress[.]

Based on our review of the record, the trial court heard testimony of a significant number of unpleaded allegations of domestic violence; however, the trial court only made findings about three of those unpleaded allegations in concluding that Defendant-Husband committed domestic violence. Those unpleaded allegations include: (1) "defendant . . . engages in excessively aggressive driving while

plaintiff and children are in the car, causing plaintiff fear"; (2) "defendant was listening to plaintiff outside her bedroom door, then after plaintiff locked the door, defendant repeatedly pounded on the door and broke into plaintiff's bedroom, causing her fear of physical assault"; and (3) "defendant has hacked into plaintiff's email account, which has caused her emotional distress."

It is well established 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). Of the unpleaded allegations of domestic violence, Defendant-Husband only objected to the testimony concerning aggressive driving:

> [Plaintiff's Counsel:] Now, [Defense Counsel] asked you about whether [Defendant-Husband] had physically harmed you. Did he ever put you and the children in harm's way?
>
> [Plaintiff-Wife:] Yes.
>
> Q. When?
>
> A. [Defendant-Husband] had a lot of road rage, a lot of road rage, and we basically couldn't drive to the store without him racing somebody or cutting somebody off.
>
> [Defense Counsel:] I'm going to object to that. That's way outside. There's nothing within the scope of the domestic violence—what she filed.
>
> [Plaintiff's Counsel:] It's within the scope of her questioning. I'm cross-examining her.
>
> [Defense Counsel:] (Interjecting) She said he had never done anything but touched her one time.
>
> [Plaintiff's Counsel:] You know, Your Honor, I'm just trying to talk here.
>
> THE COURT: I know. I'm going to allow the question. Go ahead.

Because defense counsel objected to this testimony, and because the trial court used this unpleaded allegation of domestic violence as a basis for its decision to grant the protective order, we must determine, pursuant to *Jarrett*, whether Plaintiff-Wife's complaint provided

Defendant-Husband with notice of the nature and basis of the unpleaded allegations of aggressive driving. *Id.*

Plaintiff-Wife's complaint made no mention of Defendant-Husband's driving tendencies, and none of the allegations in the complaint provided Defendant-Husband with notice that his driving would be an issue at the hearing. Accordingly, the trial court erred in admitting this testimony and finding this ground as a basis for its conclusion that Defendant-Husband committed domestic violence.

Having so concluded, we disregard the erroneous finding concerning aggressive driving in conducting the remainder of our review.

B. Findings of Fact

[2] Defendant-Husband next challenges certain findings of fact in the trial court's domestic violence protective orders.

When reviewing a domestic violence protective order, our task is to determine "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. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Burress v. Burress*, 195 N.C. App. 447, 449-50, 672 S.E.2d 732, 734 (2009) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (quotation marks omitted), *appeal dismissed and disc. review denied*, 369 N.C. 753, 800 S.E.2d 65 (2017). "In a non-jury trial, where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." *Clark v. Dyer*, 236 N.C. App. 9, 24, 762 S.E.2d 838, 846 (2014), *cert. denied*, 368 N.C. 424, 778 S.E.2d 279 (2015).

Our General Statutes define "domestic violence" as

> the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C. Gen. Stat. § 50B-1(a).

Any individual in a qualifying personal relationship who resides in North Carolina may seek relief under Chapter 50B "by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person." *Id.* § 50B-2(a). If the trial court "finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." *Id.* § 50B-3(a).

1. Unsupported Findings of Fact

Defendant-Husband challenges the evidentiary support for the trial court's finding that "defendant was listening to plaintiff outside her bedroom door, then after plaintiff locked the door, defendant repeatedly pounded on the door and *broke into plaintiff's bedroom*, causing her fear of physical assault[.]" (Emphasis added).

At the hearing, Plaintiff-Wife testified:

> That evening, June 16th, I was in bed texting, looking at things on my phone.
>
> He had chosen to start sleeping out on the couch.
>
> I heard a noise out in the hallway, and I actually came out in the hallway, and [Defendant-Husband] was standing there, and it just gave me that really eerie feeling. He was like spying on me.
>
> So I locked the bedroom door.
>
> He didn't like that, or he wanted to come back in, so he started pounding on the door, and I said, "I don't want you in here."
>
> He got a little key, unlocked the bedroom door, because the previous people that lived there had the little sticks to unlock the door.

> He came in and said he needed to get his phone charger, but I grabbed my purse. I didn't know what he was going to do.
>
> I didn't know if he was going to hit me. I didn't know if he was going to take my purse. I didn't know what to expect.

Plaintiff-Wife's testimony that Defendant-Husband used a key to unlock the bedroom door, after which he retrieved his phone charger and left, does not support the trial court's finding that Defendant-Husband "broke into plaintiff's bedroom." Accordingly, this finding is not supported by competent evidence.

Defendant-Husband further argues that the trial court's finding that he threw keys at Plaintiff-Wife is unsupported by competent evidence. In her complaint, Plaintiff-Wife alleged that on one occasion, Defendant-Husband "[t]hrew the keys down and told [her] to 'F[***]ing put the key on the ring.' " At the hearing, Plaintiff-Wife testified:

> I was packing in the bedroom, and I was about a foot or two away from the bed. He was holding our daughter . . . in his arms, and he came in the bedroom and he took the key and the keyring, and he slammed it on the bed, Your Honor.
>
> Those keys actually slid across the bed.
>
> And he said to me, "Put the key back on the f[***]ing ring," and he had our daughter in his arms, and he went out the bedroom door and slammed it and went outside with her.

Plaintiff-Wife further testified that she was "five feet away" from Defendant-Husband when he threw the keys on the bed. However, the trial court found that "on 6/30/2017, defendant *threw keys at plaintiff* and yelled profanity at her." (Emphasis added). Defendant-Husband challenges this finding, and we agree that it is unsupported by the evidence presented at the hearing. In her complaint and in her testimony, Plaintiff-Wife alleged that Defendant-Husband "threw the keys down" on the bed. No evidence supports the trial court's finding that Defendant-Husband "threw keys at plaintiff."

2. Finding of Demeanor and Past Behavior

Defendant-Husband concedes that competent evidence supports the trial court's finding that "defendant has a 'flashpoint' temper"; however,

Defendant-Husband argues that this finding nevertheless does not support a conclusion that domestic violence occurred. We agree.

"To support entry of a [domestic violence protective order], the trial court must make a conclusion of law 'that an act of domestic violence has occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012) (quoting N.C. Gen. Stat. § 50B-3(a)). "Although we appreciate that a 'history of abuse' may at times be quite relevant to the trial court's determination as to whether a recent act constitutes 'domestic violence,' a vague finding of a general 'history of abuse' is not a finding of an 'act of domestic violence' . . . ." *Id.*

Here, Plaintiff-Wife testified several times concerning Defendant-Husband's anger issues. For example, Plaintiff-Wife testified that Defendant-Husband "has always been an angry person[,]" and that after he threw the keys on the bed, "he was the most angry I've ever seen him at that point." Plaintiff-Wife further testified concerning a different incident stating that

> [Defendant-Husband] has been angry, has always been angry. He's always had issues with anger in work, wherever he is.
>
> He's been angry at me plenty of times, . . . and he just became so unpredictable and so angry, I just never knew what he was going to do next.

From this testimony, the trial court found that Defendant-Husband "has a 'flashpoint' temper." This is not a finding of fact that an act of domestic violence, as defined by statute, had occurred, but rather more of a finding concerning Defendant-Husband's demeanor and past behavior. The trial court's finding that Defendant-Husband has a flashpoint temper does not "identify the basis for the act of domestic violence." *Id.* at 224, 726 S.E.2d at 196 (quotation marks omitted) (citing *In re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602, *disc. review denied*, 361 N.C. 693, 652 S.E.2d 262 (2007) ("The trial court need not recite in its order every evidentiary fact presented at hearing, but only must make specific findings on the ultimate facts that are determinative of the questions raised in the action and essential to support the conclusions of law reached. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense." (citation omitted))). Accordingly, this finding cannot support a conclusion that Defendant-Husband committed an act of domestic violence as defined by N.C. Gen. Stat. § 50B-1.

3. Finding Concerning Fear of Serious Bodily Injury

Defendant-Husband next contends that the trial court's finding that "plaintiff was afraid of defendant and what he might do" does not support the trial court's conclusion that Defendant-Husband placed Plaintiff-Wife in fear of imminent serious bodily injury. We agree.

"The test for whether the aggrieved party has been placed 'in fear of imminent serious bodily injury' is subjective; thus, the trial court must find as fact the aggrieved party 'actually feared' imminent serious bodily injury." *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (citation omitted). In *Smith*, the plaintiff testified that the defendant's actions "made her feel uncomfortable and creepy." *Id.* at 437, 549 S.E.2d at 914-15 (quotation marks omitted). The trial court found that the "[p]laintiff testified [that the] [d]efendant had never physically hurt her, nor was she afraid that he would physically hurt her." *Id.* at 438, 549 S.E.2d at 915. The *Smith* Court held that "[t]hese findings of fact which show [the] [d]efendant's conduct caused [the] [p]laintiff to feel uncomfortable but did not place her in fear of bodily injury do not support a conclusion [that the] [d]efendant placed [the] [p]laintiff in fear of serious imminent bodily injury." *Id.* (quotation marks omitted).

In the instant case, Plaintiff-Wife testified several times that she was "fearful" or "scared" of Defendant-Husband. She testified that she was afraid of his anger, afraid that Defendant-Husband would take the children away, and fearful of what he might "do next." Plaintiff-Wife also testified that after Defendant-Husband used a key to enter the bedroom, "I didn't know if he was going to hit me. I didn't know if he was going to take my purse. I didn't know what to expect."

Plaintiff-Wife further testified about an incident when she found the children's backpacks full of their belongings, and she was concerned that Defendant-Husband was going to leave with the children. When Plaintiff-Wife confronted him, Defendant-Husband cursed at her, slammed the door, and walked away. Plaintiff-Wife testified that

> I didn't know what he was going to do. I didn't know if he was going to go and grab the children and leave or if he was going to harm me, come back in and hit me. I didn't know.
>
> He was very unpredictable. I didn't know what he was going to do.

Additionally, defense counsel asked Plaintiff-Wife whether Defendant-Husband had ever "hurt," "hit," or "harmed" her. Plaintiff-Wife answered that Defendant-Husband "pushed [her] away" on one

occasion; however, when asked again, Plaintiff-Wife stated, "[h]e has not physically hurt me, no. But I didn't know if he could."

Although certainly not an exoneration of Defendant-Husband's behavior, none of the evidence presented to the trial court supports the conclusion that Defendant-Husband's actions subjectively caused Plaintiff-Wife to fear imminent serious bodily injury. Defendant-Husband was unpredictable, and Plaintiff-Wife testified that she was afraid and never knew what he was going to do next. However, regardless of Defendant-Husband's disconcerting behavior, none of his actions amounted to evidence that Defendant-Husband placed Plaintiff-Wife in fear of imminent serious bodily injury. Accordingly, the trial court's findings of fact do not support its conclusion that Defendant-Husband placed Plaintiff-Wife in fear of imminent serious bodily injury.

4. Finding Concerning Substantial Emotional Distress

Finally, Defendant-Husband argues that the trial court's findings of fact fail to support the conclusion that Defendant-Husband placed Plaintiff-Wife in fear of continued harassment inflicting substantial emotional distress. We agree.

As explained above, a trial court can determine that an act of domestic violence occurred when a person in a qualifying relationship with another "[p]lac[es] the aggrieved party . . . in fear of . . . continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 50B-1(a)(2). The domestic violence statute refers to Chapter 14, which defines "harassment" as "[k]nowing conduct, including . . . 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.* § 14-277.3A(b)(2). Thus, to support a conclusion that harassment rose to the level of domestic violence, the trial court must find that the defendant (1) knowingly committed an act; (2) directed at a person with whom the defendant shared a "personal relationship," as defined by N.C. Gen. Stat. § 50B-1(b); (3) which tormented, terrorized, or terrified the aggrieved party; and (4) served no legitimate purpose. *See id.*; *Kennedy*, 221 N.C. App. at 222, 726 S.E.2d at 195-96. As with fear of imminent serious bodily harm, "[t]he plain language of the statute requires the trial court to apply only a subjective test to determine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances." *Wornstaff v. Wornstaff*, 179 N.C. App. 516, 518-19, 634 S.E.2d 567, 569 (2006), *aff'd per curiam*, 361 N.C. 230, 641 S.E.2d 301 (2007).

At the hearing, Plaintiff-Wife testified that Defendant-Husband hacked into her email account, and she presented a screenshot of its security page to support her testimony. Plaintiff-Wife testified that the screenshot "show[ed] what devices [were] signed into [her] email [account]," and that Defendant-Husband's "phone was signed into [her] email account" from Seattle, Washington. Plaintiff-Wife testified that she "noticed that there were some drafts in my Yahoo account with forwarded emails from my email to his email," and that she was "shocked that his phone was signed into [her] personal email."

There is a dearth of case law concerning computer hacking, especially in the domestic violence context; however, in an unpublished opinion from this Court, we considered whether, pursuant to N.C. Gen. Stat. § 50B-1(a)(2), the defendant's hacking of a Facebook account placed the plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. *See Jackson v. Jackson*, 238 N.C. App. 198, 768 S.E.2d 63 (2014) (unpublished), COA14-440, 2014 N.C. App. LEXIS 1299. We find the analysis in this case to be persuasive.

In *Jackson*, the defendant hacked into the plaintiff's Facebook account and posted videos and messages that the plaintiff characterized as " 'trash' and 'slander.' " *Id.*, 2014 N.C. App. LEXIS 1299, at *5-6. "[B]ecause the video and messages were posted to [the p]laintiff's Facebook account and directly referred to [the p]laintiff," the hacking and posting of messages satisfied the "directed at a person" element of harassment. *Id.* at *17. However, the plaintiff denied that she had suffered "substantial emotional distress" or "sought any counseling" because of the Facebook hacking, and there was no other evidence that she suffered substantial emotional distress. *Id.* at *18. Thus, there was no support for a finding that the hacking caused the plaintiff substantial emotional distress, or constituted an act of domestic violence. *Id.* at *19.

In the instant case, Plaintiff-Wife failed to present evidence that Defendant-Husband's hacking of her email account caused her substantial emotional distress. The trial court stated that the hacking "caused [Plaintiff-Wife] emotional distress." However, while Plaintiff-Wife testified that Defendant-Husband's actions "shocked" her, she did not testify that the hacking caused her emotional distress—substantial or otherwise—or fear of continued harassment. This testimony is insufficient to support a finding that the hacking caused Plaintiff-Wife substantial emotional distress. *See* N.C. Gen. Stat. § 14-277.3A(b)(4) (defining "substantial emotional distress" as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling"). Further, no other evidence exists in the record

to support a finding that Defendant-Husband's hacking of Plaintiff-Wife's email account, although clearly reprehensible, caused Plaintiff-Wife to suffer substantial emotional distress. Accordingly, there was no evidence presented to support the trial court's finding that Defendant-Husband caused Plaintiff-Wife to suffer substantial emotional distress by hacking into her email account.

C. Custody

Defendant-Husband last argues that the trial court lacked jurisdiction to enter a temporary custody order regarding the parties' minor children. However, in that the temporary order has expired, this issue is moot.

In its Amended Domestic Violence Order of Protection entered on 12 September 2017, the trial court granted Plaintiff-Wife temporary custody of the minor children. In the order, the trial court recognized that competing custody claims were pending in Wake County and Washington State, and that the parties had scheduled a hearing in Washington for 21 September 2017 to determine jurisdiction. Nevertheless, the trial court determined that it was in the children's best interests to establish a temporary custody and visitation agreement until the custody cases could be heard.

In North Carolina, a temporary custody award entered in a Chapter 50B order cannot last longer than one year. N.C. Gen. Stat. § 50B-3(a1)(4) ("A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to exceed one year."). Nor may "a temporary award of custody entered as part of a protective order . . . be renewed to extend a temporary award of custody beyond the maximum one-year period." *Id.* § 50B-3(b).

In the instant case, the trial court's custody order did not have an expiration date or state the fixed period of time for which it was to apply. As a result, the custody order in the instant case necessarily expired no later than 12 September 2018, more than one month before this matter came on for hearing by this Court.

"A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398, 474 S.E.2d 783, 787 (1996) (quotation marks omitted). "[T]he proper procedure for a court to take upon a determination that [an issue] has become moot is dismissal of the action . . . ." *Id.* at 399, 474 S.E.2d at 787. Accordingly, we dismiss as moot Defendant-Husband's appeal from the expired temporary custody order.

III. Conclusion

The trial court erred by admitting testimony in support of unpleaded allegations of domestic violence, and the trial court's findings of fact fail to support a conclusion that an act of domestic violence occurred. Accordingly, we reverse the domestic violence protective orders entered against Defendant-Husband. Further, we dismiss as moot Defendant-Husband's appeal from the expired temporary custody order.

REVERSED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge TYSON concur.

OSI RESTAURANT PARTNERS, LLC f/k/a OSI RESTAURANT PARTNERS, INC. and OUTBACK STEAKHOUSE, INC.; BONEFISH GRILL, LLC f/k/a BONEFISH GRILL, INC.; CARRABBA'S ITALIAN GRILL, LLC f/k/a CARRABBA'S ITALIAN GRILL, INC.; CHEESEBURGER IN PARADISE, LLC; OS SOUTHERN, LLC f/k/a OS SOUTHERN, INC.; OSI/FLEMING'S, LLC f/k/a OUTBACK/FLEMING'S, LLC; and OUTBACK STEAKHOUSE OF FLORIDA, LLC f/k/a OUTBACK STEAKHOUSE OF FLORIDA, INC., Plaintiffs

v.

OSCODA PLASTICS, INC. and ALLIED COMPANIES, LLC f/k/a THE ALLIED COMPANIES INTERNATIONAL, LLC and its successors in interest and/or related entities ALLIED INDUSTRIES INTERNATIONAL, INC.; ALLIED FLOORING PRODUCTS, INC.; ECO-GRIP CENTRAL, LLC; ECO-GRIP EAST, LLC; ECO-GRIP FLOORING, LLC; ECO-GRIP FLOORING GULF COAST, LLC; and ECO-GRIP GREAT LAKES, LLC, Defendants

No. COA18-841

Filed 16 July 2019

Discovery—sanctions—in addition to prior ordered sanction—lack of notice—due process violation

In the discovery phase of a lawsuit between a group of restaurants and a commercial flooring manufacturer, where the trial court sanctioned the manufacturer with a spoliation instruction and later held a hearing on the manufacturer's motion to set aside the instruction, the trial court violated the manufacturer's due process rights by imposing additional sanctions pursuant to Rule of Civil Procedure 37(b) at that hearing, per the restaurants' request. The restaurants did not file a motion seeking sanctions against the manufacturer under Rule 37 before the hearing, so the manufacturer lacked prior notice that such sanctions would be considered and on what alleged grounds those sanctions might be imposed.

Appeal by defendant Oscoda Plastics, Inc. from order entered 10 April 2018 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 27 March 2019.

Young Moore and Henderson, P.A., by Christopher A. Page and Jonathan L. Crook, for plaintiffs-appellees.

Parker Poe Adams & Bernstein LLP, by Kevin L. Chignell and Collier R. Marsh, for defendant-appellant Oscoda Plastics, Inc.

ZACHARY, Judge.

Defendant Oscoda Plastics, Inc.[1] appeals from the portion of the trial court's order imposing discovery sanctions in the form of striking its answer to Plaintiffs' claims for negligence, breach of implied warranty, and breach of express warranty. Because Defendant was not given notice that sanctions might be imposed, we reverse that portion of the trial court's order.

Background

Plaintiffs are several restaurants operated under the parent company OSI Restaurant Partners, LLC (collectively, "Plaintiffs"). Defendant is a manufacturer of commercial flooring products, which Plaintiffs purchased and installed in 130 of their restaurants across the United States. Plaintiffs initiated the instant action against Defendant on 5 July 2013, alleging that the flooring they purchased from Defendant had "completely failed at numerous restaurants, requiring complete replacement of the flooring products at numerous of the Plaintiffs' locations," as well as "costly repairs." Specifically, Plaintiffs alleged that the problems included "seam separation, seam distortion, bubbling under the flooring, flooring detachment from the substrate, and water ponding beneath the flooring." In their complaint, Plaintiffs asserted claims for negligence, breach of implied warranty, breach of express warranty, strict liability, negligent misrepresentation, and breach of consumer protection acts.

Through discovery, Plaintiffs sought to learn the extent of Defendant's knowledge of the alleged defects in its flooring. Plaintiffs requested that Defendant produce, *inter alia*, all documents that referred or related to (1) "the design, testing, or manufacture of" its flooring, (2) "any issues with or complaints about" the flooring, and (3) "any attempt to repair or otherwise correct the issues with or complaints about" the flooring.

1. The other defendants are not party to the instant appeal.

Following Plaintiffs' first motion to compel, Defendant indicated that it had certain "backup tapes" that might potentially contain responsive emails and documents.

On 4 September 2015, the trial court ordered Defendant to produce "all responsive, non-privileged documents contained on the backup tapes for the time period from 2006 through 2009." On 9 October 2015, Defendant filed a motion for reconsideration, contending that it had "obtained new information . . . that indicates that recovery of the backup tapes will be far more expensive and time consuming . . . than [Defendant] initially expected." However, after two orders extending Defendant's deadline to produce the backup tapes, Defendant returned to court, this time representing that it was unable to access the documents due to the fact that the backup tapes were encrypted.

On 16 March 2016, the trial court entered an order (the "Spoliation Order"), concluding that Defendant had "intentionally encrypted emails and . . . intentionally failed to retain the electronic ability to retrieve the subject emails, with knowledge of their relevance and materiality for this case," and that Defendant had "suppressed its knowledge of this encryption for several months prior to it being revealed for the first time by forensic experts." The trial court ordered that Defendant be sanctioned with a "spoliation instruction to the jury unless, not less than 120 days prior to the trial, [Defendant] provide[d] Plaintiffs the subject emails in an unencrypted form."

Shortly thereafter, Defendant represented that it had discovered a means by which it could gain access to the documents on its backup tapes, and on 14 October 2016, Defendant produced more than 5,000 pages of those documents. When Plaintiffs reviewed the documents, they discovered a potential reference to the existence of flooring testing data. Plaintiffs requested that Defendant further supplement its document production to include those related materials, and after Plaintiffs filed a second motion to compel, Defendant produced additional documents. Defendant also indicated that it did not possess any additional responsive documents requested by Plaintiffs, but that such documents were in the possession of its sister company, Duro-Last. The trial court thus ordered Defendant to "use reasonable efforts to encourage the voluntary production of the Duro-Last Documents by Duro-Last."

Duro-Last produced 1,054 pages of documents on 13 July 2017. At that point, Defendant maintained that the terms of the Spoliation Order had been "fully satisfied," and on 13 November 2017, Defendant filed a motion to set aside the spoliation instruction.

According to Plaintiffs, however, the documents that they received from Duro-Last contained several highly relevant emails that would have been stored on Defendant's backup tapes, but nevertheless were not included within the 5,000 pages of documents that Defendant produced from the tapes. In particular, Plaintiffs emphasized an email sent from Defendant's technical sales manager to a Duro-Last representative, in which the manager stated, "we have been doing some testing on our vinyl flooring . . . . The biggest problem we have with material in the field is shrinking." According to Plaintiffs, this "smoking gun" email

> was on the backup tapes, it is not privileged, it is relevant, it contains search terms [Defendant] apparently applied in [its] review, and *it was sent from the only employee who supplied information for [Defendant's] responses to Plaintiffs' first set of interrogatories, in which [Defendant] flatly denied any defects with its product.*

Plaintiffs subsequently filed a motion to amend their complaint in order to allege "newly discovered facts related to [Defendant's] knowledge of defects in the [flooring] and [Defendant's] contemporaneous misrepresentations and fraudulent concealment of the same," and to "assert claims for fraudulent concealment and punitive damages against [Defendant] based on th[is] newly discovered evidence." Defendant consented to Plaintiffs' motion to amend their complaint.

On 14 December 2017, Defendant's motion to set aside the spoliation instruction came on for hearing before the Honorable Robert H. Hobgood. Plaintiffs argued that the spoliation instruction was justified based upon Defendant's conduct throughout discovery. Furthermore, pointing to the newly discovered "smoking gun" emails, Plaintiffs argued that the Spoliation Order "not only shouldn't be lifted, [but] it should be modified to make it more severe." Plaintiffs suggested that the trial court order Defendant to produce *all* of its remaining backup tapes within 30 days, and if Defendant did not comply, Plaintiffs asked that the court "consider the sanction of a default judgment against [Defendant], and we will try the case on damages."

Apparently surprised by Plaintiffs' stance, Defendant noted that Plaintiffs' argument was "not a response to our argument" regarding the spoliation instruction, but was instead "related to [the allegations in their] motion to amend." Defendant maintained that it had consented to Plaintiffs' motion to amend "because we understood that today was not the time to argue that." Defendant also pointed out that there was not a pending motion to compel, but nevertheless attempted to defend against Plaintiffs' suggestion that additional sanctions were warranted.

On 10 April 2018, the trial court denied Defendant's motion to set aside the spoliation instruction due to Defendant's failure to comply with the Spoliation Order. Specifically, the trial court found that Defendant "ha[d] not satisfied the requirement . . . that it produce to Plaintiffs the subject emails from 2006 to 2009 on the backup tapes." In addition, the trial court found that Defendant's

> repeated sworn representations in its pleadings and interrogatory responses that it never believed [its flooring] product to be defective in any way have been shown to be false or misleading by the documents Duro-Last produced from the backup tapes. The Court finds it significant that perhaps the most critical email Duro-Last produced was sent by [Defendant's technical sales manager], who was also the only witness [Defendant] identified as providing responses to Plaintiffs' interrogatories, in which [Defendant] flatly denied there being any defect in [its flooring] at any time.

Based upon its findings of misrepresentations and "other acts of misconduct," the trial court concluded that it would "impose additional sanctions against [Defendant] pursuant to North Carolina Rules of Civil Procedure 37(b)(2) and its inherent powers." The trial court sanctioned Defendant by striking its answer and entering default against it as to liability on Plaintiffs' claims for negligence, breach of implied warranty, and breach of express warranty. Defendant timely filed written notice of appeal.

On appeal, Defendant argues that the trial court's order striking its answer as a discovery sanction violated Defendant's due process rights, in that Defendant "was not provided notice in advance of the 14 December 2017 hearing that sanctions would be considered." In the alternative, Defendant contends that the trial court abused its discretion because (1) no discovery violation occurred, and (2) the order was manifestly unsupported by reason.

Grounds for Appellate Review

Although the trial court's order is interlocutory, Defendant maintains that it has the right to an immediate appeal because the order affects a substantial right, in that it sanctions Defendant in the form of striking its answer. Indeed, "[o]rders of this type have been described as affecting a substantial right," and are therefore immediately appealable. *Essex Grp. Inc. v. Express Wire Servs.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003).

Discussion

Defendant first argues that the trial court violated its due process rights by ordering discovery sanctions and striking Defendant's answer, because Defendant received "no notice that the trial court was considering sanctions and no notice of the basis for the sanctions imposed." We agree.

Rule 37 of the North Carolina Rules of Civil Procedure allows a trial court to sanction a party for discovery violations. *See* N.C. Gen. Stat. § 1A-1, Rule 37(b) (2017). However, "[n]otice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution," and these protections apply with equal force to a trial court's authority to impose sanctions under Rule 37. *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998).

In order for a trial court to impose sanctions against a party, the Due Process Clause requires that the party was first afforded the "right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions." *Megremis v. Megremis*, 179 N.C. App. 174, 179, 633 S.E.2d 117, 121 (2006). A party is entitled to notice whether sanctions are imposed under Rule 37, *id.* at 178-79, 633 S.E.2d at 121, or under the trial court's inherent disciplinary authority, *Williams v. Hinton*, 127 N.C. App. 421, 426, 490 S.E.2d 239, 242 (1997) ("[T]he trial courts have ample power to control the conduct of attorneys through either the inherent power to discipline attorneys or by the use of contempt powers, or both, after proper notice and opportunity to be heard."). Clearly, "the complete absence of notice of potential sanctions . . . is not adequate notice." *Green v. Green*, 236 N.C. App. 526, 540, 763 S.E.2d 540, 550 (2014). "Our Court has held that a party sanctioned under Rule 37 ha[s] [constitutionally adequate] notice of sanctions where the moving party's written discovery motion clearly indicate[s] the party [is] seeking sanctions under Rule 37." *Megremis*, 179 N.C. App. at 179, 633 S.E.2d at 121.

In the instant case, Plaintiffs did not file a written motion seeking discovery sanctions against Defendant. At the time of the 14 December 2017 hearing, the only motions pending were (1) Defendant's motion to set aside the spoliation instruction, and (2) Plaintiffs' motion to amend their complaint. Because Defendant had already consented to Plaintiffs' motion to amend the complaint, the only matter left to be resolved at the hearing was Defendant's motion to set aside the spoliation instruction.

After Defendant presented its argument as to why it should be relieved of the spoliation instruction, Plaintiffs responded that Defendant's

conduct "so far justifies [the] spoliation order for trial in this case." However, drawing upon largely the same grounds alleged in their motion to amend, Plaintiffs further argued that the Spoliation Order should "be modified to make it more severe." Defendant protested, noting that Plaintiffs' argument was not responsive to Defendant's, and explaining that "we understood that today was not the time to argue that." Nevertheless, Defendant attempted to respond to Plaintiffs' contention that the allegations set forth in their motion to amend justified subjecting Defendant to further sanctions.

On appeal, Plaintiffs contend that the trial court's decision to impose additional sanctions following the 14 December 2017 hearing did not violate Defendant's due process rights, because the allegations in their motion to amend sufficiently "laid out the factual basis for additional sanctions." In other words, because Defendant had been served with Plaintiffs' motion to amend, and because the allegations therein could also serve as the "factual basis for additional sanctions," Defendant was provided sufficient notice of both (1) the fact that sanctions might be imposed, and (2) the grounds for such sanctions. Plaintiffs' argument is misplaced.

Our case law makes clear that parties have a due process right not only to notice of "the alleged grounds for the imposition of sanctions," but also "of the fact that sanctions may be imposed." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 609, 596 S.E.2d 285, 290 (2004), *disc. review denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). In the instant case, however, Plaintiffs "filed no written motion seeking sanctions," *Green*, 236 N.C. App. at 540, 763 S.E.2d at 549, nor was there a pending motion to compel at the time of the 14 December 2017 hearing. While Plaintiffs' motion to amend the complaint contained allegations which, if true, might support the imposition of additional sanctions against Defendant, wholly absent from Plaintiffs' motion was any indication that those allegations were intended to serve as the basis for additional sanctions. *Cf. N.C. State Bar v. Barrett*, 219 N.C. App. 481, 488, 724 S.E.2d 126, 131 (2012) ("The allegations in the complaint did not . . . clearly apprise Defendant of the conduct which she would have to defend at the hearing." (quotation marks omitted)).

Moreover, the fact that Defendant attempted to defend against Plaintiffs' request for additional sanctions at the hearing is not evidence that Defendant did, in fact, receive proper notice. *See Zaliagiris*, 164 N.C. App. at 609, 596 S.E.2d at 290 ("The fact that the party against whom sanctions are imposed took part in the hearing and did the best [it] could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given." (quotation marks

omitted)). Because the issue of sanctions was only "initially addressed at the hearing," it cannot be said that Defendant received proper notice and an opportunity to be heard, so as to render the trial court's order compliant with the demands of due process. *Green*, 236 N.C. App. at 540, 763 S.E.2d at 549.

The trial court exhibited abundant patience in this matter. Patience runs thin when a party repeatedly delays compliance with discovery requests and court orders. However, because Defendant received no notice whatsoever that it might be subject to sanctions based upon the facts alleged in Plaintiffs' motion to amend prior to the 14 December 2017 hearing, we must reverse the trial court's order. *See Megremis*, 179 N.C. App. at 181, 633 S.E.2d at 122 ("[D]efendant in the present case did not have notice *in advance* of the trial that sanctions might be imposed against her. Consequently, we conclude the trial court violated defendant's due process right to proper notice." (citation omitted)); *see also Green*, 236 N.C. App. at 540, 763 S.E.2d at 550 ("We can safely say that the complete absence of notice of potential sanctions . . . is not adequate notice.").

Finally, we note that Defendant's due process argument is properly presented for appellate review. Defendant was not deprived of its due process rights until the point at which the trial court *entered* its order imposing additional unnoticed sanctions, the order from which Defendant appeals. Nor did Defendant waive its right to due process at the 14 December 2017 hearing, as Plaintiffs contend. "[W]aiver of the right to due process must be made voluntarily, knowingly, and intelligently." *Barrett*, 219 N.C. App. at 488, 724 S.E.2d at 131. At the hearing, Plaintiffs requested that the Spoliation Order "be modified to make [the sanction] more severe" and proceeded to outline the grounds supporting such action. Defendant, seemingly blindsided, protested that "we understood that today was not the time to argue that," and continued to assert the same throughout the remainder of the hearing. Defendant's statements demonstrate that it had not anticipated that it would be required to expand the scope of its argument beyond the spoliation instruction to include defenses to the imposition of additional sanctions. *See id.* ("Defendant stated during the hearing that 'my understanding is that the misrepresentation alleged in the complaint was the only issue that required me to formulate a defense for today.' This statement indicates Defendant believed she was facing only the allegation in the complaint and was not prepared to defend any others; it does not suggest that she was voluntarily, knowingly, and intelligently waiving her right to due process."). Accordingly, Defendant did not waive its right to due process,

and appropriately asserts the same in support of its contention that the trial court's order imposing additional sanctions must be reversed.

Conclusion

For the reasoning discussed herein, we reverse that portion of the trial court's order sanctioning Defendant by striking its answer to Plaintiffs' claims for negligence, breach of implied warranty, and breach of express warranty. Having so concluded, we need not address Defendant's remaining challenges to the trial court's order.

REVERSED IN PART.

Judges STROUD and INMAN concur.

MATTHEW JASON ROYBAL, PLAINTIFF
v.
CHRISTY ANNE RAULLI, DEFENDANT

No. COA18-1085

Filed 16 July 2019

1. Appeal and Error—interlocutory appeal—Uniform Deployed Parents Custody and Visitation Act—custodial responsibility order

In a case of first impression, the Court of Appeals had jurisdiction under N.C.G.S. § 50-19.1 to immediately review an appeal from a custodial responsibility order entered pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) because, although the order was technically temporary, it constituted a final order (as to custody issues raised under the UDPCVA) within the meaning of Civil Procedure Rule 54(b) but for the other pending claims.

2. Parties—Uniform Deployed Parents Custody and Visitation Act—custodial responsibility order—non-parent—necessary party

In a custody action between parents of two minor children, a custodial responsibility order entered under the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) was remanded so that the children's stepmother—to whom the trial court granted "limited contact" with the parties' daughter—could be made a party to the action, as required under the UDPCVA (N.C.G.S. § 50A-375(b)).

Because the trial court treated the stepmother as a "de facto" party, its failure to formally add the stepmother as a party did not impair the Court of Appeals' jurisdiction to review the case.

3. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—claim for custodial responsibility—prior judicial order—no modification

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), a prior custody order regarding the parties' daughter constituted a "prior judicial order designating custodial responsibility of a child in the event of deployment" (N.C.G.S. § 50A-373). Further, where the UDPCVA's standard for modifying prior custody orders was less stringent than the standard for modifying custody orders under Chapter 50 of the General Statutes, the trial court did not abuse its discretion by determining that the "circumstances required" no change to the prior order's provisions addressing caretaking or decision-making authority over the daughter.

4. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—caretaking authority—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its discretion by denying caretaking authority—one type of custodial responsibility under the UDPCVA—to the stepmother over the parties' daughter. The court entered findings of fact showing that it carefully considered the entire family's situation, as well as the daughter's needs, when reaching its determination.

5. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—decision-making authority—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its

discretion by denying decision-making authority—one type of "custodial responsibility" under the UDPCVA—to the stepmother over the parties' daughter. The UDPCVA allowed the court to grant decision-making authority "if the deploying parent is unable to exercise that authority" (N.C.G.S. § 50A-374), but the father failed to present any evidence that he would be unable to communicate with the mother—and thereby exercise decision-making authority over his daughter—during his deployment.

6. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its discretion by granting the stepmother "limited contact" with the parties' daughter on a shorter schedule than what the father was granted under a prior custody order. The prior order did not address granting limited contact to a non-parent with the daughter, so the trial court was not bound by that order when determining the amount of limited contact to grant the stepmother.

7. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—custodial responsibility—prior judicial order—temporary custody order—no modification

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court properly treated a temporary custody order it had previously entered as to the parties' son as a "prior judicial order designating custodial responsibility of a child in the event of deployment" (N.C.G.S. § 50A-373), because the term "prior judicial order" included temporary orders. Further, under the UDPCVA's lenient standard for modifying prior custody orders, the trial court did not abuse its discretion by determining that the "circumstances required" no change to the prior order's provisions addressing caretaking or decision-making authority over the parties' son.

8. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court's order denying the stepmother "limited contact" with the parties' son was remanded because the trial court based its decision on a flawed interpretation of the UDPCVA and of a custody order previously entered in the case. Furthermore, the evidence showed that the son had a "close and substantial relationship" with his stepmother, and nothing in the trial court's order suggested that granting her limited contact would be contrary to the son's best interests (N.C.G.S. § 50A-375).

9. Appeal and Error—abandonment of issues—no objection at trial court hearing

In an appeal from a custodial responsibility order entered pursuant to the Uniform Deployed Parents Custody and Visitation Act, where the appellant father challenged the time limits the trial court imposed on the parties' presentation of evidence and arguments at a related hearing, the father's argument was deemed abandoned because he did not object to the time limitations or request additional time during the hearing.

Appeal by plaintiff from order entered 8 October 2018 by Judge Samantha Cabe in District Court, Orange County. Heard in the Court of Appeals 8 May 2019.

Browner Law, PLLC, by Jeremy Todd Browner, for plaintiff-appellant.

Ellis Family Law, P.L.L.C., by Autumn D. Osbourne, for defendant-appellee.

STROUD, Judge.

Matthew Roybal appeals from an order addressing several issues of first impression for this Court arising from the Uniform Deployed Parents Custody and Visitation Act ("UDPCVA"). N.C. Gen. Stat. §§ 50A-350-396 (2017). Father's motion and the trial court's order dealt with all three aspects of custodial responsibility recognized by the UDPCVA: caretaking authority, decision-making authority, and limited contact. N.C. Gen. Stat. §§ 50A-374-375. The applicable standards for each aspect of custodial responsibility are slightly different, and here,

separate prior orders addressed custody for each of the parties' two children, Elizabeth and Jay.[1] Because both children's previous custody orders addressed caretaking authority and decision-making authority in the event of Father's deployment, and the trial court did not find that the circumstances required modification, the trial court did not abuse its discretion in denying Father's motion as to these two aspects of custodial responsibility. But the prior orders did not address "limited contact," which is a form of visitation specifically authorized under the UDPCVA. N.C. Gen Stat. § 50A-375. The statute requires limited contact to be granted to a "nonparent" with a "close and substantial relationship" with a child unless limited contact is contrary to the child's best interest. *Id.* The trial court correctly granted limited contact to Father's wife, Stepmother, as to Elizabeth, but erred in its interpretation of Jay's prior order and North Carolina General Statute § 50A-373(1) as preventing the court from granting limited contact as to Jay. We therefore affirm the trial's court order in part but remand for the trial court to grant limited contact with Jay to Stepmother unless the court determines that she does not have a "close and substantial relationship" with Jay or that limited contact would be contrary to his best interests. *Id.* We also remand for the trial court to recognize Stepmother as a party to this action "until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b).

I. Background

Mother and Father (hereinafter "parents") never married but while they were residing together, Elizabeth was born in 2012, and after their relationship ended, Jay was born in 2016. In September of 2014, Plaintiff-Father filed a verified complaint against Defendant-Mother for joint and legal custody of their daughter, Elizabeth. On 21 November 2014, Mother answered Father's verified complaint and requested custody and child support.

On 29 June 2016, the trial court entered into a consent order for joint legal and physical custody of Elizabeth ("Elizabeth's Consent Order"). When Elizabeth's Consent Order was entered, Father was residing with his then fiancé, Victoria, ("Stepmother") and her daughter, age seven, from a previous relationship. Elizabeth had already been "introduced as a member of [Father's] household,"[2] and Mother was seven months

1. Pseudonyms will be used for the privacy of the minors involved.

2. The parents developed the terms of Elizabeth's Consent Order in mediation and it includes "limited findings of fact" by consent. The facts regarding circumstances at the time of entry of Elizabeth's Consent Order come from findings of fact in the 2016 order regarding Jay's custody.

pregnant with Jay. Elizabeth's order has extensive and detailed provisions for shared custody and decision-making and has these provisions relevant to this case:

> 2. Time-Sharing (Physical Custody). The parties shall share the physical custody of the minor child as set forth herein.
>
> (a) Regular Weekly Schedule: Except for the periods of Vacation, Holidays and the Plaintiff's Military Duty as set forth below and except for what may otherwise be mutually agreed upon between the parties the minor child shall be in the physical custody of the Plaintiff beginning at 9:30 AM on Sunday morning and continuing until the beginning of school on Tuesday morning [two (2) days later] or until 9:30 AM on Tuesday morning if there is no school. The minor child shall be in the physical custody of the Defendant beginning with her drop off at school on Tuesday morning or from 9:30 AM on Tuesday if there is no school until she is dropped off for the beginning of school on Thursday morning [two (2) days later] or until 9:30 AM on Thursday morning if there is no school. The minor child shall be in the Plaintiff's physical custody from the time she is dropped off for school on Thursday morning or from 9:30 AM on Thursday morning if there is no school until the time she is dropped off for school on Friday or until 9:30 AM on Friday if there is no school. The minor child shall be in the Defendant's physical custody from Friday at the beginning of school or from 9:30 AM on Friday if there is no school until Sunday morning at 9:30 AM. The net result of this schedule is that the Plaintiff has physical custody of the minor child for three (3) overnights (Sunday, Monday and Thursday) and the Defendant has physical custody of the minor child for four (4) overnights (Tuesday, Wednesday, Friday and Saturday) with the minor child each week, sharing her on a 2-2-1-2 schedule.
>
> (i) Military Duty: In the event that the Plaintiff has an USAR Drill Weekend (also known as a "Battle Assembly"), he shall pick up the minor child by 6:00 PM on Sunday to begin his physical custodial time. If the Plaintiff is unable to pick up the child by 6:00 PM, the Defendant shall retain physical custody of the child until the beginning of school

on Monday morning or until 9:30 AM on Monday morning if there is no school, or as may be otherwise mutually agreed to between the parties.

. . . .

5. "Temporary Military Duty" or "Active Duty". To the extent that any Temporary Military Duty would impact the Regular Weekly Schedule set forth above, the parties shall return to mediation to determine a new schedule, as appropriate at that time. Likewise, in the event that the parties cannot create a mutually agreeable schedule during any periods of Active Duty, the parties shall return to mediation for assistance in reaching a new schedule. Until such time as a new Order or agreement is in place, the minor child shall remain in Defendant's care if the Plaintiff is unavailable to exercise his time with the minor child.

6. Legal Custody. The parties shall share jointly in the decisions in reference to the major areas of parenting, as often as possible, and specifically:

. . . .

(xi) The parties further stipulate and agree that should Plaintiff be deployed or otherwise unavailable due to his military status and therefore he be [sic] unable to respond to Defendant surrounding a matter that would generally fall under legal custody as described herein, Defendant shall be entitled to solely make said decision after waiting forty eight (48) hours to hear back from Plaintiff short of an emergency.

After the entry of Elizabeth's Consent Order, Jay was born in August 2016. In September 2016, Father filed a motion to modify custody seeking modification of Elizabeth's Consent Order and determination of Jay's custody. On 11 July 2017, the trial court entered an order regarding Jay's custody, granting the parents joint legal and physical custody on a temporary basis, with a final order to be determined later.[3] The trial court denied Father's motion to modify Elizabeth's Consent Order,

3. The order provides that a hearing on permanent custody for Jay "shall not be scheduled before December 2017." Jay's order does not appear to be a consent order, but prior to the Conclusions of Law, the order states: "Based upon the consent of the parties and the foregoing Limited Findings of Fact, the Court makes the following: CONCLUSIONS OF LAW."

finding no substantial change of circumstances since entry of the order. When Jay's order was entered, Father had married Stepmother, and she was pregnant. Jay was eight months old at the time of the hearing in April 2017; he was still breastfeeding and not yet sleeping through the night. The trial court granted joint legal and physical custody of Jay to the parents and set forth a detailed schedule for physical custody and provisions regarding decision-making. As relevant to the issues in this case, the order includes these provisions regarding military service:

> g. Should Plaintiff be unable to exercise his custodial time described herein due to travel for work or any form of military duty, including but not limited to: temporary military duty, active duty or deployment, the minor child shall remain in Defendant's custody.
>
> h. The parties shall share jointly in the decisions in reference to the major areas of parenting, as often as possible, and specifically:
>
> i. The parties each have the right to make the day-to-day decisions for the minor child. In matters of more consequence with long-lasting significance, these issues will be discussed between the parties in an effort to resolve them by mutual agreement. In the event the parties cannot agree, they shall seek assistance from a relevant professional or return to mediation.
>
> ii. The parties shall each provide one another with a current address, email address and telephone number and shall provide notice of any change in this information at least 48 hours prior to such change.

On 21 May 2018, Father notified Mother via email of his upcoming deployment. Mother and Father discussed attending mediation but could not schedule mediation in time to resolve their custody issues before Father's departure. Father's official orders to report for "active duty as a member of your Reserve Component Unit" of the United States Army were issued on 2 August 2018.[4] He was required to report first to Fort Hood, Texas, on 20 August 2018 for mandatory training prior to deployment, and his mobilization would begin 27 August 2018 and last

4. The United States Army Reserves is included in the definition of "Uniformed service." N.C. Gen. Stat. § 50A-351(18).

400 days. The purpose of his activation was "in support of OPERATION ENDURING FREEDOM-HORN OF AFRICA." The Orders did not allow dependents to accompany Father.

On 13 August 2018, Father filed a "Motion to Grant Caretaking Authority to Nonparent Due to Deployed Parent" under the UPDCVA with the Orange County District Court. He alleged Stepmother and the children's stepsister and half brother have close and substantial relationships with Elizabeth and Jay and that Stepmother should be granted "caretaking and decision-making authority, or in the alternative, limited contact" with both children.

Despite Father's deployment date of 20 August 2018, the trial court set the hearing for 22 October 2018. Father filed a petition for a writ of mandamus with this Court to order the trial court to expedite the hearing as required under North Carolina General Statute § 50A-371.[5] On 24 September 2018, this Court granted Father's petition and ordered the trial court to hold a hearing by 8 October 2018. On 28 September 2018, the trial court held a hearing on Father's motion and entered an order on 8 October 2018 denying the motion as to Jay and granting it in part by ordering limited contact only for Elizabeth. Father timely appealed.

II. Interlocutory Appeal

[1] The order on appeal is an interlocutory order, since it does not resolve all pending claims and is a temporary order. An order issued under the UDPCVA is by definition a "temporary order" and terminates "60 days from the date the deploying parent gives notice of having returned from deployment to the other parent" or "death of the deploying parent":

> A temporary order for custodial responsibility issued under Part 3 of this Article shall terminate, if no agreement between the parties to terminate a temporary order for custodial responsibility has been filed, 60 days from the date the deploying parent gives notice of having returned from deployment to the other parent and any nonparent granted custodial responsibility, when applicable, or upon the death of the deploying parent, whichever occurs first.

5. The UDPCVA requires the trial court to conduct an expedited hearing. N.C. Gen. Stat. § 50A-371. We understand that the trial court's docket is normally set far in advance and is more than full, but because military deployments often require parents to report for duty very soon, the statute requires this type of hearing to be given priority.

N.C. Gen. Stat. § 50A-388(a). "The general rule which has been stated by this Court is that temporary custody orders are interlocutory and unless the order affects a "substantial right of [the appellant] which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits[,]" the appeal must be dismissed. *File v. File*, 195 N.C. App. 562, 569, 673 S.E.2d 405, 410 (2009) But all prior cases addressing appeals of temporary custody orders dealt with orders entered under Chapter 50, and in those cases, a permanent order will normally be entered in the near future. *See Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). ("[A]n order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues."). Our Court has not previously addressed jurisdiction to review a custodial responsibility order issued under the UDPCVA.[6]

Father contends this order falls under North Carolina General Statute § 50-19.1, which allows immediate appeal of custody orders even if other claims remain pending in the same action:

> 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).

We agree that a custodial responsibility order under the UDPCVA is a variety of "child custody" order covered by North Carolina General Statute § 50-19.1. Although Jay's Custody order was a temporary order and issues regarding his permanent custody remain unresolved, the issues regarding his permanent custody under Chapter 50 are independent of Father's claim under the UDPCVA. The order on appeal is technically a "temporary" order, since custodial responsibility orders under

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6. "Custodial responsibility" is "[a] comprehensive term that includes any and all powers and duties relating to caretaking authority and decision-making authority for a child. The term includes custody, physical custody, legal custody, parenting time, right to access, visitation, and the authority to designate limited contact with a child." N.C. Gen. Stat. § 50A-351(6).

the UDPCVA are *required* to be temporary orders unless the parties agree to entry of a permanent order.[7] *See* N.C. Gen. Stat. §§ 50A-385-388. But orders for custodial responsibility under the UDPCVA would be essentially non-appealable if we treated them like temporary custody orders under Chapter 50. The order on appeal is a final order addressing all issues raised under the UDPCVA and those issues are independent of the underlying Chapter 50 custody claims, so it is otherwise "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. In addition, as a practical matter, since a hearing regarding Jay's pending permanent custody could not be done while Father is deployed, if Father were required to wait for resolution of Jay's permanent custody before appealing the custodial responsibility order, the UDPCVA order would be rendered moot. Because the order under the UDPCVA is a final order addressing the UDPCVA claim, we have jurisdiction to review the order under North Carolina General Statute § 50-19.1.

III. Parties

[2] We first note that Stepmother has not formally intervened or been made a party to this case.[8] Either parent may file a claim or motion under the UDPCVA. The UDPCVA addresses how and when a "proceeding for a temporary custody order" may be filed. N.C. Gen. Stat. § 50A-370(b) ("At any time after a deploying parent receives notice of deployment, either parent may file a motion regarding custodial responsibility of a child during deployment."). This portion of the statute does not address intervention or adding parties to the case. Later in Article 3, North Carolina General Statute § 50A-375, entitled "Grant of Limited Contact," deals with provisions of the order and provides that "[a]ny nonparent who is granted limited contact *shall* be made a party to the action until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b) (emphasis added). "Limited contact" is defined as "[t]he opportunity for a nonparent to visit with a child for a limited period of time. The term

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7. "After a deploying parent receives notice of deployment and during the deployment, a court may issue a temporary order granting custodial responsibility unless prohibited by the Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 521-522. A court may not issue a permanent order granting custodial responsibility in the absence of the deploying parent without the consent of the deploying parent." N.C. Gen. Stat. § 50A-370(a).

8. Elizabeth's Consent Order includes a provision regarding intervention by "Defendant's mother, Diane Ivers Raulli" who "filed a Motion to Intervene in this case on June 28, 2016." The parties stipulated Defendant's mother was allowed to intervene and a consent order was to be prepared granting intervention, reserving her request for grandparent visitation rights. Our record does not reveal if the order for intervention was ever entered or if Grandmother's request for visitation was ever considered.

includes authority to take the child to a place other than the residence of the child." N.C. Gen. Stat. § 50A-351(11).

The order on appeal granted Stepmother, a "nonparent" as defined by North Carolina General Statute § 50A-351(11), "limited contact" with Elizabeth, so she should have been made a party to this action "until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b). We must therefore consider whether we have jurisdiction to consider the issues on appeal, since all "necessary parties" must be joined in an action under North Carolina General Statute § 1A-1, Rule 19:

> Rule 19 dictates that all necessary parties must be joined in an action. Rule 19 requires the trial court to join as a necessary party any persons united in interest and/or any persons without whom a complete determination of the claim cannot be made since a judgment without such necessary joinder is void. A party does not waive the defense of failure to join a necessary party; an objection on this basis can be raised at any time. *A reviewing court is required to raise the issue ex mero motu to protect its jurisdiction.*

Commonwealth Land Title Ins. Co. v. Stephenson, 97 N.C. App. 123, 125, 387 S.E.2d 77, 79 (1990) (emphasis added) (citations, quotation marks, brackets, and ellipsis omitted).

Under North Carolina General Statute § 50A-370(b), only the parents may bring a claim under the UDPCVA, so Stepmother could not have filed the motion. N.C. Gen. Stat. § 50A-370(b). Under North Carolina General Statute § 50A-375(b), the trial court is directed to make a person to whom limited contact is granted "a party to the action until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b). "It is well established that 'the word "shall" is generally imperative or mandatory.' " *Multiple Claimants v. N. Carolina Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). In addition, "[a] nonparent granted caretaking authority, decision-making authority, or limited contact under this Part has standing to enforce the grant until it is terminated under Part 4 of this Article or by court order." N.C. Gen. Stat. § 50A-376(b). Thus, Stepmother would have standing to enforce the order under North Carolina General Statute § 50A-376(b). The order also specifically directs Stepmother to participate in the visitation schedule for Elizabeth and to "work together" with Mother to ensure that Elizabeth does not miss special events and that she will see her step and half siblings for "major holidays, including Thanksgiving and Christmas."

We also recognize that in custody cases, our Courts have previously recognized "de facto parties" where a nonparent has been granted custodial rights by a court order and have allowed the "de facto" parties to be formally added as parties even after entry of a court order or on appeal. In *Sloan v. Sloan*, this Court noted

> Moreover, after a trial court has awarded custody to a person who was not a party to the action or proceeding, this Court has held that
>
> > it would be proper and advisable for that person to be made a party to the action or proceeding to the end that such party would be subject to orders of the court. This may be done even after judgment and by the appellate court when the case is appealed.
>
> By filing a motion to intervene in the matter, intervenors were simply requesting to be formally recognized as parties to a child custody action in which they had already been awarded visitation rights. Therefore, the trial court did not err in granting their motion to intervene even after the order determining permanent custody of C.S. was entered.

164 N.C. App. 190, 194-95, 595 S.E.2d 228, 231 (2004) (citation, ellipsis, and brackets omitted).

Therefore, Stepmother was treated as a "de facto" party based upon the trial court's order granting her limited contact and ordering her to take specific actions, and the fact that the trial court did not formally order her to be added as a party does not impair our jurisdiction. As noted in *In re Custody of Branch*, it is "proper and advisable" for Stepmother to be "made a party to the action or proceeding to the end that such party would be subject to orders of the court." 16 N.C. App. 413, 415, 192 S.E.2d 43, 45 (1972). "We have held, however, that this may be done even after judgment and by the appellate court when the case is appealed." *Id.* Based upon North Carolina General Statute § 50A-375, Stepmother should be made a party to this action "until the grant of limited contact is terminated," so we will remand the order on appeal for the trial court to include this provision.

IV. Standard of Review

No case has yet addressed the standard of review for custodial responsibility orders under the UDPCVA. The issues presented here are primarily statutory construction issues, which we review de novo:

> We review issues of statutory construction de novo. In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute. A statute that is clear on its face must be enforced as written. Courts, in interpreting the clear and unambiguous text of a statute, must give it its plain and definite meaning, as there is no room for judicial construction. . . .
>
> In applying the language of a statute, and because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used. Finally, we must be guided by the fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.

Hill v. Hill, ___ N.C. App. ___, ___, 821 S.E.2d 210, 227-28 (2018) (alteration in original) (quoting *In re Ivey*, ___ N.C. App. ___, ___, 810 S.E.2d 740, 744 (2018)).

Father challenges none of the trial court's findings of fact as unsupported by the evidence, so where the trial court has correctly interpreted the statute, we review the trial court's conclusions of law to determine if they are supported by the findings of fact. *Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007).

V. Caretaking and Decision-Making Authority for Elizabeth

Just as the underlying custody order provisions for Elizabeth and Jay differ, the trial court's order under the UDPCVA also has different provisions for Elizabeth and Jay. As to Elizabeth, the trial court granted limited contact; as to Jay, the trial court denied Father's motion entirely. We will therefore address the provisions of the order regarding Elizabeth and Jay separately.

A. "Prior Judicial Order" under N.C. Gen. Stat § 50A-373

[3] Father does not challenge the trial court's findings of fact but argues the trial court erred by denying caretaking authority or decision-making authority as to Elizabeth. The trial court granted only limited contact with Elizabeth to Stepmother. Father argues first that Elizabeth's Consent Order does not "directly address a deployment but only addresses 'Temporary Military Duty' or 'Active Duty.' " He contends that these terms, as used in Elizabeth's Consent Order, refer to his "military activity during his once a month drill or when he is sent away for required military training in preparation for a deployment." Thus, Father argues, since Elizabeth's Consent Order does not address deployment, it is not a "prior judicial order designating custodial responsibility of a child *in the event of deployment*." N.C. Gen. Stat. § 50A-373(1) (emphasis added). Father contends that the trial court should have considered his claim as to Elizabeth under North Carolina General Statute § 50A-374, which controls in the absence of a "prior judicial order" addressing deployment.

Mother agrees with Father that Elizabeth's Consent Order "does not specifically refer to the term 'deployment' so it is not a 'prior judicial [order]' as contemplated by N.G. Gen. Stat. § 50A-373(1)." She agrees that "N.C.G.S. § 50A-374 was the governing statute for the trial court to determine whether to grant caretaking and decision-making authority for" Elizabeth and contends the trial court applied it properly since North Carolina General Statute § 50A-374 says the court may grant caretaking authority to a nonparent but does not require that it do so.

The trial court first made detailed findings of fact regarding the prior orders and various family members, including Stepmother, the children's stepsister, and their half brother. As to Elizabeth, the trial court made these relevant findings of fact and conclusions of law:

> 15. [Mother] has not cut off access to both minor children to [Stepmother] or to their step-sister and half-brother.
>
> 16. [Mother] and [Stepmother] communicate better with each other than the parties do with one another.
>
> 17. [Mother] and [Stepmother] seem to work out these children maintaining a relationship amongst themselves and both are acting in the children's best interests.
>
> . . . .

19. There is a prior permanent custody order in place for the minor child [Elizabeth]. The order refers to "active duty," but not specifically to "deployment."

20. There are sufficient circumstances to grant limited contact as to [Elizabeth] but deny custodial responsibility and decision making authority. The terms of the prior order are sufficient to address custodial/decision-making authority.

21. Sufficient circumstances exist to allow [Stepmother] limited contact with [Elizabeth] as described herein.

22. [Mother] and [Stepmother] can do a great job in keeping these four children in contact with one another and that both of them want to see these children thrive.

23. [Mother] and [Stepmother] can augment the above limited contact in ways that are beneficial to all four of the above-mentioned children even though only two of them are subject to this order.

24. [Mother] and [Stepmother] have not acted in any way other than keeping the four children in contact with one another and allowing the children to thrive.

. . . .

Based on the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. The facts as set forth in paragraphs 1 through 25 above are fully incorporated herein by reference to the extent that they are also conclusions of law.

2. The Court has jurisdiction of the parties and the subject matter of this action.

3. That there are not sufficient circumstances to modify the previous custody orders of [Elizabeth] and [Jay] to allow custodial responsibility and grant decision making authority to [Stepmother.]

4. That [Elizabeth's] custody order is not clear on limited contact in the event of Plaintiff's deployment and limited

> contact as to [Elizabeth] to [Stepmother] is granted as described herein.
>
> 5. That NCGS §50A-373 specifically says, "In a proceeding for a grant of custodial responsibility pursuant to this Part"
>
> 6. That NCGS §50A-373 and §50A-375 are both located in Part 3 of Article 3, Chapter 50A of the North Carolina General Statutes.
>
> 7. That the grant of Limited Contact is a proceeding of Part 3 of Article 3, Chapter 50A of the North Carolina General Statutes and is subject to NCGS §50A-373.

Although Mother and Father both contend in their briefs that the claim for a custodial responsibility order for Elizabeth is not subject to North Carolina General Statute § 50A-373, we disagree, at least in part. We will first address the "Judicial Procedure for Granting Custodial Responsibility During Deployment" as set out in Part 3 of the UPDCVA. Part 3 sets out provisions applicable to the trial court's resolution of a claim for a custodial responsibility order. N.C. Gen. Stat. §§ 50A-370-384. North Carolina General Statute § 50A-373 titled, "Effect of a prior judicial decree or agreement,"[9] governs cases in which the parents have an existing order or agreement addressing "custodial responsibility of a child in the event of deployment":

> In a proceeding for a grant of custodial responsibility pursuant to this Part, the following shall apply:
>
> (1) A prior judicial order designating custodial responsibility of a child in the event of deployment is binding on the court unless the circumstances require modifying a judicial order regarding custodial responsibility.

N.C. Gen. Stat. § 50A-373.

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9. We note that the Uniform Act entitles this same section "Effect of Prior Judicial *Order* or Agreement," while North Carolina General Statute § 50A-373 is titled "Effect of prior judicial *decree* or agreement." (Emphasis added.) Yet the substantive language of both the Uniform Act and North Carolina statute uses the same terminology: "A prior judicial *order* . . . ." N.C. Gen. Stat. § 50A-373. The Official Comments following the section also use the term "decree" instead of "order." We have been unable to determine any relevant difference between the terms "order" and "decree" for purposes of this case.

B. Terminology

One issue noted by the Prefatory Note to the Uniform Act is "The Problem of Differing Terminology":

> The UDPCVA seeks to establish uniformity in the terminology used in custody cases arising from deployment, given the prospect that many of these cases will involve more than one jurisdiction. States, however, currently differ on the terminology that they use to describe issues of custody and visitation. In enacting the UDPCVA, states are encouraged to add any state specific terminology to the definitions of the specific terms used in the Act, without replacing the Act's specific terms or deleting the existing definitions of those terms. Use of common terms and definitions by states enacting the Act will facilitate resolution of cases involving multiple jurisdictions.

Unif. Deploy. Parent Cust. & Vist. Act, Prefatory Note.

The terminology used by the UDPCVA is crucial to both the parents' arguments and our analysis, so we will first address the meaning of the controlling terms. The UDPCVA includes definitions of many terms, and where the statute has provided a definition, we must use that definition. *See Knight Pub. Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 492, 616 S.E.2d 602, 607 (2005) ("If a statute 'contains a definition of a word used therein, that definition controls,' but nothing else appearing, 'words must be given their common and ordinary meaning[.]' " (alteration in original) (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974)).

North Carolina's UDPCVA was adopted in 2013 with only a few variations from the Uniform Act. North Carolina General Statute § 50A-395, titled "Uniformity of application and construction" requires that "[i]n applying and construing this Article, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." N.C. Gen. Stat. § 50A-395. Very few other state appellate courts have addressed orders issued under the UDPCVA, and none have addressed the issues raised in this case. We will consider any differences between the Uniform Act and the law as adopted in North Carolina to determine if they are relevant to the issues in this case, and we will consider the Prefatory Note and Comments to the Uniform Act as applicable. As to any terminology used by the Uniform Act and adopted by North Carolina, we will seek to interpret terms as intended under the Uniform Act "to promote uniformity of the law with

respect to its subject matter." *Id.* We will therefore use the specific terms as stated in the UDPCVA in accord with their definitions and will include terms used in North Carolina "without replacing the Act's specific terms or deleting the existing definitions of those terms." *Id.*

C. "Custodial Responsibility"

There is no dispute that Elizabeth's Consent Order is a "prior judicial order," as it is an order previously issued in Elizabeth's custody case. The issue on appeal arises based upon the rest of the phrase: "designating custodial responsibility of a child in the event of deployment." N.C. Gen. Stat. § 50A-373(1). The first term we must consider is "custodial responsibility." The UDPCVA uses several terms unique to the Uniform Act to address various aspects of custody, recognizing that different states use different terminology. "Custodial responsibility" is the "umbrella term" for the various aspects of custody:

> The UDPCVA establishes one umbrella term, "custodial responsibility," for all issues relating to custody, including the responsibility often referred to in other state custody law as physical custody, visitation, and legal custody. The Act also establishes three sub-categories of custodial responsibility that can be transferred to others during deployment: "caretaking authority," "decision-making authority," and "limited contact." The terminology used for each of these sub-categories is original to the UDPCVA. The term "caretaking authority" is meant to encompass the authority to live with, spend time with, or visit with a child. States often use a number of terms that fall within this definition, including "primary physical custody," "secondary physical custody," "visitation," and "possessory conservatorship." All these are meant to be subsumed under the term "caretaking authority."
>
> In contrast, the term "decision-making authority" means the authority to make decisions about a child's life beyond the authority that ordinarily accompanies a transfer of caretaking authority under state custody law. This term is meant to encompass the authority referred to in many states as "legal custody," including the authority reasonably necessary to make decisions such as the ability to enroll the child in a local school, to deal with health care, to participate in religious training, and to allow the child to engage in extracurricular activities and travel.

> Finally, the term "limited contact" refers to a form of visitation with the child given to nonparents on the request of a deployed service member. This type of visitation allows the service member to sustain his or her relationship with the child through designating either a family member or other person with whom the child has a close relationship to spend time with the child during the service member's absence. The limited contact definition allows the possibility that it may be granted to minors as well as adults. Thus a minor half-sibling or step-sibling of the child could be granted limited contact during a service member's deployment. This type of contact with the child is a more limited form of visitation than courts usually grant to parents or grandparents outside the deployment context.

N.C. Gen. Stat. § 50A-351 Official Comment.

Elizabeth's Consent Order addressed physical custody and visitation, comparable to "caretaking;" we have quoted some of those provisions above. The Consent Order also had detailed provisions under the heading "Legal Custody" which addressed joint decision-making in the "major areas of parenting, as often as possible," including subsections addressing day-to-day decisions; medical treatment; education; extracurricular activities; and travel out of state. It also addressed decision-making when Father is "deployed or otherwise unavailable due to his military status and therefore he be [sic] unable to respond to Defendant surrounding a matter that would generally fall under legal custody as described herein."

But Elizabeth's Order does not address "limited contact," which differs somewhat from the types of provisions typically included in a consent order between two parents addressing only their own custody and visitation rights under Chapter 50. "Limited contact" is a form of visitation with nonparents; under Chapter 50, a trial court can grant visitation to nonparents only in very limited circumstances. *See McIntyre v. McIntyre*, 341 N.C. 629, 635, 461 S.E.2d 745, 749-50 (1995) (finding grandparents have the right to seek visitation "only in certain clearly specified situations"). This type of visitation with persons other than parents can be addressed by an order or agreement, but in this instance, the parents did not set forth any form of "limited contact" with any nonparent.[10]

10. As noted above, Elizabeth's Consent Order included a provision regarding intervention by the maternal grandmother and her request for grandparent visitation rights was reserved.

D. "Deployment"

The next term in contention here is "deployment." Fortunately, the UDPCVA also defines deployment:

> The movement or mobilization of a service member to a location for more than 90 days, but less than 18 months, pursuant to an official order that (i) is designated as unaccompanied; (ii) does not authorize dependent travel; or (iii) otherwise does not permit the movement of family members to that location.

N.C. Gen. Stat. § 50A-351(9).

Both Mother and Father contend that Elizabeth's Consent Order refers to "Temporary Military Duty" and "Active Duty" but not specifically "deployment." This is not entirely correct, as the order includes a decision-making provision which specifically includes deployment:

> The parties further stipulate and agree that should Plaintiff be *deployed or otherwise unavailable due to his military status* and therefore he be unable to respond to Defendant surrounding a matter that would generally fall under legal custody as described herein, Defendant shall be entitled to solely make said decision after waiting forty-eight (48) hours to hear back from Plaintiff short of an emergency.

(Emphasis added.)

Certainly, the parents were using the common meaning of "deployment" in the Consent Order and not the specific definition under the UDPCVA but that does not mean that Elizabeth's Consent Order provisions do not address the circumstances described as "deployment" as defined by North Carolina General Statute § 50A-351(9). Both deployment and active duty are defined by the Department of Defense, and we look to those definitions to aid our interpretation. Active duty is defined as, "Full-time duty in the active military service of the United States, including active duty or full-time training duty in the Reserve Component." U.S. Dep't of Defense, Dictionary of Military and Associated Terms, 7 (May 2019). Deployment is defined as, "The movement of forces into and out of an operational area." *Id.* at 65.

The terms of Elizabeth's order actually contemplate several types of military duty by Father, ranging from weekend drill—which would not be "deployment" as defined by the UDPCVA due to the short time duration—to "Active Duty," which is the type of duty Father was

deployed to perform. One subsection of the order, following the regular weekly schedule, addresses a variation to the schedule for his monthly drill weekends: "Military Duty: In the event that the Plaintiff has an USAR Drill Weekend (also known as a 'Battle Assembly'), he shall pick up the minor child by 6:00 PM on Sunday to begin his physical custodial time." Later, the Consent Order addresses longer term assignments in a section referring to "Temporary Military Duty" and "Active Duty," including "*any* Temporary Military Duty that would impact the Regular Weekly Schedule set forth above." (Emphasis added.) Father's deployment to Africa for over a year obviously "impact[s] the Regular Weekly Schedule." Thus, Elizabeth's Consent Order is "[a] *prior judicial order* designating *custodial responsibility* of a child *in the event of deployment*[.]" N.C. Gen. Stat. § 50A-373(1) (emphasis added). Although the Consent Order does not address limited contact, it addresses caretaking authority and decision-making authority in the event of deployment.

E. Application of N.C. Gen. Stat. 50A-373

We have determined that Elizabeth's Consent Order is "[a] prior judicial order designating custodial responsibility of a child in the event of deployment," so it is "binding on the court unless the circumstances require modifying a judicial order regarding custodial responsibility." N.C. Gen. Stat. §50A-373(1). As noted above, the Consent Order addresses only "caretaking" and "decision-making," so it was "binding" on the trial court "*unless the circumstances require modifying* a judicial order regarding custodial responsibility." *Id.* (emphasis added). The trial court found "the terms of the prior order are sufficient to address custodial/decision-making authority." But Father argues that

> [i]t is well established in North Carolina 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 provided that the change is in the best interest of the child.
>
> However, the North Carolina legislature enacted North Carolina's UDPCVA with a weaker "circumstances require" in NCGS §50A-373(1) versus "circumstances meet the requirements of law of this state other than this [act] for modifying a judicial order regarding custodial responsibility," of the model act section 305(1). Plaintiff/Appellant's position is that "circumstances required" is too nebulous to be considered anything but the

> normal conditions to modify a custody order. Therefore, [Elizabeth's] order should not be viewed for caretaking authority through NCGS §50A-373(1) but through NCGS 50A-374.

(Citations omitted.)

North Carolina General Statute § 50A-373 differs from the Uniform Act's comparable Section 305, as noted by Father, in a manner he contends inappropriately gives the trial court entirely unlimited discretion to enter or to refuse to enter a custodial responsibility order contrary to a "prior judicial order" which addresses custody in the event of deployment. The UDPCVA provides no specific guidance on why our General Assembly substituted the terms "circumstances require" for "circumstances meet the requirements of law of this state other than this [act] for modifying a judicial order regarding custodial responsibility." But North Carolina General Statute § 50A-395 requires us to give consideration "to the need to promote uniformity of the law with respect to its subject matter among states that enact it." N.C. Gen. Stat. § 50A-395. In addition, the General Assembly adopted the Comments to Section 305 of the Uniform Act, and these comments address the language of the Uniform Act, despite the difference in the language adopted by North Carolina. The Official Comment notes that

> [s]ection 305 [G.S. 50A-373] governs the court's consideration of a past judicial decree or agreement between the parents that specifically contemplates custody during a service member's deployment. In crafting this provision, the UDPCVA seeks to give significant deference to past decrees and agreements in which issues of custody during deployment have already been considered and resolved. At the same time, it seeks to balance the value of certainty gained by leaving settled matters settled against the recognition that in some circumstances past determinations may no longer be in the best interest of the child.
>
> This provision gives somewhat more deference to custody provisions in prior judicial decrees than in out-of-court agreements. *To overturn the former, the challenger must first meet the state's standard for modifying a judicial decree regarding custodial responsibility. In most states, this standard requires that there be a showing of a substantial or material change of circumstances that was not foreseeable at the time the prior judicial decree*

> *was entered.* Only if a challenger meets that showing, as well as overcomes the presumption that the previous decree was in the best interest of the child, may the court modify the earlier decree. In contrast, the challenger of a custody provision established in a past agreement needs only to overcome the presumption that the provision is in the best interest of the child.

N.C. Gen. Stat. § 50A-373 Official Comment (alteration in original) (emphasis added).

By rejecting the phrase "meet the requirements of the law of this state other than this [act]" as used in the Uniform Act, the General Assembly was removing the portion of the statute which would arguably have required the exact same substantial change of circumstances as the standard for modification of a prior permanent custody order under North Carolina's UDPCVA. As enacted in North Carolina, the UPDCVA allows the trial court to modify a prior custody order with a lesser showing than would normally be required for modification of a permanent order. In other words, the movant need not prove a "substantial change in circumstances that was not foreseeable at the time the prior judicial decree was entered[,]" as described in the Official Comments. *See* N.C. Gen. Stat. § 50A-373 Official Comment (allowing an existing custody order to be modified if the "circumstances require" which is left to the trial court to determine).

This lesser standard for "circumstances" which "require" modification is in accord with the purpose of the UDPCVA. It is intended to address "issues of child custody and visitation that arise when parents are deployed in military or other national service" since "deployment in national service raises custody issues that are not adequately dealt with in the law of most states." Unif. Deploy. Parent Cust. & Vist. Act, Prefatory Note. If a motion to modify a prior permanent custody order based upon a substantial change of circumstances affecting the best interests of the children under North Carolina General Statute § 50-13.7 adequately addressed the custody concerns of deployed parents and their families, there would be no need for the UDPCVA to address the standard for modification at all. Often, the parents will have an existing order or agreement, which may or may not address deployment or as in this case, the order may address some aspects of custodial responsibility but not others. The UDPCVA seeks to enable deployed parents to obtain an order quickly and to preserve not just the relationship between the deployed parent and child, but also between the child and the deployed

parent's other family members or others who have a substantial relationship with the child based upon the deployed parent.

Although we agree with Father that the phrase "circumstances require" may seem "nebulous," it is given more content and meaning when read in context with the other applicable provisions of the UDPCVA and the "polar star" of all child custody cases: the best interests of the child.[11]

> In custody matters, the best interests of the child is the polar star by which the court must be guided. Although the trial judge is granted wide discretion, a judgment awarding permanent custody must contain findings of fact in support of the required conclusion of law that custody has been awarded to the person who will best promote the interest and welfare of the child. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child. The welfare of the child is the paramount consideration to which all other factors, including common law preferential rights of the parents, must be deferred or subordinated.

McRoy v. Hodges, 160 N.C. App. 381, 386-87, 585 S.E.2d 441, 445 (2003) (citations, quotation marks, and ellipsis omitted).

The trial court must give deference to a "prior judicial order" which addresses "custodial responsibility" in the event of deployment, but if "circumstances require," it may enter an order under the UDPCVA with additional terms for any aspect of "custodial responsibility," including caretaking, decision-making, or limited contact. *See* N.C. Gen. Stat. §50A-373(a). Although it is not clear from the trial court's conclusions of law exactly how it determined North Carolina General Statute

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11. North Carolina General Statute § 50A-374, the statute Father argues should apply to his motion as to Elizabeth, grants the trial court discretion to grant caretaking authority if it is in the best interest of the child. N.C. Gen. Stat. § 50A-374(a) ("*In accordance with the laws of this State* and on the motion of a deploying parent, a court *may* grant caretaking authority of a child to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship if it is *in the best interest of the child*." (emphasis added)). Several other sections of the UDPCVA also refer to "the law of this State" and "best interest of the child." *See* N.C. Gen. Stat. § 50A-352, 373, 374, 375, 377, 378, 379, 387 & 388. The UDPCVA incorporates the "best interest" standard explicitly in various sections. *See* N.G. Gen. Stat. §§ 50A-373(b), 375(a), 377(3)-(4), 379(a), 387.

§ 50A-373 applied to Elizabeth's Consent Order, the trial court's rationale is clear. Essentially, the trial court examined the relationships between Mother, Stepmother, and all four children; noted the admirable cooperation between Mother and Stepmother; examined the existing provisions of Elizabeth's Consent Order; and determined that the circumstances required no change to the provisions of the order regarding caretaking or decision-making, but that it would be in Elizabeth's best interest to have limited contact as set out in the order.

F. Caretaking Authority

[4] Father argues that the trial court was not bound by Elizabeth's Consent Order and erred by not granting Stepmother caretaking authority under North Carolina General Statute §50A-374, which provides that the trial court "*may* grant caretaking authority of a child to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship if it is in the best interest of the child." N.C. Gen. Stat. § 50A-374(a) (emphasis added). Even if we agreed with Father that Elizabeth's Consent Order was not binding on the trial court, the trial court had the discretion to grant caretaking authority under North Carolina General Statute § 374 but was not required to do so.

> "As used in statutes, the word 'shall' is generally imperative or mandatory." *In contrast, "may" is generally intended to convey that the power granted can be exercised in the actor's discretion, but the actor need not exercise that discretion at all.*

Silver v. Halifax Cty. Bd. of Commissioners, ___ N.C. ___, ___, 821 S.E.2d 755, 761 (2018) (emphasis added) (citation omitted).

Father has not shown that the trial court abused its discretion by denying caretaking authority to Stepmother. The trial court's findings show it carefully considered the entire family's situation and tailored the order to address Elizabeth's needs, so we cannot discern any abuse of discretion. *See Walsh v. Jones*, ___ N.C. App. ___, ___, 824 S.E.2d 129, 134 (2019) ("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." (quoting *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253-54)).

G. Decision-Making Authority

[5] Father also argues that the trial court erred by not granting Stepmother decision-making authority under North Carolina General Statute § 50A-374, which provides that the trial court

> *may* grant part of the deploying parent's decision-making authority for a child to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship *if the deploying parent is unable to exercise that authority*. When a court grants the authority to a nonparent, the court shall specify the decision-making powers that will and will not be granted, including applicable health, educational, and religious decisions.

N.C. Gen. Stat. § 50A-374(c) (emphasis added).

Father argues that Elizabeth's Consent Order, which requires him to respond to Mother within 48 hours regarding decisions they are to make jointly, are not practicable during his deployment since he will be "on another continent" and although he may have access to "video chatting and email, his military duty frequently requires him to be away from civilian communications for days at a time." Since he may be unable to be reached or unable to respond within 48 hours, he contends that Stepmother knows "his wishes" on a "wide variety of subjects," she should be allowed to step into his role in joint decision-making with Mother. But we note that Father did not testify at the hearing, and Stepmother did not testify regarding Father's duties during his deployment, his actual communication options, or his potential lack of access to "video chatting or email" during his deployment. Since Father presented no evidence on these facts, we will generously assume that Father's argument is generally based upon the "communications" section of Elizabeth's Consent Order, which provides for the parents to "share and exchange information" "via telephone, email and text messages."

Just as for caretaking authority, decision-making authority is a discretionary ruling, but this subsection provides a condition precedent: the trial court *may* grant decision-making authority to a nonparent "*if* the deploying parent is unable to exercise that authority." *Id.* Father did not present evidence regarding his potential lack of ability to communicate with Mother by "telephone, email and text messages," as provided by Elizabeth's Consent Order. Where Father did not present evidence that his military duties would substantially interfere with his ability to use these forms of communication or that he would normally be unable

to respond to Mother within 48 hours, the trial court had no basis upon which to find that Father would be "unable to exercise" his decision-making authority. Father has not demonstrated any abuse of discretion by the trial court's denial of decision-making authority to Stepmother.

H. Limited Contact

[6] Since Elizabeth's Consent Order did not address the aspect of "custodial responsibility" defined by the UDPCVA as "limited contact," the trial court's consideration of "limited contact" was governed by North Carolina General Statute §50A-375:

> In accordance with laws of this State and on motion of a deploying parent, a court *shall* grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship, *unless the court finds that the contact would be contrary to the best interest of the child.*

N.C. Gen. Stat. § 50A-375(a) (emphasis added). The trial court did grant Stepmother "limited contact" for Elizabeth, but Father argues that the trial court erred because the amount of time granted was "substantially reduced from" the time granted to Father by Elizabeth's Consent Order. He contends that the reduction in contact between Elizabeth and her stepsister and half brother is not in her best interest.

Unlike "caretaking authority" and "decision-making authority" under North Carolina General Statute § 50A-374, North Carolina General Statute § 50A-375 uses mandatory language. The trial court "*shall* grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship, *unless* the court finds that the contact would be contrary to the best interest of the child." *Id.* (emphasis added). "It is well established that 'the word "shall" is generally imperative or mandatory.' " *Multiple*, 361 N.C. at 378, 646 S.E.2d at 360 (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). Therefore, the trial court is not required to grant caretaking or decision-making authority, but the trial court is obligated to grant limited contact with a nonparent who has a "close and substantial relationship" with the child unless the court finds that doing so would be contrary to the best interest of the child. *See* N.C. Gen. Stat. §§ 50A-374-375.

Based upon the trial court's findings, it determined that continued contact between Elizabeth and Stepmother and her stepsister and half brother was in her best interest. But Elizabeth's Consent Order did not

address limited contact with a nonparent, and the trial court was not bound by the schedule of custodial time granted to Father in the Order. The actual schedule and amount of limited contact with a nonparent remains within the discretion of the trial court. Here, Elizabeth and Jay already had different custodial schedules based upon the difference in their ages and needs. The trial court did not abuse its discretion by granting "limited contact" to Elizabeth on a different and lesser schedule than Father's usual custodial time under her Consent order.

We also note that Father has not specifically argued, and we have therefore not considered, whether the trial court should have considered any separate grant of limited contact between Elizabeth and her step or half siblings. North Carolina General Statute § 50A-375 provides that "a court shall grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship . . . ." N.C. Gen. Stat. § 50A-375(a). A "nonparent" is "[a]n individual other than a deploying parent or other parent." N.C. Gen. Stat. § 50A-351(12). A "close and substantial relationship" is "[a] relationship in which a significant bond exists between a child and a nonparent." N.C. Gen. Stat. § 50A-351. The Official Comment notes that

> [t]he limited contact definition allows the possibility that it may be granted to minors as well as adults. Thus a minor half-sibling or step-sibling of the child could be granted limited contact during a service member's deployment. This type of contact with the child is a more limited form of visitation than courts usually grant to parents or grandparents outside the deployment context.

N.C. Gen. Stat. 50A-351 Official Comment. Although an order under the UDPCVA can grant contact to another child, as opposed to the stepparent or other adult nonparent, the order on appeal grants the limited time to Stepmother, not to her son or daughter.[12] The order contemplates that time with Stepmother will normally include her other children as well, thus maintaining the relationships among the children.

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12. Since the UDPCVA provides that "[*a*]*ny* nonparent who is granted limited contact *shall be made a party to the action* until the grant of limited contact is terminated," it would appear that if limited contact were granted to a minor child, the minor child would need to be "made a party to the action," a prospect which may present additional procedural complications which a trial court would need to consider carefully. N.C. Gen. Stat. § 50A-375(b) (emphasis added).

Overall, the trial court's order properly struck the balance between deference to Elizabeth's Consent Order and the unique provisions for "limited contact" with a nonparent under North Carolina General Statute § 50A-375. The order's findings of fact support its conclusions of law, and Father has shown no abuse of discretion as to the provisions for "limited contact" as to Elizabeth.

VI. Jay's Order

A. Provisions of Order on Appeal

[7] In addition to the findings of fact and conclusions of law quoted above, the order includes the following findings of fact (which may be more appropriately considered as a conclusions of law) regarding Jay:

> 13. The prior custody order for the minor child, [Jay] designates custodial responsibility during Plaintiff [Father's] deployment on behalf of the US Army and that order is binding on this court.
>
> 14. The court finds that circumstances do not require modification of said order.

Jay's prior order provided as follows regarding deployment:

> g. Should Plaintiff be unable to exercise his custodial time described herein due to travel for work or any form of military duty, including but not limited to: temporary military duty, active duty or deployment, the minor child shall remain in [Mother's] custody.

Jay's order also provided for joint decision-making in much the same manner as Elizabeth's consent order. Jay's order was entered by the trial court separately from Elizabeth's Consent Order and it is a temporary custody order. The order provides that a hearing upon Jay's permanent custody would not be "scheduled before December 2017."

B. Distinction Between Temporary and Permanent Prior Order for Purposes of N.C. Gen. Stat. § 50A-373(1)

Father first argues that because Jay's Order is a temporary order, it is not a "prior judicial order" under North Carolina General Statute § 50A-373 because "it is well settled law in North Carolina that a temporary order entered under N.C. Gen. Stat. §13.5(d3) can be revisited without a change in circumstances needed" but only upon consideration of the child's best interests. He contends that the trial court "must

view it through N.C. Gen. Stat. § 50A-373 as a 'circumstances required' equals the best interest of the child standard or through N.C. Gen. Stat. § 50A-374, which statutorily requires a view as the best interest of the child." Mother contends that North Carolina General Statute § 50A-373(1) refers to a "prior judicial order" and makes no distinction between temporary or permanent prior judicial orders. She also argues that Father has not cited any authority in support of his argument for a distinction between temporary and permanent orders for purposes of North Carolina General Statute § 50A-373(1). She is correct, but since no case in the United States has addressed this issue, neither Father nor Mother could have cited any case as authority under the UDPCVA on this point. But the language of the statute makes it clear that "prior judicial order" includes both temporary and permanent orders.

In several sections the UDPCVA makes the distinction between permanent and temporary orders, and it is obvious from the Act overall and the Comments to the Uniform Act these words were carefully chosen, while North Carolina General Statute § 50A-373(1) instead uses the inclusive and non-specific term "prior judicial order." For example, under North Carolina General Statute § 50A-353,[13] regarding jurisdiction, the statute distinguishes between prior temporary and permanent orders regarding custodial responsibility for purposes of determining jurisdiction under the UCCJEA. In North Carolina General Statute § 50A-374(b), the statute refers to an "existing permanent custody order":

> Unless the grant of caretaking authority to a nonparent under subsection (a) of this section is agreed to by the other parent, the grant is limited to an amount of time not greater than (i) the time granted to the deploying parent in an existing permanent custody order, except that the court may add unusual travel time necessary to transport the child or (ii) in the absence of an existing permanent custody order, the amount of time that the deploying parent habitually cared for the child before being notified of

13. "(b) If a court has issued a *permanent order regarding custodial responsibility* before notice of deployment and the parents modify that order temporarily by agreement pursuant to Part 2 of this Article, for purposes of the UCCJEA, the residence of the deploying parent is not changed by reason of the deployment.

(c) If a court in another state has issued a *temporary order regarding custodial responsibility* as a result of impending or current deployment, for purposes of the UCCJEA, the residence of the deploying parent is not changed by reason of the deployment." N.C. Gen. Stat. § 50A-353 (emphasis added).

> deployment, except that the court may add unusual travel time necessary to transport the child.

N.C. Gen. Stat. § 50A-374(b). Therefore, the UDPCVA gives greater weight to a prior *permanent* custody order than a prior temporary order for purposes of jurisdiction under the UCCJEA and the terms of a grant of caretaking authority. But under North Carolina General Statute § 50A-373, the term "prior judicial order" encompasses both temporary and permanent custody orders. A permanent order is given more weight for the specific purposes set out in the UDPCVA, but Jay's temporary order is a "prior judicial order" for purposes of North Carolina General Statute § 50A-373(a).

C. Denial of Caretaking Authority and Decision-Making Authority

Both Mother and Father acknowledge that Jay's order more clearly addresses custodial responsibility in the event of Father's deployment than did Elizabeth's Consent Order, discussed above. Jay's order uses the specific term "deployment," although, as discussed above, use of that specific term is not necessarily controlling. If the provisions of the prior judicial order encompass custodial responsibility under the circumstances described in North Carolina General Statute § 50A-351(9), it is a "prior judicial order designating custodial responsibility of a child in the event of deployment" and it "is binding on the court unless the circumstances require modifying a judicial order regarding custodial responsibility." N.C. Gen. Stat. § 50A-373.

Also, as discussed above regarding Elizabeth's Consent Order, the standard for modifying the provisions of the prior judicial order is lesser than the substantial change in circumstances normally required for modification of a permanent custody order under Chapter 50, and the trial court has the discretion to determine if the "circumstances require" entry of an order if in the best interests of the child. Father argues that his "objective" in bringing his motion under the UDPCVA was to "keep both children's custody situation the same as when as when he was not deployed." Father's goal is understandable, but it is impossible to keep their "custody situation" *the same* since he—the children's Father—is not in the home. In some circumstances, a trial court may determine that the custodial schedule should remain the same, despite the absence of the parent, but based upon the trial court's findings of fact, we see no abuse of discretion in the trial court's determination that circumstances did not require modification of the caretaking authority or decision-making authority as set forth in Jay's order, for the same reasons as stated above for Elizabeth.

D. Limited Contact

[8] Just as Elizabeth's Consent Order did not address the aspect of "custodial responsibility" defined by the UDPCVA as "limited contact," Jay's order had no provisions for "limited contact." Thus, Jay's order was not binding on the trial court as to limited contact. In addition, the trial court's consideration of "limited contact" was governed by North Carolina General Statute § 50A-375:

> In accordance with laws of this State and on motion of a deploying parent, a court shall grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship, unless the court finds that the contact would be contrary to the best interest of the child.

N.C. Gen. Stat. § 50A-375(a).

As discussed above, the language of North Carolina General Statute § 50A-375 is mandatory, but there are two conditions for granting limited contact: (1) the child has a "close and substantial relationship" with the nonparent, and (2) contact with the nonparent is not contrary to the best interest of the child. *Id.* The trial court's findings do not specifically state whether Jay has a "close and substantial relationship"—a term defined by North Carolina General Statute § 50A-351(4)—with Stepmother or his step and half siblings, but the overall import of the evidence and findings suggests that he does have this type of relationship with Stepmother. In fact, Mother's response to Father's motion for an order under the UDPCVA admits many allegations regarding the relationships between both children, Stepmother, and their step and half siblings. The trial court noted that both Mother and Stepmother were working together to maintain the relationships among the four children and were acting in their best interests. Nothing in the trial court's order suggests that limited contact with Stepmother would be "*contrary* to the best interest of" Jay.

The trial court determined that under North Carolina General Statute § 50A-373(1), it could not grant limited contact to Stepmother for Jay based upon Jay's Order which had provisions regarding deployment. To that extent, the trial court erred in its interpretation of the statute.[14] We therefore reverse the order as to the denial of limited contact as to

14. The trial court's statements in open court support this interpretation. When Father's counsel asked for clarification as to the denial of limited contact with Jay, the trial court stated "I am finding that his prior order is binding because I'm not finding that

Jay and remand for entry of an order addressing limited contact. If the trial court determines that Jay does *not* have a "close and substantial relationship" with Stepmother or his step and half siblings, or if it determines that limited contact would be *contrary* to his best interests, the trial court may enter a new order denying Father's request for limited contact. Since the trial court did not make these specific findings or conclusions based upon its interpretation of Jay's order and North Carolina General Statute § 50A-373(1), the trial court should do so on remand. In addition, the trial court may in its discretion receive additional evidence limited to this issue on remand. If the trial court orders limited contact on remand, after making appropriate findings of fact, it may set the schedule for the limited contact in its discretion and is neither required nor prohibited from following either the schedule granted to Father in Jay's order or the same limited contact schedule as granted for Elizabeth. The trial court may consider Jay's age and needs as well has his, Mother's, and Stepmother's schedules, and any other factors relevant to establishing the times for limited contact with Stepmother.

VII. Time Limit

[9] Father's last argument raises a procedural issue. He argues the trial court erred by limiting each side to 20 minutes for presentation of their evidence and arguments, and "[t]his amount of time was insufficient for the Plaintiff-Appellant to open, submit evidence with more than one witness, cross-examine the Defendant-Appellee, and close in this hearing." However, as Mother points out, Father's counsel did not object to the time limitations or request additional time before the trial court. She also notes that Father did not use all of the 20 minutes allotted to him, nor did he attempt to offer affidavits or other documentary evidence in addition to Stepmother's testimony.

"[T]he manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, and his control of the case will not be disturbed absent a manifest abuse of discretion." *Wolgin v. Wolgin*, 217 N.C. App. 278, 283, 719 S.E.2d 196, 199 (2011) (quoting *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986)) (affirming denial of appellant's motion for a new trial where the trial court limited the presentation of evidence when "(1) the length of the trial was

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circumstances require the modification of that, and therefore I cannot change that order. That does not prohibit [Mother] from allowing [Jay] to go. It's just that there is a prior order that is specifically talking about the custodial responsibility of the child in the event of deployment, and I'm finding that that is binding on this court, and I'm not going to change it."

discussed at pre-trial conferences and both parties agreed to a two-day trial; (2) the court made inquiry concerning the ability of both parties to present evidence within a two-day time frame and neither party objected during pre-trial conferences; (3) the court made several references to the time constrictions during the trial; and (4) at the close of Defendant's evidence, Defendant made no objection to time limits enforced by the trial court on the second day of trial"). We also note that this hearing was held on an expedited basis for purposes of entering a temporary order, and the trial court may take these factors into account when setting time limits for the hearing. Because Father did not make a timely request for additional time for presentation of his case prior to or during the hearing, this issue is deemed abandoned and cannot be raised for the first time on appeal. N.C. R. App. P. 10(a)(1).

VIII. Conclusion

We affirm the trial court's order as to Elizabeth, but we remand for the trial court to add Stepmother as a party to this action "until the grant of limited contact is terminated" under North Carolina General Statute § 50A-375(b) and to enter an order granting limited contact with Jay to Stepmother, *unless* the trial court determines that Jay does not have a "close and substantial relationship" with Stepmother or that limited contact would be contrary to his best interests. The trial court may in its sole discretion receive evidence on remand relevant to this determination only or it may enter an order based upon the current record.

AFFIRMED IN PART AND REMANDED.

Judges HAMPSON and YOUNG concur.

STATE OF NORTH CAROLINA, ON RELATION OF CITY OF ALBEMARLE, PLAINTIFF
v.
CHUCKY L. NANCE, JENNIFER R. NANCE, CHARLENE SMITH, MANAGER, NANCY DRY, JAMES A. PHILLIPS, TRUSTEE, FIRST BANK, LENDER, AND KIRSTEN FOYLES, TRUSTEE, DEFENDANTS

No. COA18-916

Filed 16 July 2019

1. Nuisance—public—hotel—manager—employment already terminated —failure to state a claim

A city failed to state a claim for relief pursuant to Civil Procedure Rule 12(b)(6) where its complaint prayed that defendant Smith, who was the manager of a "hotel" that was a hotbed of criminal activity, would no longer be allowed to operate or maintain a public nuisance on the hotel property. At the time the city brought the claim, defendant Smith's employment or tenancy had already been terminated and the hotel had closed.

2. Cities and Towns—initiation of legal action—through outside counsel—standing—applicable statutes and ordinances

A city lacked standing to bring a public nuisance action against operators of a "hotel" where the city failed to follow the requirements of the applicable statutes and ordinances requiring that it adopt a resolution in order to bring suit through outside counsel. The trial court properly concluded that it lacked subject matter jurisdiction over the action.

Appeal by plaintiff from order entered 30 October 2017 by Judge Lori Hamilton and orders entered 11 May 2018 and 29 May 2018 by Judge Julia L. Gullett in Stanly County Superior Court. Heard in the Court of Appeals 5 June 2019.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Janelle Lyons, for plaintiff-appellant.

Bowling Law Firm, PLLC, by Kirk L. Bowling and Mark T. Lowder, for defendant-appellees Chucky L. Nance and Jennifer R. Nance.

John W. Webster for defendant-appellee Charlene Smith.

TYSON, Judge.

The City of Albemarle (the "City") appeals from orders of the trial court, which allowed Defendants' motions to compel discovery and granted Chucky L. Nance's, Jennifer R. Nance's ("the Nances"), and Charlene Smith's ("Smith") motions to dismiss. We affirm.

I. Background

The Nances have owned the subject property in Albemarle since 2012. A business known as the "Heart of Albemarle Hotel" operated on the property until April 2017. From January 2014 through April 2017, three years and four months, Albemarle police officers allegedly visited the areas near the subject property seventy-nine times in response to complaints of criminal activity, including assaults, sales of narcotics, and solicitation of prostitution.

On 24 March 2017, Albemarle's Chief of Police R.D. Bowen sent letters to the Nances, Kirsten Foyles, Nancy Dry, and James A. Phillips, Jr., giving notice to the parties, asserting the subject property was being used illegally under the nuisance statute, and demanding the nuisance be abated within 45 days. No notice letter was sent to Defendant Smith.

The City's purported outside counsel filed a complaint against the Nances, Smith, First Bank, Foyles, Dry, and Phillips on 4 August 2017, four months after the hotel had closed and all activities had ceased. The City alleged the Nances' use of real property constitutes a public nuisance pursuant to N.C. Gen. Stat. §§ 19-1 and 19-2. The City also alleged Smith was employed as a manager of the subject hotel but "Nance has fired Charlene Smith as the manager of the Property, but has placed her at [another hotel owned by the Nances] as the acting manager, overseeing day-to-day operations."

The Nances responded they had complied with the City's notice letter, fired Smith, evicted all patrons and tenants of the subject property, closed the hotel by 21 April 2017 and filed their answer. The Nances alleged they had notified City Manager Michael Ferris that all patrons and tenants had been evicted in April 2017 and the property was and has remained closed since that time.

Smith filed her answer and alleged she had "vacated the subject property on or about April 20, 2017 at the request of Defendant Chucky Nance when the business thereon ceased operation."

Foyles and First Bank filed a motion to dismiss, which was granted by the trial court in an order filed 13 November 2017. The City voluntarily dismissed the claims against Dry and Phillips, with prejudice, on

26 October 2017. None of those orders, actions, or dismissed parties are before us on appeal and judgments thereon are final.

Smith moved to dismiss the City's claims against her pursuant to N.C. R. Civ. P. 12(b)(6) as part of her answer. Smith argued, in part, that the City's complaint was insufficient, where it alleged she had been employed by the Nances and no allegation of her ownership existed to make her a real party in interest. The trial court heard and granted Smith's motion to dismiss with prejudice.

The Nances also filed a motion to dismiss the City's claims for lack of subject matter jurisdiction. The trial court heard the Nances' motion to dismiss, wherein they argued N.C. Gen. Stat. § 160A-12 required the city council to have passed a resolution authorizing the filing of the complaint. *See* N.C. Gen. Stat. § 160A-12 (2017). The City conceded, and the trial court found as fact, that no such resolution had been presented to, heard, or adopted by the council.

The trial court entered an order granting the Nances' motion to dismiss, which states, in relevant part:

> 1. N.C. General Statutes 19-2.1 grants authority to "the Attorney General, district attorney, county, municipality, or any private citizen of the county" to bring a civil action in the name of the State of North Carolina to abate a nuisance. This section specifies how a case must proceed.
>
> 2. N.C. General Statutes 160A-11 sets out and describes the corporate powers of cities and towns as follows:
>
> The inhabitants of each city heretofore or hereafter incorporated by act of the General Assembly or by the Municipal Board of Control shall be and remain *a municipal corporation* by the name specified in the city charter. Under that name they shall be vested with all of the property and rights in property belonging to the corporation; shall have perpetual succession; *may sue and be sued*; may contract and be contracted with; may acquire and hold any property, real and personal, devised, sold, or in any manner conveyed, dedicated to, or otherwise acquired by them, and from time to time may hold, invest, sell, or dispose of the same; may have a common seal and alter and renew the same at will; and *shall have and may exercise in conformity with the city charter and the general laws of this State all municipal*

> *powers*, functions, rights, privileges, and immunities of every name and nature whatsoever.
>
> 3. N.C. General Statutes 160A-12 specifies how the powers of municipalities are to be carried into action:
>
> *All powers*, functions, rights, privileges, and immunities of the corporation *shall be exercised by the city council* and carried into execution as provided by the charter or the general law. A *power*, function, right, privilege, or immunity that is conferred or imposed by charter or general law without directions or restrictions as to how it is to be *exercised or performed shall be carried* into execution *as provided by ordinance or resolution of the city council.*
>
> 4. Plaintiff, through Plaintiff's counsel, has been candid that no vote was taken by the Albemarle City Council that would authorize the filing of the lawsuit against these defendants and that *the City Council assumed this would be a law enforcement function.*
>
> 5. As a result, this Court cannot find that the City has vested subject matter jurisdiction with this Court, and pursuant to statute the Court has no other alternative than to dismiss this action. (Emphasis supplied)

The City timely appealed from the trial court's order granting the Nances' and Smith's respective motions to dismiss.

II. Jurisdiction

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

III. Standard of Review

All issues in this appeal are reviewed *de novo*. "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 457 N.C. 567, 597 S.E.2d 673 (2003).

"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) (citation omitted). "Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *Id.* (citation omitted).

IV. Analysis

A. Dismissal of Appeal of Motion to Compel

The City gave notice that it was appealing the order granting the Nances' motion to compel entered 30 October 2017. "The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a). Where a party "does not set forth any legal argument or citation to authority to support [the] contention, [it is] deemed abandoned." *State v. Evans*, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017). This issue was not addressed in the City's appellate brief and it has abandoned this issue. The trial court's order entered 30 October 2017 is final.

B. Smith's Motion to Dismiss

[1] Upon appellate review of the trial court's dismissal under Rule 12(b)(6) for failure to state a claim:

> [W]e determine 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. In ruling upon such a motion, the complaint is to be liberally construed. Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim.

State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010) (citations omitted).

To determine whether the City asserted a claim upon which relief can be granted, we review the original complaint in the light most favorable to the non-moving party. All allegations therein are taken as true. *Id.*

The complaint alleges Smith "oversaw the day-to-day operations at the Heart of Albemarle" and that Smith was "fired . . . as the manager," but was placed at another hotel as acting manager. No other hotel of the Nances is a part of or a party to this litigation.

Smith's employment or tenancy at the Heart of Albemarle Hotel was allegedly terminated by 20 April 2017, and she was ordered to and did vacate the premises entirely. The City waited until 4 August 2017 to file the complaint.

N.C. Gen. Stat. § 19-1(a) provides that "[t]he erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of alcoholic beverages, illegal possession or sale of controlled substances . . . shall constitute a nuisance." N.C. Gen. Stat. § 19-1(a) (2017). At the time the City brought the claim, Smith's employment or tenancy had already been terminated and all activities and tenancies at the Heart of Albemarle Hotel had ceased.

The City argues the statute provides that "[t]he abatement of a nuisance does not prejudice the right of any person to recover damages from its past existence." N.C. Gen. Stat. § 19-1.5 (2017). This assertion is irrelevant, as the City did not serve Smith with any notice of the alleged public nuisance and does not request damages against Smith in the complaint. In its complaint, the City prayed that "Defendants Chucky L. Nance, Jennifer Nance, Charlene Smith and their agents" no longer be allowed to operate or maintain a public nuisance on the property or within the state of North Carolina. Smith was no longer employed by nor a tenant or leasee of the Nances, was not present at the hotel, and was a private citizen when Plaintiff brought its claim.

Smith cannot possibly provide any relief that Plaintiff sought. We affirm the trial court's order to dismiss the complaint against Smith under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiff's arguments are overruled.

C. Subject Matter Jurisdiction

[2] The City asserts the trial court erred in granting the Nances' motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The Nances contend the trial court properly found and concluded the City lacked standing to initiate the legal action. They argue the City did not invoke the trial court's subject matter jurisdiction, because the city council did not hold a vote and resolve to commence legal proceedings. We agree.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2017). The party bringing the action has the burden of proving standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364 (1992); *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002).

The elements of standing are "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other

matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 119 L. Ed. 2d at 364. Questions of standing are properly addressed in Rule 12(b)(1) motions to dismiss. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

"Standing refers to 'a party's right to have a court decide the merits of a dispute.' To have standing to bring a claim, one must be a 'real party in interest,' which typically means the person or entity against whom the actions complained of were taken." *WLAE, LLC v. Edwards*, __ N.C. App. __, __, 809 S.E.2d 176, 181 (2017) (citations omitted).

"If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (quoting *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (internal quotation marks omitted)).

"Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the *Attorney General, district attorney, county, municipality, or any private citizen of the county* may maintain a civil action in the name of the State of North Carolina to abate a nuisance." N.C. Gen. Stat. § 19-2.1 (2017) (emphasis supplied).

Cities may exercise the powers delegated to them by the General Assembly issuing a city charter and are operated as municipal corporations. N.C. Gen. Stat. §§ 160A-11, 160A-12 (2017). As municipal corporations, cities are required to exercise these powers as are delegated and provided in statutes by ordinance or resolution of the city council. *Id.*

Albemarle's adopted ordinances set out the duty of the city attorney to "prosecute and defend suits against the City." The ordinances also provide that the "*Council may employ other legal counsel* from time to time, in addition to the City Attorney, as may be necessary to handle adequately the legal affairs of the City." City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3 (emphasis supplied).

The City contends it has standing because it was damaged through the repeated visits of police officers to the Heart of Albemarle Hotel. The City asserts "public nuisance actions are *qui tam* actions, whereby essentially anyone can file suit to end the nuisance." The City also asserts the fact that it retained an attorney to file the suit is sufficient to show that the suit was filed by an agent of the City, as verified by the chief of police, which meets the requirements of N.C. Gen. Stat. § 19-2.1.

The City additionally asserts the exercise of municipal powers must be performed consistent with the city charter, and since the charter allows the city council to hire other legal counsel "as may be necessary to handle adequately the legal affairs of the City," its hiring outside counsel to file the suit was in compliance with the ordinance, and meets the requirements of N.C. Gen. Stat §§ 19-2.1, 160A-11, 160A-12.

The Nances do not contest the statutes and the City's charter allow the City to file and maintain a civil action for a public nuisance. They argue the city council did not vote and resolve to exercise its authority in this action. Without the city council's ordinance or resolution, the Nances argue the City has produced no evidence to show that the formal process to file suit was initiated, approved, or resolved by the city council. We agree.

It is undisputed, and the trial court found, that no notice, meeting, minutes, or vote of the city council was resolved, given, or taken to initiate a public nuisance action against the Nances. The City's private counsel asserted before the trial court that the city council had "discussed the case" and "assumed" the proper action would be taken by the State Bureau of Investigation ["SBI"] and chief of police "to let them follow through with whatever they thought was best to do," and to maintain it as a criminal proceeding, as it is common practice in other cities and counties to "just file[] a Chapter 19."

The notice letter seeking to abate the alleged public nuisance did not come from one of the entities or public individuals on N.C. Gen. Stat. § 19-2.1's enumerated list of those empowered or authorized to bring and maintain a public nuisance abatement action: "the Attorney General, district attorney, county, municipality, or any private citizen of the county."

The City's police chief signed the notice letter. Contrary to the council's assumption, neither the SBI nor the chief of police is included in this list to initiate a civil public nuisance action. Further, nothing in the record indicates the letter was drafted by any party that could have maintained such an action. Even if Chief Bowen had been acting as a private citizen of the county, no evidence in the record shows a bond being posted, as is required when a private citizen initiates the action. N.C. Gen. Stat § 19-2.1.

The civil action was not properly initiated by the city council. It was discussed by the council and letter notice was initiated by the chief of police, without any reference to being drafted by or on behalf of the city attorney or outside counsel for the City. Albemarle's ordinances require that either the city attorney or outside counsel selected by the council

prosecute this action. In order to bring suit through outside counsel, the city council must adopt a resolution. City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3; N.C. Gen. Stat. § 160A-12. The city council was on notice of this requirement, yet no evidence of compliance has been produced. The city attorney's signature or joinder to this action after it was initiated does not appear on any of the pleadings or documents.

While the City's outside counsel asserted at oral argument that both he and previous trial counsel were hired pursuant to a resolution of the city council, no evidence of this authority exists in the record. Without such evidence, the council's discussion, assumptions, and common practice do not convey nor carry their burden to prove standing. *Neuse River Found. Inc.*, 155 N.C. App. at 113, 574 S.E.2d at 51.

"The [city council] never attempted to obtain nor received the required . . . vote prior to filing this [civil] action. Without the required vote, the [council] lacked the authority to commence legal proceedings against [the Nances] and does not possess standing." *Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC*, 171 N.C. App. 89, 97, 614 S.E.2d 351, 356 (2005).

Albemarle's ordinances define the proper party to initiate an action for the city. "[B]y enacting [such an] ordinance, the [council] must follow the procedures it has set therein. If such procedures are inconvenient, the [council] should change them, not ignore them." *Town of Kenansville v. Summerlin*, 70 N.C. App. 601, 602, 320 S.E.2d 428, 430 (1984) (citation omitted).

The City must follow the requirements of the statutes and charter, and the ordinances and procedures it established. Here, it has failed to do so. *Id.* The City's arguments are overruled. The trial court's order is affirmed.

V. Conclusion

The City failed to argue or present any authority concerning its appeal of the order granting of the Nance's motion to compel discovery. Where a party "does not set forth any legal argument or citation to authority to support [the] contention [it is] deemed abandoned." *Evans*, __ N.C. App. at __, 795 S.E.2d at 445. This issue was not addressed in the City's brief and is abandoned. N.C. R. App. P. 28(a).

The City fails to state a claim upon which relief can be granted against Smith. N.C. R. Civ. P. 12(b)(6). Smith never received notice of any violations or to abate any nuisance. At the time the complaint was made, Smith was no longer employed by the Nances nor was a tenant

of the Heart of Albemarle Hotel property. The City failed to demand any relief that could be granted after Smith no longer worked at or occupied the hotel property.

The City failed to properly initiate a public nuisance action against the Nances. The City failed to follow the requirements of the statutes and ordinances in effect or to provide evidence of outside counsel's authority to file suit on its behalf. *Town of Kenansville*, 70 N.C. App. at 602, 320 S.E.2d at 430. The trial court properly concluded it lacked subject matter jurisdiction to address the City's claims against the Nances. *Peninsula*, 171 N.C. App. at 97, 614 S.E.2d at 356.

The trial court's orders compelling discovery and dismissing the City's claims are affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and YOUNG concur.

STATE OF NORTH CAROLINA
v.
ADAM RICHARD CAREY

No. COA18-1233

Filed 16 July 2019

1. Appeal and Error—abandonment of issues—lack of argument

Pursuant to Rule of Appellate Procedure 28(a), defendant abandoned any issue pertaining to his conviction for impersonating a law enforcement officer where he failed to raise any argument on appeal.

2. Firearms and Other Weapons—weapon of mass destruction—N.C.G.S. § 14-288.8—flash bang grenade

The State did not present sufficient evidence that defendant possessed a weapon of mass death and destruction in violation of N.C.G.S. § 14-288.8(c) where multiple "flash bang" grenades were found in defendant's car, because those devices did not fit the definition of or qualify as the type of grenade listed in the statute.

Judge YOUNG concurring in part and dissenting in part.

STATE v. CAREY

[266 N.C. App. 362 (2019)]

Appeal by defendant from judgment entered 18 May 2018 by Judge Leonard L. Wiggins in Onslow County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General E. Burke Haywood, for the State.

Guy J. Loranger, for defendant-appellant.

TYSON, Judge.

Adam Richard Cary ("Defendant") appeals from judgments entered upon a jury's verdict finding him guilty of one count each of possession of a weapon of mass death and destruction and impersonation of a law enforcement officer. We find no error in Defendant's conviction for impersonation of a law enforcement officer, reverse his conviction for possession of a weapon of mass death and destruction, and remand for resentencing.

I. Background

Defendant was operating a dark-colored Dodge Charger and pulled over a speeding vehicle on 16 July 2016. Defendant had "emergency lights" flashing on his car. State Highway Patrol Trooper Cross pulled behind Defendant's vehicle and noticed the registration plate was not consistent with or issued to a law enforcement agency. After further investigation, Defendant was arrested, and his car was searched incident to arrest. Officers found a medical technician badge, firearms, magazines, ammunition, suppressors, three diversionary flash bang grenades, and other items located inside of Defendant's car. Defendant was indicted on three counts of possession of weapons of mass destruction, impersonating a law enforcement officer, following too closely, and speeding.

On 15 May 2018, the State dismissed two counts of possession of firearms as weapons of mass death and destruction, following too closely, and speeding. After trial on 18 May 2018, a jury returned verdicts finding Defendant guilty of one count of possession of a weapon of mass death and destruction and impersonation of a law enforcement officer. For the conviction of possession of a weapon of mass death and destruction charge, the court ordered Defendant to serve a term of 16 to 29 months. The court suspended the sentence and imposed intermediate punishment, ordering Defendant to serve an active term of 120 days and placing him on supervised probation for a period of 24 months. For the

conviction on the charge of impersonating a law enforcement officer, the court ordered Defendant serve a term of 45 days. The court suspended the sentence and imposed community punishment, placing Defendant on supervised probation for a period of 24 months. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred by denying his motion to dismiss the weapon of mass death and destruction charge. Defendant also contends the trial court committed plain error by: (1) failing to instruct the jury on the definition of "weapon of mass death and destruction;" and (2) instructing the jury that it could find that the State satisfied the "weapon of mass death and destruction" element when the indictment did not allege that theory of guilt.

IV. Impersonation of a Law Enforcement Officer

[1] Defendant appealed all of his convictions, including impersonating a law enforcement officer. On appeal, Defendant raises no arguments to challenge or show error in this conviction. Defendant's failure to bring forth arguments and authority results in abandonment of his appeal of this conviction. N.C. R. App. P. 28(a). We find no error in Defendant's conviction of impersonating a law enforcement officer.

V. Standard of Review

This Court reviews questions of statutory construction *de novo*. *In re Ivey*, __ N.C. App. __, __, 810 S.E.2d 740, 744 (2018) (citation omitted).

VI. Motion to Dismiss

[2] Defendant contends the trial court erred by denying his motion to dismiss the possession of a weapon of mass death and destruction charge for insufficient evidence. He argues possession of flash bang grenades falls outside of the category of "Grenade" listed as a "weapon of mass death and destruction" set forth in N.C. Gen. Stat. § 14-288.8(c). We agree and reverse Defendant's conviction of possession of a weapon of mass death and destruction.

A. "Weapon of Mass Death and Destruction"

Defendant was charged with one count of possession of a weapon of mass death and destruction under N.C. Gen. Stat. 14-288.8(c). We must consider the provisions and language contained within the statute in order to determine whether or not a flash bang device would qualify as a weapon of mass death and destruction. While a "grenade" may qualify as a "weapon" under *State v. Sherrod*, a flash bang grenade is neither a deadly weapon nor a weapon of mass death and destruction. *State v. Sherrod*, 191 N.C. App. 776, 781, 663 S.E.2d 470, 474 (2008) (defining weapon as "an instrument of attack or defense in combat, . . . or an instrument of offensive or defensive combat[;] something to fight with[;] something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy" (citation omitted)). Viewing the statute holistically and narrowly, the flash bang grenades found in Defendant's car do not fit within the definition of a weapon of mass death and destruction in N.C. Gen. Stat. § 14-288.8(c).

B. Ejusdem Generis

When appellate courts review and construe the meanings of words and phrases the General Assembly listed within a statute, the legislative intent is presumed to pair and restrict the meaning and application of broad and generic words to the specific context or stated purpose of the statute.

> "[T]he *ejusdem generis* rule is that where general words *follow* a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated."

State v. Fenner, 263 N.C. 694, 697-98, 140 S.E.2d 349, 352 (1965). This principle "does not warrant the court subverting or defeating the legislative will." *Id.* at 698, 140 S.E.2d at 352.

Following this canon of statutory construction, possession of a "flash bang grenade," even though called a "grenade," does not fit the definition nor qualify as the type of "Grenade" that is enumerated in N.C. Gen. Stat. § 14-288.8(c)(1) as a weapon of mass death and destruction. The other items included in the list, such as a "Bomb," "Rocket having a propellant charge of more than four ounces," "Missile having an explosive or incendiary charge of more than one-quarter ounce," and "Mine," comprise a set of highly deadly and destructive fragmentary and

incendiary explosives capable of causing mass deaths and destruction. They are dissimilar to and unlike the flash bang "grenades" found inside of Defendant's car.

The admitted evidence, viewed in the light most favorable to the State, shows flash bang grenades do not fall within the category of restricted items capable of producing mass death and destruction as are regulated under the statute. *Id.* Trooper Cross testified that to deploy a flash bang grenade, the user would "[h]old the long lever, the spoon, pull the pin out . . . you would roll it into a room . . . and it would make a bright flash and a very loud bang for the purpose of rendering the people—or whoever is in that room—stunned, disabled, disoriented[.]"

This testimony of the effects of "a bright flash and a very loud bang" upon use is wholly inconsistent with the types and categories of egregious devices and weapons of mass death and destruction regulated or prohibited under N.C. Gen. Stat. § 14-288.8(c)(1). The statute regulating weapons of mass death and destruction prohibits the unlicensed or unauthorized possession of a class of weapons of munitions of war that are capable of and can result in widespread and catastrophic deaths and destruction of property. The State produced no evidence that the items recovered from Defendant's vehicle were intended to be included within this statute or capable of rendering those results.

"[T]he *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970). A flash bang grenade is not classified or defined even as a deadly weapon to individuals or multiple persons, as with a knife, gun, pistol, rifle, or shotgun, and does not fit into the greater and more restricted category of weapons of mass death or destruction.

To be defined and included as a weapon of mass death or destruction, the item must be capable of causing catastrophic damage and consistent with the highly deadly and destructive nature of the other enumerated items in the list contained in N.C. Gen. Stat. § 14-288.8(c). *Id.* The flash bang grenades found inside of Defendant's vehicle are not consistent with the purpose, do not fit within, and do not rise to the potential impacts of enumerated general items within the list as constrained by the intent and purpose of the statute. *Id.* The State's argument is overruled.

C. Exclusions from the Statute

N.C. Gen. Stat. § 14-288.8(c) contains the express provision that the "term 'weapon of mass death and destruction' does not include any device which is neither designed nor redesigned for use as a weapon." Defendant specifically requested a jury instruction on this exception under N.C. Gen. Stat. § 14-288.8(c), which the trial court denied.

When describing how he had used flash bang grenades while serving on active military duty in Iraq, Trooper Cross stated that "we could surprise, stun and get the upper hand so we could do what we had to do quickly." Flash bang grenades were not used as a weapon of mass death or destruction, but were deployed for surprise, disorientation, and diversionary purposes, uses clearly outside of the purpose, scope, and prohibitions of the statute.

It is overly simplistic and erroneous to classify a flash bang with "a bright flash and a very loud bang" or a smoke grenade emitting fog as a "Grenade" as a weapon of mass death and destruction. This inclusion would equate to classifying a cherry bomb as a "Bomb" or a bottle rocket as a "Rocket" capable of causing mass deaths. *See Sherrod*, 191 N.C. App. at 781, 663 S.E.2d at 474. No admitted evidence shows these flash bang devices are capable of being used as a weapon to cause mass deaths or widespread destruction.

D. Rule of Lenity

The rule of lenity may apply if there is ambiguity within the statute. The trial court's preemptive interpretation of N.C. Gen. Stat. § 14-288.8(c)(1) is overly broad. The rule of lenity requires courts to read criminal statues narrowly and restrictively. As here, the statute's general and undefined terms could include possession of items within its provisions, which are neither dangerous nor deadly weapons, and yet be included and sanctioned as a weapon of mass death and destruction.

Because of the broad, general terms included, the ambiguity in what items are included within the proscribed list in N.C. Gen. Stat. § 14-288.8(c)(1) compels the rule of lenity to be applicable here. *See State v. Heavner*, 227 N.C. App. 139, 144, 741 S.E.2d 897, 901 (2013); *State v. Crawford*, 167 N.C. App. 777, 780, 606 S.E.2d 375, 378 (2005) ("The rule of lenity applies only when the applicable criminal statute is ambiguous.").

The rule of lenity "forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Wiggins*, 210 N.C.

App. 128, 133, 707 S.E.2d 664, 669, *cert. denied*, 365 N.C. 189, 707 S.E.2d 242 (2011) (quotation omitted). "[W]hen applicable, the rule of lenity requires that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Heavner*, 227 N.C. App. at 144, 741 S.E.2d at 901-02 (quotation and citation omitted).

Based upon the application of the rule of lenity to the intent and types of weapons proscribed by the statute, Defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction should have been granted. The flash bang grenades found in Defendant's car were not devices or weapons or "Grenades" capable of causing mass death and destruction when construing N.C. Gen. Stat. § 14-288.8(c)(1) narrowly under the rule of lenity. *Id.*

VII. Plain Error in the Jury Instructions

Defendant also asserts the trial court committed plain error both by failing to instruct the jury on the definition of weapon of mass death or destruction and by preemptively instructing the jury that the State had satisfied the possession of a weapon of mass death and destruction element, if it found that Mr. Carey had possessed a "grenade" where the indictment did not allege that theory of guilt. Since we reverse Defendant's conviction for possession of a weapon of mass death and destruction because the trial court should have granted Defendant's motion to dismiss for the reasons analyzed above, we do not address Defendant's arguments challenging the jury instructions regarding these issues.

VIII. Conclusion

Defendant's failure to bring forth arguments and authority results in abandonment of the appeal of his conviction for impersonating a law enforcement officer. N. C. R. App. P. Rule 28(a). We find no error in that conviction.

The trial court erred by failing to grant Defendant's motion to dismiss. The flash bang grenades found in the back of Defendant's vehicle do not satisfy the requirements for possession of a "Grenade" that is a "weapon of mass death and destruction" as is set out by N.C. Gen. Stat. § 14-288.8(c). These items are not "of the same kind, character and nature as those [weapons] specifically enumerated by the statute." *Fenner* at 697-98, 140 S.E.2d at 352.

The trial court increased the potential penalty on Defendant by construing the scope of the statute's undefined and general words ambiguously, beyond the General Assembly's intention, and inconsistent with

the well-established canons of statutory construction. *See Wiggins*, 210 N.C. App. at 133, 707 S.E.2d at 669.

The State failed to present sufficient evidence under N.C. Gen. Stat. 14-288.8(c) to support a conclusion or verdict that possession of the flash bang grenades found in Defendant's car were a "Grenade" proscribed as a weapon of mass death and destruction. Defendant's motion to dismiss is properly allowed.

We reverse the trial court's decision and remand for resentencing. This decision does not prevent nor prohibit the possession or use of flash bang grenades from being otherwise restricted or regulated by law. *It is so ordered.*

NO ERROR IN PART; REVERSED IN PART; AND REMANDED.

Judge MURPHY concurs.

Judge YOUNG concurs in part and dissents in part with separate opinion.

YOUNG, Judge, dissenting in part and concurring in part.

I. Introduction

The majority has held that flash bang grenades are not weapons of mass death and destruction under N.C. Gen. Stat. § 14-288.8(c) (2017). Accordingly, the majority held that the trial court erred by denying Defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction for insufficient evidence and reversed the conviction. Because I disagree with the underlying principle, I must respectfully dissent.

The majority held that a "flash bang grenade," even though called a "grenade," does not fit the definition nor qualify as the type of "Grenade" that is enumerated in N.C. Gen. Stat. § 14-288.8(c)(1). Following the canons of statutory construction, the plain language of the statute should control. *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014).

> The intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, the court will give effect to the plain meaning of the words without resorting to judicial construction. Courts must give an unambiguous statute its plain and definite meaning, and

> are without power to interpolate, or superimpose, provisions and limitations not contained therein.

Id. at 238, 758 S.E.2d at 671.

II. Motion to Dismiss

"[T]o obtain a conviction for possession of a weapon of mass death and destruction, the State must prove two elements beyond a reasonable doubt: (1) that the weapon is a weapon of mass death and destruction and (2) that defendant knowingly possessed the weapon." *State v. Billinger*, 213 N.C. App. 249, 253, 714 S.E.2d 201, 205 (2011). Defendant only challenges element one. By statute, "the term 'weapon of mass death and destruction' includes: Any explosive or incendiary: (a) Bomb; or (b) Grenade; or . . . (f) Device similar to any of the devices described above." N.C. Gen. Stat. § 14-288.8(c)(1).

Defendant contends that the grenades in his possession are excluded from the definition of weapons of mass death and destruction. However, the statute does not support his argument.

> The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

N.C. Gen. Stat. § 14-288.8(c).

In *Sherrod*, this Court held "an instrument of attack or defense in combat, . . . or an instrument of offensive or defensive combat[;] something to fight with[;] something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy" is a weapon. *State v. Sherrod*, 191 N.C. App. 776, 781, 663 S.E.2d 470, 474 (2008). In the present case, the weapon at issue is a grenade. Diversionary grenades are military-issued ordnance which are used in combat. Furthermore, in the present case, the words: "GRENADE, HAND, DIVERSIONARY" and "IF FOUND DO NOT HANDLE NOTIFY POLICE OR MILITARY,"

were printed on the labels of the grenades found in Defendant's vehicle. Trooper Christopher Cross, who served in the military for sixteen years and used a flash bang grenade, testified that flash bang grenades "have the ability to cause serious injury, such as loss of limbs, burns, and things like that."

The flash bang grenade at issue was designed to be used in combat as a weapon. Moreover, the flash bang grenade was not "redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device." Lastly, there is no evidence to show that the flash bang grenade was "surplus ordnance sold, loaned, or given by the Secretary of the Army," nor was it an "antique" or used solely for "sporting purposes." As such, the flash bang grenade is not excluded from being a weapon of mass death and destruction as enumerated in N.C. Gen. Stat. § 14-288.8(c).

Pursuant to the plain language of the statute, a "flash bang grenade" is, by law, a "grenade," and therefore a weapon of mass death and destruction. Furthermore, a "flash bang grenade" does not fall within an exclusion enumerated in N.C. Gen. Stat. § 14-288.8(c). There was sufficient evidence to support a finding that Defendant possessed a weapon of mass death and destruction.

III. Failure to Provide Definition

Defendant alleges the trial court committed plain error by failing to instruct the jury on the definition of a "weapon of mass death or destruction" as provided in N.C. Gen. Stat. § 14-288.8(c)(1). Although the majority declined to address this issue, I believe it is properly before us. Defendant raised no objection at trial, and we therefore review for plain error.

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

As in Defendant's first argument, this Court established in *Sherrod* that a grenade is a weapon "used in destroying, defeating, or physically injuring an enemy." *Sherrod*, 191 N.C. App. at 781, 663 S.E.2d at 474. In addition, the applicable statute defines a grenade as a "weapon of mass death and destruction," so there was no need for a definition to be provided. N.C. Gen. Stat. § 14-288.8(c)(1).

Even if it were error for the trial court to decline to instruct the jury on the definition of a "weapon of mass death or destruction," it would not rise to the level of prejudice to Defendant. The definition specifically includes grenades, and thus, the jury would probably have reached the same result. Therefore, I would find no plain error.

IV. Element not in Indictment

Defendant contends the trial court committed plain error by instructing the jury that it could find that the State satisfied the "weapon of mass death or destruction" element if it found that Defendant possessed a "grenade" where the indictment did not allege that theory of guilt. As above, although the majority declined to address this issue, I believe it is properly before us. Because this issue was not preserved by objection at trial we review for plain error.

The indictment alleged Defendant "did possess a weapon of mass death and destruction, three flash bang grenades." Defendant complained that the description of the grenade was too specific. A flash bang grenade was presented at trial even though it was only referred to as a "grenade."

In *Bollinger*, the defendant was indicted for carrying a concealed weapon. The indictment stated that the defendant "unlawfully and willfully did carry a concealed deadly weapon while off his premises, to wit: *a Metallic set of Knuckles*." *State v. Bollinger*, 192 N.C. App. 241, 243, 665 S.E.2d 136, 138 (2008) (emphasis in original). The trial court instructed the jury that "it could find defendant guilty only upon a finding that defendant 'intentionally carried and concealed about his person *one or more knives*." *Id.* at 244, 665 S.E.2d at 138 (emphasis in original). As in the instant case, the defendant argued that there was a fatal variance between the offense charged in the indictment and the evidence presented, and instructions given, at trial. This Court held that "an indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime." *Id.* at 246, 665 S.E.2d at 139. In *Bollinger*, the additional language, "to wit: *a Metallic set of Knuckles*" was deemed "mere surplusage and not an essential element of the crime of carrying a concealed weapon." *Id.* at 246, 665 S.E.2d at 139-140.

Similarly, in this case, it was unnecessary to say, "three flash bang grenades" instead of "grenades." It is clear that the offense is possession of a weapon of mass death and destruction. As a result, the indictment did allege that theory of guilt. However, even if it did not, the jury

would probably not have reached a different result in the absence of this instruction, and therefore, I would find no plain error.

V. Impersonating a Law Enforcement Officer

I agree with the majority that Defendant's failure to bring forth arguments and authority results in abandonment of his appeal of this conviction. N.C.R. App. P. Rule 28(a).

VI. Conclusion

With regard to impersonating a law enforcement officer, I concur with the majority that Defendant's argument is abandoned on appeal. However, with regard to the weapon of mass death and destruction, I respectfully dissent, and this Court should uphold the lower court's decision.

STATE OF NORTH CAROLINA
v.
TIMOTHY LAVAUN CRUMITIE

No. COA18-781

Filed 16 July 2019

1. Identification of Defendants—out-of-court identification—photograph—Eyewitness Identification Reform Act—not applicable

In a prosecution for murder and kidnapping (among other crimes), where defendant abducted and shot his ex-girlfriend after fatally shooting her boyfriend, the trial court properly admitted testimony from a police officer who saw a man running near the crime scene, obtained a description of defendant from the ex-girlfriend, and located a DMV photograph of defendant, whom he recognized as the man he had seen earlier. This out-of-court identification was neither a lineup nor a "show-up" under the Eyewitness Identification Reform Act (EIRA) and therefore could not be suppressed on the basis that the officer failed to follow EIRA procedures. Further, there was no evidence that the officer's viewing of the photograph was inherently suggestive or created a substantial likelihood of irreparable misidentification.

2. Constitutional Law—Confrontation Clause—expert testimony—report created by another expert

In a prosecution for murder and kidnapping (among other crimes), where defendant abducted and shot his ex-girlfriend after fatally shooting her boyfriend, the trial court did not violate the Confrontation Clause by allowing an FBI agent to give expert testimony about a cellular site analysis report created by another agent, who was unavailable to testify. In testifying about the use of cellphone data to locate defendant on the night of the alleged crimes, the expert gave his independent opinion based on his own peer review of the report, and defendant had ample opportunity to cross-examine the expert about that opinion and about the report itself.

Appeal by defendant from judgment entered 21 February 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 April 2019.

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

Massengale & Ozer, by Marilyn G. Ozer for defendant-appellant.

BRYANT, Judge.

Where an identification by a law enforcement officer was not subject to the Eyewitness Identification Reform Act, we affirm the trial court's denial of defendant's motion to suppress. Where defendant was given an opportunity to cross-examine testifying expert witness about another expert's report, the trial court did not err in allowing the testimony into evidence.

In the early evening of 5 August 2016, defendant Timothy Lavaun Crumitie went to the apartment complex of his ex-girlfriend, Kimberly Cherry, and shot her boyfriend, Michael Gretsinger, twice in the head. Defendant abducted Cherry and took her to his house in Rowan County. He eventually took her back to a field near her apartment complex, shot her twice in the head, and dumped her in the trunk of the car. Cherry survived and escaped to call the police. Cherry had difficulty speaking, due to the bullets in her head causing hemorrhaging and trauma to the area that controls speech. After speaking with the police, Cherry was transported to the hospital and admitted to the intensive care unit. Gretsinger was rushed to the hospital for surgery. Although the surgery stabilized

Gretsinger, the doctors could not remove the bullets as they had passed through to the other side of his brain, and Gretsinger died nine days later.

Defendant was indicted on one count of attempted first-degree murder of Cherry, one count of attempted first-degree murder of Gretsinger, one count of possession of a firearm by a felon, one count of first-degree kidnapping, and one count of assault on a female. After Gretsinger was pronounced dead, defendant was indicted for murder and one count of first-degree burglary. The State did not seek the death penalty. Defendant filed a pre-trial motion to suppress identification testimony by Officer Bradley Potter of the Charlotte-Mecklenburg Police Department, who responded to Cherry's 911 call and observed defendant near Cherry's apartment.

The case was tried on 5 February 2018 in Mecklenburg County Superior Court before the Honorable Hugh B. Lewis, Judge presiding. Defendant filed a pre-trial motion to suppress and a hearing was held.

Officer Potter testified that he saw a man at Cherry's apartment when he responded to a shooting incident at her residence. The man ran into the breezeway of an adjacent building, and Officer Potter ran after him. Officer Potter testified that he thought, from the towel in the man's hands, the man was running to render aid to a gunshot victim. After he lost sight of the man, Officer Potter went to try and locate Cherry, who had sought refuge with people in another apartment. Cherry told Officer Potter that her boyfriend had been shot and described the suspect as a black male, fifty years old, and approximately 5'9" in height. Because Cherry was having difficulty communicating verbally, Officer Potter asked her to write down what she needed to tell him on his notepad. She wrote down defendant's name and her apartment number where officers soon found Gretsinger. Officer Potter accessed a DMV photograph of defendant, whom he identified as the same man he had seen running with a towel when he arrived at the scene. The trial court denied defendant's suppression motion and allowed Officer Potter to testify before the jury. At trial, the State called Officer Potter to testify about Cherry's 911 call, and over defendant's objections, the trial court allowed his testimony identifying defendant.

Special Agent Michael Sutton of the FBI's Cellular Analysis Survey Team ("CAST") was called to testify for the State as an expert in the field of historical cellular site analysis and cellular technology. Special Agent Warren, the FBI agent who analyzed the cellphone records of defendant and Cherry, was unavailable to testify at trial. The State moved to introduce Agent Warren's cell site analysis report through Agent Sutton. Defendant objected arguing the State had committed discovery

violations and that admission of the report would violate defendant's right to confront witnesses against him. The trial court excluded Agent Warren's report but allowed Agent Sutton to testify about the procedures of CAST, his review of the report, and his independent opinion about the testing.

Defendant was convicted[1] of first-degree murder of Gretsinger, first-degree kidnapping and attempted first-degree murder of Cherry, second-degree burglary, and possession of a firearm by a felon. The jury found defendant not guilty of assault on a female. Defendant received a mandatory life sentence for first-degree murder and separate sentences for the other convictions. Defendant gave notice of appeal in open court.

On appeal, defendant argues the trial court erred by: I) denying his motion to suppress eyewitness identification testimony, and II) allowing an expert witness to testify regarding a report created by an unavailable witness.

I

[1] Defendant first argues the trial court improperly denied his motion to suppress Officer Potter's eyewitness testimony. Specifically, defendant argues that Officer Potter failed to comply with "show-up" procedures, as set forth in the Eyewitness Identification Reform Act ("EIRA"). We disagree.

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). "Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

The EIRA, codified in N.C. Gen. Stat. § 15A-284.52, establishes standard procedures for law enforcement officers when conducting out-of-court eyewitness identifications of suspects. N.C. Gen. Stat. § 15A-284.52 (2017). There are three types of eyewitness identifications under the EIRA to identify the perpetrator of a crime: live lineups, photo lineups, and show-ups. Live lineups are "procedure[s] in which a group

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1. The attempted first-degree murder of Gretsinger was dismissed and the first-degree burglary indictment was later amended to second-degree burglary.

of people [are] displayed to an eyewitness[,]" whereas photo lineups are "procedure[s] in which an array of photographs [are] displayed to an eyewitness[.]" *Id.* § 15A-284.52(a)(6)–(7). Show-ups are "procedure[s] in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." *Id.* § 15A-284.52(a)(8).

Here, the inadvertent out-of-court identification of defendant, based on a single DMV photograph accessed by an investigating officer, was neither a lineup or show-up under the EIRA, and thus not subject to those statutory procedures.

At the hearing, the trial court made the following factual findings:

> We have an officer arriving on the scene having been dispatched for a high priority call. He is on full alert. He is going into a well[-]lit area, his eyesight is 20/20 with his contacts which he was wearing that evening. He saw an individual running with a towel approximately sixty yards or fifty yards away from him. That'll be about 160 feet, 175 feet.
>
> He believes that individual was actually proceeding to the location where the injured individual may need to provide aid, and follows that individual and loses sight of him in the breeze way [sic]. Eventually[,] the officer, along with other officers, come across the victim who was allegedly shot twice in the head. They began looking for another victim, who then provided the information of names.
>
> The officer proceeds to continue his investigation using an electronic database in his patrol car, which includes identification photographs of individuals that are in that database. When he brings up the defendant's name, a picture comes up as well. It's after that point he connects the identity of the defendant with the person he saw in the parking lot.
>
> That officer is doing good police work and investigating a crime scene which is part of his official capacity. Therefore, I believe that as to the photograph itself, that the statement in *Macon* where the court indicated that they did not believe the legislature intended to prevent police officers from consulting a photograph in a database to follow up on leads that are given by other officers, or in this case also a

> victim. And they upheld the court's decision that the EIRA did not apply here.

Upon review of Officer Potter's testimony, we agree with the trial court that the EIRA does not apply to his identification of defendant. Officer Potter testified in detail that when he arrived at Cherry's apartment complex, he saw a black male, wearing a green t-shirt, and carrying a white towel approximately 60 yards away. Officer Potter interviewed Cherry, who issued a detailed statement and description of the suspect—she identified defendant by name and age. That information—defendant's name, physical description, and date of birth—was used by Officer Potter to locate registered vehicles for the purposes of issuing a BOLO. As Officer Potter searched through the CJLeads database, defendant's DMV photograph appeared and Officer Potter learned for the first time that defendant was the man he saw when he arrived at Cherry's apartment complex. Officer Potter testified that he was "100 percent" certain he could identify the man even if defendant's DMV photograph was suppressed as evidence.

Even assuming Officer Potter's viewing of defendant's DMV photograph was somehow inherently suggestive, defendant has not demonstrated that, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. *See State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983) ("Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification.").

> The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Id. at 164, 301 S.E.2d at 95.

Officer Potter responded to a high-priority dispatch to investigate a crime. He was in a well-lit area, had clear 20/20 vision with contacts, and a clear, unobstructed view of a man running about "sixty yards or fifty yards away from him." He was able to see a man, wearing a green shirt, and carrying a white towel. Prior to viewing defendant's photograph,

Officer Potter did not give a description of the man as he was not a suspect at that time. In fact, Officer Potter testified with "100 percent" certainty that he could identify the man as it was an "instantaneous reaction" upon seeing the photograph. Further, the length of time between Officer Potter seeing defendant in person and seeing his DMV photograph in CJLeads was less than an hour.

Based on the circumstances, there is neither evidence that viewing the photograph was inherently suggestive or that Officer Potter's viewing of the photograph created a substantial likelihood of irreparable misidentification. Officer Potter's identification at the scene was clearly independent of his viewing of defendant's photograph, and thus, there was no error by the trial court in admitting his testimony. *See State v. Macon*, 236 N.C. App. 182, 191, 762 S.E.2d 378, 383 (2014) (holding that an officer's identification of a suspect would be admissible if the identification "had an origin independent of the impermissible procedure.").

II

[2] Defendant also argues the trial court erred by allowing Agent Sutton to testify as an expert witness, and refer to the report of Agent Warren, who was unavailable to testify. Specifically, defendant contends the trial court violated his constitutional right to confront his witness.[2] We disagree.

Our courts have consistently held that an expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in this case. *See State v. Brewington*, 367 N.C. 29, 32, 743 S.E.2d 626, 628 (2013) (holding that the defendant's rights were not violated when testifying witness gave an opinion based on her own analysis of a lab report prepared by another analyst); *see also State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 161 (2013) (holding that Confrontation Clause was not violated by the admission of expert's independent opinion based on testing that was conducted by another analyst). Our Supreme Court in *State v. Ortiz-Zape* stated:

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2. Defendant also contends that because he was not provided an expert report from Agent Sutton, he was unable to effectively cross-examine him. Defendant was given prior notice that Agent Sutton would testify in place of Agent Warren and he was given an opportunity to use Agent Warren's report during cross-examination of Agent Sutton to challenge the underlying basis of his opinion. Thus, we reject defendant's contention of a potential discovery violation as it is without merit.

> [W]hen an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.

367 N.C. at 9, 743 S.E.2d at 161 (internal citation and quotation marks omitted).

Here, Special Agent Warren, who was unavailable to testify, had performed a cell site analysis and created a report of the data. The State called Agent Sutton, an expert in the field of historical cell site analysis and cellular technology, and he was tendered as an expert without objection from defendant. During his direct examination, Agent Sutton testified about the procedures in cell site analysis:

> [PROSECUTOR]: Can you tell the jury how a peer review is completed?
>
> [AGENT SUTTON]: With all of our cases when the CAST expert conducts an analysis, before we put the final stamp of approval on that, a second expert has to review that information and concur. So a completely independent analysis of the call detail records and the ultimate conclusions has to be done. And then at that point[,] the report is submitted as final.
>
> [PROSECUTOR]: Were you asked to review [Agent Warren's] cell phone analysis for this case?
>
> [AGENT SUTTON]: Yes.
>
> [PROSECUTOR]: Did you do that?
>
> [AGENT SUTTON]: I did.
>
> [PROSECUTOR]: And did you independently check the information in his cell site analysis to verify that it is correct and accurate?

[AGENT SUTTON]: I did.

[PROSECUTOR]: Is it correct and accurate?

[AGENT SUTTON]: It is.

[PROSECUTOR]: Is it fair to say that you essentially did another peer review on it?

[AGENT SUTTON]: That is exactly what I did.

[PROSECUTOR]: Is [sic] your analysis and conclusions the same as Special Agent Warren's?

[AGENT SUTTON]: They are.

Defendant's argument that the admission of Agent Sutton's testimony regarding Agent Warren's report violated his constitutional right to confront his witness is without merit. The record supports that Agent Sutton gave his independent opinion about the process of reviewing cellphone data recorded by network carriers and utilizing cellphone towers to determine the location of defendant's phone in relation to Cherry's apartment around the time of the incident. His testimony provided insight as to the practice of cell site analysis and the peer review process, which he used to formulate his independent opinion separate from that of Agent Warren prior to the submission of the final report. It is also clear from the record that defendant was given ample opportunity to cross-examine Agent Sutton as to the report created by Agent Warren as well as Agent Sutton's own independent expert opinion. Accordingly, the trial court did not err in admitting Agent Sutton's testimony.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE v. GREEN

[266 N.C. App. 382 (2019)]

STATE OF NORTH CAROLINA
v.
JAMES BROWN GREEN, JR.

No. COA18-1114

Filed 16 July 2019

1. Sentencing—prior record level—calculation—stipulation—possession of drug paraphernalia—facts underlying conviction

The trial court properly counted defendant's 1994 possession of drug paraphernalia conviction as a Class 1 misdemeanor when calculating his prior record level. Even though under the new statutory scheme the conviction could have been a Class 1 or Class 3 misdemeanor (depending on whether it involved marijuana or non-marijuana paraphernalia), defendant's stipulation to the Class 1 misdemeanor classification also served as a stipulation that the facts underlying the conviction justified the classification (in other words, that the conviction was for possession of non-marijuana paraphernalia).

2. Sentencing—prior record level—calculation—stipulation—evidence inconsistent with stipulation

The trial court erred in calculating defendant's prior record level by assigning his 1993 maintaining a vehicle/dwelling conviction two points instead of one. Even though defendant stipulated that the conviction warranted a Class I felony classification, the judgment (which was before the trial court) clearly showed that the conviction was a misdemeanor.

3. Sentencing—prior record level—calculation—stipulation—evidence inconsistent with stipulation

The trial court erred by counting defendant's 1993 carrying a concealed weapon conviction as a Class 1 misdemeanor in calculating his prior record level where defendant stipulated to the classification but the applicable statute provided that a defendant's first offense was a Class 2 misdemeanor and a second offense was a Class H felony. Even though the Court of Appeals could conceive of a scenario in which an offense labeled as "carrying concealed weapon" could be a Class 1 misdemeanor (under a different statute), the parties stipulated that the applicable statute was N.C.G.S. § 14-269(c), which did not provide for any violation of its provisions to be classified as a Class 1 misdemeanor.

4. Sentencing—prior record level—calculation—stipulation—erroneous classification—remedy

Where defendant stipulated as part of a plea agreement to prior convictions that were erroneously classified, resulting in an incorrect finding of his prior record level, the appropriate remedy was for the plea agreement to be set aside in its entirety, with the parties having the option to enter a new plea agreement or proceed to trial on the original charges.

Appeal by Defendant from Judgment entered 24 April 2018 by Judge John E. Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Winifred H. Dillon, Attorney at Law, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James Brown Green, Jr. (Defendant) appeals from his convictions for Possession of a Firearm by a Felon, Possession with Intent to Sell/Deliver Cocaine (PWISD Cocaine), Possession of Drug Paraphernalia, and having attained the status of a Habitual Felon. Relevant to this appeal, the Record before us tends to show the following:

On 7 August 2017, a Craven County Grand Jury returned true Bills of Indictment charging Defendant with one count of PWISD Cocaine, Possession of Drug Paraphernalia, Possession of a Firearm by a Felon, and attaining Habitual-Felon status. Pursuant to a plea agreement, Defendant entered an *Alford* plea[1] to all four charges on 24 April 2018. As recorded on the Transcript of Plea, the parties' plea agreement provided that Defendant's offenses would be consolidated for judgment into one habitual-felon sentence and that Defendant would receive an "active sentence of 87–117 months bottom mitigated."

Defendant stipulated to a Prior-Record-Level Worksheet (Worksheet) presented by the State that listed Defendant's prior convictions in North Carolina. The Worksheet disclosed a total of 19 points, making

1. *See North Carolina v. Alford*, 400 U.S. 25, 37-39, 27 L. Ed. 2d 162, 171-72 (1970) (allowing a defendant to plead guilty while maintaining his factual innocence).

Defendant a prior-record level VI offender for sentencing purposes. Relevant to this appeal, the Worksheet listed three prior convictions that Defendant contends were erroneously classified: (1) 1994 Possession of Drug Paraphernalia, classified as a Class 1 misdemeanor; (2) 1993 Maintaining a Vehicle/Dwelling for the use or storage of controlled substances, classified as a Class I felony; and (3) 1993 Carrying Concealed Weapon, classified as a Class 1 misdemeanor. The State also submitted, as exhibits, copies of three prior judgments, which were used for the Habitual-Felon Indictment. One of these judgments showed that the 1993 Maintaining-a-Vehicle/Dwelling conviction constituted a violation of N.C. Gen. Stat. § 90-108. According to this judgment, the conviction was classified as a misdemeanor but did not include the specific class of misdemeanor.

After conducting a plea colloquy with Defendant and after hearing the Prosecution's summary of the factual basis for the plea, the trial court accepted Defendant's *Alford* plea. The trial court then sentenced Defendant to the agreed-upon prison term of 87 to 117 months, which was in the mitigated range based on Defendant's class of offense and prior-record level as calculated on the Worksheet. Defendant timely filed his Notice of Appeal on 30 April 2018.

Jurisdiction

Defendant's appeal is properly before this Court pursuant to Section 15A-1444(a2)(1) of our General Statutes. *See* N.C. Gen. Stat. § 15A-1444(a2)(1) (2017) (providing "[a] defendant who has entered a plea of guilty . . . is entitled to appeal as a matter of right the issue of whether the sentence imposed . . . [r]esults from an incorrect finding of the defendant's prior record level").

Issue

The sole issue on appeal is whether the trial court erred in calculating Defendant's prior-record level by (1) including Defendant's 1994 Possession-of-Drug-Paraphernalia conviction in Defendant's prior-record-level calculation; (2) classifying Defendant's 1993 Maintaining-a-Vehicle/Dwelling conviction as a Class I felony; and (3) counting Defendant's 1993 Carrying-Concealed-Weapon conviction as a Class 1 misdemeanor.[2]

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2. Although Defendant did not object to the trial court's prior-record-level calculation, we note this issue is automatically preserved for appellate review pursuant to our General Statutes and established case law. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2017); *see also State v. Meadows*, 371 N.C. 742, 747, 821 S.E.2d 402, 406 (2018) (recognizing arguments "that '[t]he sentence imposed was unauthorized at the time imposed, exceeded the

Analysis

I. Standard of Review

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804 (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

II. Prior-Record Level

Generally, "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions[.]" N.C. Gen. Stat. § 15A-1340.14(a) (2017). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.* § 15A-1340.14(f). "In determining [a defendant's] prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." *Id.* § 15A-1340.14(c). Standing alone, a sentencing worksheet prepared by the State listing a defendant's prior convictions is insufficient proof of those convictions. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). Rather, prior convictions can be proven by any of the following methods:

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

Id. § 15A-1340.14(f)(1)-(4).

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maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law' " are statutorily preserved (citing N.C. Gen. Stat. § 15A-1446(d)(18))); *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) ("It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." (citations omitted)).

Here, the trial court, relying on the parties' stipulations, sentenced Defendant as a prior-record level VI with 19 prior-record-level points based on eight prior convictions. Defendant contends three of his prior convictions were wrongly calculated. Although neither the State nor Defendant has pointed us to *State v. Arrington*, we believe this precedent instructs our analysis in this case where Defendant stipulated to his prior-record level. *See* 371 N.C. 518, 819 S.E.2d 329 (2018). However, this case also illustrates certain challenges in the application of *Arrington*, such as where the underlying record shows a stipulation to be in error or where the stipulation is to a classification for an offense that conflicts with the actual classification in the applicable criminal statute.

Our Court recently summarized the Supreme Court's decision in *Arrington*:

> 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. [*State v. Arrington*, 371 N.C. 518,] 519, 819 S.E.2d [329,] 330 [(2018)]. 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).

State v. Salter, ___ N.C. App. ___, ___, 826 S.E.2d 803, 808 (2019).

In both *Arrington* and *Salter*, the respective defendants stipulated to classifications of prior offenses that were supported, at least at some level, by the applicable existing criminal statutes defining those offenses. In *Arrington*, our Supreme Court held the defendant stipulated to the existence of facts converting his prior second-degree murder conviction into a Class B1 offense. In *Salter*, applying *Arrington*, we held Defendant could stipulate to a factual underpinning that supported converting his no-operator's-license violation into a Class 2 misdemeanor under the applicable statutes. The case currently before us presents three additional scenarios implicating *Arrington*: first, where *Arrington* most clearly applies; second, where *Arrington* should not apply; and third, where *Arrington* could apply.

A. 1994 Possession-of-Drug-Paraphernalia Conviction

[1] Defendant first argues the trial court erred in counting his 1994 Possession-of-Drug-Paraphernalia conviction as a Class 1 misdemeanor. Prior to 2014 and thus at the time of Defendant's 1994 Possession-of-Drug-Paraphernalia conviction, our General Statutes only contained one classification for possession of drug paraphernalia—Class 1 misdemeanor; however, in 2014, our Legislature divided possession of drug paraphernalia into two offenses. *See* 2014 N.C. Sess. Law 119,

§ 3 (N.C. 2014). Under this new statutory scheme, possession of *marijuana* paraphernalia is a Class 3 misdemeanor; whereas, possession of *non-marijuana* drug paraphernalia remains a Class 1 misdemeanor. *Compare* N.C. Gen. Stat. § 90-113.22A (2017) (possession of marijuana paraphernalia), *with id.* § 90-113.22 (2017) (possession of non-marijuana drug paraphernalia). Defendant contends that because "the State presented no evidence that [Defendant's] prior conviction for possession of drug paraphernalia . . . was for non-marijuana paraphernalia[,]" this conviction should not have been included in his prior-record-level calculation. *See id.* § 15A-1340.14(b)(5) (excluding Class 3 misdemeanors from a defendant's prior-record-level calculus). We, however, disagree and conclude *Arrington* controls, as Defendant's stipulation falls within *Arrington*'s ambit.

Here, on the Worksheet, Defendant—as "the person most familiar with the facts surrounding his offense"—stipulated that his 1994 Possession-of-Drug-Paraphernalia conviction was classified as a Class 1 misdemeanor. *Arrington*, 371 N.C. at 526, 819 S.E.2d at 334 (citation omitted). Thus, Defendant was "stipulating that the facts underlying his conviction justify that classification." *Id.* at 524, 819 S.E.2d at 333. Therefore, under *Arrington*, we conclude there was no error in the trial court's inclusion of one record point based on Defendant's stipulation to the 1994 Possession-of-Drug-Paraphernalia conviction being classified as a Class 1 misdemeanor. *See id.*

Defendant contends *State v. McNeil* requires a different result. *McNeil* held: "Where the State fails to prove a pre-2014 possession of paraphernalia conviction was for non-marijuana paraphernalia, a trial court errs in treating the conviction as a Class 1 misdemeanor." ___ N.C. App. ___, ___, 821 S.E.2d 862, 863, *temporary stay allowed*, ___ N.C. ___, 820 S.E.2d 519 (2018). However, there is a crucial distinction between *McNeil* and the case *sub judice*—the defendant in *McNeil* never stipulated to his prior-record level. *See id.* at ___, 821 S.E.2d at 864 ("During the sentencing hearing, Defendant did not stipulate to his prior convictions, there was no specific mention of the paraphernalia charge, and the only evidence proffered by the State was a certified copy of Defendant's DCI Computerized Criminal History Report."); *see also Alexander*, 359 N.C. at 827, 616 S.E.2d at 917 ("There is no doubt that a mere worksheet, standing alone, is insufficient to adequately establish a defendant's prior record level."). Thus, *Arrington* was not applicable to *McNeil*, which in turn has no bearing on the present case.

Here, however, Defendant's stipulation to this conviction's classification is the prototypical situation to which *Arrington* applies. Just

as in *Arrington*, at the time of Defendant's 1994 Possession-of-Drug-Paraphernalia conviction, the governing statute only had one classification for this crime. *See* N.C. Gen. Stat. § 90-113.22 (1993) (listing all types of possession-of-drug-paraphernalia violations as a Class 1 misdemeanor); *see also Arrington*, 371 N.C. at 522, 819 S.E.2d at 332 (explaining that at the time of the defendant's 1994 second-degree murder conviction, "all second-degree murders were classified at the same level for sentencing purposes" (citation omitted)). Again, just as in *Arrington*, the Legislature subsequently divided this crime into two different classifications depending on the type of drug paraphernalia possessed. *See* 2014 N.C. Sess. Law 119, § 3 (N.C. 2014) (creating two types of possession-of-drug-paraphernalia crimes with differing classifications for sentencing purposes); *see also Arrington*, 371 N.C. at 522-23, 819 S.E.2d at 332 (explaining the Legislature's 2012 division of second-degree murder into two separate classifications for sentencing purposes). Thereafter, Defendant was convicted of a new crime and during sentencing stipulated that his prior Possession-of-Drug-Paraphernalia conviction qualified for the higher classification for sentencing. Therefore, just as in *Arrington*, Defendant could and did stipulate that this classification was proper. *See id.* at 527, 819 S.E.2d at 335 (upholding the defendant's stipulation that his prior second-degree murder conviction constituted a Class B1 conviction, which was the higher of the two classifications). For this reason, Defendant's Possession-of-Drug-Paraphernalia conviction fits squarely within *Arrington*.

B. 1993 Maintaining-a-Vehicle/Dwelling Conviction

[2] Defendant also challenges the trial court's calculation of his 1993 Maintaining-a-Vehicle/Dwelling conviction. Specifically, Defendant contends the trial court committed error by assigning two points, instead of one, to the 1993 Maintaining-a-Vehicle/Dwelling conviction. The Worksheet shows the trial court counted this conviction as a Class I felony. However, Defendant points out that the judgment for this conviction, which was submitted by the State at the sentencing hearing, shows this conviction constituted a violation of N.C. Gen. Stat. § 90-108 and was classified as a misdemeanor, although no specific class was designated.

Section 90-108 of our General Statutes sets the penalty for maintaining a vehicle or dwelling for keeping controlled substances and provides three possible classifications of this crime for sentencing purposes—Class 1 misdemeanor, Class I felony, or Class G felony. N.C. Gen. Stat. §§ 90-108(b), -108(b)(1)-(2) (2017).

Here, Defendant stipulated that this conviction warranted a Class I felony classification for sentencing purposes; however, the judgment, which was before the trial court, clearly shows that Defendant's conviction was a misdemeanor. Although certain language from *Arrington* suggests Defendant's stipulation could be proper,[3] we determine *Arrington* does not apply where there is clear record evidence demonstrating the parties' stipulation was an error or mistaken. Thus, when evidence (such as a certified copy of the judgment) is presented to the trial court conclusively showing a defendant's stipulation is to an incorrect classification—as is the case here—*Arrington* does not apply, and a reviewing court should defer to the record evidence rather than a defendant's stipulation.

We find support for this position from the plain language of the governing statute. Section 15A-13.40.14(f) places the burden of proof on the State to establish a defendant's prior convictions, including the requirement: "The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record." N.C. Gen. Stat. § 15A-1340.14(f). The statute also expresses an evidentiary preference for such records:

> The original or a copy of the court records or a copy of the records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true.

Id.

Here, because the Record in this case, including evidence presented to the trial court, discloses that Defendant's 1993 Maintaining-a-Vehicle/Dwelling conviction was a misdemeanor and as Section 90-108 only has one misdemeanor classification (Class 1), the trial court erred by assigning two points, instead of one, to this conviction.

C. 1993 Carrying-Concealed-Weapon Conviction

[3] Lastly, Defendant asserts the trial court erred in counting his 1993 Carrying-Concealed-Weapon conviction as a Class 1 misdemeanor. Here,

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3. *See Arrington*, 371 N.C. at 526, 819 S.E.2d at 334 (explaining that once a defendant stipulated to a prior conviction's classification, a trial court need not "pursue further inquiry or make defendant recount the facts during the [sentencing] hearing" (citation omitted)).

again, Defendant's Worksheet lists his conviction for "Carrying Concealed Weapon" as a Class 1 misdemeanor, and Defendant stipulated to this classification. On appeal, Defendant points us to Section 14-269(c) of our General Statutes, titled "Carrying concealed weapons[,]" which provides that a defendant's first carrying-concealed-weapon offense is a Class 2 misdemeanor, while a second offense is considered a Class H felony. N.C. Gen. Stat. § 14-269(c) (2017). The State does not contest that this is the applicable statute.

Defendant argues because the Worksheet does not list any convictions for carrying concealed weapon prior to the 1993 conviction, "this prior conviction was incorrectly counted, and one prior record point [was] incorrectly assessed." The State claims the classification of this offense depends on a question of fact—"whether the 1993 carrying a concealed weapon conviction was Defendant's first offense"—to which Defendant could and did stipulate.

As discussed *supra*, however, Section 14-269(c) provides only two classifications for a violation of its provisions—either a Class 2 misdemeanor or Class H felony. Defendant, however, stipulated that his conviction was a Class 1 misdemeanor, which is impossible under this statute.

Here is where *Arrington* creates a conundrum for a reviewing court. While the State offers no statutory support for this stipulation, our own research reveals there is a possible, albeit convoluted, factual scenario under which Defendant could have been convicted of a Class 1 misdemeanor for an offense that could be referred to in shorthand as "Carrying Concealed Weapon." Specifically, Section 14-415.21(a1) of our General Statutes provides: "A person who has been issued a valid [concealed-carry] permit who is found to be carrying a concealed handgun in violation of subsection (c2) of [N.C. Gen. Stat. §] 14-415.11 shall be guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 14-415.21(a1) (2017). In turn, Section 14-415.11(c2) prohibits the carrying of a concealed handgun while consuming alcohol. *Id.* § 14-415.11(c2) (2017). Therefore, a scenario exists under which Defendant's stipulation could be possible and thus upheld under *Arrington* and *Salter*, where we found statutory support for the classification of the offense under the applicable statutes. However, we do not believe the intent of *Arrington* was to require a reviewing court to undertake *sua sponte* a voyage of discovery through our criminal statutes to locate a possibly applicable statute and imagine factual scenarios in which it could apply. Rather, we defer to the parties who stipulated to the prior conviction as to what statute applies. Therefore, because Section 14-269 does not provide for a violation of

its provisions to be classified as a Class 1 misdemeanor, we conclude *Arrington* is inapplicable and that the trial court erred in accepting Defendant's stipulation.

[4] Having determined that Defendant's stipulation was invalid, the only remaining question is the effect of our holding on Defendant's guilty plea. Assuming, as we must on the Record and arguments before us, Defendant is correct in that this prior conviction should have been classified as a Class 2 misdemeanor, the trial court's miscalculation of this conviction and the Maintaining-a-Vehicle/Dwelling conviction (discussed in part B above) was not harmless, as Defendant's prior-record-level points would be reduced to 17, making him a prior-record level V. *See id.* § 15A-1340.14(b)(5) (excluding Class 2 misdemeanors from a defendant's prior-record-level calculus); *cf. State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (2000) (holding that error in calculating prior-record-level points is harmless if it does not affect the ultimate prior-record-level determination).

Defendant, thus, contends we should simply remand for resentencing at prior-record level V. We disagree because Defendant's sentence was imposed as part of a plea agreement, which Defendant has successfully repudiated. Rather, the plea agreement must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments. *See*, *e.g.*, *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding judgment should be vacated, guilty plea set aside, and the case remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

Conclusion

Accordingly, for the foregoing reasons, we vacate the Judgment against Defendant and set aside the plea agreement in its entirety. We remand to the trial court for further proceedings on the charges contained in the indictments, including trial, if necessary.

VACATED AND REMANDED.

Judges DILLON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
JOSHUA ELIJAH TINCHER

No. COA18-1174

Filed 16 July 2019

1. Probation and Parole—revocation of probation—concurrent versus consecutive probationary periods—default rule—section 15A-1346

Where a defendant's probation was imposed without specifying whether it ran consecutively or concurrently with an active sentence imposed in another case, the default rule contained in N.C.G.S. § 15A-1346(b) required that the probation run concurrently. Since the probationary period had expired when a violation report was filed, the trial court lacked subject matter jurisdiction to revoke defendant's probation.

2. Contempt—criminal—required findings—opportunity to be heard

A defendant who was held in criminal contempt for using profanity in the courtroom was not given an opportunity to be heard as required by N.C.G.S. § 5A-14(b), rendering the court's order and judgment of contempt deficient. Not only was there no record of the proceeding or any evidence, but the court's striking out of preprinted language on the form order (stating that defendant had notice and an opportunity to respond) established the lack of the required procedural safeguards.

Appeal by Defendant from Judgments entered 16 April 2018 and 17 April 2018 by Judge Julia Lynn Gullett in Randolph County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore, III, for the State.

Michael E. Casterline for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Joshua Elijah Tincher (Defendant) appeals from Judgments revoking his probation. In addition, we grant Defendant's Petition for Writ of *Certiorari* to review the trial court's Order and Judgment holding him in Criminal Contempt. The Record before us shows the following:

On 26 June 2006, Defendant was charged via two indictments. Under each indictment, in cases 06 CRS 51515 and 06 CRS 51521, Defendant was charged with Common Law Robbery and the Statutory Aggravating Factor of committing the offense while on pretrial release on another charge, 06 CRS 51525. On 26 February 2008, Defendant pleaded guilty to these and other charges. At the time the Judgments in question were entered, Defendant was serving an active sentence pursuant to the 06 CRS 51525 Judgment.

In both the 06 CRS 51515 Judgment and the 06 CRS 51521 Judgment, the trial court sentenced Defendant to a minimum of 20 months and a maximum of 24 months' imprisonment and then suspended those sentences in favor of 36 months of supervised probation. In the event that Defendant violated his probation upon the expiration of the active sentence in the 06 CRS 51525 Judgment, the trial court indicated that prison sentences in both the 06 CRS 51515 Judgment and 06 CRS 51521 Judgment were to run consecutively with one another. Additionally, in the 06 CRS 51515 Judgment, the trial court indicated on the Judgment that the 36-month probationary period would begin at the expiration of the active sentence in the 06 CRS 51525 Judgment. However, in the 06 CRS 51521 Judgment, the trial court did not indicate when the 36-month probationary period would begin.

On 8 February 2018, Defendant's Probation Officer, Catherine N. Russell (Officer Russell), filed two Probation-Violation Reports alleging multiple probation violations. As a result, on 16 April 2018, the trial court ultimately entered two Judgments revoking Defendant's probation in 06 CRS 51515 and 06 CRS 51521. In addition, as a result of Defendant's alleged conduct in open court following the probation-revocation proceeding, the trial court entered a Criminal-Contempt Order against Defendant, holding Defendant in Criminal Contempt and ordering him to serve 30 additional days in the custody of the North Carolina Department of Adult Correction. The trial court then entered a Criminal-Contempt Judgment requiring that the Criminal-Contempt sentence run consecutively with Defendant's other sentences upon his revoked probation.

Issues

The dispositive issues in this case are: (I) Whether the trial court lacked subject-matter jurisdiction to revoke Defendant's probation in 06 CRS 51521; and (II) Whether the trial court erred in summarily imposing Direct Criminal Contempt.

Analysis

I. Subject-Matter Jurisdiction

[1] Defendant contends the trial court lacked subject-matter jurisdiction to revoke his probation in the 06 CRS 51521 Judgment because the Probation-Violation Report was filed outside of the probationary period set out in that case. We agree.

A. Standard of Review

"[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted). "It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (alteration, citation, and quotation marks omitted). "[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

B. Probation Revocation

Defendant's probation was revoked in both file 06 CRS 51515 and file 06 CRS 51521 on 16 April 2018. Defendant does not challenge the revocation of probation in 06 CRS 51515. Rather, Defendant asserts the revocation in 06 CRS 51521 was erroneous because the 06 CRS 51521 Judgment did not state that the probation was to run concurrently with the 06 CRS 51515 Judgment's probation or consecutively with the 06 CRS 51525 Judgment's active sentence. Defendant argues, therefore, according to N.C. Gen. Stat. § 15A-1346, the probation ran concurrently with his active prison sentence already in effect in 06 CRS 51525. Defendant contends that because this probation ran concurrently with

his active sentence in 06 CRS 51525, the Parole-Violation Report filed in 06 CRS 51521 was filed after his probationary period had already expired, thereby depriving the trial court of jurisdiction to revoke his probation.

Section 15A-1346 of our General Statutes states:

> (a) Commencement of Probation. — Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences. — If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. *If not specified, it runs concurrently.*

N.C. Gen. Stat. § 15A-1346 (2017) (emphasis added). "A careful reading of the statute shows that any sentence of probation must run concurrently with any other probation sentences imposed on a defendant. The only power to adjust the timing of a probation sentence is that found under N.C. Gen. Stat. § 15A-1346(b)." *State v. Canady*, 153 N.C. App. 455, 459-60, 570 S.E.2d 262, 265 (2002) (citation omitted); *see also State v. Cousar*, 190 N.C. App. 750, 757, 660 S.E.2d 902, 906 (2008) (holding that where the trial court entered two active sentences and five suspended sentences and the judgment states the five suspended sentences, *if activated*, run consecutively with the two active sentences but does not specify whether these five *probationary* sentences run concurrently or consecutively with the two active sentences, the five suspended sentences run concurrently with the two active sentences pursuant to *Canady* and N.C. Gen. Stat. § 15A-1346(b)).

In the instant case, it is undisputed that in the "Suspension of Sentence" section of the Judgment form for 06 CRS 51521, the boxes on Lines 3 and 4, which specify when the period of probation would begin, are not marked or checked. Defendant contends, and we agree, the failure to mark one of these boxes requires us to look at the default rule in N.C. Gen. Stat § 15A-1346. Here, because the boxes have not been marked or checked to alter the default rule under N.C. Gen. Stat. § 15A-1346, the probationary period in the 06 CRS 51521 Judgment ran

concurrently with Defendant's ongoing active sentence from the day it was imposed. *See* N.C. Gen. Stat. § 15A-1346(b); *see also Cousar*, 190 N.C. App. at 757, 660 S.E.2d at 906-07; *Canady*, 153 N.C. App. at 459-60, 570 S.E.2d at 265 (citation omitted).

The State, however, contends the plea agreement in file 06 CRS 51521 —which Defendant, Defendant's trial counsel, and the Prosecutor signed—contained language requiring the probationary period to run at the expiration of the active sentence in file 06 CRS 51525. The State further contends that the trial court provided additional language to show its intent to have the probationary period imposed in the 06 CRS 51521 Judgment run consecutively with Defendant's active sentence by marking a box in the 06 CRS 51521 Judgment that states, "[t]his sentence shall run at the expiration of sentence imposed in file number 06 CRS 51515." Thus, the State asserts that the trial court's failure to mark an additional box in the 06 CRS 51521 Judgment altering the probationary period was a clerical error.

The State directs us to the plea agreement to infer intent because it references the conditions of the suspended active sentences. However, the plea agreement makes no mention that the probationary period in the 06 CRS 51521 Judgment was to run consecutively to the 06 CRS 51525 Judgment's active sentence. Accordingly, the plea agreement itself does not reflect any intention for the probation to run consecutively with the 06 CRS 51525 Judgment or to alter the default rule under N.C. Gen. Stat. § 15A-1346.

Additionally, even assuming the Record before us showed a clerical error, we have limited authority in correcting clerical errors. If the correction of a clerical error affects the substantive rights of a party or if the correction corrects a substantive error, the Court is without authority to make a change. *State v. Harwood*, 243 N.C. App. 425, 429, 777 S.E.2d 116, 119 (2015) (citations omitted). Furthermore, "[w]e have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." *Id.* (citation and quotation marks omitted). In *Harwood*, on 29 May 2009, the trial court sentenced the defendant on seven different judgments. *Id.* at 426, 777 S.E.2d at 117. The trial court suspended the last five of the seven judgments and placed the defendant on 48 months of probation. *Id.* at 427, 777 S.E.2d at 118. On 11 June 2010, the defendant was released from prison on the first two judgments, and on 27 January 2014, a probation officer filed probation-violation reports. *Id.* The defendant was found to be in violation of his probation, and the trial court revoked probation accordingly. *Id.* On appeal, the defendant contended because the judgments did not

indicate when his probation was to begin, his probation began when judgment was entered, in 2009, and thus expired in 2013, several months before the probation-violation reports were filed. In response, the State argued "this omission was due to a clerical mistake" and requested remand for correction of the mistake. *Id.* at 428-29, 777 S.E.2d at 119. In examining the judgments in *Harwood*, this Court disagreed with the State's contention:

> [E]ven assuming the 2009 trial court made a mistake, we hold that this mistake would be a substantive error, rather than a clerical one. Changing this provision would retroactively extend defendant's period of probation by more than one year and would grant the trial court subject matter jurisdiction to activate five consecutive sentences of 6 to 8 months' imprisonment. Because this provision is substantive, we lack authority to change it[.]

Id. at 430, 777 S.E.2d at 120 (citation omitted). We therefore concluded the State failed to show the trial court intended for probation to run consecutively with his active prison sentence, and even if it had, we lacked the authority to make "such a substantive change to the judgments." *Id.* at 432, 777 S.E.2d at 121 (citation omitted). We further held the trial court lacked subject-matter jurisdiction to revoke the defendant's probation and activate his remaining sentences. *Id.*

As in *Harwood*, we conclude—even assuming *arguendo* the trial court intended Defendant's probations to run consecutively—the error was substantive and changing the 06 CRS 51521 Judgment would retroactively extend Defendant's sentence. Therefore, we lack the authority to change it.

Pursuant to N.C. Gen. Stat. § 15A-1346, Defendant's period of probation in the 06 CRS 51521 Judgment ran concurrently with the active sentence imposed in the 06 CRS 51525 Judgment, not consecutively. As such, it expired prior to the filing of the Probation-Violation Reports, and the trial court lacked subject-matter jurisdiction to revoke Defendant's probation. Accordingly, we vacate the trial court's Judgment revoking probation in 06 CRS 51521.

II. Criminal Contempt

[2] Defendant next contends that the trial court failed to make statutorily required findings of fact to support its summary imposition of direct Criminal Contempt, and in the absence of such findings, Defendant

asserts the summary Criminal-Contempt Order, as well as the later Criminal-Contempt Judgment, was improperly entered.

A. Standard of Review

"A contempt hearing is a non-jury proceeding." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007). "The standard of appellate review for a decision rendered in 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. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citations omitted). "The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citation omitted).

B. Findings of Fact

Pursuant to Section 5A-13(a) of our General Statutes, direct criminal contempt occurs when the act:

> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
>
> (3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13(a)(1)-(3) (2017). In addition, "[t]he presiding judicial official may punish summarily for direct criminal contempt according to the requirements of [N.C. Gen. Stat. § 5A-14.]" *Id.* § 5A-13(a). The requirements of N.C. Gen. Stat. § 5A-14 for imposing contempt in a summary proceeding are:

> (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.
>
> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary

> opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

Id. § 5A-14(a)-(b) (2017).

On 17 April 2018, the trial court entered its Criminal-Contempt Order. In this Order, the trial court found Defendant

> after having his probation revoked, he did yell "f*** them, the motherf***ers." He was standing within clear hearing of the Court. This conduct was such that he should have known it to be improper. His conduct was such that there was no excuse for such conduct.[1]

Below this text, the form normally reads: "The undersigned gave a clear warning that the contemnor's conduct was improper. In addition, the contemnor was given summary notice of the charges and summary opportunity to respond." However, on the form at issue, this language was stricken. As a result of the alleged actions, the trial court sentenced Defendant to 30 days in custody for Criminal Contempt. The trial then entered the Criminal-Contempt Judgment.

State v. Verbal directs our analysis here. 41 N.C. App. 306, 254 S.E.2d 794 (1979). In *Verbal*, the trial court cited the defendant, an attorney, for direct contempt and sentenced him to two days' imprisonment for being late returning from lunch. *Id.* The defendant contended that his alleged behavior was indirect contempt. *Id.* at 307, 254 S.E.2d at 795. However, we did not reach the question of direct or indirect criminal contempt because we held that the trial court failed to follow the proper procedure set out in N.C. Gen. Stat. § 5A-14(b), which requires that a contemnor be given an opportunity to be heard. *Id.* We further held that "it is implicit in this statute that the judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard" and without that finding, the trial court's findings do not support the imposition of contempt. *Id.*; *see also In re Korfmann*, 247 N.C. App. 703, 709, 786 S.E.2d 768, 771 (2016) (holding that even though the appellant had an opportunity to answer the judge's preliminary questions, the judge failed to give the appellant an opportunity to respond to the charge before imposing it, which required vacatur of the trial court's contempt order); *In re Owens*, 128 N.C. App.

1. We have censored the language used in the original Order.

577, 581, 496 S.E.2d 592, 594 (1998) (holding that "the requirements of [N.C. Gen. Stat. § 5A-14] are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction").

In the instant case, there is no record of a summary proceeding taking place or the conduct in question, other than the written Order entered the day after the alleged incident. There also is no evidence that the trial court afforded Defendant the opportunity to respond to the charge or for Defendant to "present reasons not to impose a sanction." *Owens*, 128 N.C. App. at 581, 496 S.E.2d at 594. The fact the trial court expressly struck the provision of the form Order indicating Defendant was given notice and opportunity to be heard is proof, if anything, Defendant was not offered the opportunity to be heard, and the State points us to no evidence to the contrary.

As such, we conclude the Criminal-Contempt Order was facially deficient. We further conclude the Criminal-Contempt Judgment entered upon that Order is likewise deficient, and we reverse it.

Conclusion

For the foregoing reasons, we vacate the trial court's Order revoking Defendant's probation in the 06 CRS 51521 Judgment. We also reverse the trial court's Criminal-Contempt Order and Criminal-Contempt Judgment in 18 CRS 77. Defendant makes no argument concerning the revocation of probation in the 06 CRS 51515 Judgment; therefore, this Judgment remains effective.

VACATED IN PART, REVERSED IN PART, AFFIRMED IN PART.

Judges DILLON and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JULY 2019)

DEUTSCHE BANK NAT'L TR. CO. v. FERGUSON No. 18-1278	Franklin (17CVS565)	Affirmed
HOLLAND v. PARRISH TIRE CO. No. 18-809	N.C. Industrial Commission (16-707463)	Reversed
HUX v. WILSON No. 18-1188	Catawba (17CVD2363)	Affirmed and Remanded
IN RE C.M. No. 18-1077	Lee (15JA46) (15JA47)	Vacated and Remanded
IN RE D.M.G. No. 18-944	Rockingham (16JT107)	Reversed
IN RE E.M. No. 18-1223	Onslow (16JT170)	Affirmed
IN RE M.C. No. 19-3	Watauga (18JA41)	Reversed and Remanded
IN RE Z.O.S-W. No. 18-1270	Davidson (17JT9)	Affirmed
PAUL v. FATTAH No. 19-47	New Hanover (17CVD3920)	Vacated and Remanded
RHODES v. ROBERTSON No. 18-1253	Buncombe (17CVD3901)	Affirmed
STATE v. AKINS No. 18-743	Hoke (15CRS51909)	No Plain Error in Part; Vacated in Part.
STATE v. CATHCART No. 18-1025	Mecklenburg (14CRS237227)	No Plain Error in Part; No Error in Part; Dismissed in Part.
STATE v. CHARLES No. 18-945	Gaston (16CRS54022)	Dismissed
STATE v. GULLETTE No. 19-43	Mecklenburg (14CRS238731) (15CRS25911)	Affirmed

STATE v. HADDOCK No. 18-923	Edgecombe (16CRS52526)	No prejudicial error.
STATE v. JOHNSON No. 18-719	Chatham (14CRS51852) (17CRS585)	No Error
STATE v. MOODY No. 18-1216	Watauga (17CRS50437)	Affirmed
STATE v. SMALLWOOD No. 18-694	Hertford (16CRS281-83) (16CRS50283)	NO ERROR IN PART, VACATED IN PART, AND REMANDED
STATE v. VINES No. 18-961	Edgecombe (16CRS52668) (17CRS1078)	No Error
STELLA MARE RISTORANTE & PIZZERIA, INC. v. WALL No. 18-1042	Wake (11CVS13969)	Vacated and Remanded

THE BANK OF HAMPTON ROADS, PLAINTIFF
v.
LUCIEN S. WILKINS, HOWARD F. MARKS, JR., STEPHEN D. SAIEED, AND BRUNSWICK PROFESSIONAL PROPERTIES, INC, DEFENDANTS

No. COA18-1239

Filed 6 August 2019

Civil Procedure—Rule 60(a)—order amending judgment—correction of misnomer in plaintiff's name

In an action regarding a defaulted loan, the trial court properly entered an order, pursuant to Rule 60(a), to correct a misnomer in plaintiff's name (from "O'Mahoney Holdings, LTD" to "O'Mahoney Holdings, LLC") in a charging order entered by another judge. This correction neither affected any of defendant's substantial rights (because plaintiff's identity was certain and known to all parties) nor altered the original charging order's effect. The doctrine of laches did not require reversal because Rule 60(a) provides no time limit for correcting clerical errors on judgments, and the doctrine of judicial estoppel—which defendant failed to raise in the trial court despite asserting it on appeal—did not apply where the misnomer was based on inadvertence or mistake.

Appeal by Defendant Stephen D. Saieed from Order entered 7 May 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 8 May 2019.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm, for plaintiff-appellee.

Stubbs & Perdue, P.A., by Matthew W. Buckmiller, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Stephen D. Saieed (Defendant) appeals from an Order to Amend Charging Order (Order) filed on 7 May 2018, amending 4 April 2017 Charging Orders (Charging Order) to reflect that O'Mahoney Holdings, LLC—and not O'Mahoney Holdings, LTD—is the assignee and holder of the Charging Order against corporate entities in which Defendant has an interest. The Record tends to show the following:

On 5 August 2010, the Bank of Hampton Roads (Bank) filed a complaint against Defendant and others, seeking to collect on a defaulted loan by Brunswick Professional Properties, LLC, on which loan Defendant was a guarantor (10-CVS-3647 Action). On 20 April 2011, the trial court entered its Order Granting Summary Judgment Against all Defendants (Judgment).[1] Pursuant to a Purchase Agreement, Bank then assigned the Judgment to "O'Mahoney Holdings, LTD" on 14 March 2016 (Assignment of Judgment). Thereafter, on 4 April 2017, O'Mahoney Holdings, LTD sought and obtained the Charging Order against eight limited-liability companies in which Defendant allegedly had an interest.

After the Charging Order was obtained in favor of O'Mahoney Holdings, LTD, a separate lawsuit was filed by O'Mahoney Holdings, LLC against Defendant and various limited-liability companies allegedly associated with Defendant (17-CVS-4280 Action). Sometime after the filing of the 17-CVS-4280 Action, Defendant filed a motion to dismiss apparently alleging, *inter alia*, that O'Mahoney Holdings, LLC was not the holder of the Judgment and therefore not the real party in interest.[2] This motion appears to have been based on the fact that the Assignment of Judgment and Charging Order instead named "O'Mahoney Holdings, LTD."

In response, O'Mahoney Holdings, LLC filed its Motion to Correct Order *Nunc Pro Tunc* Based on Misnomer of O'Mahoney Holdings, LLC (Motion to Correct) on 28 February 2018. In its Motion to Correct, counsel for O'Mahoney Holdings, LLC explained that the designation of LTD instead of LLC was a "clerical error" created by the LLC's principal and sole managing member, Matthew F. Collins (Collins), who—since the creation of O'Mahoney Holdings, LLC—believed the corporate descriptor was LTD not LLC. This mistake was repeated by counsel for O'Mahoney Holdings, LLC on all contracts and court documents up until 2018. In its Motion to Correct, O'Mahoney Holdings, LLC sought to amend, pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure, the Assignment of Judgment, the Charging Order, and all other related court proceedings to correct this misnomer.

On 20 March 2018, the trial court entered an order in the 10-CVS-3647 Action, the 17-CVS-4280 Action, and a separate, related action, finding O'Mahoney Holdings, LLC was not the holder of the Judgment and thus

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1. This Judgment was also against Defendants Lucien S. Wilkins and Howard F. Marks, Jr.; however, these two Defendants are not parties to this appeal.

2. The motion to dismiss the 17-CVS-4280 Action is not included in this Record. However, the trial court's order on this motion was also entered in the 10-CVS-3647 Action and is included in the Record.

was not the real party in interest. The trial court noted the Assignment of Judgment was a private contract and that the Charging Order therefore was not subject to revision under Rule 60(a) until the Assignment of Judgment was corrected. The trial court then allowed O'Mahoney Holdings, LLC six months to correct the issues regarding the Assignment of Judgment.

On 23 March 2018, O'Mahoney Holdings, LLC filed an Amendment to the Assignment of Judgment (Amended Assignment of Judgment), which "correct[ed] a scrivener's error contained in the [Purchase] Agreement and [Assignment of Judgment] whereby O'Mahoney Holdings, LLC was inadvertently referred to as O'Mahoney Holdings, Ltd." On 6 April 2018, O'Mahoney Holdings, LLC filed in this 10-CVS-3647 Action its Renewed Motion to Correct Order *Nunc Pro Tunc* Based on Misnomer of O'Mahoney Holdings, LLC (Renewed Motion to Correct) seeking again to correct this misnomer in the Assignment of Judgment, Charging Order, and all related proceedings under Rule 60(a). The same day, O'Mahoney Holdings, LLC filed its Motion for Ratification on Standing seeking to ratify the standing of O'Mahoney Holdings, LLC as the real party in interest in the various actions.

On 7 May 2018, the trial court entered its Order amending the Charging Order under Rule 60(a) "to reflect that O'Mahoney Holdings, LLC is the assignee and holder of the judgment against [Defendant]." The trial court also noted the "Charging Order as amended shall be effective as of the date originally entered." The same day, the trial court entered its Order Addressing Real Party in Interest (Real Party in Interest Order) finding "O'Mahoney Holdings, LLC is the real party in interest as Plaintiff and that their status as the real party in interest will relate back to the filing of the commencement of this action." On 6 June 2018, Defendant filed his Notice of Appeal from the Order amending the Charging Order. Defendant, however, did not appeal the Real Party in Interest Order.

Issue

The determinative issue on appeal is whether the trial court erred by entering its Order amending the Charging Order to correct a misnomer under Rule 60(a).

Analysis

I. Standard of Review

"Rule 60 motions are addressed to the sound discretion of the trial court and will not be disturbed absent a finding of abuse of discretion." *Lumsden v. Lawing*, 117 N.C. App. 514, 518, 451 S.E.2d 659, 661-62

(1995) (citation omitted). "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) (citation omitted).

II. Rule 60(a)

Defendant contends the trial court erred by entering its Order amending the Charging Orders to correct the misnomer under Rule 60(a) for several reasons. First, Defendant claims Rule 60(a) does not allow for correction of a misnomer in a plaintiff's name. Second, even assuming Rule 60(a) permits this change, Defendant argues it cannot apply retroactively or "*nunc pro tunc*." Third, Defendant asserts the Order is invalid because the superior court judge who entered this Order did not enter the original Charging Order. Lastly, Defendant argues that the doctrines of laches and judicial estoppel prevented the trial court from entering the Order. For the following reasons, we disagree.

Rule 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2017). Our Court has noted, "The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions." *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985) (citations omitted).

Our review of decisions from our appellate courts reveals no circumstances where Rule 60(a) has been used to correct a misnomer of a party's name. However, "Rule 60(a) simply codifies the body of law in existence in this State at the time the new rules of civil procedure were adopted." *H & B Co. v. Hammond*, 17 N.C. App. 534, 538, 195 S.E.2d 58, 61 (1973) (citation omitted). Therefore, we look to our pre-enactment case law for guidance.

In *Shaver v. Shaver*, our Supreme Court described a court's power to correct clerical errors as follows:

> [T]he court has inherent power to amend judgments by correcting clerical errors or supplying defects so as to

> make the record speak the truth. The correction of such errors is not limited to the term of court, but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. But this power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. And the power to correct clerical errors after the lapse of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered.

248 N.C. 113, 118, 102 S.E.2d 791, 795 (1958) (citations omitted). On the question of the effect of clerical errors in the names and designation of parties, our case law is clear. "Names are to designate persons, and where the identity is certain a variance in the name is immaterial. Errors or defects in the pleadings or proceedings not affecting substantial rights are to be disregarded *at every stage of the action*." *Patterson v. Walton*, 119 N.C. 500, 501, 26 S.E. 43, 43 (1896) (citations and quotation marks omitted). We also find the case of *Gordon v. Pintsch Gas Co*. instructive. 178 N.C. 435, 100 S.E. 878 (1919).

In *Pintsch Gas Co.*, our Supreme Court affirmed the order of the lower court allowing an amendment, after judgment was entered, correcting and changing the name of the defendant from "Pintsch Gas Company" to "Pintsch Compressing Company," where the true defendant had notice it was the intended defendant and suffered no prejudice as a result of the name change. *Id*. at 438-39, 100 S.E. at 879-80. The *Pintsch Gas Co.* Court went on to explain: "A misnomer does not vitiate provided the identity of the *corporation* or person . . . intended by the parties is apparent, whether it is in a deed, *or in a judgment*, or in a criminal proceeding[.]" *Id*. at 439, 100 S.E. at 880 (emphasis added) (citations and quotation marks omitted); *see also McLean v. Matheny*, 240 N.C. 785, 787, 84 S.E.2d 190, 191 (1954) ("Ordinarily, under the comprehensive power to amend process and pleadings where the proper party is before the court, although under a wrong name, an amendment will be allowed to cure a misnomer." (citations omitted)); *Thorpe v. Wilson*, 58 N.C. App. 292, 297, 293 S.E.2d 675, 679 (1982) ("If . . . the effect of amendment is merely to correct the name of a person already in court, there is no prejudice.").

Because our case law prior to the enactment of the North Carolina Rules of Civil Procedure makes clear that a trial court can correct a misnomer in a judgment, we conclude Rule 60(a) may be an appropriate

vehicle for amending a judgment to correct a misnamed party. *See H & B Co.*, 17 N.C. App. at 538, 195 S.E.2d at 61 (citation omitted). We acknowledge our previous case law dealt with a misnamed *defendant* not a *plaintiff*. However, we see no basis to apply any different rule. Our conclusion is supported by two decisions from our sister states interpreting their corresponding rule in the same manner. *See Reisbeck, LLC v. Levis*, 2014 COA 167, ¶¶ 8-15, 342 P.3d 603, 604-06 (2014) (upholding amendment of judgment to correct a misnomer in the plaintiff's name from "Reisbeck, LLC" to "Reisbeck Subdivision, LLC," where the record indicated it was an honest mistake, the corrected judgment represented the parties' expectations, no additional or different liability would have been imposed on any existing defendant, and no party previously a stranger to the action would have been added); *Labor v. Sun Hill Indus. Inc.*, 48 Mass. App. Ct. 369, 369-73, 720 N.E.2d 841, 842-44 (1999) (allowing the individual plaintiffs to amend the judgment from "Jan-Art Packaging, Inc.," which was a nonexistent corporation, to "Janet Labor and Arthur Thomas, d/b/a Jan-Art Packaging Co.").

Here, the trial court did not err by allowing O'Mahoney Holdings, LLC's Renewed Motion to Correct. As discussed, Rule 60(a) allows for the correction of a misnomer in a judgment so long as it does not "affect the substantive rights of the parties[.]" *Hinson*, 78 N.C. App. at 615, 337 S.E.2d at 664 (citations omitted); *see also Patterson*, 119 N.C. at 501, 26 S.E. at 43 (holding a variance in a party's name does not affect a substantive right "where the identity is certain" (citation omitted)). Because O'Mahoney Holdings, LLC's identity is certain, correction of this misnomer does not affect a substantial right of Defendant. Indeed, Defendant does not argue O'Mahoney Holdings, LLC and O'Mahoney Holdings, LTD are distinct, existing entities or that there was any confusion by Defendant regarding the actual identity of the judgment creditor. Moreover, nothing in the record indicates this misnomer was anything but an honest mistake by Collins—the managing member of the LLC, no additional liability is imposed on Defendant by correcting this mistake, and no party previously a stranger to the action was added; therefore, the trial court did not err in allowing O'Mahoney Holdings, LLC's Rule 60(a) Renewed Motion to Correct. *See Reisbeck, LLC*, 2014 COA 167, ¶¶ 8-15, 342 P.3d at 604-06.

Defendant next argues that, even assuming Rule 60(a) allows this change, it cannot apply retroactively or "*nunc pro tunc*." In O'Mahoney Holdings, LLC's Renewed Motion to Correct, O'Mahoney Holdings, LLC asked the trial court "for entry of an order *nunc pro tunc* to correct" the misnomer. In its Order, the trial court does not use the phrase "*nunc pro*

tunc." The Order did, however, state: "The Charging Order as amended shall be effective as of the date originally entered."

We note, "*Nunc pro tunc* orders are allowed only when a judgment has been actually rendered, or decree signed, *but not entered on the record*, in consequence of accident or mistake or the neglect of the clerk[.]" *Long v. Long*, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (emphasis added) (citation and quotation marks omitted). Here, the Charging Order was "entered on the record"; therefore, the Order was not and could not have been entered *nunc pro tunc*. *See id.* (citation and quotation marks omitted). Rather, the Order was entered pursuant to Rule 60(a) following the Amended Assignment of Judgment in order to "make the record speak the truth." *See Shaver*, 248 N.C. at 118, 102 S.E.2d at 795. Such an order does not "apply retroactively;" rather, the change simply corrects a clerical error and does not alter the effect of the original Charging Order. *See Gordon v. Gordon*, 119 N.C. App. 316, 318, 458 S.E.2d 505, 506 (1995) (explaining that correction of a clerical mistake under Rule 60(a) does not "alter[] the effect of the original order" (citation omitted)).

Defendant further contends the Order is invalid because the superior court judge who entered this Order did not enter the original Charging Order. *See, e.g.*, *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (explaining the general rule that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action" (citation omitted)). However, as the Official Comment to Rule 60(a) makes clear, "[t]he motion to correct a clerical error need not be made to the same judge who tried the cause." N.C. Gen. Stat. § 1A-1, Rule 60(a) cmt. Therefore, the trial court could and did properly enter the Order.

Lastly, Defendant argues the doctrines of laches and judicial estoppel require reversal of the Order. With regard to the doctrine of laches, our Court has held: "Rule 60(a) provides no time limit for the correction of clerical errors. In fact, the rule states that such errors may be corrected 'at any time.' " *Gordon*, 119 N.C. App. at 319, 458 S.E.2d at 507. Therefore, the doctrine of laches is inapplicable. As for the doctrine of judicial estoppel, Defendant failed to raise judicial estoppel before the trial court; therefore, we need not address this argument. *See Bailey & Assocs. Inc. v. Wilmington Bd. of Adjust.*, 202 N.C. App. 177, 195, 689 S.E.2d 576, 589 (2010) ("[Appellant's] failure to raise the issue of [judicial] estoppel before the [trial court] effectively . . . precludes this Court from considering [appellant's] estoppel claim."). Nevertheless, even assuming this argument is preserved, we find the doctrine inapplicable

because O'Mahoney Holdings, LLC's "inconsistent position," that its corporate descriptor was LLC instead of LTD, "was based on inadvertence or mistake." *See Whiteacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 30, 591 S.E.2d 870, 889 (2004) (citation and quotation marks omitted) ("Thus, it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." (citation and quotation marks omitted)).

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order amending the Charging Order to correct the misnomer under Rule 60(a).

AFFIRMED.

Judges STROUD and YOUNG concur.

ROY EUGENE COUICK, PETITIONER
v.
TORRE JESSUP, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES, STATE OF NORTH CAROLINA, RESPONDENT

No. COA18-1200

Filed 6 August 2019

Motor Vehicles—license revocation—willful refusal of chemical analysis—affidavit—sufficiency of evidence

The Department of Motor Vehicles had no jurisdiction to revoke a driver's license for willful refusal to take a chemical analysis test where the law enforcement officer designated on his affidavit refusal of one type of test—blood—but petitioner refused another type of test—breath. The affidavit failed to show the essential element that the driver refused the type of chemical analysis requested and was therefore not a "properly executed affidavit" pursuant to N.C.G.S. § 20-16.2.

Appeal by respondent from order entered 25 May 2018 by Judge Jeffery K. Carpenter in Superior Court, Union County. Heard in the Court of Appeals 24 April 2019.

James J. Harrington for petitioner-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for respondent-appellant.

STROUD, Judge.

Respondent Commissioner of the Division of Motor Vehicles appeals an order vacating a decision of the Division of Motor Vehicles, rescinding its previously imposed revocation and reinstating petitioner's driving privilege. Because the affidavit and amended affidavit both showed the arresting officer designated a blood test but petitioner refused a breath test, neither was a properly executed affidavit showing petitioner willfully refused blood alcohol testing under North Carolina General Statute § 20-16.2. The trial court correctly concluded DMV did not have jurisdiction to revoke petitioner's license upon receipt of the affidavits, so we affirm.

I. Background

On 7 July 2017, petitioner was charged with driving while impaired and allegedly refused to submit to a chemical analysis. Deputy Justin Griffin of the Union County Sheriff's Office, the law enforcement officer, filed an "Affidavit and Revocation Report of Law Enforcement Officer" form (DHHS 3907) ("Affidavit"). The Affidavit noted Deputy Griffin requested petitioner submit to a blood analysis and had specifically *marked out* the word "breath" for the type of chemical analysis designated. Attached and incorporated into the affidavit was the "Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S. §20-16.2(a)" form (DHHS 4081) ("Rights Form"), which noted "Breath" as the type of analysis refused by petitioner.

On 14 November 2017, Deputy Griffin amended both the Affidavit and Rights Form. The amended Affidavit now noted that Deputy Griffin was both the law enforcement officer and chemical analyst but again he *marked out* the word "breath" and *circled* blood as the type of analysis designated. The amended Rights Form still reflected "Breath" as the type of analysis refused.

Petitioner was notified that his driving privilege would be suspended in December of 2017 for his refusal to submit to a chemical test. Petitioner requested a hearing on the matter, and in February of 2018 the Division of Motor Vehicles ("DMV") decided "petitioner's refusal to submit to a chemical analysis is sustained." Petitioner's driving privilege was suspended effective 18 February 2018.

On 2 March 2018, petitioner filed a petition for a hearing in the trial court regarding his suspended driving privilege. The trial court found "the Division seeks to revoke the Petitioner's driving privilege for willfully refusing a chemical analysis (specifically a breath analysis) that the Petitioner was not requested to submit to" because the Affidavits indicate "Petitioner was requested to submit to a blood analysis and only a blood analysis[.]" Relying on *Lee v. Gore*, 365 N.C. 227, 717 S.E.2d 356 (2011), the trial court determined the DMV did not have the authority to revoke defendant's privilege because "the affidavits signed on July 7, 2017 and on November 9, 2017 are not 'properly executed affidavits' to give rise to a revocation of the Petitioner's driving privilege for failing to submit to a chemical analysis of his breath." The trial court vacated the prior decision of the DMV, revoked the DMV's previously imposed revocation, and reinstated petitioner's driving privilege. Respondent appeals.

II. Properly Executed Affidavit

Respondent contends that its "receipt of a properly executed affidavit under N.C. Gen. Stat. § 20-16.2(d) provided the requisite jurisdiction for respondent to revoke petitioner's license under N.C. Gen. Stat. § 20-16.2." (Original in all caps.)

> [O]n appeal from a DMV hearing, the superior court sits as an appellate court, and no longer sits as the trier of fact. Accordingly, our review of the decision of the superior court is to be conducted as in other cases where the superior court sits as an appellate court. Under this standard we conduct the following inquiry: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. . . . . We hold that these cases provide the appropriate standard of review for this Court under the amended provisions of N.C. Gen. Stat. § 20–16.2.

Johnson v. Robertson, 227 N.C. App. 281, 286–87, 742 S.E.2d 603, 607 (2013) (citations and quotation marks omitted). Furthermore, "[q]uestions of statutory interpretation of a provision of the Motor Vehicle Laws of North Carolina are questions of law and are reviewed *de novo* by this Court." *Id.* at 283, 742 S.E.2d at 605 (citation and quotation marks omitted).

Respondent contends that it had authority to revoke petitioner's license upon receipt of the Affidavit because the Affidavit "contained all requisite jurisdictional elements – boxes 1, 4, 7 and 14." As *Lee* emphasizes, respondent must receive "a properly executed affidavit meeting

all of the requirements set forth in N.C. Gen. Stat. § 20-16.2(c1) before the DMV is authorized to revoked a person's driving privileges." 365 N.C. at 233, 717 S.E.2d at 360-61 (quotation marks omitted). Specifically, Respondent argues the affidavit must allege that:

> (1) The person was charged with an implied-consent offense or had an alcohol concentration restriction on the driver's license[, Box 4 of the Affidavit];
>
> (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the driver's license[, Box 1 of the Affidavit];
>
> . . . .
>
> (5) The results of any tests given or that the person *willfully refused to submit to a chemical analysis*[, Box 14 of the Affidavit].

N.C. Gen. Stat. § 20-16.2(c1) (2017) (emphasis added). In other words, respondent contends box 9 of the form is "immaterial" to its jurisdiction to revoke but acknowledges that box 14 is essential. The problem here is that box 14 conflicts with box 9 on this Affidavit and the Affidavit on its face did not establish jurisdiction. *See generally Lee*, 365 N.C. at 233, 717 S.E.2d at 360-61. Respondent relies upon *Lee* for its argument that the Affidavit was sufficient to confer jurisdiction for revocation, but Respondent overlooks the factual differences between *Lee* and this case as well as the additional statutory requirement relevant to this case. *See generally* N.C. Gen. Stat. § 16.2; *Lee*, 365 N.C. 227, 717 S.E.2d 356.

In *Lee*, the Supreme Court considered a case where a police officer stopped a driver for speeding and the officer believed the driver was driving while impaired. *Id.* at 228, 717 S.E.2d at 357. The officer took the driver to an intake center to "undergo chemical analysis by way of an Intoxilyzer test." *Id.* The officer told the driver "several times that his failure to take the Intoxilyzer test would be regarded as a refusal to take the test" and would "result in revocation of petitioner's North Carolina driving privileges." *Id.* The driver still refused to take the test, and the officer noted "on form DHHS 3908" that the driver had " 'refused' the test at 12:47 a.m. on 23 August 2007." *Id.*

> Later that day the officer appeared before a magistrate and executed an affidavit regarding petitioner's refusal to submit to chemical analysis. Form DHHS 3907, entitled

> "Affidavit and Revocation Report," was created by the Administrative Office of the Courts for this purpose. The form includes fourteen sections, each preceded by an empty box. The person swearing to the accuracy of the affidavit checks the boxes relevant to the circumstances and then signs the affidavit in the presence of an official authorized to administer oaths and execute affidavits.
>
> Section fourteen of form DHHS 3907 states: "The driver willfully refused to submit to a chemical analysis as indicated on the attached form DHHS 3908. DHHS 4003." The officer did not check the box for section fourteen. The officer then mailed both the DHHS 3907 and DHHS 3908 forms to the DMV. Neither form indicated a willful refusal to submit to chemical analysis.
>
> Nevertheless, upon receiving the forms, the DMV suspended petitioner's North Carolina driving privileges for one year, effective 30 September 2007, for refusing to submit to chemical analysis.

Id. at 228, 717 S.E.2d at 357-58.

The driver requested a hearing to contest the license revocation, and at the November 2007 hearing

> it came to light that the copy of form DHHS 3907 on file with the DMV had an '*x*' in the section fourteen box. All the other boxes marked on the form DHHS 3907 contained check marks, not *x*s. Petitioner's copy of form DHHS 3907 did not contain an *x* in the box preceding section fourteen.

Id. at 228-29, 717 S.E.2d at 358. The hearing officer upheld the license revocation, and the driver appealed to Superior Court, which affirmed. *Id.* at 229, 717 S.E.2d at 358. The driver then appealed to the Court of Appeals, which reversed the Superior Court because "DMV never received the statutorily required affidavit indicating that petitioner had willfully refused to submit to a chemical analysis of his blood alcohol level." *Id.* Based upon a dissent which considered the error in the DHHS 3907 Affidavit as "an inconsequential violation of administrative procedure, rather than a violation of petitioner's right to due process[,]" DMV appealed. *Id.*

Our Supreme Court agreed with the majority opinion that DMV had no jurisdiction to revoke the license because the Affidavit did not show the driver had willfully refused the Intoxilyzer test. *Id.* at 365 N.C. at

229-34, 717 S.E.2d at 358-61. The Court then explained that its "disposition of this case turns on the limited authority of the DMV." *Id.* at 230, 717 S.E.2d at 359.

> The DMV is a division of the North Carolina Department of Transportation ("DOT"), which has been described by this Court as an inanimate, artificial creature of statute whose form, shape and authority are defined by the Act by which it was created and which is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. Chapter 20 of our statutes creates the DMV, sets out its powers and duties, and delineates the DMV's authority to discharge these duties. As such, the DMV possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority.
>
> N.C.G.S. § 20–16.2, the statutory grant of authority at issue here, enables the DMV to act when a driver is charged with an implied-consent offense, such as driving while impaired, and the driver refuses to submit to chemical analysis. Under subsection (a) of the statute, drivers on our highways consent to a chemical analysis test if charged with an implied-consent offense. Before the test is administered, however, a chemical analyst who is authorized to administer a breath test must give the person charged both oral and written notice of his rights as enumerated in that subsection, including his right to refuse to be tested.
>
> Subsections (c) and (c1) then address the refusal to submit to chemical analysis, providing as follows:
>
> > (c) Request to Submit to Chemical Analysis.—*A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.*

> (c1) Procedure for Reporting Results and Refusal to Division.—Whenever a person refuses to submit to a chemical analysis the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating that:
>
> (5) The results of any tests given or that the person willfully refused to submit to a chemical analysis.
>
> The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.

N.C.G.S. § 20–16.2(c), (c1) (2006).[1]

Next, subsection (d) addresses the consequences stemming from a driver's refusal to submit to chemical analysis and provides for administrative review:

> (d) Consequences of Refusal; Right to Hearing before Division; Issues.—Upon receipt of a properly executed affidavit required by subsection (c1), the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division.

Id. § 20–16.2(d) (2006).

Last, subsection (e) authorizes superior court review.

> (e) Right to Hearing in Superior Court.—If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing on the record. The superior court review shall be limited

1. North Carolina General Statute § 20-16.2 has been amended since 2006, but none of the amendments effect the substance of this case. *See* N.C. Gen. Stat. § 20-16.2 (2017) (History).

> to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

Id. § 20–16.2(e) (2006).

Our appellate courts have had a number of opportunities to consider N.C.G.S. § 20–16.2. These decisions confirm that a person's refusal to submit to chemical analysis must be willful to suspend that person's driving privileges.

Here the Court of Appeals concluded that the DMV did not receive a properly executed affidavit required by subsection (c1) indicating petitioner's willful refusal to submit to chemical analysis. Consequently, the Court of Appeals held that the DMV lacked authority to revoke petitioner's driving privileges under N.C.G.S. § 20–16.2(d). The Court of Appeals further held that, absent this authority, there was also no authority in N.C.G.S. § 20–16.2 for a review hearing or superior court review.

Echoing the dissent, however, the DMV contends that the Court of Appeals erred in reaching these conclusions. The DMV argues that it has the authority to revoke petitioner's driving privileges because petitioner was charged upon reasonable grounds with the implied-consent offense of driving while impaired, was notified of his rights under N.C.G.S. § 20–16.2(a) and willfully refused to submit to chemical analysis, and thus was subject to the consequences outlined in N.C.G.S. § 20–16.2(d). We disagree that the DMV had the authority to revoke petitioner's license under these circumstances, absent an affidavit indicating that petitioner willfully refused to submit to chemical analysis.

N.C.G.S. § 20–16.2(c1) is clear and unambiguous. When a person refuses to submit to chemical analysis the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating the results of any tests given or that the person willfully refused to submit to a chemical analysis. In the instant case the officer swore out the DHHS 3907 affidavit

and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was "refused." Yet, neither document indicated that petitioner's refusal to participate in chemical analysis was willful. As such, the requirements of section 20–16.2(c1) have not been met.

Additionally, the requirements of N.C.G.S. § 20–16.2(d) have not been satisfied. The plain language of subsection (d) requires that the DMV receive "a properly executed affidavit" meeting all the requirements set forth in N.C.G.S. § 20–16.2(c1) before the DMV is authorized to revoke a person's driving privileges under N.C.G.S. § 20–16.2. *Here neither the DHHS 3907 affidavit submitted to the DMV, nor the attached DHHS 3908 form indicating a refusal, states that the refusal was willful. Consequently, the DMV lacked authorization to revoke petitioner's license.*

. . . .

[W]hile we are cognizant of the strong public policy favoring the removal of unsafe drivers from our roads, *the DMV's burden here was light. The DMV could have cured the deficiency in the affidavit by simply inquiring of the officer whether the affidavit contained an omission. If so, the DMV could have requested that the officer swear out a new, properly executed affidavit. Instead, the DMV took the position that the error described here was cured through a hearing the DMV lacked the authority to conduct.* To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason. The DMV's interpretation would also permit suspension of driving privileges for willful refusal without an evidentiary predicate. The suspended driver would then have to request a hearing to contest the State's actions. Yet, if the driver failed to request a hearing, his driving privileges likely would be suspended even though the DMV never received evidence of willful refusal. This result is not contemplated in N.C.G.S. § 20–16.2. Simply put, the DMV lacks the authority to suspend driving privileges, or revoke a driver's license, without some indication that a basis for suspension or revocation as required by N.C.G.S. § 20–16.2(c1) has occurred.

> *Finally, to hold otherwise essentially adopts a "no harm, no foul" analysis. Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the DMV's authority to act. This is not a case that turns upon prejudice to the petitioner.*

Id. at 229-234, 717 S.E.2d at 358-61 (emphasis added) (citations, quotation marks, ellipses, brackets, and footnotes omitted). The Supreme Court affirmed the Court of Appeals opinion and held "that the DMV lacked the authority to revoke the driving privileges of petitioner[.]" *Id.* at 227, 717 S.E.2d at 357. Based on *Lee*, respondent contends, "Information contained in Box #9 of the Affidavit regarding the type of chemical test requested is immaterial to a determination of whether the Petitioner's license should be revoked pursuant to N.C. Gen. Stat. § 20-16.2."

Respondent initially contends that marking "blood" instead of "breath" was merely a clerical error. To be clear, this is not simply a matter of checking boxes where a box was missed and later filled in, as in *Lee*, *id.* at 228, 717 S.E.2d at 358, or a misplaced mark could be misunderstood as a strikeout when it was intended as a checkmark to indicate just the opposite of what a strikeout would accomplish. Box 9 leaves blanks for the date and time to be filled in by hand and then the preprinted text on the form states, "I requested the driver to submit to chemical analysis of his/her breath/ or blood/ or urine." On both Affidavits "breath" and "urine" are both marked out and the word "blood" is circled. This is not merely a clerical error indicating a "minor mistake" but rather a purposeful choice to mark out "breath" and "urine[,]" and to designate "blood[.]" *See State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) ("A clerical error is defined as, an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record[.]" (citation, quotation marks, and brackets omitted)). Further, the same "error" as to the type of test designated occurs on both the original and amended Affidavits. And without the correct designation of the test requested in box 9, box 14 cannot support the claim of a willful refusal.

Respondent also argues that the correct type of test, breath, was noted on the attached DHHS Form 4081, "Rights of Person Requested to Submit to Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance under N.C.G.S. 20-16.2(a)[.]" But Form 4081 was actually part of the Affidavit. Box 14 of the Affidavit states: "The driver willfully refused to submit to a chemical analysis *as*

indicated on the attached: [] DHHS 4082 [] DHHS 4081."[2] Both the originally filed and amended DHHS 4081 forms were the same. At the top of the attached form, three options are printed:

"[ ] Breath [ ] Blood [ ] Subsequent Test[.]"

"Breath" is checked as the test refused on both the original and amended forms. Thus, on its face, the Affidavit showed that Deputy Griffin requested a blood test and petitioner refused a breath test.

But as noted, respondent also contends that the error was immaterial and does not affect whether the Affidavit was properly executed to invoke the DMV's authority. We turn to the applicable version of North Carolina General Statute § 20-16.2 which addresses the requirements for request for a chemical analysis. *See generally* N.C. Gen. Stat. § 20-16.2. One requirement is that the officer or analyst "designate the type of test or tests to be given":

> (c) **Request to Submit to Chemical Analysis.** -- A law enforcement officer or chemical analyst *shall designate the type of test or tests to be given* and may request the person charged to submit *to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section*, but the refusal does not preclude testing under other applicable procedures of law.

N.C. Gen. Stat. § 20-16.2 (emphasis added). Box 9 of the Affidavit form is the portion of the Affidavit where the officer designates the "type of test or tests to be given[.]" *Id.* The statute requires the officer or analyst to "designate the type of test or tests to be given" and the person charged must submit "to the type of chemical analysis *designated*." *Id.* (emphasis added). If the person refuses "to submit to that chemical analysis" the officer could then designate another type of testing, but the type of test designated and the type of test refused must be the same for the driver's refusal to be willful. *See id.* Thus, the *type* of chemical analysis requested and refused is an essential element showing that the driver willfully refused testing and is a necessary part of a properly executed affidavit. *Id.*

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2. On both the original and amended affidavit both boxes are checked, but only one form, DHHS 4081 was attached.

Respondent's reading of *Lee* as holding only four specific sections of the Affidavit are relevant to invoke for jurisdiction is not entirely incorrect but focuses only on the facts in the *Lee* case. *See generally Lee*, 365 N.C. 227, 717 S.E.2d 356. In *Lee*, the officer requested and the driver refused a breath test, but the box regarding willful refusal was not checked at all. *See id*. at 228, 717 S.E.2d at 357-58. Here, the issue is whether petitioner willfully refused to take the type of test designated by Deputy Griffin, and based upon both the original Affidavit and the amended Affidavit, the officer "designated" one type of test – blood -- and petitioner refused another type of test -- breath. Under North Carolina General Statute § 20-16.2, this is not a willful refusal of a chemical analysis. *See* N.C. Gen. Stat. § 20-16.2.

In *Lee*, the Supreme Court noted the "particularly disturbing" fact that the affidavit as originally completed did not have the block for box 14 checked, but the version of the affidavit presented at the hearing had an *x* mark in that block. *Lee*, 365 N.C. at 229-233, 717 S.E.2d at 358-61. The Court noted that DMV could have corrected the problem but this correction would have to be done *before* revocation of the license, not at the hearing, because DMV would have no jurisidiction either to revoke the license or to hold a hearing without a properly executed affidavit:

> The DMV could have cured the deficiency in the affidavit by simply inquiring of the officer whether the affidavit contained an omission. *If so, the DMV could have requested that the officer swear out a new, properly executed affidavit. Instead, the DMV took the position that the error described here was cured through a hearing the DMV lacked the authority to conduct*. To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason. The DMV's interpretation would also permit suspension of driving privileges for willful refusal without an evidentiary predicate.

Id. at 234, 717 S.E.2d at 361 (emphasis added) (citations omitted).

Here, on 14 November 2017, Deputy Griffin prepared the amended Affidavit form, including the amended attached DHHS 4081 form, but the amended forms still included the exact same information in Section 9 as the original forms. We assume the only reason for the Amended Affidavit was to show that Deputy Griffin was the law enforcement officer and the chemical analyst. Since the Affidavit still states

that Deputy Griffin designated one type of test and petitioner refused another type of test, the refusal was not willful under North Carolina General Statute § 20-16.2. *See generally* N.C. Gen. Stat. § 20-16.2.

Respondent also argues that any deficiency in the Affidavit was corrected by Deputy Griffin's testimony at the hearing because Deputy Griffin testified that he requested that respondent submit to a breath test and he refused. Deputy Griffin also testified that respondent asked for a blood test but he did not offer a blood test because "I have to go with my discretion" and "most of the time when I do a blood draw it's for . . . substances, illegal drugs and/or alcohol." But as our Supreme Court stressed in *Lee*, the error in the Affidavit cannot be "cured through a hearing the DMV lacked the authority to conduct. To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason." *Lee*, 365 N.C. at 234, 717 S.E.2d at 361. The respondent's argument ignores DMV's "limited authority" to suspend a driver's license. *Id.* at 230, 717 S.E.2d at 359. As the Supreme Court noted, "Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the DMV's authority to act. This is not a case that turns upon prejudice to the petitioner." *Id.* at 234, 717 S.E.2d at 361.

III. Conclusion

Because the Affidavit submitted to DMV did not show that petitioner had willfully refused chemical analysis under North Carolina General Statute § 20-16.2, it was not a "properly executed affidavit" which conferred jurisdiction upon DMV to revoke petitioner's license. We therefore affirm the trial court's order.

AFFIRMED.

Judges BRYANT and COLLINS concur.

DR. SANDRA T. CROSMUN, DR. MICHAEL HESS, LESLIE KEENAN, DR. JOHN R. PARKER, III, JAMIE E. STEVENS AND CHERYL J. THOMAS, PLAINTIFFS

v.

THE TRUSTEES OF FAYETTEVILLE TECHNICAL COMMUNITY COLLEGE, DR. LARRY J. KEEN, DR. DAVID L. BRAND AND CARL MITCHELL, DEFENDANTS

No. COA18-1054

Filed 6 August 2019

1. Appeal and Error—discovery order—interlocutory—substantial right—privilege asserted

An interlocutory order compelling discovery (which required an extensive forensic examination of a college's computer databases in a retaliatory dismissal action) was immediately appealable where defendants asserted non-frivolous and particularized objections to specific requests for information based on privilege and immunity grounds.

2. Discovery—electronically stored information (ESI)—forensic examination—privileges and immunity—protective protocol

In a whistleblower retaliatory dismissal action, the trial court abused its discretion in ordering defendant college to comply with a discovery order that allowed plaintiff's agent, not an independent or neutral party, to conduct a three-week forensic examination of electronically stored information (ESI) copied from defendant's computer servers without providing adequate protection against violations of defendant's attorney-client privilege and work-product immunity. Since a party cannot be compelled to disclose privileged information absent a prior waiver or applicable exception, the trial court was directed on remand to ensure that any discovery protocol adopted gave defendant an opportunity to review responsive documents and assert privileges prior to production.

Appeal by Defendants from an order entered 15 June 2018 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 9 May 2019.

Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess, and Rabon Law Firm, PLLC, by Charles H. Rabon, Jr., Gregory D. Whitaker, and David G. Guidry, for Plaintiffs-Appellees.

Yates, McLamb & Weyher, LLP, by Sean T. Partrick and David M. Fothergill, for Defendants-Appellants.

INMAN, Judge.

Seeking justice often involves enduring tedium. Many attorneys and judges unsurprisingly consider the discovery stage of civil litigation among the most prosaic and pedestrian aspects of practice.[1] A single page among millions of records, however—even one dismissed as irrelevant by the withholding party—may be considered a "smoking gun" to the party seeking its disclosure.

Our discovery rules "facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial," *Am. Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (1979), and are designed to encourage the "expeditious handling of factual information before trial so that critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized." *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). These vital purposes are no less present when electronic discovery ("eDiscovery") is concerned; in many instances, their importance is heightened.[2]

Electronically stored information, or ESI, "has become so pervasive that the volume of ESI involved in most cases dwarfs the volume of any paper records. This makes ESI the driving force behind the scope of preservation and discovery requirements in many cases[.]" *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 56 (2018) (hereinafter the "Sedona Principles");[3] *see*

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1. Appellate courts are generally inoculated from directly engaging in discovery by virtue of their distance from pre-trial proceedings. *Cf. Barnette v. Woody*, 242 N.C. 424, 430, 88 S.E.2d 223, 227 (1955) ("[I]t would require a tedious and time-consuming voyage of discovery for us to ascertain upon what the appellant is relying to show error, and our Rules and decisions do not require us to make any such voyage.").

2. Also no less present in eDiscovery is the monotony of document review. *See, e.g.*, *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 Fed. App'x 37, 45 (2d Cir. 2015) (interpreting North Carolina law and holding that a California attorney, unlicensed in North Carolina, was not engaged in the practice of law in this State when he served as a contract attorney sorting electronic documents into categories devised by trial counsel, as he "exercised no legal judgment whatsoever" and "provided services that a machine could have provided").

3. The Sedona Principles, first published in 2004, seek to "serve as best practice recommendations and principles for addressing ESI issues in disputes—whether in federal or state court, and whether during or before the commencement of litigation."

also Analog Devices, Inc. v. Michalski, 2006 NCBC 14, 2006 WL 3287382, at *5 (N.C. Super. Ct. Nov. 1, 2006) ("It is an inescapable fact that ninety-nine percent of all information being generated today is created and stored electronically. That fact may be shocking to judges who still find themselves buried in paper, but even our court systems are moving, albeit reluctantly, into the age of technology." (citation omitted)).[4]

Despite the general disdain of courts for discovery disputes, in the words of Dorothea Dix, "[a]ttention to any subject will in a short time render it attractive, be it ever so disagreeable and tedious at first." Dorothea L. Dix, *Conversations on Common Things; Or, Guide to Knowledge. With Questions. For the Use of Schools and Families*. 270 (4th ed. 1832). This appeal presents this Court with our first opportunity to address the contours of eDiscovery within the context of North Carolina common and statutory law regarding the attorney-client privilege and work-product doctrine.

Defendants appeal from an order compelling discovery that allows Plaintiffs' discovery expert access to Fayetteville Technical Community College's ("FTCC") entire computer system prior to any opportunity for Defendants to review and withhold documents that contain privileged information or are otherwise immune from discovery. Defendants argue

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Sedona Principles at 29. They were drafted and published by The Sedona Conference, "a 501(c)(3) research and educational institute that exists to allow leading jurists, lawyers, experts, academics, and others at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks . . . to engage in true dialogue—not debate—in an effort to move the law forward in a reasoned and just way." *Id.* at 8. The Sedona Principles and other publications of The Sedona Conference have been relied upon by federal and state courts nationwide, including North Carolina's trial courts. *See, e.g.*, *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249 (4th Cir. 2013) (relying on a glossary of eDiscovery terms published by The Sedona Conference); *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012) (citing various publications of The Sedona Conference concerning eDiscovery); *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (relying in part on the Sedona Principles in setting aside a trial court's orders compelling forensic imaging of the defendants' computer hard drives where the orders "fail[ed] to account properly for the significant privacy and confidentiality concerns present"); *In re Queen's University at Kingston*, 820 F.3d 1287 (Fed. Cir. 2016) (citing a publication of The Sedona Conference on ESI retention); *In re State Farm Lloyds*, 520 S.W.3d 595, 60 Tex. Sup. Ct. J. 1114 (2017) (utilizing the Sedona Principles to resolve an eDiscovery issue governed by Texas law); *Tumlin v. Tuggle Duggins, P.A.*, 2018 NCBC 49, 2018 WL 2327022, at *10 (N.C. Super. Ct. May 22, 2018) (relying on the Sedona Principles to determine whether sanctions for spoliation in eDiscovery were proper).

4. Our Supreme Court, recognizing the continuous stream of cases involving ESI in the North Carolina Business Court, has promulgated a series of Business Court rules expressly requiring counsel to discuss ESI with their clients and conduct a conference with the opposing party to fashion an ESI production protocol. N.C. R. Bus. Ct. 10.2-.8 (2019).

that the order compelling discovery constitutes an impermissible involuntary waiver of those privileges.[5] Plaintiffs argue that the trial court's order, in conjunction with a stipulated protective order consented to by the parties, adequately protects Defendants' privileges such that no waiver will occur. After careful review, we hold that the trial court abused its discretion by compelling production through a protocol that provides Plaintiffs' agent with direct access to potentially privileged information and precludes reasonable efforts by Defendants to avoid waiving any privilege. We therefore vacate the order and remand for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs, who are former employees of FTCC, filed suit against Defendants on 7 December 2016, alleging retaliatory dismissals from FTCC in violation of the North Carolina Whistleblower Protection Act. *See* N.C. Gen. Stat. § 126-84 (2017). One week later, Plaintiffs' counsel mailed a letter to each Defendant concerning the complaint and informing them of their obligation to preserve ESI in light of the litigation. As the action advanced to discovery, Plaintiffs served two sets of interrogatories and requests for production of documents on Defendants in April and October of 2017. Defendants responded to both sets of discovery requests but objected to certain requests based on attorney-client, attorney work-product, and state and federal statutory privileges.

In January 2018, Plaintiffs served Defendants with a third set of interrogatories and requests for production; Plaintiffs also mailed Defendants' counsel a letter asserting their discovery responses were incomplete and expressing concern that Defendants had destroyed responsive ESI. In February 2018, Defendants' counsel responded by letter denying any spoliation, rejecting Plaintiffs' claim that certain responses were incomplete, and agreeing to produce newly discovered additional responsive documents. Dissatisfied with Defendants' response, Plaintiffs' counsel sent additional letters reiterating their discovery demands. Plaintiffs followed their letters with a motion to compel requesting the trial court "[o]rder that the parties identify a computer forensics entity or individual who, at Defendants' cost, will search the computer servers

5. We recognize that the work-product doctrine is "not a privilege, but a 'qualified immunity.' " *Evans v. United Serv. Auto. Ass'n*, 142 N.C. App. 18, 28, 541 S.E.2d 782, 788 (2001) (quoting *Willis v. Power Co.*, 291 N.C 19, 35, 229 S.E.2d 191, 201 (1976)). Because the issues raised in this appeal require no analysis differentiating attorney-client privilege and work-product immunity, to avoid confusion and for ease of reading, we use the word "privilege" broadly to encompass both traditional privileges, such as attorney-client privilege, and the qualified work-product immunity.

at FTCC to determine if Defendants have deleted emails and files pertaining to these discovery requests."

Plaintiffs' motion came on for hearing on 26 February 2018 before Superior Court Judge Douglas B. Sasser. At that hearing, Judge Sasser issued an oral ruling requiring a forensic computer examination of FTCC's servers and tasked the parties with submitting a proposed order.

Judge Sasser's oral ruling did little to quell the parties' disagreement, and instead shifted their focus from what should be produced to what should appear in the proposed order. Defendants objected to Plaintiffs' first proposed order on the ground that general language permitting Plaintiffs to search FTCC's "computer files" for "deleted material" was over-broad, as it required a search of all of FTCC's systems for any and all documents without limitation. Plaintiffs refused to revise the proposed order and reiterated their belief that a search of FTCC's entire system was both necessary and allowed by Judge Sasser's ruling. Defendants then drafted their own proposed order. Plaintiffs then revised their proposed order slightly and suggested Defendants draft a consent protective order to address concerns relating to the production of student information. Defendants objected that Plaintiffs' revised order did not adequately protect privileged information or appropriately limit the scope of discoverable materials. But Defendants agreed to draft a protective order for consideration by the trial court and Plaintiffs.

While the above discussions were ongoing, and roughly two weeks after the hearing before Judge Sasser, Defendants provided Plaintiffs with a supplemental document production. Defendants also informed Plaintiffs that they had yet to complete a draft protective order, as the model protective orders they were working from "only covered inadvertent disclosure of confidential material[,]" and "[i]t has been much more difficult to address privilege issues under a forensic search situation." Plaintiffs replied that they would draft a proposed protective order prohibiting the disclosure of information protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Counsel for Defendants rejected that offer, expressing concern about how to prevent disclosure of materials within the attorney-client privilege or work-product immunity. As discussions surrounding the protective order continued, Plaintiffs submitted the parties' competing proposed orders on the motion to compel to Judge Sasser.

Judge Sasser entered Plaintiffs' proposed order on the motion to compel on 16 April 2018 (the "Forensic Examination Order"). In it, Judge Sasser provided for "a forensic examination of [FTCC's] computer

files" by a "forensic examiner." The order also provided that "the parties shall work with the examiner to agree on key words and other search parameters to use in conducting this forensic review, which will cover the period from . . . July 2014 to the present[,]" and that "Plaintiff's shall bear the initial costs of the forensic review." However, the Forensic Examination Order did not address how a forensic examiner would be selected, whether the examiner would be an independent third party, or how the forensic examination itself would be conducted, and it left resolution of any confidentiality concerns to a future protective order to be submitted by the parties at a later date.

Plaintiffs retained Clark Walton ("Mr. Walton"), an expert in computer forensics and a licensed North Carolina attorney, to draft a proposed forensic examination protocol to effectuate the Forensic Examination Order. As part of that process, Defendants permitted Mr. Walton to question members of FTCC's Information Technology department about the nature of the college's computer systems. Plaintiffs then submitted a proposed forensic examination protocol to Defendants for their consideration on 21 May 2018.[6] The proposed protocol, in pertinent part, provided for the following:

> (1) Mr. Walton would physically access, either at his offices or at FTCC, all FTCC devices on which responsive material might be found or from which responsive material may have been deleted;
>
> (2) From those devices, Mr. Walton would create searchable mirror images[7] and keep those images in his custody (the "Search Images");
>
> (3) Mr. Walton would run search terms "and other search parameters" desired by Plaintiffs through the Search Images to identify responsive data (the "Keyword Search Hits");
>
> (4) Mr. Walton would then remove non-user and other non-responsive system files from the Keyword Search Hits consistent with standard computer forensics practice;

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6. The protocol provided to and adopted by the trial court was not drafted solely by Mr. Walton; rather, it appears from the hearing transcript that Mr. Walton provided certain model protocols for use by Plaintiffs' counsel, who then crafted the protocol with input from Mr. Walton.

7. In eDiscovery parlance, a "mirror image" is "[a] bit by bit copy of any storage media. Often used to copy the configuration of one computer to anther [sic] computer or when creating a preservation copy." *The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 Sedona Conf. J. 340 (2014) (citation omitted).

(5) Using six search terms identified by Plaintiffs in their proposed protocol, Mr. Walton would then screen out any potentially privileged documents from the Keyword Search Hits (the "Privilege Search Hits");

(6) Mr. Walton would immediately deliver those documents not flagged in the Privilege Search Hits to Plaintiffs for their review, while Defendants would review the Privilege Search Hits and create a privilege log for all items in the Privilege Search Hits that they believed to be privileged;

(7) Finally, Defendants would provide Plaintiffs with the privilege log and any documents from the Privilege Search Hits that Defendants determined were not actually subject to a privilege.

Plaintiffs also submitted a proposed stipulated protective order to Defendants on 24 May 2018.

By 4 June 2018, Defendants had not responded to the protocol or followed up with Plaintiffs about the joint protective order. Plaintiffs filed a combined motion to compel and motion for sanctions requesting that the trial court: (1) adopt the proposed protocol; (2) enter the proposed protective order; (3) shift the costs of discovery to Defendants; and (4) as a sanction for Defendants' alleged violation of prior court orders, award Plaintiffs their attorneys' fees incurred in obtaining the discovery.

On the same day Plaintiffs filed the combined motion, Defendants faxed a letter objecting to the protocol, noting that their "main concern still lies with the improper protection of files that could be potentially privileged. . . . It is FTCC's position that none of the documents . . . may be viewed by anyone who is not part of the FTCC privilege [group] prior to the files being reviewed and approved by FTCC." Defendants also attached a red-lined version of the protocol identifying various provisions that they believed endangered their privileges.

The parties appeared before the trial court for a hearing on Plaintiffs' combined motion on 11 June 2018. They presented a stipulated protective order (the "Protective Order") for entry by the trial court. The Protective Order covers personnel and any other information "generally treated as confidential[,]" and, if designated confidential upon production or within 21 days of discussion in deposition testimony, precludes dissemination of that information to outside parties except as necessary to the litigation. It also addresses, in limited respects, the production of privileged information as follows:

15. Review of the Confidential Information by those so authorized by this Order shall not waive the confidentiality of the documents or objections to production. Nothing contained in this Order and no action taken pursuant to it shall waive or prejudice the right of any party to contest the alleged relevancy, admissibility, or discoverability of the Confidential Information sought or provided in discovery.

16. Nothing in the foregoing provisions of this Order shall be deemed to waive any privilege, or to preclude any party from seeking and obtaining, on an appropriate showing, such additional protection with respect to Confidential Information as that party may consider appropriate.

. . . .

17. In order to facilitate discovery, the inadvertent disclosure of documents or other information subject to confidentiality, a privilege, or other immunity from production shall be handled as follows:

a. From time to time during the course of discovery, one or more of the parties may inadvertently disclose documents or other information subject to confidentiality, a privilege, or other immunity from production. Any such disclosure shall not be deemed a waiver of the confidential, privileged, or immune nature of that document or information, or of any related subject matter.

b. To that end, if a producing party, through inadvertence, error or oversight, produces any document(s) or information that it believes is immune from discovery pursuant to any attorney-client privilege, attorney work product immunity or any other privilege or immunity, such production shall not be deemed a waiver, and the producing party may give written notice to the receiving party that the document(s) or information so produced is deemed privileged and that the return of the document(s) or information is requested. Upon receipt of such written notice, the receiving party shall immediately undertake to gather the original and all such copies to the producing party, and shall promptly destroy any newly created derivative document such as a summary of or comment on the inadvertently produced information.

Four days after the hearing and entry of the Protective Order, the trial court entered its order on Plaintiffs' combined motion (the "Protocol Order"). That order adopted the protocol proposed by Plaintiffs without alteration, and provided for Mr. Walton, as "Plaintiffs' expert[,]" to conduct a three-week-long forensic examination of the Search Images at his offices. The trial court denied Plaintiffs' motion for sanctions.

Defendants filed their notice of appeal from the Protocol Order and a motion to stay on 21 June 2018. On 3 July 2018, the trial court entered a consent order on Defendants' motion to stay, requiring the immediate imaging of certain discrete computer systems but otherwise staying operation of the Protocol Order.[8]

II. ANALYSIS

A. Appellate Jurisdiction

[1] Interlocutory orders, or those orders entered in the course of litigation that do not resolve the case and leave open additional issues for resolution by the trial court, are ordinarily not subject to immediate appeal. *Sessions v. Sloane*, 248 N.C. App. 370, 380, 789 S.E.2d 844, 853 (2016). Such orders are appealable, however, "when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014) (citations and quotations omitted). That said, "[a]n order compelling discovery is interlocutory in nature and is usually not immediately appealable because such orders generally do not affect a substantial right." *Sessions*, 248 N.C. App. at 380, 789 S.E.2d at 853 (citing *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999)).

An interlocutory order compelling discovery affects a substantial right 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[.]" *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. This rule applies to attorney work-product immunity and common law attorney-client

8. On appeal, Plaintiffs argue that the specific systems listed in the order granting the stay are the only systems subject to forensic examination under the Protocol Order. This does not appear to be the case, however, as neither the Forensic Examination Order nor the Protocol Order contains any such limit, and the stay does not modify the prior orders. The record reflects that Plaintiffs rejected Defendants' request to include such a limit in their proposed order submitted to Judge Sasser, which was later entered as the Forensic Examination Order. Applying their plain language, we interpret both the Forensic Examination and Protocol Orders as requiring a complete imaging of all of Defendants' systems.

privilege. *See*, *e.g.*, *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4 (2011) (holding an interlocutory order requiring production over the producing party's objections on attorney-client privilege and work-product immunity grounds affected a substantial right subject to immediate appeal).

Blanket assertions that production is not required due to a privilege or immunity are insufficient to demonstrate the existence of a substantial right. *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853. But specific objection to a discrete enumerated request for production or a document-by-document identification of alleged privileged information may suffice. *See*, *e.g.*, *K2 Asia Ventures*, 215 N.C. App. at 446-48, 717 S.E.2d at 4-5 (holding that some appealing defendants demonstrated a substantial right by asserting work-product immunity and attorney-client privilege as to a specific request for production of documents in their discovery responses while other appealing defendants failed to show a substantial right by simply prefacing their discovery responses with a general objection on those grounds not particularized to any specific request).

Plaintiffs argue that Defendants have failed to demonstrate that enforcement of the Protocol Order will affect a substantial right because Defendants have yet to identify specific privileged documents that would be captured and produced under the protocol. A document-by-document assertion of privilege, however, is not strictly required. Although "objections made and established on a document-by-document basis are *sufficient* to assert a privilege[,]" *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853 (citation and quotation marks omitted) (emphasis added), they are not the exclusive means of demonstrating the loss of a substantial right and the appealable nature of a discovery order. *K2 Asia Ventures*, 215 N.C. App. at 446, 717 S.E.2d at 4; *see also Friday Investments*, *LLC v. Bally Total Fitness of the Mid-Atlantic*, *Inc.*, 247 N.C. App. 641, 788 S.E.2d 170 (2016) (holding that a discovery order affected a substantial right and was immediately appealable under the circumstances even though the appellants failed to assert particularized claims of attorney-client privilege in their initial discovery responses), *aff'd as modified on separate grounds*, 370 N.C. 235, 805 S.E.2d 664 (2017). We base our determination on whether Defendants have legitimately asserted the loss of a privilege or immunity absent immediate appeal. *See*, *e.g.*, *Evans v. United States Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (holding an interlocutory discovery order was immediately appealable after determining the appellants' assertion of privilege was neither frivolous nor insubstantial and that the privilege would be lost absent immediate review).

Defendants made their specific objections on privilege and immunity grounds early and often. In their responses to Plaintiffs' requests for production of documents, Defendants particularized these objections to specific requests. When Plaintiffs first identified deficiencies in Defendants' document production, Defendants responded that they would be "re-running all . . . discovery key word searches" but would require "some time to review [any newly discovered documents] for potential privilege issues before some documents will be produced." Although we do not have a transcript of the hearing before Judge Sasser, Defendants communicated to Plaintiffs during the proposed order drafting process that any forensic examination protocol and protective order would need to protect privileged information, as they did not "think [Judge Sasser] ordered disclosure of attorney/client or work product material."

After Plaintiffs filed their combined motion to compel and motion for sanctions, Defendants filed a response objecting to the protocol because it "would require wholesale production of **all** of FTCC's attorney/client privileged information to the Plaintiffs' forensic agent." (emphasis in original). Defendants likewise lodged that objection in a letter to Plaintiffs requesting certain changes to the protocol as proposed. Defendants also raised their privilege concerns directly with the trial court at the hearing on Plaintiffs' combined motion to compel and for sanctions. Plaintiffs have never disputed that the forensic search and creation of the Search Images would capture potentially privileged information; to the contrary, they have simply argued that the protocol protects those privileged documents from production. Defendants' particularized, continuous, and timely objections do not appear frivolous from this record, especially when Plaintiffs do not deny the possibility that the forensic search will capture privileged information.

It also appears that Defendants' privileges will be lost absent immediate appeal. The Protocol Order requires the indiscriminate production of Defendants' entire computer system via the Search Images to Plaintiffs' expert, a process which, as explained *infra*, immediately violates Defendants' privilege interests. As a result, Defendants' meritorious and substantial objections will be lost absent immediate review, and the Protocol Order constitutes an interlocutory order affecting a substantial right subject to immediate appeal. *See Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581; *K2 Asia Ventures*, 215 N.C. App. at 446, 717 S.E.2d at 4; *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853.

B. Standard of Review

Discovery orders compelling production and applying the attorney-client privilege and work-product immunity are subject to an abuse of discretion analysis. *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853-54. "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." *Id.* at 381, 789 S.E.2d at 854 (citation and internal quotation marks omitted). "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted).

C. eDiscovery Orders and the Protection of Privilege

We write on a relatively blank slate regarding privileges in the forensic imaging and eDiscovery context. As our Business Court has observed, "North Carolina case law addressing problems inherent in electronic discovery, including waiver arising from inadvertent disclosure of privileged information, is not yet well developed." *Blythe v. Bell*, 2012 NCBC 42, 2012 WL 3061862, at *8 (N.C. Super. Ct. July 26, 2012).

North Carolina authority regarding eDiscovery is bare bones, generally providing that "discovery of [ESI] stands on equal footing with discovery of paper documents." N.C. R. Civ. P. 34, Comment to the 2011 Amendment (2017); *see also* N.C. R. Civ. P. 26(b) (defining ESI and including it within the scope of discovery subject to the same privileges as paper documents).

No statute, procedural rule, or decision by this Court or the North Carolina Supreme Court has delineated the parameters of eDiscovery protocols with respect to the protection of documents and information privileged or otherwise immune from discovery.

Just as a producing party is responsible for collecting, reviewing, and producing responsive paper documents, it is generally understood that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." Principle 6, Sedona Principles at 118. It behooves a responsive party's attorneys, then, to engage with opposing counsel and jointly develop a mutually agreeable means of conducting eDiscovery when it is clear that litigation will involve ESI. *See, e.g.*, Comment 3.b., Sedona Principles at 76-78 (noting that cooperation and agreement on eDiscovery may reduce costs and

expedite discovery for both parties while avoiding "expensive motion practice, which may lead to undesirable court orders"); N.C. R. Civ. P. 26(f) (providing a mechanism for discovery conferences to address production of ESI); N.C. R. Bus. Ct. 10.2-.3 (requiring a discovery conference that includes discussion of eDiscovery and detailing issues that should be addressed via an ESI production protocol).

Absent controlling authority directly on point, we consider decisions by courts in other jurisdictions as well as the universally persuasive authority, common sense.

Forensic imaging of a recalcitrant responding party's computers is one method of resolving a dispute over ESI. *See*, *e.g.*, *Feeassco*, *LLC v. Steel Network*, *Inc.*, ___ N.C. App. ___, ___, 826 S.E.2d 202, 209 (2019) (holding a trial court did not abuse its discretion in ordering an onsite audit of the producing party's electronic sales and accounting systems for potentially responsive ESI by an independent auditor when the producing party conceded it had failed to comply with discovery requests). However, as has been recognized by various state and federal courts, "[a] Court must be mindful of the potential intrusiveness of ordering forensic imaging." *Wynmoor Community Council*, *Inc. v. QBE Ins. Co.*, 280 F.R.D. 681, 687 (S.D. Fla. 2012) (citing *Bennett v. Martin*, 186 Ohio App.3d 412, 425, 928 N.E.2d 763 (10th District 2009)); *see also In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating the district court's order to provide the requesting party unlimited, direct access to the responding party's databases without any protocol for the search, including no search terms, and finding that direct access is not permissible without a factual finding of non-compliance with discovery rules); *Exec. Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 569 (8th Cir. 2008) (holding that the district court did not abuse its discretion in declining to order a forensic analysis of a computer because the responding party had provided all relevant documents in hard copy and forensic discovery could disclose privileged documents).[9]

Forensic examinations of ESI may be warranted when there exists some factual basis to conclude that the responding party has not met its duties in the production of discoverable information. *Feeassco*, ___ N.C. App. at ___, 826 S.E.2d at 209; *see also* N.C. R. Civ. P. 34, Comment to the 2011 Amendment ("If a party that receives produced information

9. The Sedona Principles likewise caution that "[i]nspection of an opposing party's computer system under Rule 34 [of the Federal Rules of Civil Procedure] and state equivalents is the exception and not the rule for discovery of ESI." Comment 6.d., Sedona Principles at 128.

claims that it needs . . . access to the full database or system that generated the information, the question of . . . direct access will turn on whether the requesting party can show that there is some specific reason, beyond general suspicion, to doubt the information and that the burden of providing direct access is reasonable in light of the importance of the information and the circumstances of the case."); *Wymmoor Community Council*, 280 F.R.D at 687 (allowing forensic imaging to recover potentially responsive deleted documents when the producing party was "either unwilling or unable to conduct a search of their computer systems for documents responsive to . . . discovery requests").

Even when a forensic examination is proper and necessary, any protocol ordered must take into account privileges from production that have not been waived or otherwise lost. Broadly speaking, courts ordering forensic examinations should be mindful of:

> a) revealing trade secrets;
>
> b) revealing other highly confidential or private information, such as personnel evaluations and payroll information, properly private to individual employees;
>
> c) revealing confidential attorney-client or work-product communications;
>
> d) unreasonably disrupting the ongoing business;
>
> e) endangering the stability of operating systems, software applications, and electronic files if certain procedures or software are used inappropriately; and
>
> f) placing a responding party's computing systems at risk of a data security breach.

Comment 6.d., Sedona Principles at 128-29.[10] As the Sixth Circuit has observed, "even if acceptable as a means to preserve electronic evidence, compelled forensic imaging is not appropriate in all cases, and courts must consider the significant interests implicated by forensic imaging before ordering such procedures." *John B.*, 531 F.3d at 460 (citation omitted).

To resolve these concerns, it is recommended that a trial court's chosen forensic examination protocol: "(1) be documented in an agreed-upon (and/or court-ordered) protocol; (2) recognize the rights

10. These interests are certainly present in this case, as FTCC maintains significant amounts of personal data concerning its students that are subject to FERPA requirements.

of non-parties, such as employees, patients, and other entities; and (3) be narrowly restricted to protect confidential and personally identifiable information and system integrity as well as to avoid giving . . . access to information unrelated to the litigation." Comment 6.d., Sedona Principles at 129. In every decision cited favorably by Plaintiffs for ordering a forensic examination or other eDiscovery protocol, the trial court also took pains to address at least some of the above concerns. *See Bank of Mongolia v. M & P Global Fin. Servs., Inc.*, 258 F.R.D. 514, 520-21 (S.D. Fla. 2009) (adopting a protocol that contained provisions designed to protect the producing parties' privileges, including an express holding that production to a court-appointed third-party expert would not constitute waiver and allowing the producing parties to conduct a prior privilege review of all documents to be produced); *Wynmoor Community Council*, 280 F.R.D. at 687-88 (adopting the *Bank of Mongolia* protocol while acknowledging the "potential intrusiveness of . . . compelling a forensic examination"); *Adair v. EQT Prod. Co.*, Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982, *4 (W.D. Va. June 29, 2012) (ordering an eDiscovery protocol that did not include an opportunity for prior privilege review of produced documents solely because other protective and clawback orders entered in the case "protect any inadvertently produced privileged documents from waiver and any nonrelevant documents from use or disclosure outside this litigation").[11]

A court-ordered eDiscovery protocol, no matter how protective of a party's confidences, may result in the production of privileged information. *See, e.g.*, *Adair*, 2012 WL 2526982 at *4 ("To be sure, there is the potential for privileged or nonrelevant documents to slip through the racks and be turned over to the other side."). Federal district courts may turn to Rule 502(d) of the Federal Rules of Evidence to resolve the issue, which expressly permits "[a] federal court [to] order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding." Fed. R. Evid. 502(d) (2019). North Carolina's Rules of Evidence and Rules of Civil Procedure

11. *Adair* did not allow the requesting party direct access to the responding party's systems through a forensic examination, and instead established a protocol by which the responding party would conduct a review of its own ESI. If the district court in *Adair* had ordered a forensic review by the requesting party without offering the producing party an opportunity to review any eventual production for privilege, it would have been outside the norm, as "courts that have allowed [forensic access] generally have required that . . . no information obtained through the inspection be produced until the responding party has had a fair opportunity to review that information." Comment 6.d., Sedona Principles at 129.

contain no direct analog, however; thus, litigants in our courts may wish to agree to protective orders to address additional privilege concerns when a forensic examination has been ordered. *See* N.C. R. P. C. 1.6(c) (2017) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."). A court ordering a forensic examination should encourage parties to enter into a protective order before requiring a forensic examination "to guard against any release of proprietary, confidential, or personally identifiable ESI accessible to the adversary or its expert [in the course of the forensic examination]." Comment 10.e., Sedona Principles at 152.

D. North Carolina Law on Privileges from Production

Although the advent of eDiscovery has undeniably altered how discovery is conducted by parties and overseen by courts, it has not thus far influenced North Carolina law regarding privileges.[12] Fundamentally, the attorney-client privilege and work-product immunity doctrine attach to ESI in the same manner and to the same extent they apply to paper documents or verbal communications. *See*, *e.g.*, N.C. R. Civ. P. 26(b)(5) (providing a mechanism for asserting privilege or work-product immunity as to "information otherwise discoverable[,]" which includes ESI under the Rule).

Determining whether the common law attorney-client privilege attaches to discoverable information—including ESI—depends on the following five criteria:

> (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.

In re Miller, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003). "[T]he [attorney-client] privilege belongs solely to the client." *Id.* at 338-39, 584 S.E.2d at

12. We acknowledge that this may change if and when cases concerning the involuntary disclosure of privileged ESI make their way to our appellate courts. *See*, *e.g.*, *Blythe*, 2012 WL 3061862, at *8-14 (discussing in detail inadvertent waiver of privilege in the eDiscovery context). Because no inadvertent disclosure has yet occurred in this case, this particular question of inadvertent waiver under North Carolina common law is not squarely before this Court, and we do not resolve it here.

788. Critically, it is the client's alone to waive, for "*[i]t is not the privilege of the court or any third party.*" *Id.* at 338, 584 S.E.2d at 788 (citations and quotation marks omitted) (emphasis in original). Compulsory, involuntary disclosure may be ordered only "[w]hen certain extraordinary circumstances are present" and some applicable exception, such as the crime-fraud exception, apply. *Id.* at 335, 584 S.E.2d at 786.

Work-product immunity, which "protects materials prepared in anticipation of litigation from discovery," *Sessions*, 248 N.C. App. at 383, 789 S.E.2d at 855, is also subject to a particularized test that asks:

> Whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Cook v. Wake Cnty. Hosp. Sys., Inc., 125 N.C. App. 618, 624, 482 S.E.2d 546, 551 (1997) (emphasis omitted). This immunity, too, is waivable. *See, e.g.*, *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977) (holding work-product immunity is waived when a party seeks to introduce its counsel's work-product into evidence). Information covered by the doctrine may nonetheless be discovered if the requesting party demonstrates a "substantial need of the materials" and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.C. R. Civ. P. 26(b)(3).

Both the work-product immunity and attorney-client privilege are subject to statutory modification. *See, e.g.*, N.C. Gen. Stat. §§ 132-1.1 and 132-1.9 (2017) (altering the application and availability of attorney-client privilege and work-product immunity in the public records context). But neither statute nor caselaw has provided any parameters for eDiscovery protocols in these respects.

E. The Protocol Order

[2] This appeal does not, at its core, turn on the appropriateness of the Forensic Examination Order. Defendants have not appealed that order, nor do they present any argument that a forensic examination was inappropriate. As is the case with many discovery disputes, we have little doubt that information pertinent to Defendants' conduct in discovery did not make its way into the printed record before us; Judge Sasser, as a

judge of the trial division tasked with overseeing the discovery, was well positioned to review the conduct of the parties before him—whether dilatory or otherwise—and determine in his discretion that the purposes of discovery were best served by entry of the Forensic Examination Order. Similarly, Judge Tally was in the best position to determine that, although sanctions were not appropriate, a court ordered protocol that weighed Plaintiffs' discovery needs more heavily than Defendants' was warranted. Although we ultimately vacate the Protocol Order for the reasons stated *infra*, this opinion should not be read on remand as questioning the necessity of either the Forensic Examination Order or entry of a protocol order favorable to Plaintiffs' interests. *See*, *e.g.*, *Capital Resources*, *LLC v. Chelda*, *Inc.*, 223 N.C. App. 227, 234, 735 S.E.2d 203, 209 (2012) ("It is well-established that, because the primary duty of a trial judge is to control the course of the trial so as to prevent injustice to any party, the judge has broad discretion to control discovery." (citations and quotation marks omitted)).

We identify error in two interrelated provisions of the Protocol Order. First, it allows Plaintiffs' expert, rather than an independent third party, the authority to directly access and image the entirety of Defendants' computer systems absent regard for Defendants' privilege. Second, it orders the delivery of responsive documents to Plaintiffs without allowing Defendants an opportunity to review them for privilege. In both instances, the protocol compels an involuntary waiver, *i.e.*, a violation of Defendants' privileges. Because North Carolina law is clear, albeit only in the analog discovery context until now, that a court cannot compel a party to waive or violate its own attorney-client privilege absent some prior acts constituting waiver or an applicable exception, *In re Miller*, 357 N.C. at 333-35, 584 S.E.2d at 786-87, those two provisions of the Protocol Order were entered under a misapprehension of the law constituting an abuse of discretion. Because production of information subject to the work-product immunity can only be compelled upon a showing of substantial need and undue hardship, N.C. R. Civ. P. 26(b)(3), requiring the production of any work-product documents to Mr. Walton and Plaintiffs without any such showing is similarly improper.

The Protocol Order, as recounted *supra*, describes Mr. Walton as "Plaintiffs' expert[.]" Plaintiffs have acknowledged that Mr. Walton is their agent and not Defendants', and conceded at oral argument that appointment of a special master would be "more neutral" than the present arrangement. Further, although Plaintiffs were unsure whether an attorney-client relationship exists between themselves and Mr. Walton, retaining an attorney as an eDiscovery expert provides the opportunity

for creation of an attorney-client relationship. *See*, *e.g.*, Jay E. Grenig et al., *Electronic Discovery & Records & Information Management Guide: Rules*, *Checklists*, *and Forms* § 8:3 (2018-2019 ed.) ("Perhaps one of the key and often overlooked benefits of e-discovery counsel is the protection of the attorney-client and work-product privileges, as well as the e-discovery counsel's ability to offer legal advice. Vendors who sell e-discovery products often offer consulting services with the products, but are prohibited from offering legal advice. While the advice of consultants may not be protected, legal advice from e-discovery counsel will have the protection of privilege.").[13]

The Protocol Order tasks Mr. Walton with creating the Search Images, which contain *all* of FTCC's data, by mirror imaging FTCC's systems. The order provides for him to take those Search Images to his own office and conduct a forensic examination of those images pursuant to the protocol over the course of three weeks. A comparable protocol for a paper production would allow Plaintiffs' expert to photocopy all of Defendants' documents (including those in their in-house counsel's file cabinets), take those copies off-site, and then review those files for responsive documents, both privileged and non-privileged, without Defendants having had an opportunity to conduct their own review of those copies first. Such a process would violate Defendants' attorney-client privilege as a disclosure to the opposing party. *See*, *e.g.*, *Industrotech Constructors*, *Inc. v. Duke University*, 67 N.C. App. 741, 743, 314 S.E.2d 272, 274 (1984) ("It is well established in this state that even absolutely privileged matter may be inquired into where the privilege has been waived by disclosure"). The digital equivalent does so as well.[14]

Plaintiffs contend that the Protocol Order's provision for a privilege screen prior to any production from Mr. Walton to Plaintiffs adequately protects Defendants' privilege. We disagree.

The Protocol Order requires Mr. Walton to use search terms to scan the Search Images for any potentially responsive files—the Keyword Search Hits—and then tasks him with searching the Keyword Search

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13. eDiscovery Attorneys are subject to fiduciary and ethical professional standards provided by our common law and the North Carolina Rules of Professional Conduct, including those that require the eDiscovery attorney to place his clients' interests over his own and those of the opposing party.

14. Nothing in this opinion should be read to call into question the competency or integrity of Mr. Walton. Our holding would not change no matter who the Plaintiffs had selected to serve as their expert, as the error present in the Protocol Order is a legal one, independent of the individuals tasked with carrying the order out.

Hits with different search terms to identify and segregate potentially privileged files—the Privilege Search Hits. The Protocol Order allows Defendants to review the Privilege Search Hits for privileged documents to withhold under a privilege log, while Mr. Walton would turn over any Keyword Search Hits not identified as Privilege Search Hits directly to Plaintiffs. Plaintiffs argue that because Mr. Walton is prohibited from sharing the Privilege Search Hits with Plaintiffs and Defendants will have an opportunity to review the Privilege Search Hits prior to production, Defendants' privilege will not be violated.

We are unconvinced. While the use of search terms assists in preventing disclosure of privileged materials, it is far from a panacea. "[A]ll keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256-57 (D. Md. May 29, 2008). Selecting the appropriate keywords and search parameters requires special care, as "there are well-known limitations and risks associated with [keyword searches], and proper selection and implementation obviously involves technical, if not scientific knowledge." *Id.* at 260 (citations omitted). To determine whether or not selected search terms are adequate to screen for privilege, parties should "test and re-test samples to verify that the search terms used . . . ha[ve] a reasonably acceptable degree of probability of identifying privileged or protected information[,]" Comment 10.g., Sedona Principles at 157, and should "perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive." *Victor Stanley, Inc.*, 250 F.R.D. at 257.

With one exception, the decisions cited by Plaintiffs in support of the Protocol Order allowed for the producing party to engage in this kind of quality control before any responsive documents identified in the forensic examinations were produced. *See Bank of Mongolia*, 258 F.R.D. at 521 (allowing the producing party to review the responsive documents identified by keyword search for privilege prior to production to the requesting party); *Wynmoor Community Council*, 280 F.R.D at 688 (providing for the same).

The singular case identified by Plaintiffs in which no prior review was allowed, *Adair*, is immediately distinguishable because it did not involve a compulsory forensic examination by the requesting party or its agent. *Adair* instead involved an order compelling the responding

party to produce certain documents through a protocol imposed on it by the trial court. *Adair*, 2012 WL 2526982 at *2-3. Also, the parties in *Adair* had entered into both a clawback order and a protective order to avoid waiver. The clawback order provided that "[t]he producing party is specifically authorized to produce Protected Documents without a prior privilege review, and the producing party shall not be deemed to have waived any privilege or production in not undertaking such a review." *Id.* at *1. The protective order prohibited use of the documents in any other action and designated all documents produced under the court's order as confidential. *Id.* at *4, n.6. In ordering a production without prior privilege review, the district court wrote that "this approach would not be appropriate without the existence of the Protective Order and Clawback Order." *Id.* at *4.

Although the parties in this case did enter into the Protective Order, unlike the protective order in *Adair*, it does not apply to all documents produced pursuant to the Protocol Order. Instead, it contemplates the parties having an opportunity to designate a document as "confidential" at the time of production—an opportunity that is denied to Defendants under the automatic production of the Keyword Search Hits by Mr. Walton to Plaintiffs pursuant to the Protocol Order. And, although the Protective Order allows for a clawback of privileged documents, it does not contain the language, relied on by the court in *Adair*, providing that production of documents without prior privilege review *would not constitute a waiver*. Instead, the clawback here applies only to privileged documents produced "through inadvertence, error or oversight," and it is not immediately clear whether production of any privileged information not captured in the Privilege Search Hits and delivered to Plaintiffs as part of the Keyword Search Hits would fall within that language.[15] Assuming *arguendo* that such a production would be inadvertent and

15. The parties disagree on this question, though neither cites any caselaw as to whether a court compelled disclosure constitutes an inadvertent disclosure, either for purposes of the Protective Order or similar clawback language found in N.C. R. Civ. P. 26(b)(5)b. Various federal courts had, prior to enactment of Rule 502 of the Federal Rules of Evidence, held that a court compelled disclosure is an inadvertent production subject to clawback by interpreting and applying Rule 501 of the Federal Rules of Evidence and a proposed rule of evidence that Congress ultimately declined to adopt. *See, e.g.*, *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 246 (D. Md. 2005) (holding that the federal common law rule of privilege applicable through Rule 501 permitted consideration of the proposed, but never enacted, federal rule concerning court compelled production and concluding such a production would not waive privilege). With the advent of Rule 502, federal courts need not grapple directly with the question any longer, and can simply state in their orders that any disclosure pursuant thereto does not constitute a waiver. Fed. R. Evid. 502(d). North Carolina, however, expressly declined to adopt either Rule 501 as

subject to the clawback provision's language, the Protocol Order nevertheless compels Defendants to violate their privilege as to any documents given to Mr. Walton and Plaintiffs that are not contained within the Privilege Search Hits, leaving Defendants with, at best, an imperfect clawback remedy to rectify the compulsory violation. *See, e.g.*, *Blythe*, 2012 WL 3061862, at *10 ("Protections to guard against privilege cannot be deferred by first addressing the risk of waiver only after a production has been made."); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 52 (M.D. N.C. 1987) ("[W]hen disclosure is complete, a court order cannot restore confidentiality and, at best, can only attempt to restrain further erosion."). Under the circumstances presented here, the Protective Order is inadequate to protect Defendants' privilege, and it does not avoid the compulsory violation of that privilege under the Protocol Order. *Cf. In re Dow Corning Co.*, 261 F.3d 280, 284 (2d Cir. 2001) ("[C]ompelled disclosure of privileged attorney-client communications, absent waiver or an applicable exception, is contrary to well established precedent. . . . [W]e have found no authority . . . that holds that imposition of a protective order . . . permits a court to order disclosure of privileged attorney-client communications. The absence of authority no doubt stems from the common sense observation that such a protective order is an inadequate surrogate for the privilege.").

In short, the Protocol Order provides Plaintiffs' agent direct access to privileged information, which disclosure immediately violates Defendants' privileges. It furthers that violation by directing that agent, having attempted to screen some privileged documents out through the use of search terms, to produce potentially responsive documents without providing Defendants an opportunity to examine them for privilege. If, following that continued violation, Plaintiffs—their agent notwithstanding—receive privileged documents, Defendants must attempt to clawback that information, reducing their privilege to a post-disclosure attempt at unringing the eDiscovery bell. Such compelled disclosure of privileged information is contrary to our law concerning both attorney-client privilege and work-product immunity. *Cf. In re Miller*, 357 N.C. at 333-35, 584 S.E.2d at 786-87; N.C. R. Civ. P. 26(b)(3). As a result, we hold the trial court misapprehended the law concerning attorney-client

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adopted by Congress or the proposed rules Congress rejected, *see* Official Commentary, N.C. R. Evid. 501 (2017), and our legislature has not yet enacted an equivalent to Federal Rule 502(d). Thus, federal caselaw is of questionable assistance. In any event, the question has not been squarely presented here, as no inadvertent disclosure has yet occurred and it is unclear whether the issue will arise between the parties. We therefore decline to reach that question on the merits.

privilege and the work-product immunity (however understandably given its undeveloped state within the eDiscovery arena), vacate the Protocol Order, and remand for further proceedings.

F. Disposition on Remand

Because we recognize the complexity of privilege in the eDiscovery context, and given the extensive investment of time and resources by the parties and the trial court to date, we identify several nonexclusive ways in which the trial court could resolve the discovery dispute in light of this decision.

First, the trial court may wish to employ a special master or court-appointed independent expert—such as Mr. Walton, provided his agency relationship to Plaintiffs is severed—to perform the forensic examination as an officer of the court[16] consistent with the cases cited by Plaintiffs on appeal. *Bank of Mongolia*, 258 F.R.D. at 521; *Wynmoor Community Council*, 280 F.R.D at 688. Such an appointment appears to be the commonly accepted approach in other jurisdictions and is consistent with the recommendations of the leading treatises on eDiscovery. *See*, *e.g.*, Comment 10.e., Sedona Principles at 152-53 (noting that forensic examination orders "usually should provide that either a special master or a neutral forensic examiner undertake the inspection"). And, by restricting the expert's relationship to that of an independent agent of the trial court, Defendants can safely disclose any and all privileged information to him without endangering confidentiality. *Cf. In re Miller*, 357 N.C. at 337, 584 S.E.2d at 787 (noting that privileged information disclosed to the trial court for *in camera* review "retains its confidential nature").

Second, the trial court may wish to provide Defendants with some opportunity, however expedited given the position of the case, to review the Keyword Search Hits prior to production to Plaintiffs. Such an approach is, again, consistent with both the cases dealing with forensic examinations cited by Plaintiffs on appeal and pertinent commentaries on eDiscovery. *Bank of Mongolia*, 258 F.R.D. at 521; *Wynmoor Community Council*, 280 F.R.D at 688. *See*, *e.g.*, Comment 6.d., Sedona Principles at 129 ("[C]ourts that have allowed access [for forensic examinations] generally have required . . . that no information obtained through the inspection be produced until the responding

16. Mr. Walton, as a licensed attorney, is already an officer of the court. That status, however, does not inherently deprive him of his agency relationship with Plaintiffs or resolve the privilege issue. Plaintiffs' attorneys, too, are officers of the court, but disclosure of Defendants' privileged information to them may nonetheless serve as a waiver of attorney-client privilege and work-product immunity.

party has had a fair opportunity to review that information."). In addition, the trial court may wish to order that any documents produced under the protocol adopted are confidential within the meaning of the Protective Order and that any disclosure of privileged information under the protocol is subject to clawback without waiver of any privilege or work-product immunity.[17]

Provisions such as those outlined here have been recognized by courts in other jurisdictions as sufficient to prevent any compulsory violation of Defendants' privilege. *See, e.g.*, *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (holding that because the forensic examination would be performed by an independent third party and the producing party would have the opportunity to review for privilege prior to any production, their "privacy and attorney-client communications will be sufficiently protected"); *Genworth Financial Wealth Mgmt., Inc. v. McMullan*, 267 F.R.D. 443, 449 (D. Conn. 2010) (ordering a forensic examination by a neutral, court-appointed expert and allowing the producing party an opportunity to review for privilege prior to production). We cite these cases as examples rather than offering them as the as the exclusive means of resolving the parties' dispute. The trial court is in the best position to fashion any other or additional provisions not inconsistent with this opinion. All that is required on remand is that the protocol adopted not deprive the Defendants of an opportunity to review responsive documents and assert any applicable privilege, whether that be through the use of the inexhaustive suggestions enumerated above or some other scheme of the trial court's own

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17. It may be that this modification alone could, in certain circumstances, be sufficient to protect the producing party's privilege. We do not resolve the question here, but note that North Carolina's legislature has not seen fit to adopt analogs to Rules 501 and 502 of the Federal Rules of Evidence that have assisted in addressing the court compelled disclosure of privileged information in the federal courts. Furthermore, we observe that such agreements appear to be generally disfavored as the exclusive means of protecting privilege in most contexts. *See* Comment 10.e., Sedona Principles at 153-56 (reviewing the drawbacks of clawback or "quick peek" agreements and concluding "[i]t is inadvisable for a fully-informed party to enter a 'quick peek' agreement unless either the risks of disclosure of privileged and work-product protected information, as well as commercial and personally sensitive information, are non-existent or minimal, or the discovery deadline cannot otherwise be met . . . and alternative methods to protect against disclosure are not available"). Such agreements, then, are best considered as an additional protective measure rather than the primary prophylactic. *Compare* N.C. R. Bus. Ct. 10.3(c)(3) (requiring counsel to discuss as part of an ESI protocol methods for designating documents as confidential) *and* N.C. R. Bus. Ct. 10.5(b) (encouraging parties to agree on implementation of privilege logs to protect privileged information), *with* N.C. R. Bus. Ct. 10.6 ("The Court encourages the parties to agree on an order that provides for the non-waiver of the attorney-client privilege or work-product protection in the event that privileged or work-product material is inadvertently produced.").

devise.[18] *Cf. Playboy Enterprises*, 60 F. Supp. 2d at 1053-54 (noting that discovery of ESI through a forensic examination is permissible but that "[t]he only restriction in this discovery is that the producing party be protected against undue burden and expense and/or invasion of privileged matter").

III. CONCLUSION

For the foregoing reasons, we vacate the Protocol Order for an abuse of discretion and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges STROUD and ZACHARY concur.

IN THE MATTER OF C.M.B., JUVENILE

No. COA18-1002

Filed 6 August 2019

1. Child Abuse, Dependency, and Neglect—neglected juvenile—Chapter 7B juvenile proceedings—Chapter 50 custody proceedings—distinction—requirement of transfer or termination of jurisdiction

Issues that arose in a juvenile neglect matter—initiated by a county department of social services (DSS) but that later included a filing by the child's guardian in Tennessee to modify the mother's visitation—were controlled by Chapter 7B (juvenile proceedings), not Chapter 50 (custody proceedings). Although DSS had not been directly involved in the case for many years since it was relieved of reunification efforts and the trial court's order treated the case as a Chapter 50 proceeding, the action was never transferred as a Chapter 50 private custody matter pursuant to

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18. Of course, the trial court may also, in its discretion, wish to address other aspects of the protocol not discussed herein, such as the shifting of costs, the manner in which search terms are selected, additional protections for information covered by FERPA, the timeline of production, or the limitation of the search to certain computers, servers, or hard drives. We stress, however, that the trial court need not reinvent the wheel, and the only issue that must be addressed on remand is the avoidance of compulsory waiver and the violation of Defendants' privilege as described herein.

N.C.G.S. § 7B-911, and the trial court never terminated its jurisdiction under section 7B-201.

2. Child Abuse, Dependency, and Neglect—neglect—Uniform Child Custody Jurisdiction and Enforcement Act—transfer to another state—lack of evidence

In a case involving a neglected child, the Court of Appeals reversed the trial court's order transferring the case to Tennessee and remanded for a new hearing to determine whether jurisdiction should be terminated pursuant to N.C.G.S. § 7B-201. Although the trial court found North Carolina to be an "inconvenient forum" pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, its findings of fact and conclusions of law were unsupported by any evidence. The trial court did not hold a full hearing, taking only some arguments (including from the child's mother before she was appointed counsel) but no sworn testimony, and considering only unverified documents.

Appeal by respondent from order entered 18 June 2018 by Judge William F. Southern, III, in District Court, Surry County. Heard in the Court of Appeals 13 March 2019.

J. Clark Fischer, for appellee William Brickel (Custodian).

Assistant Appellant Defender Annick Lenoir-Peek for respondent-mother.

STROUD, Judge.

Respondent-mother appeals an order staying proceedings and transferring jurisdiction of this juvenile proceeding under Chapter 7B to Tennessee. Because the trial court failed to hold an evidentiary hearing before entering the order on appeal, we reverse and remand for a new hearing and entry of an order consistent with this opinion.

I. Background

On 27 July 2009, the Surry County Department of Social Services ("DSS") filed a petition alleging Jane[1] was a neglected juvenile, and on 18 September 2009 the trial court adjudicated her as neglected. In a review hearing order, on 17 December 2009, the trial court noted Jane

1. A pseudonym is used to protect the identity of the minor involved.

was "in the care of a maternal great aunt [, Ms. Brickel], the placement has gone well[,]" and Mother was now residing in Virginia. Jane continued to do well with her aunt, as noted in the 22 April 2010 permanency planning order. On 8 July 2010, the trial court entered another permanency planning order which found Mother was not present at the hearing and it was not known where she was "residing."

About six months later, on 19 January 2011, the trial court found that Jane had been residing with the Brickels since September of 2009, placement had "gone well and the BRICKELS have expressed a willingness and desire to continue to provide care and placement for the child." Mother had not been in contact with DSS, and DSS was relieved of reunification efforts. The permanent plan for Jane was "custody and guardianship with a relative[.]" The trial court ordered the Brickels receive "legal and physical care, custody, and control of" Jane, appointed the Brickels as joint guardians of Jane, "released and discharged" Mother's attorney, and waived future review hearings.

On 6 August 2014, Mother and the Brickels entered into a Consent Order. Neither DSS nor a guardian *ad litem* participated in entry of the Consent Order. Mother and the Brickels agreed Jane would remain in the custody of the Brickels, and Mother would have visitation. The order noted that "[t]he current action is a review hearing" initiated by Mother's "Motion for Review" filed on 11 February 2014. The consent order noted that in late 2013 or early 2014, the Brickels had moved to Tennessee. The order included these findings of fact:

> 13. The parties also stipulate that this consent order resolves all issues that are currently pending between the parties and, upon entry of this consent order, that there are no other outstanding issues concerning the child's placement and welfare in this action.
>
> 14. DSS has been released from reunification efforts in this action. (See Permanency Planning Order, Paragraph No. 8, dated January 19, 2011).
>
> 15. DSS has also been relieved of any further responsibility in this matter. (See Permanency Planning Order, Paragraph No. 18, dated January 19, 201[1]).
>
> 16. The guardian ad litem has been discharged in this action. (See Permanency Planning Order, Paragraph No. 18, dated January 19, 2011).

17. Because DSS and the GAL have been released/discharged, these agency's attorneys' consent to this consent order is unnecessary.

The order decreed that "the child shall continue to remain in the custody of" the Brickels. It then set forth a detailed visitation schedule for Mother on weekends, holidays, and during the summer school recess; it also made provisions for the transfer of physical custody "at a location that is exactly one-half (1/2) of the distance between Harrimon, Tennessee and Dobson, North Carolina." In addition, the order decreed:

4. DSS is continued to be relieved of reunification and of any responsibility in this action.

5. The GAL is continued to be discharged in this action.

6. This consent order is a final order and it disposes of all outstanding issues in this action.

7. Attorney Marion Boone is hereby released and discharged and attorney Jody P. Mitchell is hereby released and discharged.

A few years later, in November of 2017, the Brickels filed a motion in Tennessee to register the North Carolina custody order under "T.C.A. 36-6-229" and in the same motion requested modification of the North Carolina order by suspending Mother's visitation. "T.C.A. 36-6-229" provides, "A child-custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state[.]" Tenn. Code Ann. § 36-6-229 (2017). T.C.A. § 36-6-229 allows for registration of child custody orders from another state and is part of Tennessee's Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). *See id.* Registration of the North Carolina custody order in Tennessee allowed for enforcement of the order in Tennessee, but not modification; registration of the order alone does not confer jurisdiction under the UCCJEA. *See* Tenn. Code Ann. § 36-6-230(b) (2017) ("A court of this state shall recognize and enforce, but may not modify, except in accordance with this part, a registered child-custody determination of a court of another state.") Yet the Brickels' motion also requested modification of the North Carolina order, based upon these allegations:

d. Upon information and belief, the home of . . . [Mother] is not suitable for visits with the minor child.

> e. That the minor child is schedule[d] to visit with . . . [Mother] at the beginning of Winter Break and Petitioner seeks that this visit be suspended pending a full hearing on this matter.

Mother then filed a *pro se* motion in Tennessee to dismiss the Brickels' motions. Mother also filed three pro se motions in North Carolina between December of 2017 and January of 2018: (1) a motion for review requesting an "emergency" revocation of the Brickels as guardians and that she be appointed as Jane's guardian; (2) a motion and order to show cause claiming the Brickels had violated the custody agreement, and (3) a motion requesting North Carolina to invoke jurisdiction as it was the "more appropriate forum[.]" (Original in all caps.)

The Tennessee court heard the Brickels' motions to register and modify the custody order on 13 December 2017. Mother was present and testified at the hearing in Tennessee. By order entered 12 January 2018, the Tennessee court entered an "ORDER OF TRANSFER TO COURT HAVING JURISDICTION UNDER TCA § 36-6-216 and 229" ("Order of Transfer").[2] The Tennessee "Order of Transfer" found that the minor child and Brickels had lived in Tennessee since 2014 and Mother resided in Virginia. Based upon the findings that neither the child not nor any parties had resided in North Carolina since 2014, the Tennessee court ordered "that this Court is the proper forum to have jurisdiction regarding the minor child, . . . and jurisdiction is hereby transferred." A handwritten notation at the bottom of the order states, "Court directs Ms. Hogg to forward a copy of this order to the Court in Surry County, N.C."

By order entered on 18 January 2018, the Tennessee court granted the Brickel's motion to modify visitation, modifying Mother's visitation to allow her only limited supervised visitation in Tennessee. The order notes it is based upon several statutes, including Tenn. Code Ann. § 36-6-216, "Initial custody determination; jurisdiction[;]" -218, "Child-custody determination in another state; modification[;]" and -219, which provides for "[t]emporary emergency jurisdiction" to enter an order if "necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." T.C.A. §§ 36-6-216, -218, -219. But from the findings of fact in the

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2. Tenn. Code Ann. § 36-6-216 addresses jurisdiction for an "[i]nitial custody determination" and Tenn. Code Ann. § 36-6-229 addresses registration of an out of state custody order; neither statute addresses modification jurisdiction under the UCCJEA. T.C.A. §§ 36-6-216; -229 (2017). There is no indication in the order or our record about whether the Tennessee court did or did not communicate with the North Carolina court prior to entry of the order.

order, it does not appear Tennessee was exercising emergency jurisdiction, as there are no findings of an emergency. Instead, the Tennessee court found only "[t]hat based upon the evidence and testimony presented, there has been a substantial change of circumstances sufficient to temporarily modify the terms of the prior Consent Order."

On 29 January 2018, the Brickels filed an unverified motion in North Carolina to "stay" Mother's pending motions or to transfer jurisdiction to Tennessee because North Carolina was an "inconvenient forum" under North Carolina General Statute § 50A-207. The Tennessee orders were attached as exhibits to this motion. The trial court in North Carolina began holding a hearing on the pending motions by the Brickels and Mother on 1 February 2018. The Brickels were represented by counsel, and Mother appeared *pro se*. The trial court heard arguments from the Brickels' counsel and from Mother. The trial court then inquired if Mother would like court-appointed counsel, and she requested court-appointed counsel. The trial court then announced that "[i]n reviewing [the Tennessee] order, I believe he has made his order very clear about transferring jurisdiction to himself, but I believe I need to discuss that with him before I make any further order in this Surry County matter." The trial court then set the next court date, for completion of the hearing, for 1 March 2018.

On 1 March 2018, Mother's newly-appointed counsel and the Brickels' counsel appeared, and the trial court noted that he had not yet been able to discuss the case with the judge in Tennessee and continued the case to 5 April 2018. On 2 March 2018, the trial court entered an order continuing the completion of the hearing to 5 April 2018 "for communication between Surry County and Tennessee to take place." (Original in all caps.) But the trial court never resumed the hearing which started on 1 February 2018. Instead, on 15 March 2018, a District Court Judicial Assistant for the Surry County District Court sent an email to the Brickels' counsel[3] stating that "Judge Southern has spoken with Judge Humphries in TN and agreed jurisdiction is in Tennessee. Judge Southern request[s] that you prepare an order and notify all parties there will be no need to appear on 4/5/18." On 18 June 2018, the North Carolina trial court entered an order allowing the Brickels' motion to "stay" and "transfer" jurisdiction based on North Carolina being an inconvenient forum. Mother appeals.

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3. The email was also copied to an individual Mother's brief identifies as the juvenile clerk. Neither Mother nor her counsel was included on the email.

II. Appellate Jurisdiction

Mother contends the trial court erred in determining North Carolina was an inconvenient forum under North Carolina General Statute 50A-207 and transferring the action to Tennessee. We first note that Mother argues that we have jurisdiction to consider this appeal because it is a final order, and we agree. As far as North Carolina is concerned, the order on appeal is final, since it does not leave the case open "for further action by the trial court in order to settle and determine the entire controversy[,]" *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950), but transfers the matter to Tennessee. We therefore have jurisdiction to consider Mother's appeal.

III. Distinction between Juvenile Proceedings under Chapter 7B and Custody Proceedings under Chapter 50

[1] Although the parties' arguments rely almost exclusively on the UCCJEA, the issues here are actually controlled by Chapter 7B. Before addressing the substantive issues, we stress that this case arises in a juvenile neglect proceeding initiated under Chapter 7B, but somewhere along the way, Mother, the Brickels, and the trial courts in North Carolina and Tennessee essentially began treating the case as if it were a Chapter 50 custody proceeding. Although DSS initiated this case in 2009 because of an investigation of neglect and there was an adjudication of neglect, DSS has not been directly involved in the case since 2011. DSS did not participate in this appeal nor did a guardian *ad litem* participate on behalf of Jane, so we do not have the benefit of briefs from DSS or guardian *ad litem*. The only "parties" appearing or participating before the trial and this Court are Mother and the Brickels. But this case was never transferred as a Chapter 50 private custody matter under North Carolina General Statute § 7B-911. *See* N.C. Gen. Stat. § 7B-911(a) (2017) ("Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7."). Although the UCCJEA is applicable to abuse, neglect and dependency proceedings under Chapter 7B actions, the trial court's jurisdiction over this case is based upon Chapter 7B, and the trial court has not terminated its jurisdiction.

The last order entered by the North Carolina juvenile court with the involvement of DSS and the GAL was a Permanency Planning Order entered under "NCGS 907(b)" on 19 January 2011. The 2011 order ordered that "legal and physical care, custody, and control of [the

minor child] is hereby granted to . . . [the Brickels] and, further, the same are hereby appointed as joint guardians of the child[.]" The trial court ordered that "the SURRY COUNTY DEPARTMENT OF SOCIAL SERVICESSURRY COUNTY DEPARTMENT OF SOCIAL SERVICES is relieved of further responsibility in this matter. The guardian ad litem is hereby discharged." Counsel for both Mother and Father were also released. The trial court also waived future review hearings in accordance with "N.C.G.S. 7B-906(b)[.]"[4] But the trial court did not terminate its jurisdiction. *See In re S.T.P.*, 202 N.C. App. 468, 473, 689 S.E.2d 223, 227 (2010) ("[W]e hold that the district court did not terminate its jurisdiction by its use of the words 'Case closed.' ") Nor did the 2011 order return Mother to her pre-petition status by returning Jane to her custody. Thus, the juvenile court's jurisdiction continues "until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B–201(a) (2017). Thereafter, the trial court entered its 2014 consent order between Mother and the Brickels and again did not terminate jurisdiction.[5] Under North Carolina General Statute § 7B-201, once the trial court had jurisdiction over Jane, it retains jurisdiction until she attains the age of 18 or the trial court terminates its jurisdiction. N.C. Gen. Stat. § 7B-201(a) (2017) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first."). Only North Carolina can terminate its own juvenile court jurisdiction; a court in Tennessee cannot. *See id.*

The North Carolina juvenile court has never terminated its jurisdiction in this matter and even the order on appeal does not clearly terminate jurisdiction under North Carolina General Statute § 7B-201. Instead, based solely upon the UCCJEA and not Chapter 7B, the order on appeal concluded both North Carolina and Tennessee had subject matter

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4. This version of the statute was repealed in 2013. *See* N.C. Gen. Stat. § 7B-907 (2017).

5. In fact, in its 2014 consent order the trial court noted DSS "*continued* to be relieved of reunification" and "[t]he GAL is *continued* to be discharged[,]" (emphasis added), because the trial court had already relieved DSS, the GAL, and counsel in its 2011 order. By exercising jurisdiction in 2014 -- after relieving DSS, the GAL, and counsel in 2011 -- the trial court demonstrated it retained jurisdiction. For a thorough analysis on when a juvenile court terminates its jurisdiction *see Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E.2d 235 (2011). The 2014 consent order, like its 2011 predecessor, also has no affirmative language terminating jurisdiction nor does either party contend it did -- Mother contends North Carolina has always been the appropriate jurisdiction and the Brickels filed a motion to transfer jurisdiction to Tennessee.

jurisdiction and both "stayed" and "transferred" the North Carolina action. The order includes these relevant conclusions of law:

> a. The Court has subject matter jurisdiction over this action. The Court takes judicial notice of the UCCJEA and determines that the State of Tennessee also has appropriate subject matter jurisdiction over this action.
>
> . . . .
>
> c. The Court concludes as a matter of law that the State of North Carolina is no longer a convenient forum for this matter.
>
> d. The Court concludes as a matter of law that it exercises its discretion and relinquishes jurisdiction over this matter to the State of Tennessee for any further proceedings herein.
>
> e. The Court further concludes as a matter of law that it is exercising its discretion to stay these proceedings, and/or to transfer jurisdiction of these proceedings to Tennessee, due to the pendency of the matters pending in Roane County Tennessee.

The order then decreed as follows:

> 1. This matter is stayed for any further proceedings in Surry County North Carolina.
>
> 2. This matter is hereby transferred to the Roane County court for any further proceedings and/or dispositions.
>
> 3. The Surry County Clerk of Superior Court shall forthwith prepare the Court file in this matter for transfer to the Roane County Tennessee Clerk of Circuit Court.

North Carolina General Statute § 50A-207 directs the trial court to "stay" proceedings if it "determines that it is an inconvenient forum and that a court of another state is a more appropriate forum" but this stay is conditioned upon the requirement "that a child-custody proceeding be promptly commenced in another designated state[.]" N.C. Gen. Stat. § 50A-207(c) (2017). A "stay" of proceedings is not a termination of the trial court's jurisdiction, but under a stay, a court refrains from acting temporarily and *explicitly* retains jurisdiction to lift the stay and resume the case if necessary. *See generally In re M.M.*, 230 N.C. App. 225, 229,

750 S.E.2d 50, 53 (2013) ("If a trial court considering a child custody matter determines that the current jurisdiction is an inconvenient forum and that another jurisdiction would be a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state. It is well established that the word shall is generally imperative or mandatory. The trial court here simply purported to transfer jurisdiction, effectively dismissing the case in North Carolina. It did not stay the present case and condition the stay on the commencement of a child custody proceeding in Michigan. The record before us does not indicate that there is or ever has been a custody proceeding of any sort regarding Margo in Michigan. Failure to condition an order transferring jurisdiction on the filing of a child custody proceeding in the new jurisdiction leaves the child and the proceedings in legal limbo, something that the Uniform Child–Custody Jurisdiction Act is intended to prevent. It also ignores the mandatory procedure contained in N.C. Gen. Stat. § 50A–207(c)." (citations and quotation marks omitted)). Of course, since the Tennessee custody proceeding had already been filed, a stay may not be needed.

Chapter 7B does not provide an option for "transfer" but instead provides for the trial court to either terminate the juvenile court jurisdiction and return the parents to their pre-petition status or to transfer the matter to a private custody case under Chapter 50:

> When the court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise. Termination of the court's jurisdiction in an abuse, neglect, or dependency proceeding, however, shall not affect any of the following:
>
> (1) A civil custody order entered pursuant to G.S. 7B-911.[6]
>
> (2) An order terminating parental rights.

6. North Carolina General Statute § 7B-911 addresses Chapter 50. *See* N.C. Gen. Stat. § 7B-911 (2017).

> (3) A pending action to terminate parental rights, unless the court orders otherwise.
>
> (4) Any proceeding in which the juvenile is alleged to be or has been adjudicated undisciplined or delinquent.
>
> (5) The court's jurisdiction in relation to any new abuse, neglect, or dependency petition that is filed.

N.C. Gen. Stat. § 7B-201(b) (2017). Thus, if the trial court were to determine Tennessee is a more appropriate forum under North Carolina General Statute § 50A-207 and the Tennessee proceeding will address the child custody issues, it may terminate the juvenile court's jurisdiction under North Carolina General Statute § 7B-201 to allow the matter to be addressed in that court. *See* N.C. Gen. Stat. § 7B-201.

IV. Inconvenient Forum

[2] This brings us to the present issue raised by Mother who contends the trial court erred in "transferring" the case to Tennessee based upon its determination that North Carolina is an inconvenient forum under the UCCJEA. *See generally* N.C. Gen. Stat. § 50A-207.

> (a) A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.
>
> (b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this State;

(3) The distance between the court in this State and the court in the state that would assume jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this State may decline to exercise its jurisdiction under this Article if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

N.C. Gen. Stat. 50A-207.

Mother's brief contends that only North Carolina's court had the authority to decide "who has jurisdiction in this matter" and that North Carolina "was bound to take evidence and follow the" UCCJEA. Mother argues that the trial court failed to follow the proper procedure under the UCCJEA, and the order must be reversed.

We first note that Tennessee's orders are not before us, and we do not purport to determine based upon the record before us whether Tennessee complied with the UCCJEA or made any other error under Tennessee law. But Tennessee's order "transferring" jurisdiction of this North Carolina juvenile matter to the Tennessee court has no effect on North Carolina's jurisdiction under Chapter 7B or on our analysis. Our

only question is whether there is reversible error in the North Carolina trial court's order.

A. Communication between Courts

Mother's first argument is that the trial court did not follow a proper procedure under North Carolina General Statute § 50A-110 for its communications with the Tennessee court. Where the parties do not participate in the communication, the statute requires a record to be made of the communication and the parties notified of the record:

> (b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. . . . .
>
> . . . .
>
> (d) Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.
>
> (e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

N.C. Gen. Stat. § 50A-110 (2017). Mother argues that "[t]he only record of the communication between the two courts is a one line email sent by the judge's judicial assistant to the Brickels' trial counsel, but not [Mother's] trial counsel, and copied to the juvenile clerk."

Mother is correct that the email indicates only that it was send only to the Brickels' counsel, which would be inappropriate, as it should have been sent simultaneously to counsel for both parties. But we also note that the trial court informed Mother on 1 February and her counsel on 1 March that it would be communicating with the Tennessee judge; that was the reason for the continuances. Neither Mother nor her counsel requested to participate in the communication. Further, the email was apparently included in the court file as it is a part of our record on appeal, and there is no indication Mother was not "informed promptly" of the communication or that she was not "granted access" to the court file. *Id*. The email is also a "record" as defined by North Carolina General Statute § 50A-110 as it is "information that is inscribed on a tangible

medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.*

Under North Carolina General Statute § 50A-110, Mother was also entitled to have an "opportunity to present facts and legal arguments before a decision on jurisdiction is made" if the parties did not participate in the communication between the courts. *Id.* Although the statute does not specify if this "opportunity" must be before or after the communication, we need not make this determination here. Mother presented some "facts and legal argument" to the trial court on 1 February 2018, before her counsel was appointed, but she did not testify or present evidence. *Id.* On 1 February 2018, the trial court heard only arguments and no sworn testimony. The only documents filed with the trial court were unverified motions. At that point, the trial court had heard no evidence regarding the facts of the case, only arguments. The trial court continued the case and set another date for the parties to return – presumably for an evidentiary hearing on the four pending motions -- after its communication with Tennessee. The trial court appointed counsel for Mother, but the full hearing scheduled for 5 April 2018 was canceled by the trial court. No evidentiary hearing was ever held.

B. Findings of Fact

Mother argues that the court had insufficient evidence upon which it could base its findings of fact or a decision on whether North Carolina was an inconvenient forum. We agree.

Even if we assume the trial court correctly conducted and documented its communications with the Tennessee court, we must reverse the order because there was no evidence to support the trial court's findings of fact. The order on appeal includes findings of fact regarding the factors listed in North Carolina General Statute § 50A-207 for purposes of determining that North Carolina is an inconvenient forum and related conclusions of law. We need not address each finding of fact specifically since none is supported by the evidence. Although some factors could possibly be addressed based upon the trial court's record without evidence from the parties, such as the familiarity of the court with the case, most require some evidence regarding the parties and child. Since there was no evidence, the findings of fact cannot be supported. *See Crews v. Paysour*, ___ N.C. App. ___, ___ 821 S.E.2d 469, 472 (2018) ("[A]lthough counsel discussed the issue with the trial court, the parties did not stipulate to amounts paid since the prior order or agree on how any overpayment by Father should be addressed. And arguments of counsel are not evidence: It is axiomatic that the arguments

of counsel are not evidence." (citations, quotation marks, and brackets omitted)). In addition, the motions before the trial court were unverified, and neither party presented any affidavits or other documentary evidence. We also note that when Mother presented her argument to the trial court on 1 February 2018, she had no attorney, but she was entitled to court-appointed counsel. The trial court recognized this problem and appointed counsel for Mother, but since the trial court canceled the completion of the hearing, Mother's counsel never had the opportunity to provide meaningful representation. With no evidence to support the findings of fact, the trial court's conclusions of law based upon the findings of fact must fail also.

V. Conclusion

We therefore reverse and remand for the trial court to hold a new hearing on the parties' motions and to determine whether to terminate jurisdiction under North Carolina General Statute § 7B-201. The trial court should again communicate with the Tennessee court, as directed by North Carolina General Statute § 50A-110 and should allow the parties the opportunity either "to participate in the communication" or "to present facts and legal arguments before a decision on jurisdiction is made." N.C. Gen. Stat. § 50A-110. If the trial court again determines that North Carolina is an inconvenient forum under North Carolina General Statute § 50A-207, depending upon the status of the Tennessee case, the trial court could stay the proceedings under North Carolina General Statute § 50A-207 or may terminate its jurisdiction under North Carolina General Statute § 7B-201. Although nothing in this opinion should be interpreted as expressing an opinion on whether North Carolina is an inconvenient forum under North Carolina General Statute § 50A-207, we note that the trial court also has the option of terminating the juvenile court's jurisdiction and transferring the case to a private Chapter 50 matter in North Carolina under North Carolina General Statute § 7B-911. But unless the trial court determines that the case should remain under the jurisdiction of the juvenile court of Surry County, the trial court's order should clearly terminate the juvenile court's jurisdiction. The trial court's order must be based upon sworn testimony or other evidence, and Mother is entitled to court-appointed counsel at all proceedings as long as the matter remains in juvenile court.

REVERSED AND REMANDED.

Judges INMAN and ZACHARY concur.

IN RE C.N.

[266 N.C. App. 463 (2019)]

IN THE MATTER OF C.N., A.N.

No. COA18-1031

Filed 6 August 2019

1. Termination of Parental Rights—grounds for termination—neglect—sufficiency of evidence—probability of repetition of neglect

The trial court erred by concluding that grounds of neglect existed to terminate a mother's parental rights where the children were removed from the mother's care after one child spilled a chemical cleaning product onto herself. The mother had made some progress on her case plan, and the evidence was insufficient to support a conclusion that the neglect was ongoing and that there was a probability of repetition of neglect.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of evidence

The trial court erred by concluding that grounds of willful failure to make reasonable progress existed to terminate a mother's parental rights where the children were removed from the mother's care after one child spilled a chemical cleaning product onto herself. While the trial court found that the mother had not been consistent in her treatment or fully compliant with her case plan, such findings did not support a conclusion of willful failure to make reasonable progress—especially where the evidence of willfulness was lacking and the mother presented evidence of numerous activities and accomplishments in compliance with her case plan.

Appeal by respondent-mother from order entered 3 July 2018 by Judge J.H. Corpening II in New Hanover County District Court. Heard in the Court of Appeals 27 June 2019.

No brief filed for petitioner-appellee New Hanover County Department of Social Services.

Mary McCullers Reece for respondent-appellant mother.

Womble Bond Dickenson (US) LLP, by Jessica Gorczynski, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals from an order terminating her parental rights to her minor daughters, C.N. ("Carrie") and A.N. ("Anne"). *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles). The order also terminates the parental rights of the legal father of A.N. and putative father of C.N. and the unknown father of C.N. No father is a party to this appeal. We reverse the trial court's order as it relates to Respondent-mother.

I. Background

On or about 28 June 2016, EMS and law enforcement responded to a 911 call regarding a child who had suffered chemical burns. Carrie was treated for corneal abrasions and chemical burns on her tongue in the New Hanover Regional Medical Center Emergency Department and was kept overnight for observation.

Respondent-mother reported Carrie had pulled up on a table and spilled an open bottle of Mr. Clean liquid detergent onto herself. EMS and law enforcement who responded to the 911 call reported that conditions inside the home were dirty and in poor shape. Needles were found inside the home. Respondent-mother admitted to using marijuana within the previous week and had reported past incidents of domestic violence. Concerns were also expressed about Respondent-mother's mental health.

Prior to the this incident, the New Hanover County Department of Social Services ("DSS") had received a report in May 2016 that Anne was found wandering alone behind a Roses retail store off of Carolina Beach Road. DSS obtained nonsecure custody of eleven-month-old Carrie and two-year-old Anne and filed a juvenile petition alleging they were neglected juveniles. Nonsecure custody with DSS was continued and the juveniles were placed with Respondent-mother's sister.

Respondent-mother stipulated at the adjudication hearing to the allegations in the juvenile petition that Carrie and Anne were neglected, as they did not receive proper care, supervision or discipline and lived in an environment injurious to their welfare.

The trial court adjudicated Carrie and Anne to be neglected juveniles based upon Respondent-mother's stipulation. The trial court determined their best interests were served for legal custody and placement authority to remain with DSS and to continue their placement in the Respondent-mother's sister's home.

The trial court also adopted the recommendations of DSS and the guardian *ad litem* ("GAL") for Respondent-mother's case plan and ordered

Respondent-mother to: (1) obtain and maintain stable income; (2) obtain and maintain stable housing; (3) complete a mental health assessment; (4) comply with all recommendations; (5) sign releases for DSS and GAL; (6) submit to random drug screens; (7) successfully complete substance abuse treatment; and (8) successfully complete parenting classes. Respondent-mother was scheduled for weekly supervised visitation.

A permanency planning hearing was held on 3 May 2017, after which the trial court entered its order on 23 June 2017. DSS asserted Respondent-mother was "not actively participating in her treatment plan," had not obtained stable housing, and had not shown up for the majority of the requested drug screens. Respondent-mother responded that she had completed her comprehensive clinical assessment ("CCA") and parenting classes, but had difficulties with a cell phone. The trial court changed the primary permanent plan for Carrie and Anne from reunification to legal guardianship with Respondent-mother's sister with a concurrent plan of reunification.

Another permanency planning hearing was held on 26 September 2017, after which the trial court entered an order on 13 November 2017, followed by an amended permanency planning order on 16 January 2018. The trial court found that the juveniles were "currently placed in foster care after their kinship placement with [their] maternal aunt [was] disrupted[,]" and that "Respondent-[m]other is not actively participating in her treatment plan[,]" "has not consistently engaged in services[,]" and "does not show up for the majority of the requested drug screens." The order reflects Respondent-mother had submitted proof of employment, secured housing, and asserted that transportation was an issue and requested bus passes.

The trial court ordered DSS to provide bus passes to Respondent-mother and ordered a home study on Respondent-mother's home. The court changed the primary permanent plan for Carrie and Anne to adoption with a concurrent plan for reunification.

On 8 February 2018, DSS filed a petition to terminate Respondent-mother's and the putative fathers' parental rights to Carrie and Anne. DSS alleged the following grounds for termination of Respondent-mother's parental rights: neglect and willful failure to make reasonable progress. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (Supp. 2018). The petition was heard on 23 and 26 April 2018.

The trial court found grounds of neglect and willful failure to make reasonable progress existed to terminate Respondent-mother's parental

rights. The trial court concluded Carrie and Anne's best interests required termination of Respondent-mother's parental rights in an order entered 3 July 2018. *See* N.C. Gen. Stat. § 7B-1110(a) (2017). The fathers are not parties to this appeal. The trial court's order is final concerning termination of the fathers' parental rights. Respondent-mother timely appealed. DSS filed no response or brief to Respondent-mother's appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the district court entered 3 July 2018 pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2017).

III. Issues

Respondent-mother argues the trial court erred by finding and concluding the grounds of neglect and willful failure to make reasonable progress existed to terminate her parental rights.

IV. Standard of Review

"This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015). "We review conclusions of law *de novo*." *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014).

V. Analysis

A. Neglect

[1] A neglected juvenile is one whose parent does not "provide proper care, supervision, or discipline . . . or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101 (15) (Supp. 2018).

A parent has neglected a juvenile if the court finds the juvenile to be neglected within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted).

Respondent-mother argues the trial court erred by finding and concluding that the ground of neglect under N.C. Gen. Stat. § 7B-1111(a)(1) existed to terminate her parental rights to Carrie and Anne. Where,

as here, the juvenile has been removed from the parent's custody, "[t]he trial court must also consider *any evidence of changed conditions* in light of the evidence of prior neglect *and the probability of a repetition of neglect*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (citation omitted) (emphasis supplied). *See also In re M.J.S.M.*, __N.C. App. __, __, 810 S.E.2d 370, 373 (2018) ("where there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents." (citation omitted)).

With respect to Respondent-mother, the trial court made the following findings of fact:

> 3. . . . Both children have been in the legal custody of [DSS] since June 28, 2016, were residing in a kinship placement with a maternal aunt and have currently been residing with licensed foster parents since being placed in an out of home placement.
>
> . . . .
>
> 10. That [Carrie] and [Anne] were adjudicated neglected Juveniles within the meaning of G.S. 7B-101(15) at a hearing held on August 24, 2016 where Respondent-Parents stipulated to the allegations in the petition. Respondent-Mother was ordered to comply with her Case Plan; obtain and maintain stable income and housing; submit to a substance abuse assessment and to comply with all recommendations; complete a mental health assessment and comply with all recommendations; successfully complete parenting classes; and participate in random drug screens. . . .
>
> 11. That from June 2016 through February 2018 Respondent-Mother demonstrated a pattern of instability in housing and income. She has lived with several different boyfriends within New Hanover and Bladen County and earns income by cleaning houses and selling things on eBay. For the past year, Respondent-Mother has primarily resided with a boyfriend in Carolina Beach. She is financially dependent on her boyfriend for transportation, income and housing. Respondent-Mother has been inconsistent with her communication with [DSS], has

not provided a current, working telephone number, has not provided an email address, does not return phone calls, has missed appointments and was not engaged when she did attend. [DSS] has provided her with bus passes and offered individual transportation. Respondent-Mother completed her substance abuse assessment but not the recommended treatment consisting of intensive out-patient, community support, 12 step program, individual therapy, skill set, SAIOP, after care and relapse prevention. Respondent-Mother started to participate in her treatment plan then elected to detox at home in August 2016. She disengaged with services, moved from her service area, and then sporadically re-engaged with services in early 2018. She accessed mental health treatment in August 2017 and out-patient therapy was recommended to help her cope with her depressive order, ADHD, alcohol and Opioid use. Respondent-Mother self-reports that she "has so much going on", that she has depression and runs from or ignores her problems, copes with it by sleeping for days and not eating. She stopped attending classes at Coastal Horizons because she "thought they were a joke" and would have enrolled in substance abuse treatment if she thought it was important. Respondent-Mother completed her parenting classes and participated in 13 out of 38 drug screen requests with mixed negative and positive results for benzodiazepines and amphetamines. During a home visit, Respondent-Mother was unable to account for her missing medication and thought she may have taken extra. Respondent-Mother had multiple phone issues during the underlying matter. Her boyfriend pays for her phone and has taken it from her when she texted someone else. Respondent-Mother and her boyfriend have broken up a few times over the past year when she texts other people. To date, Respondent-Mother has not been consistent with any treatment, is not compliant with her case plan and re-engaged in some services at lunch time on the first day of this hearing.

. . . .

15. . . . . Respondent-Mother was late to visits in November 2017 and December 2017 and did not notify anyone when she did not attend visits in August 2017, September

> 2017, January 2018, and March 2018. When visits with Respondent-Mother occurred, she would bring snacks and gifts for the children and interact appropriately with the children.

Based upon these findings, the trial court concluded that Respondent-mother had "neglected the children, that the neglect is ongoing, and that there is a probability of repetition of neglect."

"Our courts cannot presume a parent to be unfit or to have acted inconsistently with his constitutional rights as a parent without clear, cogent, and convincing evidence to demonstrate why the parent cannot care for his child." *In re S.J.T.H.*, __ N.C. App. __, __, 811 S.E.2d 723, 725 (2018) (citations omitted). DSS must overcome this presumption of parental fitness and meet and carry its burden of proof by clear, cogent and convincing evidence to show grounds exist to terminate parental rights. *Id.*

A parent's failure to make reasonable progress in completing a case plan may indicate a likelihood of future neglect. *In re D.M.W.*, 173 N.C. App. 679, 688-89, 619 S.E.2d 910, 917 (2005), *rev'd per curiam per the dissent*, 360 N.C. 583, 635 S.E.2d 50 (2006). Failure to make progress must be viewed by the actions and attempts of parents within their abilities and means, considering their resources or lack thereof and the priority for their securing their basic necessities of life. *See* N.C. Gen. Stat. § 7B-1111(a)(2) ("No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.").

Here, the juveniles were removed from Respondent-mother's care after the youngest child spilled Mr. Clean onto herself and Respondent-mother called for medical assistance. No evidence shows and the trial court made no findings indicating such actions were likely to be repeated. As progress on her case plan, to become a better parent, and to reduce or remove the likelihood of future neglect, Respondent-mother had completed parenting class, completed a CCA, had re-engaged in treatment, was employed, had recently submitted to drug testing and had obtained stable housing and transportation. The social worker testified Respondent-mother's recent drug test results were inconclusive and DSS was awaiting new results at the time of the hearing.

The evidence presented and the trial court's findings are insufficient to support the conclusion that "neglect is ongoing, and there is a probability of repetition of neglect." We reverse the conclusion that Respondent-mother's neglect is ongoing and the probability exists of her

future neglect of her daughters. *See In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

B. Failure to Make Reasonable Progress

[2] Respondent-mother argues the trial court erred in concluding grounds for termination of her parental rights existed "[b]ecause [she had] made reasonable efforts and progress in addressing the conditions that led to her children's removal."

The trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2).

"Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). "A finding of willfulness does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citation omitted).

The undisputed evidence shows Respondent-mother completed a CCA in January 2017. The CCA recommended substance abuse treatment and individual therapy sessions to address her mental health. Respondent-mother sought mental health services beginning in August 2017. Evidence was presented that from then until February 2018, Respondent-mother presented to and attended nine sessions for therapy and five appointments for medication management. She missed 10 scheduled sessions during the same time frame. Following a break from therapy after one session in February 2018, Respondent-mother attended one additional therapy session at the end of March 2018. The trial court found Respondent-mother had ceased attending sessions because "she 'thought they were a joke' and [she] would have enrolled in substance abuse treatment if she thought it was important."

While evidence tending to show missed therapy sessions may support the trial court's finding that her attendance at treatment was inconsistent, a parent's inconsistent attendance at therapy sessions does not alone show a lack of reasonable progress, particularly when a parent is working or seeking to comply with other provisions of her plan to meet her and her children's needs. "While extremely limited progress is not reasonable progress, certainly perfection is not required to reach the

reasonable standard." *In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015) (citations and quotations omitted).

Respondent-mother argues the trial court's findings are misleading and do not reflect evidence of her progress and situation at the time of the hearing. Respondent-mother points to undisputed evidence of her activities and accomplishments to show reasonable progress in her case plan: (1) she re-enrolled in substance abuse treatment; (2) she continued therapy; (3) she was taking medications to address her mental health issues; (4) she had fully completed a parenting class; (5) she had improved her housing; (6) she was employed; (7) she had improved transportation; and (8) she had maintained better contact with DSS.

Respondent-mother also specifically challenges the portion of finding of fact number eleven, which states she "has not provided an email address." Testimony at the termination hearing tended to show DSS did not have a valid telephone number for Respondent-mother, and had recently resorted to email to communicate with Respondent-mother when they were unable to reach her by telephone. Evidence shows Respondent-mother had, in fact, provided an email address to DSS to remain in contact with her social worker as directed by her case plan.

When the evidence and the trial court's findings are viewed against the parental presumption favorable to Respondent-mother, DSS has failed to meet its burden to prove she had failed to make reasonable progress to support the conclusion to terminate her parental rights on this ground.

Respondent-mother's efforts and the facts before us sharply contrast to those where this Court has held that "[e]xtremely limited progress is not reasonable progress." *See In re Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 224-25; *see also In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989) (upholding termination of parental rights where, "although respondent has made some progress in the areas of job and parenting skills, such progress has been extremely limited").

DSS recognized Respondent-mother had engaged with service providers and that her substance abuse recommendations were intertwined with her mental health treatment. While Respondent-mother had completed her substance abuse assessment, the social worker opined Respondent-mother's progress was minimal and she was not participating "with any real consistency that you could make some change."

Other areas of progress in Respondent-mother's case plan, such as stable housing and transportation were partly attributable to Respondent-mother's relationship with a new boyfriend, upon whom

she was financially dependent. Respondent-mother's case plan does not and cannot require that she alone be responsible for providing her housing and transportation. Evidence in the record also shows Respondent-mother was employed at the time of the hearing. Respondent-mother also engaged in appropriate visits with her daughters.

N.C. Gen Stat. § 7B-904 provides that a court may order a parent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent." N.C. Gen. Stat. § 7B-904(d1)(3) (2017). In the case of *In re W.V.*, 204 N.C. App. 290, 297, 693 S.E.2d 383, 388-89 (2010), this Court vacated the trial court's order requiring the respondent to obtain housing or employment where those requirements were unrelated to the causes of the conditions in the home which contributed to the juvenile's adjudication or the court's decision to remove the juvenile from the home. *Id.* Nothing in the record suggests or supports the finding that the Respondent-mother's dependence on her present boyfriend for housing, transportation, and for providing her a cell phone bears any relation to the causes of the conditions of the removal of Carrie and Anne from their mother's home. *See id.*

The trial court found Respondent-mother had not been consistent in her treatment, was not fully compliant with her case plan, and had only recently re-engaged in some services. These findings do not support the trial court's conclusion that Respondent-mother had not made reasonable progress in her case plan to address the reasons that led to the removal of her children, or that her failure to make reasonable progress was willful to support termination of her parental rights to both of her daughters. *See In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005) (trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.) and *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001) ("Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." (citation omitted)).

VI. Conclusion

The public policy of North Carolina, as is statutorily expressed by the General Assembly, mandates every court-ordered plan to include a

concurrent goal of reunification of children with their parent(s). N.C. Gen. Stat. § 7B-906.2 (2017). This policy necessarily requires that DSS's relationships and dealings with the parent(s) must continue as cooperative, rather than adversarial, until termination of the parent's rights by the court and through exhaustion of appeals. *Id*. The trial court's adjudication of the evidence and findings of fact fail to support the conclusions that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) or (a)(2) to terminate Respondent-mother's parental rights. We reverse the trial court's termination of Respondent-mother's parental rights to Carrie and Anne. *It is so ordered.*

REVERSED.

Judges DILLON and BERGER concur.

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT RECORDING SOUGHT BY CITY OF GREENSBORO

No. COA18-992

Filed 6 August 2019

Constitutional Law—First Amendment—police body camera recordings—release to city council members—gag order

A court order allowing city council members to view certain recordings from police body cameras but limiting the council members' ability to discuss the recordings in a public setting did not violate the council members' First Amendment rights. By statute (N.C.G.S. § 132-1.4A), the trial court had discretion to order the restrictions on the release of the recordings, and the council members had no First Amendment right to view the recordings—they only viewed them by the grace of the legislature through a judicial order.

Judge BERGER concurring in separate opinion.

Appeal by Plaintiff from order entered 23 February 2018 by Judge Susan Bray in Guilford County Superior Court. Heard in the Court of Appeals 8 May 2019.

Fox Rothschild LLP, by Patrick M. Kane and Kip David Nelson, and City of Greensboro Attorney's Office, by Rosetta Davidson Davis, for Petitioner-Appellant City of Greensboro.

Rossabi Reardon Klein Spivey PLLC, by Gavin J. Reardon and Amiel J. Rossabi, for Other-Appellee Involved Greensboro Police Officers.

Julius L. Chambers Center for Civil Rights, by Mark Dorosin and Elizabeth Haddix, ACLU of North Carolina Legal Foundation, by Christopher A. Brook, and Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess and Cheyenne N. Chambers, for Amici Curiae.

DILLON, Judge.

Petitioner City of Greensboro (the "City") appeals from the trial court's order denying its Motion to Modify Restrictions placed on Greensboro city council members, which allowed them to view certain recordings from body cameras ("body-cams") worn by Greensboro Police Department officers, *but* which limited their ability to discuss the recordings in a public setting. The City contends that the trial court's restrictions interfere with the city council members' fundamental responsibilities to their constituents and violate council members' First Amendment rights. After careful consideration, we affirm.

I. Background

This case arises from a 10 September 2016 incident in downtown Greensboro, resulting in the arrest of several individuals by Greensboro police officers (the "Officers"). The parties to this action are the City and the Officers.

Video footage of the incident was recorded by the Officers' body-cams. The City petitioned the footage be made available to members of its City council to view.

In January 2018, the trial court entered orders (the "Release Orders") allowing members of the City's governing council and certain other City officials to view the body-cam footage, but subject to a limited gag order, as follows: those City officials choosing to view the footage would not be allowed to discuss the footage except amongst themselves in the performance of their official duties. This Release Order further provided that any violation of the gag order would subject the offender to a fine

of up to five hundred dollars ($500.00) and imprisonment of up to thirty (30) days. The Release Order, though, allowed the City Attorney to seek modification of the gag order in the future.

The following month, in February 2018, the City moved to lift the gag order, to allow its officials to discuss the body-cam footage with their constituents and others. After a hearing on the matter, the trial court entered orders denying the City's motions for modification (the "Modification Denial Order").

The City appealed.[1]

II. Analysis

On appeal, the City argues that the trial court committed error by refusing to remove the gag order. We disagree.

In conducting our review, we will first assess the initial validity of the restriction in the Release Orders under the First Amendment.

Our General Assembly has provided that police body-cam footage is neither a public nor a personnel record, N.C. Gen. Stat. § 132-1.4A(b) (2016), and that only those depicted in the video and their personal representatives have an absolute right to view the footage, N.C. Gen. Stat. § 132-1.4A(c) (2016). The General Assembly also provided that anyone else wanting to view police body-cam footage may not do so unless that individual obtains a court order. N.C. Gen. Stat. § 132-1.4A(g) (2016). And "[i]n determining whether to order the release of all or a portion of the recording, in addition to any other standards [it] deems relevant," the court must consider the applicability of eight standards in making its decision, as follows:

> (1) Release is necessary to advance a compelling public interest.
>
> (2) The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.

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1. The Officers contend that the Modification Denial Order and the initial Release Orders are interlocutory because they left open the possibility of future modification once City officials actually viewed the body-cam footage. However, alongside its appeal, the City has filed a petition for writ of *certiorari*. To the extent that the City has no right to appeal the orders before us, we grant the City's petition for writ of *certiorari* to aid our jurisdiction. *See* N.C. R. App. P. 21(a)(1).

> (3) The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.
>
> . . .
>
> (5) Release may harm the reputation or jeopardize the safety of a person.
>
> (6) Release would create a serious threat to the fair, impartial, and orderly administration of justice.
>
> (7) Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.
>
> (8) There is good cause shown to release all portions of a recording.

Id. If a court is inclined to grant a request to release the footage, the court "may place any conditions or restrictions on the release of the recording that the court, *in its discretion*, deems appropriate." *Id.* (emphasis added).

Here, the trial court, in its discretion, deemed it appropriate to place a "condition or restriction" on the release of the body-cam footage to the City officials; namely, that the City officials could only discuss the footage amongst themselves in their official capacities. To support the imposition of this gag order, the trial court determined that statutory standards #1, 2, 3, 5, 6, 7 and 8 were all applicable. Specifically, standards #2, 5, 6 and 7 all support the imposition of the gag order. And in its Modification Denial Order, the trial court, in its discretion, denied the City's motion to lift the gag order.

In its principal brief to our Court, though, the City made no argument that the trial court abused its discretion in the manner it considered or weighed the statutory standards. And it is the City's burden on appeal to show how the trial court abused its discretion.[2] Rather, the City argues

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2. The City does note in its factual summation that the criminal cases of the two individuals depicted in the video were no longer pending. And this statement does suggest that standard #7, that a court must consider whether denying a request for the release of body-cam footage would be "necessary to protect either an active or inactive internal or criminal investigation[,]" was no longer applicable. N.C. Gen. Stat. § 132-1.4A(g)(7) (2016). But the City makes no argument that the other statutory standards supporting the gag order were no longer present. For instance, the City makes no argument that standard #5, that a public disclosure of the information "may harm the reputation or jeopardize the safety of [the officers,]" was no longer applicable.

that the gag order impermissibly violates the First Amendment rights of its council members and, otherwise, impairs their ability to engage in open government.[3] For the following reasons, we disagree.

The gag order does not violate the City's First Amendment[4] rights because the gag order only restricts the council's speech about matters that the council, otherwise, had no right to discover except by the grace of the legislature through a judicial order. Indeed, our General Assembly chose not to make body-cam footage a public record. *See* N.C. Gen. Stat. § 132-1.4A(b). In so holding, we are guided by the United States Supreme Court's opinion in *Seattle Times Co. v. Rhinehart*, in which that Court held that a protective order preventing public disclosure of information learned through discovery in a civil case did not violate the First Amendment. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-37 (1984). In that case, a newspaper was involved in litigation and sought discovery of financial documents from the other party. The trial court allowed the discovery, deeming it relevant to the litigation, but otherwise granted the other party a protective order preventing the newspaper from publishing the information to the public. The newspaper challenged the

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3. Briefly, for clarity, we elaborate that the City does not challenge the constitutionality of Section 132-1.4A itself. The City makes no arguments regarding the constitutional validity of keeping body-cam footage private, requiring court orders for release of the footage, or allowing the imposition of restrictions for viewing the footage based upon the trial court's discretion. Rather, the City challenges the constitutionality of the particular restriction placed on its access to the footage in this case: an order limiting the city council members' speech under threat of punishment.

4. The Officers contend that whether the restriction is unconstitutional under the First Amendment is not preserved for appeal because the issue was not argued during the trial court's hearing on the motions for modification. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). Indeed, our Courts have a policy of not undertaking constitutional questions "except on a ground definitely drawn into focus by [the movant's] pleadings." *Hudson v. Atl. Coast Line R. Co.*, 242 N.C. 650, 667, 89 S.E.2d 441, 453 (1955).

However, this Court has stated that specific language invoking the constitution is not required where a constitutional issue is "apparent from the context." *State v. Spence*, 237 N.C. App. 367, 371, 764 S.E.2d 670, 674-75 (2014) (holding criminal defendant properly preserved constitutional issue by making a request that "directly implicate[d]" a constitutional right). In its motion to modify restrictions, the City repeatedly references the city council members' inability to properly engage in discussion and political discourse with their constituents. The City argued the same during the trial court's hearing on the matter. And the United States Supreme Court has acknowledged that an elected representative's speech to their constituency is guarded by the First Amendment. *See Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). The issue of the First Amendment's affirmative grant of freedom of speech was "definitely drawn into focus" by the City's arguments, which "directly implicate" a government official's need to speak openly with his or her constituency.

protective order, contending that it had a First Amendment right to publish the information learned during discovery.

The *Seattle Times* Court disagreed, holding that the protective order did not violate the newspaper's First Amendment rights. Essentially, the Court held that where a person only learns of information through judicial compulsion, the court compelling disclosure can place restrictions on the further dissemination of that information, but otherwise cannot generally place restrictions on the dissemination of information learned by other means:

> As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the [Civil Procedure] Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant [otherwise] has no First Amendment right of access to [the] information.
>
> . . .
>
> [I]t is significant to note that an order prohibiting dissemination of . . . information [that was only learned about through discovery during civil litigation] is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's process.

Id. at 32-34 (internal citation omitted).

The present case is similar to *Seattle Times*. Specifically, here, the City has no First Amendment right to the body-cam footage, but has been given the right to access the information through a court order. The gag order only prevents the City from disseminating information that it has only learned through the court order. The gag order does not otherwise restrain the City officials from discussing the subject police encounter generally, only from discussing the body-cam footage specifically. Therefore, we conclude that the gag order does not impermissibly infringe on the City's First Amendment rights.

In the same way, we conclude that the gag order does not impermissibly impair the City council's ability to perform its official duties. Indeed, the City council members have no right to the information in the first place. The trial court could have denied the request to view the body-cam footage altogether. The City council members are still free to discuss any information about the police encounter learned from other sources with their constituents. Accordingly, we conclude that the trial court did not exceed its authority in imposing the gag order as a condition of access to the body-cam footage.

III. Conclusion

We conclude that, though the restriction does limit the City council members' speech, the trial court did not abuse its discretion in initially placing and later refusing to modify a restriction on release of body-cam footage, as the City officials otherwise had no right to the information. Much like a protective order under Rule 26(c), the discretionary restrictions allowed by Section 132-1.4A seek to protect the interests of those depicted in the information being released. In this case, protecting the reputation and safety of those individuals, as well as safeguarding the administration of justice, presents a substantial government interest for which the trial court's restrictions are no greater than necessary. The City has failed to meet its burden of showing that the trial court abused its discretion in determining that this protection is still not warranted. Therefore, we affirm.

AFFIRMED.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority's analysis. However, appellant's constitutional argument was not raised in the trial court. Because appellant presents its First Amendment argument for the first time on appeal, this matter should be dismissed. *See Powell v. N.C. Dep't of Transp.*, 209 N.C. App. 284, 296, 704 S.E.2d 547, 555 (2011) ("A constitutional issue not raised at trial will generally not be considered for the first time on appeal.").

IN RE ENTZMINGER

[266 N.C. App. 480 (2019)]

IN THE MATTER OF PHILLIP ENTZMINGER,
ASSISTANT DISTRICT ATTORNEY PROSECUTORIAL DISTRICT 3A

No. COA18-1224

Filed 6 August 2019

1. Attorneys—misconduct—material misrepresentations to court—sufficiency of evidence

In a disciplinary hearing against an assistant district attorney (ADA), competent evidence supported the superior court's conclusion that the ADA's statements to the court—regarding when he learned of the unavailability of a key witness—constituted a material misrepresentation in violation of the Rules of Professional Conduct 3.3 and 8.4 where the statements had the potential to mislead the court by suggesting no one in the district attorney's office had been informed of the witness unavailability until the day of trial, contrary to the facts.

2. Attorneys—misconduct—allegation of material misrepresentation of fact—qualified by stating personal belief

In a disciplinary hearing against an assistant district attorney (ADA), the evidence did not support the superior court's conclusion that the ADA's response to a question in court—that a case was not prioritized higher because "There were felonies on the docket is my understanding"—constituted a material misrepresentation in violation of the Rules of Professional Conduct. The ADA's qualification in his response that it was his personal belief made the statement truthful.

3. Attorneys—misconduct—findings—"unavailing" apology to court—sufficiency of evidence

In a disciplinary hearing against an assistant district attorney (ADA) whose written explanation for why a criminal case was being dismissed included language directed against the trial judge, the superior court's finding that the ADA's apology was "unavailing" and its conclusion that the ADA refused to acknowledge the wrongful nature of his conduct were supported by competent evidence.

Appeal by respondent from order entered 31 May 2018 by Judge Marvin K. Blount in Pitt County Superior Court. Heard in the Court of Appeals 22 May 2019.

IN RE ENTZMINGER

[266 N.C. App. 480 (2019)]

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

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for respondent-appellant.

TYSON, Judge.

Phillip Entzminger ("Respondent") appeals from an order of discipline, which suspended his license to practice law for two years, with possibility of a stay of the balance of the suspension after six months. We affirm the order appealed from in part, reverse in part, and remand for further hearing on the appropriate discipline to be imposed.

I. Background

Respondent was employed as an assistant district attorney ("ADA") in Pitt County when he entered a dismissal of a driving while impaired ("DWI") charge. Haleigh Aguilar was arrested for DWI and driving after underage consumption of alcohol in December 2014. Aguilar's case was one in a series of cases in which the Pitt County District Attorney's Office "employed a novel and unusual procedure to obtain grand jury presentments and indictments in pending impaired driving cases." *State v. Baker*, ___ N.C. App. ___, ___, 822 S.E.2d 902, 903 (2018). Prior to Aguilar's initial trial and disposition in district court, the district attorney obtained a presentment and indictment from a grand jury in March 2017 and removed the case to superior court. Aguilar's case was set for trial during the 11 September 2017 superior court criminal session.

Aguilar married a United States Marine Corps service member, who was then stationed in Hawaii. Aguilar moved to Hawaii while her charges were pending. Aguilar's attorney, Leslie Robinson, Esq. contacted Hailey Bunce, the ADA assigned to Aguilar's case, on 8 August 2017 to request the trial be given priority to be heard due to his client having to return to North Carolina from Hawaii. Robinson also requested to be provided advance notice of a possibility of a continuance, and indicated he would oppose a motion to continue if the State did not call Aguilar's case for trial during the scheduled week of 11 September 2017.

Bunce indicated to Robinson that Aguilar's case was assigned to Respondent. In her reply email, Bunce stated the district attorney's office was unable to guarantee priority and advised Robinson to contact Respondent directly with any additional questions. Respondent was

copied on Bunce's emailed response. Robinson then sent his same calendar and notice requests directly to Respondent.

On 25 August 2017, Respondent replied to Robinson and indicated the trial of Aguilar's case had been assigned to ADA Brandon Atwood. Respondent also indicated to Robinson he could make no promises concerning the priority of Aguilar's case and noted pending felonies would probably have priority for disposition over this case. Robinson then sent the same priority requests previously sent to Bunce and Respondent to ADA Atwood.

Aguilar flew back from Hawaii to North Carolina for trial and was present for calendar call on Monday, 11 September 2017. Two other DWI cases were called prior to Aguilar's case. Her case was called for trial on Wednesday, 13 September 2017.

Officer Sinclair, Aguilar's breathalyzer test administrator, was an essential State witness. On 5 September 2017, she had informed a DWI Victim Witness Assistant within the district attorney's office of her unavailability as a witness for court due to training during the week of 11 September 2017. No ADA was informed of this scheduling issue. Officer Sinclair received an email from the district attorney's office on 11 September 2017, requesting her attendance in court. Officer Sinclair replied and again informed them of her conflict and being unavailable at training out of town. No subpoena was issued for Officer Sinclair to be present in court.

Atwood became aware of Officer Sinclair's impending absence sometime on 11 September 2017. Someone in the district attorney's office sent Respondent to "take over" the Aguilar case on Wednesday, 13 September 2017. Atwood informed Respondent of Officer Sinclair's unavailability. Neither Atwood nor Respondent informed Robinson of the officer's unavailability, nor did Respondent disclose his intention to move to continue the case.

After lunch on 13 September 2017, Respondent appeared before Resident Superior Court Judge, Jeffery Foster, and moved for a continuance in the Aguilar matter. Robinson objected and presented the history and circumstances of the case and his notices of scheduling with the district attorney's office.

The following colloquy occurred with Respondent, Atwood, and Judge Foster:

> THE COURT: Well, why didn't you call this case first?

> [Respondent]: There were felonies on the docket is my understanding.
>
> THE COURT: No, there weren't. They were all pled out last week.
>
> [Respondent]: I think when the calendar was made, your Honor, I think you could make –
>
> THE COURT: But we knew Monday that, that wasn't the case is what I'm saying, so why didn't we go ahead and do this?
>
> . . .
>
> THE COURT: When did y'all know that this officer was going to be unavailable?
>
> [Respondent]: I found out today, your Honor, at approximately 12:15. I was –
>
> THE COURT: When did the officer know?
>
> MR. ATWOOD: I was made aware that the chemical – that the officer in the case was in Huntersville, I was made aware Monday.

After determining no subpoena was present in the court file or had been issued for Officer Sinclair, the trial court denied the State's motion to continue. The State dismissed the DWI charge against Aguilar and accepted her plea on the driving after consuming while underage charge.

The next day, Respondent completed a document entitled "Prosecutor's Dismissal and Explanation" which included Respondent's version of the reason for the State's dismissal of the DWI:

> This 2014 case was set in superior court. The analyst was unavailable due to training with the Huntersville Police Department (North Carolina). The State made a motion to continue which was denied. Oddly enough, the judge indicated the DWI case should have been set further up in calendar because defendant was from Hawaii. All defendants simply need to move out of state after being charged with a crime if that is the case.
>
> . . . .

> [The State] could have proved all the elements but a superior court judge denied the motion to continue for lack of an analyst to show the .12.

Judge Foster saw and reviewed the dismissal document and spoke with Officer Sinclair concerning her absence for training and learned the true history, including her prior notice of her unavailability and absence as a witness on trial day. After consulting with other judges, Judge Foster "made the decision to begin this action." Judge Foster felt Respondent's comments on the dismissal document "called the Court into disrepute," and were "disrespectful," "inappropriate," and "unnecessary."

Judge Foster entered an order for Respondent to show cause why he should not be held in contempt or disciplined. The order alleged Respondent: (1) showed "a disregard for the dignity of the Court"; (2) "demonstrated undignified and discourteous conduct"; (3) "[m]isled the Court by making statements he knew or should have known to be false"; and, (4) "[a]cted to create a false record."

The Office of Counsel of the State Bar was appointed to prosecute the matter. Respondent filed a motion to recuse Judge Foster, which was granted by the trial court.

A hearing was held in two phases: the first phase was to determine whether Respondent had violated the Rules of Professional Conduct or was guilty of criminal contempt, and, if so, the second phase was to determine the appropriate discipline. The trial court found Respondent was not guilty of criminal contempt, but found he had violated Rules 3.3(a)(1), 4.4(a), 8.2(a), 8.4(c), and 8.4(d) of the Rules of Professional Conduct.

After hearing additional evidence concerning sanctions, the trial court suspended Respondent's license to practice law for two years. Respondent was provided the opportunity to request a stay of the suspension after six months had elapsed and after compliance with various requirements.

Respondent entered notice of appeal. The trial court denied his motion to stay the order of discipline. This Court granted Respondent's motion for writ of *supersedeas* and stayed enforcement of the order of discipline until the disposition of this appeal.

II. Jurisdiction

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

III. Issues

Respondent argues the trial court erred by finding and concluding: (1) Respondent had made false statements of material fact regarding when he had learned of Officer Sinclair's unavailability, which misled the trial court; (2) Respondent's statement that "there were felonies on the docket is my understanding" created a material misrepresentation that Respondent knew or should have known was false; and, (3) Respondent had refused to acknowledge the wrongful nature of his conduct and his apology to the Court was "unavailing."

IV. Standard of Review

Respondent asserts this Court's standard of review on an order of discipline is the whole record test. He cites *N.C. State Bar v. Livingston*, __N.C. App. __, __, 809 S.E.2d 183, 188 (2017), for support. The order in *Livingston* was entered by the State Bar Disciplinary Hearing Commission. *Id.*

The North Carolina State Bar (the "State Bar") asserts the appropriate standard of review is whether competent evidence supports the findings of fact, since this is a matter brought by a court in the exercise of its inherent disciplinary power over officers of the court and members of the bar. *In re Key*, 182 N.C. App. 714, 717, 643 S.E.2d 452, 455 (2007); *State v. Key*, 182 N.C. App. 624, 626, 643 S.E.2d 444, 447 (2007).

Respondent argues the proceedings before us are more like a disciplinary hearing, as compared with the proceedings in the *Key* cases, which were prosecuted by the local district attorney and the State Bar. We find this argument unconvincing.

As in the *Key* cases, this matter was initiated by a judge of the superior court pursuant to the court's inherent authority to discipline attorneys and under N.C. Gen. Stat. § 5A-15(a). The appointment of counsel of the State Bar to prosecute this matter, given Respondent's employment by the district attorney, rests within the authority of the court, and does not remove the proceeding from its authority. N.C. Gen. Stat. § 5A-15(g) (2017) ("The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt.").

Our review of the trial court's findings of fact "is limited to whether there is competent evidence in the record to support the findings." *In re Key*, 182 N.C. App. at 717, 643 S.E.2d at 455. "It is irrelevant that the evidence would also support contrary findings of fact." *Id.* at 717-18, 643 S.E.2d at 455.

"Where the trial judge sits as the trier of the facts, his findings of fact are conclusive on appeal when supported by competent evidence . . . . The appellate court cannot substitute itself for the trial judge in this task." *Gen. Specialities Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979) (internal citations and quotations omitted).

The trial court's conclusions of law, which must be supported by its findings of fact, are reviewed *de novo*. *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 664, 554 S.E.2d 356, 361-62 (2001). Any sanctions imposed are reviewed on appeal for abuse of discretion. *Id.* at 664-65, 554 S.E.2d at 362.

V. Analysis

The inherent power of Justices and Judges of the General Courts of Justice to discipline members of the Bar as officers of the court predates and remains more comprehensive than the statutory powers initially and subsequently provided by the General Assembly to the State Bar. *Swenson v. Thibaut*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978). It is axiomatic that judges must rely upon the honesty and veracity of all witnesses and participants, and particularly the full disclosure and candor by members of the Bar, to be able to administer and render fair and impartial justice. *See id.*

The trial court found and concluded Respondent's conduct during the Aguilar hearing, and its dismissal and aftermath, constituted grounds for discipline. Respondent challenges two of those conclusions of law. Respondent also challenges one finding of fact and conclusion concerning his apology.

A. False Statement Concerning Officer Availability

[1] The superior court concluded:

> That [Respondent], by claiming to the Court to have learned of Officer Sinclair's unavailability only minutes before a hearing on the State's motion to continue and thereby misleading the Court by making a material misrepresentation of facts upon which the Court acted, violated Rule 8.4(c) and Rule 3.3(a)(1) of the Rules of Professional Conduct[.]

Respondent asserts this conclusion "is not supported by the findings of fact and is greatly at odds with the evidence presented at the hearing." Based upon this Court's standard of review, we disagree. *See In re Key*, 182 N.C. App. at 717, 643 S.E.2d at 455.

North Carolina's Rules of Professional Conduct provide: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer." N.C. R. Prof. Cond. Rule 8.4(c). Additionally, "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." N.C. R. Prof. Cond. Rule 3.3(a)(1).

Here, competent evidence supports the superior court's disciplinary order. Respondent made two statements to Judge Foster regarding Officer Sinclair's availability that implicated rules 8.4 and 3.3. First, when Judge Foster questioned why Officer Sinclair was not present to testify, Respondent replied, "I could not tell you. Ms. Stroud in our office told me today that she was in Huntersville. And I want to say actually [she] has a job in Huntersville in training with the police department." Second, in response to Judge Foster's question to Respondent of when "did *y'all* know that [Officer Sinclair] was going to be unavailable," Respondent stated, "*I* found out today, your Honor, at approximately 12:15." (Emphasis supplied).

Respondent's statements could be found to be a misrepresentation of facts that could have misled the court to believe the District Attorney's office had learned of Officer Sinclair's absence only that day. This potential to mislead the court may have prompted Atwood to interject and clarify Respondent's statements, by saying, "I was made aware Monday. [Officer Sinclair] contacted our office and said she is in training with the police department." During Respondent's hearing, Atwood was asked and clarified why he felt the need to interject:

> [COUNSEL]: And how did you take that question in terms of who he [Judge Foster] was asking?
>
> [ATWOOD]: Mr. Entzminger and I were both standing at the counsel table. Mr. Entzminger was – made the motion to continue, but since I was standing with him, Mr. Entzminger gave his answer and I felt it proper to clarify with my answer.
>
> [COUNSEL]: And why did you feel like after Mr. Entzminger said, well, I just found out at 12:15 that you needed to also answer?
>
> [ATWOOD]: To just be truthful with the Court at that point that I had – I had found out at some point Monday after

> 10:18. I didn't want – I didn't want Judge Foster to think that we had just found out on Wednesday at whatever time it was. I wanted him to know that it was at some point Monday after 10:18, or whenever it was.

Atwood made similar statements on cross-examination:

> [COUNSEL]: Mr. Atwood, you said you didn't want Judge Foster to think that you didn't know that Officer Sinclair was unavailable?
>
> [ATWOOD]: I just didn't want – I wanted to clarify Mr. Entzminger's answer, that it wasn't at – whatever his response was. I wanted to clarify with my knowledge.
>
> [COUNSEL]: You felt it needed clarification?
>
> [ATWOOD]: Correct. I just wanted Judge Foster to hear my answer.

Judge Foster's question was directed at both Respondent and Atwood as representatives of both the district attorney's office and the State, and was inquiring when they or their office and the State had collectively learned of Officer Sinclair's unavailability. Respondent's answers were found to potentially have misled the court, a violation of the rules of professional conduct:

> an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer *or in a statement in open court*, may properly be made *only* when the lawyer knows the assertion is true or *believes it to be true on the basis of a reasonably diligent inquiry*. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

N.C. R. Prof. Cond. Rule 3.3, cmt. 3 (emphasis supplied).

Respondent's statement that *he* had just found out about Officer Sinclair's unavailability that afternoon could have been stated in Respondent's ignorance of the truth. However, this statement belied the truth that the district attorney's office was made aware of the officer's absence over a week before the case was to be called, no subpoena had been issued, and it had simply failed to act upon the information received until Respondent moved for a continuance and made representations to the court.

Respondent's statements prompted the presiding judge to question whether Officer Sinclair was ignoring a subpoena, to check the court file, and to decide whether or not the court should issue a show cause order to appear. Ultimately, Respondent stated he could not make the representation Officer Sinclair had, in fact, been subpoenaed. After the court reviewed the court file for the presence of a subpoena and found none, it denied the State's motion to continue.

The trial court found Respondent's answers did not disclaim knowledge, failed to disclose the true facts known by the State, led the court to question the duty and motivations of other actors and officers not present in court, and tended to shift the blame elsewhere for the State's essential witness not being present.

The superior court found these statements violated Rules 8.4(c) and 3.3(a)(1) of the Rules of Professional Conduct. Competent evidence in the record supports these findings of fact. "It is irrelevant that the evidence would also support contrary findings of fact." *In re Key*, 182 N.C. App. at 717-18, 643 S.E.2d at 455. Respondent's argument is overruled.

B. Statement Concerning the Docket

[2] When Judge Foster asked why the State did not call the Aguilar case for trial first, Respondent replied, "There were felonies on the docket *is my understanding*." (Emphasis supplied). Judge Foster responded: "No, there weren't. They were all pled out last week." At the hearing, the trial court concluded it was a material misrepresentation that Respondent knew or should have known to be false, and this statement constituted another violation of Rule 8.4(a) of the Rules of Professional Conduct.

The trial court's finding and conclusion that this statement was a material misrepresentation of fact to the court is not supported by competent evidence. Respondent relied upon the trial docket and calendar and represented facts he believed to be true, with the qualification of "in my understanding."

Atwood, as Respondent's co-counsel, immediately supplemented the response:

> THE COURT: Well, why didn't you call this case first?
>
> [RESPONDENT]: There were felonies on the docket is my understanding.
>
> THE COURT: No, there weren't. They were all pled out last week.

> [RESPONDENT]: I think when the calendar was made, your Honor, I think you could make –
>
> THE COURT: But we knew Monday that, that wasn't the case is what I'm saying, so why didn't we go ahead and do this?
>
> [ATWOOD]: Your Honor, due to the number of motions that were in this particular case, we decided to place two cases in front of it that did not have the amount of motions to try to go ahead and knock out a couple of cases.

Respondent's first response of "There were felonies on the docket is my understanding" was a truthful statement. At the disciplinary hearing, the trial court made factual findings that: (1) there were felonies originally calendared on the docket; (2) Respondent had no involvement in the Aguilar case "from 25 August 2017 until approximately 12:15 pm on 13 September 2017"; (3) Respondent "was not assigned to represent the State during the 11 September 2018 trial session and did not appear in court before Judge Foster during that session until he was summoned to by someone in the DA's office to appear in Superior Court"; and (4) Respondent "had not participated in any trial preparation regarding the case."

A conclusion that Respondent engaged in conduct involving misrepresentation that reflected adversely on his fitness as a lawyer does not logically follow from the factual findings that Respondent had no involvement with the case between the time that the felonies on the docket were pled out and the moment before the hearing in question. Respondent, when specifically asked, recited a fact that was true at the last point of his knowledge, and also qualified it as such.

No evidence supports a finding or conclusion that Respondent engaged in misrepresentations concerning the docket and the reasons for the order in which the Aguilar case was called for trial, in violation of N.C. R. Prof. Cond. Rule 8.4(c). This conclusion is reversed.

C. Respondent's Apology

[3] Respondent asserts his apology to the court was "direct and unequivocal" and challenges Finding of Fact 5: "[Respondent's] apology to Judge Foster was unavailing," and the inclusion and consideration of "[Respondent's] refusal to acknowledge [the] wrongful nature of conduct" in the conclusions regarding discipline.

Respondent argues the trial court improperly considered his defense raised during the adjudication phase against him during the dispositional

phase, in violation of *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 657, 596 S.E.2d 337, 343 (2004). The findings of fact related to Respondent's conduct leading to and during the adjudication phase include:

> 1. Entzminger sent an electronic communication to Judge Foster on 3 November 2017 stating, in part, that his language in the Aguilar dismissal was directed at Robinson [defense counsel], not Judge Foster.
>
> 2. Entzminger's electronic communication to Judge Foster further states that there was no disrespect for Judge Foster's ruling in the filed dismissal.
>
> 3. Leading up to and through the hearing in this matter, Entzminger continued to claim, in the face of clear evidence to the contrary, that the language in the "Prosecutor's Dismissal and Explanation" was not directed at Judge Foster.
>
> 4. Entzminger did not apologize to Judge Foster at any point from the time he filed the "Prosecutor's Dismissal and Explanation" to the time of the hearing in this matter. Entzminger took the stand on the second day of the hearing, after the Court found that Entzminger had engaged in professional misconduct, and apologized to Judge Foster.

Respondent is correct in arguing that an attorney may defend against charges of professional misconduct without his defense being used against him in the dispositional phase. *See id.* His assertion of his lack of an apology to Judge Foster prior to or during the adjudication hearing being held against him in determining the appropriate discipline is not supported by the findings.

The trial court explicitly found that after being found to have engaged in unprofessional conduct. Respondent did, in fact, apologize to Judge Foster:

> Judge Foster, I apologize for my actions. The language that was put in the dismissal was inappropriate, should not have been there. It was – could have been seen as directed towards you, which it was not. I shall always yield gracefully to any ruling that you have. You should know the only reason that I have not been to you – the only reason why I have not been by your office, sat down in your office, the only reason I have not talked to you in the hallway has been under the advice of both counsel as well as those

> that I have asked since this began. I realize that when I sent you text messages, when I left you a phone message in order to set up a meeting, instead I should have just gone to your office. By the time I received counsel from others they said it was probably not a good idea. I wanted nothing more than to look at you and say I apologize for anything that I put in the dismissal. And I'm not just saying that just because here we are now. I'm really not. I was prepared to do this last Tuesday, I was prepared to do this last February, I was prepared to do this back at the end of September, before October the 2nd. I have always been prepared to do this. Yesterday if you would have been in court, in the afternoon you had to go somewhere, I would have said the same thing, that I deeply apologize to you. But more to the point I apologize to Mr. Walthall. I apologize to Mr. – the other Bar representative, I forget his name. And I apologize to Judge Blount. It is my actions that have brought us here today and I apologize for wasting the Court's time with something like this.

Despite Respondent's explanations and assertions, the trial court found his apology lacking. Respondent admitted under cross-examination during the dispositional phase of his trial that at least part of the language from his order of dismissal could have been construed as being directed at Judge Foster's ruling on denying Respondent's motion to continue. Respondent's dismissal specifically states: "Oddly enough, *the judge* indicated the DWI case should have been set further up in the calendar because defendant was from Hawaii." (Emphasis supplied).

The trial court included this finding of fact regarding discipline, which Respondent does not challenge and is binding upon appeal:

> 14. Contrary to the overwhelming weight of the evidence presented at the hearing, Entzminger's continued attempts to maintain that the dismissal language was not directed at Judge Foster and that he meant no disrespect to Judge Foster by his conduct demonstrates Entzminger's refusal to acknowledge the wrongfulness of his conduct."

"[U]nchallenged findings of facts are binding on appeal." *N.C. State Bar v. Key*, 189 N.C. App. 80, 87, 658 S.E.2d 493, 498 (2008) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Competent evidence exists to support the challenged finding of fact, which, along with uncontested findings, supports the challenged

conclusion of law. This Court does not find facts or "substitute itself for the trial judge." *Gen. Specialties Co.*, 41 N.C. App. at 275, 254 S.E.2d at 660. Respondent's argument is overruled.

VI. Conclusion

Competent evidence in the record supports the challenged findings of fact that Respondent had made false statements of material fact regarding when he had learned of Officer Sinclair's unavailability, which misled the trial court, and that Respondent had refused to acknowledge the wrongful nature of his conduct and his apology to the Court was "unavailing." *In re Key*, 182 N.C. App. at 717, 643 S.E.2d at 455. Those challenged conclusions of law are supported by the trial court's findings of fact and are affirmed.

The trial court's conclusion of law that Respondent's statement that "there were felonies on the docket is my understanding" created a material misrepresentation that Respondent knew or should have known was false is a conclusion of law unsupported by competent evidence and is unsupported by the findings of fact. This conclusion is reversed.

Respondent failed to challenge or argue the trial court's conclusion, or the findings of fact supporting it, that Respondent's filing of the dismissal violated Rules 8.4(d), 8.2(a), and 4.4(a) of the Rules of Professional Conduct and "constitute[d] grounds for discipline." *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

The trial court's order for discipline is affirmed in part, reversed in part, and remanded for a new hearing on the disciplinary sanctions to be imposed. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and ZACHARY concur.

IN RE NICOR, LLC

[266 N.C. App. 494 (2019)]

IN THE MATTER OF NORTH CAROLINA (FUTURE ADVANCE) DEED OF TRUST BY NICOR, LLC TO JERONE C. HERRING AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 1770, PAGE 152 OF THE MOORE COUNTY REGISTRY

SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 263, IN THE MOORE COUNTY REGISTRY

IN THE MATTER OF NORTH CAROLINA DEED OF TRUST AND SECURITY AGREEMENT BY NICOR, LLC TO BB&T COLLATERAL SERVICE CORPORATION AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 2988, PAGE 461 OF THE MOORE COUNTY REGISTRY

SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 265, IN THE MOORE COUNTY REGISTRY

IN THE MATTER OF NORTH CAROLINA DEED OF TRUST AND SECURITY AGREEMENT BY FOREST HAVEN, LLC TO BB&T COLLATERAL SERVICE CORPORATION AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 2793, PAGE 393 OF THE MOORE COUNTY REGISTRY

SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 269, IN THE MOORE COUNTY REGISTRY

IN THE MATTER OF NORTH CAROLINA DEED OF TRUST AND SECURITY AGREEMENT BY NICOR, LLC TO BB&T COLLATERAL SERVICE CORPORATION AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 3216, PAGE 62 OF THE MOORE COUNTY REGISTRY
SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 267, IN THE MOORE COUNTY REGISTRY

No. COA18-1071

Filed 6 August 2019

Mortgages and Deeds of Trust—foreclosure—power-of-sale—possible deficiency judgment—argument outside scope of proceeding

In a foreclosure proceeding, obligors' argument that anti-deficiency statutes (N.C.G.S. §§ 45-21.36 and 45-21.38) should have precluded the trial court from entering orders of sale permitting foreclosure amounted to an equitable argument that was outside the scope of a power-of-sale foreclosure proceeding. The trial court properly allowed foreclosure to proceed where the elements of N.C.G.S. § 45-21.16 were satisfied, although the trial court lacked authority to conclude that a judgment previously obtained by the holder of several promissory notes did not prevent foreclosure. However, obligors could raise their argument regarding a deficiency judgment in a hearing to enjoin the sale held pursuant to section 45-21.34.

IN RE NICOR, LLC

[266 N.C. App. 494 (2019)]

Appeal by respondents from orders entered 26 April 2018 by Judge Tanya T. Wallace in Moore County Superior Court. Heard in the Court of Appeals 27 March 2019.

Nelson Mullins Riley & Scarborough LLP, by Leslie Lane Mize and D. Martin Warf, for petitioner-appellee.

Clayton Myrick McClanahan & Coulter, by Noel B. McDevitt, Jr., and West & Smith, LLP, by Stanley W. West, for respondents-appellants.

ZACHARY, Judge.

Respondents-Appellants Nicor, LLC and Forest Haven, LLC (hereinafter "Nicor," "Forest Haven," and collectively "Obligors") appeal from orders of sale in three proceedings permitting foreclosure of certain real property "described in the [d]eeds of [t]rust in accordance with the terms and provisions of the power of sale contained therein." Prior to commencing foreclosure proceedings, RREF II WBC Acquisitions, LLC ("RREF"), then the holder of the notes, filed Obligors' confession of judgment entitling RREF to judgment for the entire outstanding amount owed on the promissory notes securing the deeds of trust. The trial court entered judgment in RREF's favor and stayed the foreclosure proceedings. Obligors argued before the trial court, and now argue before this Court, that the entry of judgment in RREF's favor for the aggregate debt secured by the deeds of trust on the property precluded the holder of the notes from subsequently foreclosing on the properties. Due to the limited scope of power-of-sale foreclosure proceedings, we conclude that this argument was not properly before the trial court. Accordingly, we affirm the trial court's orders of sale permitting foreclosure.

I. Background

Over a period of nearly twelve years, Nicor executed five promissory notes with principal amounts totaling $1,351,200.00 and secured repayment by executing three deeds of trust, originally for the benefit of BB&T Collateral Service Corporation ("BB&T"). Thereafter, BB&T assigned the Nicor promissory notes and deeds of trust to RREF.

On 4 May 2015, Forest Haven executed a promissory note in the original principal amount of $933,500.00, and secured repayment of the note by executing a deed of trust in favor of BB&T. BB&T assigned the Forest Haven promissory note and deed of trust to RREF.

Obligors defaulted; however, in October 2015, Obligors and RREF entered into a forbearance agreement, which provided Obligors

additional time to satisfy their debts. The agreement acknowledged the current amount of the debt owed and the existence of defaults under the promissory notes. RREF agreed not to exercise its rights under the loan documents until the earlier of 31 August 2016, or Obligors' failure to comply with the terms of the forbearance agreement (including any event of default). In addition, Obligors agreed to entry of judgment in RREF's favor if Obligors failed to satisfy the terms of the forbearance agreement, and they accordingly executed a confession of judgment. Obligors further permitted RREF, "[u]pon termination of the Forbearance Period," to initiate foreclosure proceedings upon the Nicor and Forest Haven deeds of trust that "have not [been] paid off under the terms of this Agreement."

One year later, in October 2016, the parties executed a "Modification of Forbearance Agreement" extending the forbearance period to 31 August 2017. The second forbearance agreement included confession of judgment and foreclosure provisions that were identical to those contained in the first forbearance agreement.

Obligors subsequently failed to comply with the terms of the modified forbearance agreement, and RREF filed the confession of judgment on 8 August 2017 in Moore County Superior Court. That day, the clerk of court entered judgment against Obligors in the amount of $1,834,071.42, plus interest at the annual rate of 12% to be calculated from the filing of the confession of judgment.

On 12 October 2017, RREF initiated three power-of-sale foreclosure proceedings before the Moore County Clerk of Superior Court. After initiating the foreclosure proceedings, RREF assigned the Nicor and Forest Haven promissory notes and deeds of trust to CL45 MW Loan 1, LLC ("CL45"), the current holder of the notes. The assistant clerk of superior court consolidated the matters for hearing, and concluded that the requirements of N.C. Gen. Stat. § 45-21.16 were satisfied. On 1 February 2018, the assistant clerk of court entered an order of sale in each proceeding allowing CL45 to proceed with the power-of-sale foreclosures on the real estate described in the deeds of trust.

Obligors appealed, and the matters were consolidated for a *de novo* hearing in Moore County Superior Court on 12 March 2018, the Honorable Tanya T. Wallace presiding. On 26 April 2018, Judge Wallace concluded that the requirements of N.C. Gen. Stat. § 45-21.16 were satisfied and entered orders of sale permitting foreclosure. Obligors timely filed notices of appeal.

II. Discussion

Obligors argue on appeal that the trial court erred in permitting the foreclosures to proceed after the holder of the notes had already obtained a judgment against Obligors for the entire amount of the debt secured by the deeds of trust. For the reasons explained below, we affirm the trial court's orders of sale permitting foreclosure.

A. Standard of Review

When reviewing a trial court's decision sitting without a jury, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Id.*

B. Power-of-Sale Foreclosure

There are two types of foreclosure proceedings in North Carolina: (1) foreclosure by judicial action, and (2) foreclosure under power of sale. *Banks v. Hunter*, 251 N.C. App. 528, 534, 796 S.E.2d 361, 367 (2017). "[F]oreclosure by power of sale under a deed of trust is a non-judicial proceeding." *In re Foreclosure of Lucks*, 369 N.C. 222, 222, 794 S.E.2d 501, 503 (2016). Chapter 45 of our General Statutes, concerning power-of-sale foreclosures, provides "certain minimal judicial procedures, including requiring notice and a hearing designed to protect the debtor's interest." *Id.* at 223, 794 S.E.2d at 503. In order to foreclose under a power-of-sale provision in a deed of trust, the clerk must find:

> (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A[.]

N.C. Gen. Stat. § 45-21.16(d) (2017). If the clerk finds the existence of these six elements, "the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article." *Id.*

The statute permits a *de novo* appeal of the clerk's findings "to the judge of the district or superior court having jurisdiction" within ten days after entry of the clerk's order. *Id.* § 45-21.16(d1). On appeal, the trial court is limited to deciding the same issues as the clerk—the existence of the elements provided in N.C. Gen. Stat. § 45-21.16(d). *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993). "The superior court has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in N.C. Gen. Stat. § 45-21.16." *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013) (quotation marks omitted).

C. Anti-Deficiency Statutes

Obligors first argue that the entry of judgment against them for the full amount of the debt precludes CL45 from subsequently proceeding with foreclosure, because doing so would in effect repeal N.C. Gen. Stat. § 45-21.36. Section 45-21.36 grants debtors a fair-market-value offset defense to certain deficiency judgments entered after foreclosure. A party may utilize this defense

> [w]hen any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part.

N.C. Gen. Stat. § 45-21.36.

Under this provision, where the foreclosing creditor is the high bidder for the property for an amount less than the debt owed to the foreclosing creditor in a power-of-sale foreclosure, and the foreclosing creditor subsequently sues to recover the deficiency, the deficiency may

be eliminated or reduced in two circumstances. First, the court may eliminate the deficiency if the debtor can show "that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale." *Id.*; *see also United Cmty. Bank v. Wolfe*, 242 N.C. App. 245, 246, 775 S.E.2d 677, 679 (2015), *rev'd on other grounds*, 369 N.C. 555, 799 S.E.2d 269 (2017). Alternatively, the court can reduce the deficiency upon the debtor's showing "that the amount bid [by the foreclosing creditor] was substantially less than its true value." N.C. Gen. Stat. § 45-21.36; *see also Wolfe*, 242 N.C. App. at 246, 775 S.E.2d at 679.

This statute's purpose is "to protect a debtor from a creditor unilaterally determining the amount to be applied to a debt resulting from the trustee's sale of collateral." *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 307, 776 S.E.2d 838, 842 (2015). The deficiency offset "protects a debtor by calculating the debt based upon the fair market value of the collateral instead of the amount bid by the creditor at the trustee's sale." *Id.* at 307, 776 S.E.2d at 843. This protection "is an equitable method of calculating the indebtedness, and as such is not subject to waiver." *Id.* "[W]aiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guarantee agreement would violate public policy." *Id.* at 308, 776 S.E.2d at 843.

Obligors assert that this Court should interpret section 45-21.36 as preventing the evasion of its deficiency protections, just as our Supreme Court interpreted section 45-21.38 in *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979). Section 45-21.38 provides that

> [i]n all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase

> money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

N.C. Gen. Stat. § 45-21.38.

Pursuant to this statute, "if the debt secured by the mortgage or deed of trust is for the balance of the purchase price owed to the [creditor] for the land involved, no deficiency judgment can be recovered against the mortgagor." 1 Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 13.46[1] (Matthew Bender, 6th ed.). However, the deed of trust must explicitly state that the indebtedness is for the balance of the purchase price for the real estate. *Id.*

Our Supreme Court interpreted this purchase-money mortgage antideficiency statute as limiting a foreclosing creditor, who was also the original seller of the land, to the remedy of foreclosing on the land. *Ross Realty*, 296 N.C. at 370, 250 S.E.2d at 273 ("[W]e think the manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.").

In construing section 45-21.38, the *Ross* Court stated that "the 1933 General Assembly intended to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees." *Id.* at 371, 250 S.E.2d at 274. Indeed, our Supreme Court determined that it was "compelled to construe [section 45-21.38] more broadly and . . . conclude that the Legislature intended to take away from creditors the option of suing upon the note in a purchase-money mortgage transaction. This construction of the statute not only prevents its evasion, but also gives effect to the Legislature's intent." *Id.* at 373, 250 S.E.2d at 275.

The mortgages in this case do not fall within section 45-21.38's protections because they are not purchase-money mortgages, but Obligors nevertheless ask our Court "to construe [section] 45-21.36 with the same breadth" as our Supreme Court construed section 45-21.38 in *Ross*. The construction that Obligors seek would prevent a lender from suing and obtaining a judgment *in personam* on a promissory note, and then subsequently pursuing a second action *in rem* by filing a foreclosure action. Obligors maintain that if CL45 proceeds with the foreclosure under these circumstances, then it "can purchase the properties for a fraction of their fair market value at the foreclosure sale with negligible effect on the substantial [j]udgment that it possesses. Then, [CL45] can freely

continue to execute and enforce the [j]udgment against [the] property that was never secured by the foreclosed deeds of trust." In sum, Obligors contend that it would be inequitable—and in their view, prohibited by statute—to permit CL45 to foreclose on the property when it has already taken a substantial money judgment against Obligors for the full amount of the debt.

While Obligors ask this Court to read into section 45-21.36 an anti-deficiency protection when a foreclosing mortgagee has already taken a judgment against the mortgagor, this appeal is before us after the trial court found in each case that CL45 had established the elements required for authorization of a power-of-sale foreclosure. CL45 responds that Obligors' equitable argument exceeds the scope of review under N.C. Gen. Stat. § 45-21.16(d); however, Obligors contend that after taking a judgment for the entire amount of the debt, CL45, as the holder of the notes, lost the "right to foreclose on the underlying [d]eeds of [t]rust *as a matter of law*."

D. "Right to Foreclose Under the Instrument"

As discussed above, one of the elements that the clerk of court or trial court must find to authorize a power-of-sale foreclosure is that the party seeking foreclosure had the "right to foreclose under the instrument." N.C. Gen. Stat. § 45-21.16(d). The trial court must "consider strictly whether 'the instrument' at issue conveys a right to foreclose." *Young*, 227 N.C. App. at 506, 744 S.E.2d at 480. The right to foreclose will not exist simply because the proper wording is used in the deed of trust; rather, "[i]n order for a trustee under a Deed of Trust to have any right to foreclose on a parcel of land, the Deed of Trust must encompass the subject property as security for the debt owed by the mortgagor." *In re Foreclosure of Michael Weinman Assoc.*, 333 N.C. 221, 228, 424 S.E.2d 385, 389 (1993). In that the clerk or trial court has no equitable jurisdiction in a power-of-sale foreclosure, "[t]he existence of any equitable defenses is inapposite to consideration" of the right to foreclosure. *Young*, 227 N.C. App. at 506, 744 S.E.2d at 480. Thus, only legal defenses may be considered.

Our courts have found that legal defenses to the right to foreclose under the instrument were properly raised where: (1) the property listed in the notice of hearing was not encumbered by the lien in the deed of trust, *Goforth*, 334 N.C. at 376-77, 432 S.E.2d at 859-60; (2) the property was released from the deed of trust and did not secure the note, or the borrower was entitled to a release under the deed of trust and the lender refused to deliver or record the release; the deed of trust did not contain

a valid power-of-sale provision; and the property subject to foreclosure was owned free and clear of the deed of trust being foreclosed upon, *Weinman*, 333 N.C. at 229-30, 424 S.E.2d at 389-90; (3) the property was not secured by the deed of trust because the lender attached a fraudulent legal description to the deed of trust after the borrower signed it, *In re Hudson*, 182 N.C. App. 499, 503, 642 S.E.2d 485, 488 (2007); and (4) the deed of trust was not properly executed by the parties, *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999), *disc. review denied*, 351 N.C. 353, 543 S.E.2d 126 (2000).[1]

As these cases illustrate, a party may assert an appropriate legal defense to the right to foreclose where (1) the loan documents provide the lender or holder of the note with the right to foreclose, and (2) a defect exists in the documents or the proceedings resulting therefrom. The existence of a deficiency judgment against the debtor is not a legal defense that may be raised prior to the issuance of the order of sale.

While the trial court must decline to address any argument beyond the existence of the six elements listed in N.C. Gen. Stat. § 45-21.16(d), this Court has repeatedly held that such arguments may be raised in a hearing to enjoin a foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34. *Young*, 227 N.C. App. at 505-06, 744 S.E.2d at 480. To enjoin a mortgage sale on equitable grounds,

> [a]ny owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient.

N.C. Gen. Stat. § 45-21.34.

In the instant case, the only element disputed by Obligors is CL45's right to foreclose under the instrument. Obligors do not contend that any of the loan documents prohibit CL45 from proceeding with foreclosure. The forbearance agreements explicitly provide for CL45's right

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1. For further explanation and more examples, *see* Meredith Smith, *Foreclosure by Power of Sale Equitable vs. Legal Defenses G.S. Chapter 45-21.16*, UNC School of Government, 6-7 (March 2015), [https://perma.cc/A6YS-3N3P].

to foreclose. Moreover, Obligors do not contest the existence of any of the other elements in N.C. Gen. Stat. § 45.21.16(d). However, although the trial court determined that "the filing of the Confession of Judgment does not preclude foreclosure," the trial court did not have the authority to make this conclusion. Accordingly, the trial court's order of sale permitting foreclosure of the properties at issue must be affirmed, sans the conclusion that the previously filed judgment does not preclude foreclosure.

In a subsequent hearing to enjoin the power-of-sale foreclosure pursuant to N.C. Gen. Stat. § 45-21.34, Obligors may assert that entering judgment against a debtor precludes a creditor from subsequently seeking to foreclose. If Obligors are unsuccessful in enjoining the foreclosure on equitable grounds pursuant to N.C. Gen. Stat. § 45-21.34, they may appeal that order to this Court and make their arguments again. *See Goad v. Chase Home Fin. LLC*, 208 N.C. App. 259, 704 S.E.2d 1 (2010) (reviewing the denial of an order to enjoin a foreclosure pursuant to N.C. Gen. Stat. § 45-21.34).

III. Conclusion

We affirm the trial court's orders of sale permitting foreclosure. Obligors' equitable argument exceeds the scope of a trial court's review in a power-of-sale foreclosure proceeding; however, Obligors may present their argument in a hearing to enjoin the mortgage sale pursuant to N.C. Gen. Stat. § 45-21.34 if circumstances warrant.

AFFIRMED.

Judges STROUD and INMAN concur.

RALEIGH RADIOLOGY LLC D/B/A RALEIGH RADIOLOGY CARY, PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED, RESPONDENT, AND DUKE UNIVERSITY HEALTH SYSTEM, RESPONDENT-INTERVENOR

No. COA18-785-2

Filed 6 August 2019

1. Hospitals and Other Medical Facilities—certificate of need—application—statutory criteria—compliance

An administrative law judge properly concluded that a certificate of need application for an MRI machine complied with the statutory criteria (N.C.G.S. § 131E-183(a)) regarding the population to be served (criteria 3), financial and operational projections (criteria 5), the cost, design, and means (criteria 12), and the contribution in meeting the needs of the elderly and underserved groups (criteria 13(c)). There was substantial evidence of the applicant's compliance with each of the review criteria.

2. Hospitals and Other Medical Facilities—certificate of need—appeal—comparative analysis of applications—de novo review

An administrative law judge erred on appeal by conducting its own comparative analysis of two certificate of need (CON) applications for an MRI machine where the CON agency did not abuse its discretion in its own analysis. The administrative law judge erroneously exceeded its authority by conducting a de novo review and considering two additional factors not utilized by the agency.

3. Hospitals and Other Medical Facilities—certificate of need—spoliation of evidence—irrelevant documentation

An administrative law judge (ALJ) did not err by denying a certificate of need (CON) applicant's motion in limine to apply adverse inference based on another applicant's alleged spoliation of certain evidence where the other applicant's third-party consultant who drafted its CON application discarded all useless and irrelevant documentation, consistent with the practice of most consultants in the field. Further, the documents would not have been the subject of review because the ALJ's review was limited to the CON agency's findings and conclusions.

Appeal by Respondents and cross-appeal by Petitioner from an amended final decision entered 16 March 2018 by Judge J. Randolph

Ward in the Office of Administrative Hearings. Heard originally in the Court of Appeals 13 March 2019. This matter was reconsidered in the Court pursuant to an order allowing Petitioner's Petition for Rehearing. This opinion supersedes the opinion *Raleigh Radiology v. NC DHHS*, No. 18-785, ___ N.C. App. ___, 827 S.E.2d 337 (2019), previously filed on 7 May 2019.

Brooks, Pierce, McLendon Humphrey & Leonard, L.L.P., by James C. Adams, II, for Petitioner Raleigh Radiology LLC.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need.

Poyner Spruill LLP, by Kenneth L. Burgess, William R. Shenton, and Matthew A. Fisher, for Respondent-Intervenor Duke University Health System.

DILLON, Judge.

Petitioner Raleigh Radiology LLC ("Raleigh") and Respondents N.C. Department of Health and Human Services, Division of Health Care Regulation, Health Care Planning and Certificate of Need (the "Agency"), and Duke University Health System ("Duke") all appeal a final decision of the Office of Administrative Hearings ("OAH") regarding the award of a Certificate of Need ("CON") for an MRI machine in Wake County.

I. Background

In early 2016, the Agency determined a need for a fixed MRI machine in Wake County and began fielding competitive requests. In April 2016, Duke and Raleigh each filed an application for a CON with the Agency.

Section 131E-183 of our General Statutes sets forth the procedure the Agency should use when reviewing applications for a CON. N.C. Gen. Stat. § 131E-183 (2016). The Agency uses a two stage process: First, the Agency reviews each application independently to make sure that it complies with certain statutory criteria. *See Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460 (1995) (citing N.C. Gen. Stat. § 131E-183(a)). Typically, if only one application is found to have complied with the statutory criteria, that applicant is awarded the CON. But if more than one application complies, the Agency moves to a second step, whereby the Agency conducts a comparative

analysis of the compliant applications. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 461.

In the present case, the Agency approved Duke for the CON, denying Raleigh's application, on two alternate grounds. First, the Agency determined that Duke's application alone was compliant. Alternatively, the Agency conducted a comparative analysis, assuming *both* applications were compliant, and determined that Duke's application was superior.

In October 2016, Raleigh filed a Petition for Contested Case Hearing. After a hearing on the matter, the administrative law judge (the "ALJ") issued a Final Decision, determining that both applications were compliant *but that*, based on its own comparative analysis, Raleigh's application was superior. Accordingly, the ALJ reversed the decision of the Agency and awarded the CON to Raleigh.

Duke and the Agency timely appealed. Raleigh also timely cross-appealed.

II. Standard of Review

We review a final decision from an ALJ for whether "substantial rights of the petitioners may have been prejudiced[.]" N.C. Gen. Stat. § 150B-51(b) (2018). We use a *de novo* standard if the petitioner appeals the final decision on grounds that it violates the constitution, exceeds statutory authority, was made upon unlawful procedure, or was affected by another error of law. N.C. Gen. Stat. § 150B-51(b)(1)-(4), (c) (2018). And we use the whole record test if the petitioner alleges that the final decision is unsupported by the evidence or is "[a]rbitrary, capricious, or an abuse of discretion." N.C. Gen. Stat. § 150B-51(b)(5)(6), (c) (2018).

III. Analysis

On appeal, Duke and the Agency argue that the ALJ erred in reversing the Agency's decision. Though successful in its appeal before the ALJ, Raleigh cross-appeals certain aspects of the ALJ's decision and with the process in general. We address the issues raised in the appeal and cross-appeal below.

A. ALJ's Finding that Duke's Application Conformed

[1] We first address Raleigh's cross-appeal challenge to the ALJ's finding that Duke's application complied with the Agency criteria. That is, though the ALJ awarded Raleigh the CON based on a determination that Raleigh's compliant application was superior to Duke's compliant application, Raleigh contends that the ALJ should have determined that Duke's application was not compliant to begin with. Specifically, Raleigh

contends that Duke did *not* conform with Criteria 3, 5, 12, and 13(c) found in Section 131E-183(a). For the following reasons, we disagree.

We review this argument under the whole record test, N.C. Gen. Stat. § 150B-51(b)(5)(6), (c), and properly "take[] into account the administrative agency's expertise" in evaluating applications for a CON. *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.

A review of the whole record reveals that the evidence presented by Duke in its CON application, the Agency hearings, and the Office of Administrative Hearings amounts to substantial evidence of Duke's compliance with the review criteria.

In conformity with Criteria 3, Duke "identif[ied] the population to be served by the proposed project, and . . . demonstrate[d] the need that this population has for the services proposed, and the extent to which all residents of the area . . . are likely to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a)(3). More specifically, in its application, Duke illustrated the current levels of accessibility to MRI scanners in Wake County and identified the location of its proposed MRI, the Holly Springs/Southwest Wake County area, as one in need of increased access to scanners, particularly due to its rapidly growing population. Duke also laid out the current travel burdens faced by Wake County residents in the Duke Health System who require access to an MRI scanner and how the addition of a new MRI scanner in its proposed location could have a favorable impact on those geographic burdens. Duke coupled those factors with the historically consistent utilization rate for MRIs in Wake County to demonstrate the need in the area for the MRI scanner.

In conformity with Criteria 5, Duke provided financial and operational projections that demonstrated "the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal[.]" N.C. Gen. Stat. § 131E-183(a)(5). For example, Duke set forth the anticipated source of financing for the project, with all the funding projected to be drawn from its accumulated reserves. Duke also provided five-year projections for its financial position and income statements, as well as three-year projections for the revenues to be produced by the new MRI scanner. The Chief Financial Officer of Duke also certified the existence and availability of funding for the project and referenced Duke's most recent audited financial statement to demonstrate the availability of such funds.

Duke also conformed with Criteria 12 by delineating that the construction "cost, design, and means" were reasonable by comparing its proposed

project with potential alternatives. N.C. Gen. Stat. § 131E-183(a)(12). Essentially, Duke compared its proposal to potential alternatives, including maintaining the status quo, developing the proposed MRI scanner in a different location, developing a mobile MRI service in Holly Springs, and pursuing the current project.

Lastly, Duke conformed with Criteria 13(c) by "demonstrat[ing] the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups . . . [and] show[ing] [t]hat the elderly and the medically underserved groups identified in this subdivision will be served by [its] proposed services and the extent to which each of these groups is expected to utilize the proposed services[.]" N.C. Gen. Stat. § 131E-183(a)(13)(c). Duke demonstrated that it expects almost one-third (1/3) of its patients to be Medicare or Medicaid recipients and that it has the support of community programs, which help in providing healthcare access to low-income, uninsured residents of Wake County. In addition, Duke provided statistics regarding its interactions with female and elderly patients, along with its policy of non-discrimination against handicapped persons. Using this data, Duke asserted that these kinds of patients will receive the same access to the new MRI scanner at the Holly Springs location.

In accordance with our previous holdings in CON cases, this Court "cannot substitute our own judgment for that of the Agency if substantial evidence exists." *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005). Indeed, Duke met this threshold by putting forth the aforementioned evidence; and the Agency is entitled to deference, as Duke put forth substantial evidence of its conformity with these criteria. Thus, we affirm the ALJ's finding of fact number 24 that Duke's application was compliant.

B. Comparative Analysis Review

[2] Duke and the Agency argue that the ALJ erred in conducting its own comparative analysis review of the two CON applications. That is, they argue that the ALJ should have given deference to the Agency's determination that Duke's application was superior. We review this question of law *de novo*. *Cumberland Cty. Hosp. Sys. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 524, 527, 776 S.E.2d 329, 332 (2015).

Our Court has held that where the Agency compares two or more applications which otherwise comply with the statutory criteria, "[t]here is no statute or rule which requires the Agency to utilize *certain* comparative factors." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health*

& Human Servs., 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006) (emphasis added). But, rather, the Agency has discretion to determine factors by which it will compare competing applications. *Id.*

However, the ALJ on appeal of an Agency decision does not have this same discretion to conduct a comparative analysis. That is, where an unsuccessful applicant appeals an Agency decision in a CON case, the ALJ does *not* engage in a *de novo* review of the Agency decision, but simply reviews for correctness of the Agency decision, pursuant to N.C. Gen. Stat. § 150B-23(a). *E. Carolina Internal Med., P.A. v. N.C. Dep't of Health & Human Servs.*, 211 N.C. App. 397, 405, 710 S.E.2d 245, 252 (2011). Indeed, "there is a presumption that 'an administrative agency has properly performed its official duties.' " *Id.* at 411, 710 S.E.2d at 255 (quoting *In re Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)).

In the present case, the Agency reviewed Duke's application and Raleigh's application for the CON independently. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 460 (citing N.C. Gen. Stat. § 131E-183(a)). This review revealed that Duke's application conformed with all criteria and that Raleigh failed to conform with respect to certain criteria. At that point, assuming that Raleigh's application indeed failed to conform to certain criteria, it would have been appropriate for the Agency to proceed with issuing the CON to Duke. Nevertheless, the Agency, as stated in its seventy-four (74) pages of findings, additionally "conducted a comparative analysis of [Duke's and Raleigh's applications] to decide which [one] should be approved," assuming that Raleigh's application did satisfy all of the criteria. *See id.* at 385, 455 S.E.2d at 461.

The Agency, in its discretion, used seven comparative factors in reviewing the CON applications: (1) geographic distribution, (2) demonstration of need, (3) access by underserved groups, (4) ownership of fixed MRI scanners in Wake County, (5) projected average gross revenue per procedure, (6) projected average net revenue per procedure, and (7) projected average operating expense per procedure. This comparative analysis led the Agency to approve and award the CON to Duke.

However, on appeal to the OAH, the ALJ deviated from the above factors by considering two additional factors: (1) the types of scanners proposed by each applicant, and (2) the timeline of each proposed project. Admittedly, there was evidence that Raleigh's proposed MRI machine was superior to the machine which Duke would use. It is this deviation and the reliance on additional comparative factors by the ALJ which we must conclude was error.

Indeed, adding two additional comparative factors is not affording deference to the Agency, but rather constitutes an impermissible *de novo* review of this part of the Agency's decision. Such a substitute of judgment by the ALJ is not allowed. *E. Carolina Internal Med.*, 211 N.C. App. at 405, 710 S.E.2d at 252.

Evidence was provided that the factors utilized by the Agency have been used in two previous MRI CON decisions and that the additional factors used by the ALJ have not been a part of the Agency's policies and procedures for many years. We note that information pertaining to Raleigh's allegedly superior MRI machine was not included in Raleigh's application, though it was otherwise presented at the Agency public hearing, but without an expert testifying as to the machine's medical efficacy. Even so, the Agency has the discretion to pick which factors it evaluates in conducting its own comparative analysis. *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58, 625 S.E.2d at 845. Further, regarding the timeline factor used by the ALJ, there was testimony that the Agency puts little, if any, weight to this factor as the factor disadvantages new providers. The ALJ did not determine that the Agency acted arbitrarily and capriciously, but rather simply substituted his own judgment in weighing the factors. We cannot say, though, that the Agency abused its discretion to rely on the factors that it did. Therefore, we conclude that the ALJ exceeded its authority conducting a *de novo* comparative analysis of the competing applications.

Separately, Raleigh argues that the Agency erred by concluding that its application was not conforming. But even assuming that the Agency incorrectly made a determination that Raleigh's application did not conform to certain statutory criteria, such error was harmless: the Agency proceeded with a comparative analysis of both applications as if Raleigh's application did comply and, in its discretion, determined that Duke's application was superior.

Therefore, we reverse the Final Decision and reinstate the decision of the Agency.[1]

C. Motion in Limine – Spoliation of Evidence

[3] In its cross-appeal, Raleigh argues that the ALJ erred in denying its motion in limine to apply adverse inference based on Duke's alleged spoliation of certain evidence. We disagree.

1. We note that additional arguments were made on appeal. For instance, Duke and the Agency contend that Raleigh did not establish substantial prejudice and that the Final Decision was incomplete and untimely by thirty-seven (37) minutes. However, in light of the ALJ's comparative analysis error and our subsequent reversal of the Final Decision, we need not address these arguments.

"[W]hen 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, *disc. rev. denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). This inference is a permissible adverse inference. *Id.* "To qualify for [an] adverse inference, the party requesting it must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction." *McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 (internal citations omitted). However, "[i]f there is a fair, frank and satisfactory explanation" for the absence of the documents, an adverse inference will not be applied. *Yarborough v. Hughes*, 139 N.C. 199, 211, 51 S.E. 904, 908 (1905).

In the present case, Duke contracted with a third-party consultant, ("Keystone"), to perform and draft its CON application. Keystone's practice is to discard all useless documentation and application references so as to keep only relevant, accurate applications and data. This practice is consistent with most consultants in this field, it is not disputed, and amounts to "a fair, frank and satisfactory explanation[.]" *Id.*

Moreover, as Duke and the Agency correctly point out, these documents would not be the subject of review or an appeal. Rather, the ALJ's review of the Agency's decision is limited to its seventy-four pages of findings and conclusions. We conclude that the ALJ did not err in not applying an adverse inference based on the absence of certain documents.

IV. Conclusion

The ALJ erred in not deferring to the comparative analysis performed by the Agency and conducting its own comparative analysis. However, the ALJ did not err in finding and concluding that Duke conformed with the applicable review criteria nor in not applying an adverse inference against Duke regarding certain information. Thus, we reverse the Final Decision and reinstate and affirm the decision of the Agency awarding the CON to Duke.[2]

REVERSED.

Judges BRYANT and ARROWOOD concur.

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2. We acknowledge Raleigh's motion for leave to file a supplemental brief regarding the ALJ's authority to remand a contested case to the Agency. We deny this motion as our resolution has rendered such an issue moot.

STATE OF NORTH CAROLINA
v.
ELMER ROMERO ORTIZ, Defendant, and ANTHONY BROADWAY, Bail Agent, and 1ST ATLANTIC SURETY COMPANY, Surety

No. COA18-1311

Filed 6 August 2019

1. Appeal and Error—notice of appeal—timeliness—final judgment

A board of education timely filed its notice of appeal from the trial court's order providing relief from a forfeited bail bond where the trial court's oral ruling—at which time the clerk stamped "forfeiture stricken" on the forfeiture notice, the trial court signed and dated the stamp, and the clerk wrote "entered" and the date next to the stamp—was not a final order. The stamped notice was not served on the parties (as required by Civil Procedure Rule 58), and the trial court's and parties' actions indicated that nobody thought the oral ruling was a final order. The board of education timely filed a notice of appeal from the final judgment, which was entered approximately two months later.

2. Bail and Pretrial Release—bond forfeiture—relief—pre-final judgment—deportation

The trial court erred by granting relief from a forfeited bail bond based on N.C.G.S. § 15A-301 where the defendant had been deported, because N.C.G.S. § 15A-544.5 is the exclusive avenue for relief from a pre-final judgment forfeiture.

Appeal by the State from Order entered 18 September 2018 by Judge Larry D. Brown, Jr. in Alamance County District Court. Heard in the Court of Appeals 21 May 2019.

Todd Allen Smith and Champion & Giles, P.A., by Robert Clyde Giles, II, for Alamance Burlington Board of Education, Appellant.

No brief for Elmer Romero Ortiz, Defendant.

David K. Holley for Anthony Broadway, Bail Agent, Appellee.

Brian Elston Law, by Brian D. Elston, for 1st Atlantic Surety Company, Surety, Appellee.

INMAN, Judge.

The Alamance Burlington Board of Education ("the Board") appeals from the trial court's order providing relief from a forfeited bond before a final judgment. The Board argues that the trial court erred in granting relief based on N.C. Gen. Stat. § 15A-301 because a different statute, N.C. Gen. Stat. § 15A-544.5, is the exclusive means for relief. After thorough review of the record and applicable law, we vacate the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record tends to show the following[1]:

On 29 June 2017, Defendant Elmer Romero Ortiz ("Defendant") was arrested in Alamance County on felony charges of committing a statutory sex offense on a child younger than fifteen years of age and taking indecent liberties with a minor. Defendant was released on a $50,000 bond on 30 June 2017 to secure his appearance at further proceedings. The bond was underwritten by Anthony Broadway as bail agent for 1st Atlantic Surety Company (collectively, "Sureties").

Defendant failed to appear for his 14 February 2018 court date. The court forfeited Defendant's bond and issued an order for his arrest. The forfeiture order was entered on 19 February 2018, the parties were notified of the forfeiture on 22 February 2018, and the final judgment of forfeiture was scheduled to be entered on 22 July 2018.

On 26 April 2018, Sureties filed a motion to recall the order for arrest and strike the forfeited bond, pursuant to N.C. Gen. Stat. §§ 15A-301 and 15A-544.5. Sureties alleged that Defendant was deported at the time of his missed 14 February 2018 court appearance.

During the initial hearing on the motion on 3 May 2019, the Board argued that because the forfeiture had not yet become a final judgment, Section 15A-544.5 was the sole avenue of relief and that Sureties could not establish any of that statute's enumerated factors to set aside the bond forfeiture. Sureties conceded that none of the factors existed, but argued that Section 15A-301 provided alternative authority for the trial court to strike the forfeiture. The trial court took the matter under advisement and continued the hearing.

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1. Because there is no transcript of the trial court proceedings, the parties prepared a narrative summarizing what transpired at the hearings, pursuant to Rule 9(c)(1) of our Rules of Appellate Procedure.

At the second hearing on 9 May 2018, at the request of the trial court, Defendant's counsel and an assistant district attorney for Alamance County were present, along with Sureties and the Board. Defense counsel informed the trial court that Defendant was in federal immigration custody on 14 February 2018 and that his current whereabouts were unknown.[2] The assistant district attorney asserted her belief that since being deported, Defendant "had already returned to the United States without proper permission and had been apprehended by law enforcement officials in Texas." The trial court again took the matter under advisement.

During the third hearing on 20 July 2018—two days before the original final judgment date—the trial court told the parties that it would not strike Defendant's arrest order but would grant Sureties relief from the forfeited bond. The trial court entered a written order on 18 September 2018 citing Section 15A-301 for its authority to grant relief and found "that extraordinary circumstances exist[ed] for good cause" to strike the bond forfeiture.

The Board appealed on 20 September 2018.

II. ANALYSIS

A. Notice of Appeal

[1] Sureties argue that the Board's appeal should be dismissed because it untimely filed notice of appeal more than two months following entry of final judgment on 20 July 2018. We disagree.

Rule 3 of our Rules of Appellate Procedure generally provides that in civil actions a party has 30 days to file and serve notice of appeal from the date of the trial court's final judgment or from the date of service if not served within three days upon judgment. N.C. R. App. P. 3(c) (2019); *Brown v. Swarn*, __ N.C. App. __, __, 810 S.E.2d 237, 238 (2018). In describing what makes a judgment final, Rule 58 of our Rules of Civil Procedure states:

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2. Throughout the proceedings, Defendant's location was never verified, nor did the trial court ever determine whether he was permanently deported or detained somewhere in the United States. Prior to his February 2018 court date, in a letter dated 20 November 2017, the United States immigration authorities notified the Alamance County Clerk of Court that it "[would] be enforcing an order of removal from the United States against" Defendant. The assistant district attorney also filed a dismissal with leave on 14 February 2018 reasoning that Defendant was deported. And in the trial court's order granting relief from the forfeited bond, it found that Defendant was in federal custody prior to his court date.

> [A] judgment is entered when it is *reduced to writing, signed by the judge, and filed with the clerk of court* pursuant to Rule 5. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered.

N.C. Gen. Stat. § 1A-1, Rule 58 (2017) (emphasis added). Thus, "the rendering of an oral ruling does not constitute the entry of a final judgment or order." *Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 709 n.3, 701 S.E.2d 348, 353 n.3 (2010) (citing *Kirby Bldg. Sys., Inc. v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990)); *see also Carter v. Hill*, 186 N.C. App. 464, 465-66, 650 S.E.2d 843, 844 (2007) (holding that no judgment was entered to support the civil contempt order because it was made orally by the trial court and not reduced to writing, pursuant to Rule 58).

After the trial court's oral ruling at the 20 July 2018 hearing, the clerk stamped "forfeiture stricken" on the bond forfeiture notice, and the trial court signed and dated that stamp. The clerk also wrote "entered" and the date next to the stamp. No copy of the signed and stamped forfeiture notice was served on either of the parties. Sureties assert that (1) the stamped forfeiture notice constituted a valid written final judgment and (2) because final judgment was rendered, the Board had actual notice of the entry of judgment and its content, notwithstanding the lack of service.[3]

It is clear from the 18 September 2018 order that the trial court did not construe the signed and stamped forfeiture notice to be a final judgment. Not only was the stamped notice not served on the parties, as required by Rule 58 of the Rules of Civil Procedure, the parties' and trial court's actions contravene Sureties' argument. At the conclusion of the 20 July 2018 hearing, the trial court told Sureties, consistent with Rule 58, *to draft a proposed final order*, deliver it to the Board for review, and then submit it to the trial court. After Sureties submitted a proposed order, the trial court notified the parties that it would write its own final order. These communications are inconsistent with the stamped and signed forfeiture notice serving as a final judgment. *See Russ v. Woodard*, 232 N.C. 36, 41, 59 S.E.2d 351, 355 (1950) (holding that a final judgment

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3. Sureties made the same argument in the district court arguing that the Board had actual notice of the court's decision on 20 July 2018. The trial court, in an order entered on 21 December 2018, denied Sureties' motion. Sureties do not contest any of the findings in that order.

is made "without any reservation for other and *future directions* of the court, so that it is not necessary to bring the case again before the court" (quotations and citations omitted) (emphasis added)).

Further, the Board's conduct reflects that it did not have notice that final judgment had been rendered before the trial court's written order in September 2018. *See Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted) ("[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered."). After the trial court indicated that it would write the final order, the Board continually inquired up until 18 September 2018 as to when the order would be finalized because it "wished to enter a timely notice of appeal."

We therefore conclude that the trial court's judgment granting relief from the forfeited bond was not entered on 20 July 2018, but rather on 18 September 2018. Because the Board timely filed notice of appeal two days later, we need not address Sureties' secondary argument concerning the Board's actual notice, and proceed in reviewing the merits of the issue on appeal.

B. Authority to Grant Relief Pre-Final Judgment

[2] The Board argues that Section 15A-544.5 is the sole provision in Chapter 15A for a court to provide relief before the date of a forfeited bond's final judgment and that the trial court erred in granting relief from the bond forfeiture. In response, Sureties argue that Section 15A-301 granted the trial court authority to relieve them of their bond obligation. For the reasons set out below, we conclude that the trial court exceeded its statutory authority provided by Chapter 15A and vacate the trial court's order.

Section 15A-554.1 *et seq.* of our General Statutes govern bail bond forfeiture and establish the contours of the trial court's authority to relieve an obligor from its bond liability. When a bond has been issued to secure the pre-trial release of a criminal defendant who then proceeds to "fail[] on any occasion to appear before the court as required," the trial court is obligated to "enter a forfeiture for the amount of that bond . . . against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2017). A forfeiture order becomes a final judgment 150 days after notice is given to the interested parties. *Id.* § 15A-544.6. Once final, the judgment is docketed "as a civil judgment . . . against each surety named in the judgment." *Id.* § 15A-544.7(a).

In certain statutorily prescribed circumstances, the trial court can grant relief to a surety from the forfeited bond pre- and post-final judgment. For bonds that have not become final judgments, the trial court can only "set aside" a forfeiture if one of seven enumerated reasons have been established, such as due to the defendant's death or additional incarceration. *See id.* § 15A-544.5(b) ("Reasons for Set Aside."). For final judgments, the trial court can grant "relief" if (1) "[t]he person seeking relief was not given notice" or (2) "[o]ther extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief." *Id.* § 15A-544.8(b).

Here, the trial court concluded that, although Section 15A-544.5 did not apply,[4] as no factor existed to set aside the forfeited bond, Section 15A-301 provided a basis to grant relief. Section 15A-301 generally allows for the trial court to recall "[a]ny criminal process other than a warrant or criminal summons . . . for good cause." *Id.* § 15A-301(g)(2). The trial court construed Section 15A-544.5 to apply only to "motions to set aside [sic] a forfeiture," and concluded that a "motion[] to strike a bond forfeiture (recall of process)" pursuant to Section 15A-301 is distinct and provided an alternative basis to grant Sureties relief. Because Sureties motioned to "strike"—instead of set aside—the forfeited bond, the trial court concluded Section 15A-301 applied in lieu of Section 15A-544.5.

The Board contends that a bond forfeiture is not a criminal process as written in Chapter 15A, Article 17 of our General Statutes, but rather a civil matter separate from any criminal statute's purview. Indeed, although bond proceedings are ancillary to an underlying criminal proceeding, they are civil in nature and are not controlled by the North Carolina Rules of Criminal Procedure, *State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 221, 606 S.E.2d 907, 909 (2005), and forfeited bonds are docketed as civil judgments once final. N.C. Gen. Stat. § 15A-544.7(a). Further, Article 17 of our General Statutes establishes four types of criminal processes: citations, criminal summons, warrants for arrests, and orders for arrests. N.C. Gen. Stat. §§ 301 *et seq.* (2017). Bond forfeiture proceedings—and bonds generally—are not listed as a criminal process or referenced in any of Article 17's provisions. It follows then that a trial court's authority to

4. Section 15A-544.8 was not implicated because the parties disputed the bond forfeiture before it was scheduled to become final on 22 July 2018. *See id.* § 15A-544.6 (stating that a forfeiture does not become final if (1) an order to set aside the forfeiture was entered on or before the final judgment date or (2) a motion to set aside the forfeiture is pending on the date of final judgment).

recall a criminal process under Section 15A-301 does not extend to bond forfeitures.[5]

Even assuming, without deciding, that a bond forfeiture proceeding is a criminal process, Section 15A-544.5 provides that "[t]here shall be no relief from a [pre-final] forfeiture except as provided in this section" and that "a forfeiture shall be set aside for any one of the [seven] reasons, *and none other*." *Id.* §§ 15A-544.5(a)-(b) (emphasis added). Section 15A-544.5 clearly and unambiguously instructs that it is "[t]he *exclusive avenue for relief* from forfeiture on an appearance bond (where the forfeiture has not yet become a final judgment)." *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012); *see also State v. Knight*, __ N.C. App. __, __, 805 S.E.2d 751, 755 (2017) ("[B]y its plain language, [Section] 15A-544.5 provides the 'exclusive' relief for setting aside a bond forfeiture that has not yet become a final judgment."); *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004) (same); *State v. Cobb*, __ N.C. App. __, __, 803 S.E.2d 176, 178 (2017) (same).

It is for this reason that the trial court could not rely on Section 15A-301 to relieve Sureties from the forfeited bond. Accordingly, because relief from a pre-final judgment forfeiture "is exclusive and limited to the reasons provided in [Section] 15A-544.5," *State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008), the trial court's authority to grant relief is limited to one of the seven enumerated reasons set out in subdivision (b). And because Defendant's "deportation is not listed as one of the [seven] exclusive grounds" to set aside a bond forfeiture, *id.* at 665, 660 S.E.2d at 618, the trial court was without authority to grant Sureties relief from the forfeited bond. *See also State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005) (holding that the trial court "lacked

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5. The trial court's error in this regard is understandable. It is well established that the purpose of bail "is to secure the appearance of the principal in court as required." *State v. Hollars*, 176 N.C. App. 571, 574, 626 S.E.2d 850, 853 (2006) (quotations and citation omitted). But, "Criminal Process" is defined as "[a] process (such as an arrest warrant) that issues to compel a person to answer for a crime." Black's Law Dictionary (11th ed. 2019); *see also State v. Jones*, __ N.C. App. __, __ 805 S.E.2d 701, 710 (2017) (Zachary, J., dissenting) (citing Black's Law Dictionary's definition and Article 17's Official Commentary on what constitutes a criminal process). If bond procedures are meant to incentivize a defendant's appearance in court, it is arguable that bond proceedings can be categorized as a criminal process. We need not answer this question because, as is discussed below, Section 15A-544.5 narrows the trial court's authority with respect to bonds before they become final judgments. *See Whittington v. N.C. Dep't of Human Res.*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990) ("[W]hen one statute speaks directly and in detail to a particular situation, that direct, detailed statute will be construed as controlling other general statutes regarding that particular situation, absent clear legislative intent to the contrary.").

the authority to grant surety's motion" because it "was not premised on any ground set forth" in Section 15A-544.5).

Sureties first argue that the trial court did not err in granting them relief because N.C. Gen. Stat. § 15A-544.5(b)(1) allows the trial court to set aside the forfeiture when the "failure to appear has been set aside . . . and any order for arrest issued for that failure to appear has been recalled." Sureties assert that, in conjunction with the relief from the forfeiture, the trial court also struck Defendant's failure to appear and recalled the order for arrest because it "did not grant in part or deny in part [Sureties'] motion."

We are unpersuaded. First, the written narrative crafted by the Board—which was not objected to by Sureties—states that the trial court refused to strike the order for arrest. Second, the order itself is silent as to a decision on the failure to appear or the order for arrest, merely stating that "[t]he issue before this Court is to determine whether the Surety and Bail Agent should receive relief from the Bond Forfeiture in this case." Lastly, the trial court's order expressly concludes that "[no] factors exist as enumerated under [Section] 15A-544.5 to strike the forfeiture in this case" and that it was relying on Section 15A-301 in granting relief.[6] Sureties' understanding of the court's order is thus misplaced.[7]

Sureties next argue that the trial court did not err because the Board failed to file a written objection to the motion to set aside the bond forfeiture as required by statute. Upon a motion to set aside a forfeiture, "[e]ither the district attorney or the county board of education may object to the motion by filing a written objection." N.C. Gen. Stat. § 15A-544.5(d)(3) (2017). If, after 20 days upon service of the motion, "neither the district attorney nor the attorney for the board of education has filed a written objection to the motion . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either." *Id.* § 15A-544.5(d)(4). Despite there being multiple hearings on the matter, there is no evidence in the record showing that the Board filed a written objection within 20 days of Sureties' motion. However, Sureties did not raise this issue before the trial court and instead fully participated over the course of three hearings. *See Richland Run Homeowners*

6. Because the trial court admitted that Section 15A-544.5 was inapplicable, we reject Sureties' other arguments pertaining to the trial court's authority under that statute.

7. We also reject Sureties' additional argument that the Board lacks standing to appeal the order because it is premised on the trial court granting relief through N.C. Gen. Stat. § 15A-544.5(c).

Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 347, 473 S.E.2d 649, 651 (1996) ("[B]y attending and participating in the hearing without objection or without requesting a continuance, plaintiff waived any right to object to the summary judgment hearing on the ground of lack of notice."), *rev'd on other grounds*, 346 N.C. 170, 484 S.E.2d 527 (1997). Because Sureties did not preserve this issue for appeal by arguing that Section 15A-544.5(d)(4) applied, it cannot serve as an alternative basis to affirm the trial court's order.

III. CONCLUSION

In sum, we hold that the Board timely filed its notice of appeal on 20 September 2018 upon the trial court's final 18 September 2018 order. We also hold that the trial court erred in granting Sureties relief from the forfeited bond. Section 15A-544.5 is the exclusive section for relieving a party from a forfeited bond pre-final judgment and the trial court in this instance was without statutory power under Section 15A-301 to supplement that authority. In determining that no basis existed within Section 15A-544.5 to set aside the forfeited bond, the trial court's order is vacated.

VACATED.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE v. EDGERTON

[266 N.C. App. 521 (2019)]

STATE OF NORTH CAROLINA
v.
LAMONT EDGERTON, DEFENDANT

No. COA18-1091

Filed 6 August 2019

1. Indictment and Information—indictment—habitual larceny—essential elements—representation in prior larcenies not essential element

Defendant's indictment for habitual larceny was not facially invalid for failing to allege that defendant was represented by counsel or waived counsel in the predicate prior larcenies, because representation by counsel was not an essential element of habitual larceny. Language in N.C.G.S. § 14-72(b)(6) that prior larceny convictions could not be counted unless defendant was represented by or waived counsel established an exception for which a defendant bears the burden of production.

2. Stipulations—habitual larceny—stipulation to prior convictions—authority of counsel

In a prosecution for habitual larceny, the record contained no evidence that defense counsel lacked authority to stipulate to defendant's prior larceny convictions, since attorneys are presumed to have authority to act on behalf of their clients, and because defendant's statement in court did not amount to a denial of the existence of his prior convictions but an objection to their use where they predated the enactment of the habitual larceny statute.

3. Indictment and Information—special indictment—section 15A-928(c)—habitual larceny—prior convictions an element of offense—failure to arraign—prejudice

In a prosecution for habitual larceny, which includes as an essential element that a defendant has four prior convictions for larceny, the trial court's failure to arraign defendant on a special indictment as required by N.C.G.S. § 15A-928(c) was not prejudicial where defendant was given adequate notice that his prior convictions would be used against him as well as an opportunity to admit or deny those convictions.

4. Larceny—habitual—sufficiency of evidence—essential elements—stipulation to prior convictions

Sufficient evidence was presented to uphold a conviction of habitual larceny where defendant stipulated to prior larceny convictions through counsel and his argument on appeal that representation in those prior convictions was an essential element was rejected.

5. Evidence—best evidence rule—habitual felon status—proof of prior convictions—ACIS printout

In a prosecution for habitual felon status, introduction of a printout from the Automated Criminal/Infraction System (ACIS) to prove prior convictions did not violate the best evidence rule because the printout was a certified copy of the original record, and an assistant clerk of court testified to its accuracy at trial.

Appeal by Defendant from judgment dated 26 April 2018 by Judge Mark E. Powell in Rutherford County Superior Court. Heard in the Court of Appeals 25 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.

W. Michael Spivey for Defendant-Appellant.

INMAN, Judge.

Felony habitual larceny, which elevates the crime of misdemeanor larceny if the defendant has been convicted of four or more prior larcenies, does not include as an essential element the requirement that the defendant was represented by counsel or waived counsel in obtaining those prior larceny convictions.

Lamont Edgerton ("Defendant") appeals following a jury verdict finding him guilty of habitual larceny and attaining the status of an habitual felon. Defendant argues that (1) the indictment was facially invalid and insufficient to charge him with habitual larceny; (2) he was not properly arraigned for the charge of habitual larceny; (3) his attorney was not authorized to stipulate to his prior larceny convictions; (4) the State did not provide sufficient evidence to prove the charge of habitual larceny; and (5) the use of an Automated Criminal/Infraction System printout to prove a prior felony conviction violated the best evidence rule. After

careful review of the record and applicable law, we hold that Defendant has failed to demonstrate error.

I. Factual and Procedural History

The record and evidence introduced at trial reveal the following:

On 14 September 2016, employees at Ingles Markets, Incorporated ("Ingles") witnessed Defendant "sticking . . . meats inside of a bag he brought in the store for himself." Defendant then left the store without paying for the items. One employee followed Defendant outside and planned to identify the license plate of Defendant's vehicle, but Defendant made eye contact with him and the employee returned inside the store.

Defendant reentered the store and confronted the employees at the Ingles deli counter. Defendant became "pretty rowdy," asked the employees if there was a problem, and said if there was he would "be back and take care of that problem." Both employees felt threatened by Defendant's behavior and told Defendant to take the meat. Once Defendant had left the store, they notified their management and called the police.

Sergeant Andy Greenway ("Sgt. Greenway") of the Lake Lure Police Department was dispatched to Ingles to investigate the call. He viewed surveillance footage of the incident and recognized Defendant. Sgt. Greenway and another officer found Defendant in front of his house with his father and sister and noticed two empty Ingles bags in the driveway. He then arrested Defendant, who asked, "Can I not just have my dad go back and pay for the pork chops?" Sgt. Greenway told Defendant that it was too late for that. Defendant told Sgt. Greenway that he took the pork chops because he had no money and wanted something nice to eat on his birthday.

Defendant was indicted for habitual larceny and as an habitual felon. The habitual larceny charge came on for jury trial during the 23 April 2018 session of Rutherford County Superior Court. At the close of the State's evidence, after conferring with Defendant, Defendant's counsel informed the court "for the record, we would stipulate to the sufficient prior larcenies to arrive at the level of habitual larceny." On 25 April 2018 the jury returned a verdict finding Defendant guilty of larceny.

After the jury returned its verdict, Defendant became agitated, made comments to the jury, and was removed from the courtroom when he got "more and more out of control." The court found that Defendant

"was a physical threat to everyone in the courtroom" and ruled that he had waived his right to be present.

The habitual felon phase of the trial proceeded in Defendant's absence.[1] Defendant's counsel declined to stipulate to Defendant's felony record. Karla Tower, an assistant clerk of the Rutherford County Superior Court, testified about Defendant's prior felony convictions and the jury found Defendant guilty of being an habitual felon.

The next day, the court reconvened for sentencing with Defendant present. The court found Defendant to have a level VI prior felony record level, and sentenced Defendant to 103 to 136 months' imprisonment. Defendant appeals.

II. Analysis

A. Indictment

[1] Defendant argues the indictment charging him with habitual larceny was facially invalid because it did not allege all the essential elements of the offense. We disagree.

Our General Statues provide that larceny of property valued $1,000 or less is a misdemeanor, and larceny of property valued more than $1,000 is a felony. N.C. Gen. Stat. § 14-72(a) (2017). But our statutes also provide that a charge of larceny ordinarily classified as a misdemeanor can be elevated to a felony charge when the defendant has committed four or more prior larcenies. The larceny must have been:

> [c]ommitted after the defendant has been convicted in this State or in another jurisdiction for any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times. *A conviction shall not be included in the four prior convictions required under this subdivision unless the defendant was represented by counsel or waived counsel at first appearance or otherwise prior to trial or plea.*

N.C. Gen. Stat. § 14-72(b)(6) (2017) (emphasis added). Defendant argues that the felony indictment in this case is invalid because it did

1. Defendant does not argue on appeal that the trial court erred in proceeding in his absence.

not specifically allege that he was represented by counsel or had waived counsel in the proceedings underlying each of his prior larceny convictions. For the reasons explained below, we hold that the counsel requirement is not an essential element of the crime of habitual larceny and that the indictment was therefore valid.

A constitutionally sufficient indictment "must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Brice*, 370 NC 244, 249, 806 S.E.2d 32, 36 (2017) (citations omitted). An indictment that fails to allege an essential element of the offense is facially invalid, thereby depriving the trial court of jurisdiction. *Id*. We review a challenge to the facial validity of an indictment *de novo*, *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016), considering the matter anew and freely substituting our own judgment for that of the trial court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

The indictment in this case alleges that Defendant did "steal, take, and carry away 2 packs of pork products, the personal property of Ingles Markets, Inc." and, in a separate count, alleges that Defendant previously had been convicted of four larceny offenses. The indictment lists the date of conviction, court, and file number for each larceny offense. The indictment does not allege that Defendant obtained those convictions while he was represented by counsel or had waived counsel.

We consider whether Section 14-72(b)(6)'s counsel requirement is an essential element of the offense, and is therefore required to be alleged in an indictment for habitual larceny, or whether the requirement provides for an exception to criminal liability that is not an essential element of the offense. Each provision in a statute defining criminal behavior is not necessarily an essential element. Such provisions may instead constitute, for example, affirmative defenses or evidentiary issues to be proven at trial. *See*, *e.g.*, *State v. Sturdivant*, 304 N.C. 293, 309-10, 283 S.E.2d 719, 730-31 (1981) (holding that consent is an absolute defense to kidnapping, rather than an essential element); *State v. Leaks*, 240 N.C. App. 573, 578, 771 S.E.2d 795, 799 (2015) (holding the manner used by a sex offender to notify the sheriff of a change in address is an evidentiary issue to be proven at trial, rather than an essential element of the crime). In some instances, we have held that exceptions to criminal statutes are "hybrid" factors, which the State is not required to allege in an indictment and for which it bears no initial burden of proof but must rebut evidence that a defendant's conduct falls within the exception. *See State v. Trimble*, 44 N.C. App. 659, 666, 262 S.E.2d 299, 303-04 (1980).

Allegations beyond the essential elements of a crime need not be included in an indictment. *State v. Rankin*, ___ NC ___, ___, 821 S.E.2d 787, 792 (2018).

The language of Section 14-72(b)(6) provides for an exception to the crime of habitual larceny, removing from consideration prior convictions obtained when a defendant was not represented by counsel and had not waived counsel. "Whether an exception to a statutorily defined crime is an essential element of that crime or an affirmative defense to it depends on whether the statement of the offense is complete and definite without inclusion of the language at issue." *Id.* When the statute's statement of the offense is complete and a subsequent clause provides an exception to criminal liability, the exception need not be negated by the language of the indictment. *State v. Mather*, 221 N.C. App. 593, 598, 728 S.E.2d 430, 434 (2012) (citing *State v. Connor*, 142 N.C. 700, 701, 55 S.E. 787, 788 (1906)). There are no "magic words" that indicate an exception to a statutory offense is a defense: "[t]he determinative factor is the nature of the language in question." *State v. Brown*, 56 N.C. App. 228, 230, 287 S.E.2d 421, 423 (1982). The question is whether the language is part of the definition of the crime or if it withdraws a class from an already complete definition of the crime. *Id.*

This Court has employed this analysis with respect to several criminal statutes, but we have not always focused on the same factors in making this determination. Prior decisions have identified as relevant the manner in which the statute and exception are drafted, *Brown*, 56 N.C. App. at 228, 287 S.E.2d at 421, prior decisions that enumerate the elements of the crime, *Brice*, 370 N.C. at 244, 806 S.E.2d at 32, and the essential fairness of assigning an exception as a defense or as an element, *Trimble*, 44 N.C. App. at 659, 262 S.E.2d at 299.

In *Brown*, we examined Section 14-74 of our General Statutes, which defines the crime of larceny by an employee. 56 N.C. App. at 230, 287 S.E.2d at 423. This statute criminalizes the act of an employee who takes certain possessions of his employer with the intent to steal or defraud "[p]rovided, that nothing in this section shall extend to apprentices or servants within the age of 16 years." N.C. Gen. Stat. § 14-74 (2017). We held that the exception withdrew a class of defendants—those under sixteen years of age—from the crime of larceny by an employee, and that the language of the statute preceding the clause completely defined the offense. *Brown*, 56 N.C. App. at 230-31, 287 S.E.2d at 423. Therefore, an indictment for the crime was not required to allege the defendant's age. *Id.* This Court further reasoned that a defendant's age "is a fact particularly within [the] defendant's knowledge," such that placing the

burden on the defendant to raise that exception is not an unfair allocation of proof. *Id.*

Similarly, Section 14-72(b)(6) provides a complete statement of the crime of habitual larceny without incorporating the exception at issue. We reach this conclusion by determining the type of criminal conduct the legislature intended to prohibit. *See Rankin*, ___ N.C. at ___, 821 S.E.2d at 792. In so defining a crime, we look to decisions by our Supreme Court enumerating its elements. *See*, *e.g.*, *Leaks*, 240 N.C. App. at 577, 771 S.E.2d at 799.

In *Leaks*, we addressed whether an indictment charging a sex offender with failure to notify the sheriff of a change of address must allege failure to provide notice in writing. *Id.* at 577-78, 771 S.E.2d at 798-99. We held that the writing requirement is an evidentiary issue, rather than an essential element, based on a Supreme Court decision enumerating the elements of that crime as part of its review of the sufficiency of the evidence presented against a defendant. *Id.* (citing *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449, (2009)).

With respect to Section 14-72(b)(6), we take guidance from our Supreme Court's recent decision in *Brice*, which enumerated the elements of habitual larceny:

> [A] criminal defendant is guilty of the felony of habitual misdemeanor larceny in the event that he or she "took the property of another" and "carried it away" "without the owner's consent" and "with the intent to deprive the owner of his property permanently" after having been previously convicted of an eligible count of larceny on four prior occasions.

370 N.C. at 248-49, 806 S.E.2d at 35-36 (internal citations omitted).[2] Our Supreme Court omitted the counsel requirement in its list of the essential elements of the offense. *Id.* We view this as an accurate description of the behavior our legislature intended to criminalize: larceny by a defendant who has been previously convicted of larceny at least four times. The counsel exception is therefore not an essential element of habitual larceny.

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2. An "eligible count" refers to convictions of larceny as defined in the statute: "any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction." N.C. Gen. Stat. § 14-72(b)(6).

We follow the guiding principal that the elements of an offense cannot be so defined as to place an unfair burden of proof upon the defendant. *See Brown*, 56 N.C. App. at 231, 287 S.E.2d at 423. It is "substantively reasonable to ask what would be a 'fair' allocation of the burden of proof, in light of due process and practical considerations, and then assign as 'elements' and 'defenses' accordingly." *Trimble*, 44 N.C. App. at 666, 262 S.E.2d at 303.

It is not unfair to require the defendant to bear the initial burden of producing evidence regarding representation by counsel with respect to one or more prior larceny convictions. Eligible prior larcenies for the purposes of Section 14-72(b)(6) include those committed at any time prior to the larceny being elevated to habitual status, in *any* jurisdiction. Even when a prior larceny was committed within the same jurisdiction as the habitual larceny case, as the assistant superior court clerk testified, court records are purged after a period of time. Defendants are likely the best source of information as to whether or not they were represented in proceedings resulting in a particular prior conviction.

Our Supreme Court's analysis of an analogous provision in our Fair Sentencing Act is instructive. In *State v. Thompson*, the Court examined the use of prior convictions as aggravating factors during sentencing. 309 N.C. 421, 307 S.E.2d 156 (1983). Although the burden of proving the prior convictions rests on the State, the Court held that "the initial burden of raising the issue of . . . lack of assistance of counsel on a prior conviction is on the defendant." *Id.* at 427, 307 S.E.2d at 161. The Court allocated to the defendant the burden to object to, or move to suppress, the admission of evidence of a prior conviction based on lack of representation because "cases in which a defendant was convicted while indigent and unrepresented should be the exception rather than the rule. A defendant generally will know, without research, whether this occurred." *Id.* at 426, 307 S.E.2d at 160 (quoting *State v. Green*, 62 N.C. App. 1, 6 n.1, 301 S.E.2d 920, 923 n.1 (1983)). As it is not unfair to require a defendant to raise the issue of lack of counsel when prior convictions are being used for sentencing purposes, it is likewise not unfair to place that initial burden on the defendant in the case of habitual larceny.

The legislature has also spoken on this question. Our Criminal Procedure Act provides that a defendant moving to suppress the use of a prior conviction "has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel." N.C. Gen. Stat. § 15A-980(c) (2017). This statute demonstrates a decision by our legislature that requiring a defendant to raise the representation issue is not an unfair allocation of the burden of proof.

Because Defendant's appeal challenges only the validity of the indictment, and Defendant presented no evidence regarding whether he was represented by or waived counsel in his prior larceny cases, our analysis concludes with determining that the counsel requirement is not an essential element of habitual larceny. We do not address whether the defendant bears any burden on this issue beyond that of production.[3]

Based on the structure of Section 14-72(b)(6), our Supreme Court's definition of its elements in *Brice*, and the availability to defendants of information regarding whether they had or waived counsel when they obtained prior convictions, we hold that representation by or waiver of counsel in connection with prior larceny convictions is not an essential element of felony habitual larceny as defined by N.C. Gen. Stat. § 14-72(b)(6). The indictment in this case was not required to allege facts regarding representation by or waiver of counsel and was sufficient to charge Defendant with the crime of felony larceny and grant the trial court subject matter jurisdiction.

B. Authority to Stipulate

[2] Defendant additionally argues that his attorney was without authority to stipulate to the prior convictions used to elevate his charge to habitual larceny. Defendant analogizes this stipulation to counsel's entry of a guilty plea or admission of a defendant's guilt to a jury, decisions which "must be made exclusively by the defendant." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). "[A] decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences." *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 274 (1969)).

We have expressly rejected this analogy in prior decisions. In *State v. Jernigan*, the defendant, charged with habitual impaired driving,

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3. While some defenses place the burdens of both production and proof upon the defendant, some only require an initial showing that shifts the burden of proof to the State. In *Trimble*, for example, we examined Section 14-401 of our General Statutes, which criminalizes putting poisonous foodstuffs in certain public places and provides that it "shall not apply" to poisons used for protecting crops and for rat extermination. 44 N.C. App. at 664, 262 S.E.2d at 302. We held that the exception was neither an element of the crime nor an affirmative defense, but a hybrid factor for which "the State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a non-frivolous manner, puts forth evidence to show that his conduct is within the exception" the burden shifts to the State. *Id.* at 666, 262 S.E.2d at 303-04. Similarly, in *Thompson*, our Supreme Court held that a *prima facie* showing by a defendant that prior convictions being used as aggravating factors were obtained in violation of the right to counsel shifts the burden to the State to show that they were not. 309 N.C. at 428, 307 S.E.2d at 161.

argued that the same procedural protections that apply to guilty pleas applied when his counsel stipulated to his previous convictions. 118 N.C. App. 240, 243-45, 455 S.E.2d 163, 165-66 (1995). We held in that case that a defendant's attorney may stipulate to an element of a charged crime, including previous convictions, and there is no requirement that the record show the defendant personally stipulated to the element or knowingly and voluntarily consented to the stipulation. *Id.* (citing *State v. Morrison*, 85 N.C. App. 511, 514-15, 355 S.E.2d 182, 185 (1987)). An attorney is presumed to have the authority to act on behalf of his client during trial, including while stipulating to elements of a crime, and "the burden is upon the client to prove the lack of authority to the satisfaction of the court." *Id.* at 245, 455 S.E.2d at 167 (citing *State v. Watson*, 303 N.C. 533, 538, 279 S.E.2d 580, 583 (1981)).

Defendant cites our Supreme Court's decision in *State v. Mason* for the proposition that "an attorney has no right, in the absence of express authority, to waive or surrender by agreement or otherwise the substantial rights of his client." 268 N.C. 423, 426, 150 S.E.2d 753, 755 (1966) (citation omitted). However, that same decision makes clear that its holding is based on the fact that the waiver made by defendant's counsel was *not* a "stipulation of guilt to an essential element of the crime charged." *Id.* at 425, 150 S.E.2d at 755.

In this case, the record does not show that Defendant's attorney acted without authority. The trial transcript does not support Defendant's assertion on appeal that he "immediately, clearly, and vigorously rejected any stipulation." Once the State's evidence had concluded and the jury was allowed to leave, Defendant's attorney informed the trial court "for the record, we would stipulate to the sufficient prior larcenies to arrive at the level of habitual larceny." Defendant then interjected, "It ain't nothing but a misdemeanor larceny charge." He explained, "It's not no felony larceny. Habitual larceny came out December 1, 2012. I did my time on all them other charges."

Defendant's statements immediately following his counsel's stipulation do not reflect a denial of the existence of those convictions or of his attorney's authority to stipulate to them. Instead, they reflect his legal disagreement with the use of convictions obtained prior to the enactment of our habitual larceny statute as prior convictions for the statute's purposes. Defendant has not satisfied the burden of showing his trial counsel did not have authority to stipulate to his prior larceny convictions.

C. Habitual Larceny Arraignment

[3] Defendant also argues that the trial court's failure to arraign him as mandated by Section 15A-928(c) of our General Statutes constitutes prejudicial error. We disagree.

When a defendant's prior convictions are used to raise an offense from a lower grade to a higher grade, thereby becoming an element of the offense, the State must obtain a special indictment alleging the previous convictions. N.C. Gen. Stat. § 15A-928(b) (2017). After the trial commences, and before the close of the State's case, the trial judge must arraign the defendant upon the special indictment and advise him that he may admit the alleged convictions, deny them, or remain silent. N.C. Gen. Stat. § 15A-928(c) (2017).

Defendant did not object at trial to the court's failure to arraign him. Although this would generally preclude Defendant from raising this issue on appeal, "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. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (citations and quotations omitted). A statutory mandate automatically preserves an issue for appellate review when it (1) requires a specific act by the trial judge or (2) requires specific proceedings the trial judge has authority to direct. *In re E.D.*, ___ N.C. ___, ___, 827 S.E.2d 450, 457 (2019) (citations omitted). Because the arraignment proceeding in question is mandated by Section 15A-928(c) of our General Statutes, the trial court's error is preserved for appeal if it prejudiced Defendant.

The State does not contest that the trial court failed to formally arraign Defendant upon the charge of habitual larceny. A trial court's failure to arraign defendant under Section 15A-928(c) is not *per se* reversible error but is analyzed for prejudice. "If there is no doubt that defendant was fully aware of the charges against him and was in no way prejudiced by the omission of the arraignment required by Section 15A-928(c), the trial court's failure to arraign defendant is not reversible error." *Jernigan*, 118 N.C. App. at 244, 455 S.E.2d at 166. The question before us, both in determining if this issue was preserved for appeal and if the error is reversible, is whether Defendant was prejudiced by the failure of the trial court to arraign him.

In *Jernigan*, the trial court failed to arraign a defendant who was charged with habitual impaired driving. 118 N.C. App. at 243, 455 S.E.2d at 165. Because the defendant's attorney informed the court that he had

discussed the case with the defendant and the defendant was willing to stipulate to the charges, and the defendant made no argument on appeal that he was not aware of the charges against him or did not understand his rights or the effect of the stipulation, we held that he was not prejudiced by the lack of arraignment. *Id.* at 245, 455 S.E.2d at 167.

In this case, as in *Jernigan*, Defendant stipulated through counsel to the prior convictions. Unlike in *Jernigan*, Defendant argues on appeal that he did not understand the charges of the special indictment and was confused about the impact of the stipulation. The record does not support this argument.

The two purposes of the statute, informing Defendant of the prior convictions that would be used against him and allowing him an opportunity to admit or deny those convictions, were fulfilled in this case. As in *Jernigan*, the prior convictions being used to elevate Defendant's charge were identified with specificity in a valid indictment, providing him with notice. 118 N.C. App. at 243, 455 S.E.2d at 166. When the trial court addressed the question of whether Defendant wished to stipulate to the prior convictions, Defendant was allowed the opportunity to admit or deny the convictions. Defendant's attorney requested a moment to speak with his client, they conferred and then, through counsel, Defendant stipulated to the prior larcenies. While Defendant protested at that time, as discussed *supra*, his disagreement concerned the eligibility of convictions he had obtained prior to the enactment of the habitual larceny statute. Defendant did not before the trial court and does not on appeal deny the convictions. Accordingly, we find that the purposes of Section 15A-928(c) were satisfied and Defendant was not prejudiced by the trial court's failure to arraign him on his prior convictions.

D. Sufficiency of Evidence

[4] Defendant additionally argues that the trial court erred in denying his motion to dismiss because the State failed to present sufficient evidence that Defendant was represented by or had waived counsel for his previous larceny convictions.

We review a trial court's denial of a motion to dismiss *de novo*, considering the matter anew and freely substituting our own judgment for that of the trial court. *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015). In reviewing a motion to dismiss based on insufficiency of the evidence, our inquiry is "whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of defendant's being the perpetrator of such offense." *Id.* at 470-71, 770 S.E.2d at 136.

In this case, the only essential element that Defendant contends the State failed to prove was that Defendant was represented by or had waived counsel in his prior larceny convictions. However, as discussed *supra*, because we hold that the counsel requirement is not an essential element under Section 14-72(b)(6), the State was not required to provide evidence of Defendant's representation. Furthermore, Defendant's counsel stipulated to Defendant's convictions for "sufficient prior larcenies to arrive at the level of habitual larceny." We therefore hold that the trial court did not err in denying Defendant's motion to dismiss.

E. Best Evidence Rule

[5] Finally, Defendant challenges the use of an Automated Criminal/Infraction System ("ACIS") printout to prove one of Defendant's prior convictions during the habitual felon phase of Defendant's trial. Defendant argues that the use of the printout violates the best evidence rule, which excludes secondary evidence used to prove the contents of a recording when the original recording is available. *See* N.C. Gen. Stat. § 8C-1, Rules 1002-1004 (2017).

When a defendant is charged with attaining the status of habitual felon, the trial proceeds in two phases. N.C. Gen. Stat. § 14-7.5 (2017). First the defendant is tried for the underlying felony and then, if the defendant is found guilty, the indictment charging the defendant as an habitual felon is revealed to the jury and the trial proceeds to the second phase. *Id*. The State must then prove that the defendant "has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States." N.C. Gen. Stat. § 14-7.1 (2017). The prior convictions "may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." N.C. Gen. Stat. § 14-7.4(a) (2017).

Defendant argues that Section 14-7.4 requires that a copy of judgment record be used to prove prior convictions, and that an ACIS printout is therefore secondary evidence that must comply with the foundational requirements of the best evidence rule—meaning the State must establish that a copy of the judgment record could not be "obtained by the exercise of reasonable diligence." N.C. Gen. Stat. § 8C-1, Rule 1005 (2017). We disagree.

This Court has previously held that a certified copy of an ACIS printout is sufficient evidentiary proof of prior convictions under our habitual felon statute. *State v. Waycaster*, ___ N.C. App. ___, ___, 818 S.E.2d 189, 195 (2018). We concluded in *Waycaster* that Section 14-7.4 is permissive and allows, rather than requires, that the proof tendered be a certified

copy of the court record of the prior conviction. *Id.* Accordingly, an ACIS printout, certified by the Clerk of McDowell County Superior Court as containing information accurately reflecting the judgment, was sufficient proof of the defendant's prior conviction. *Id.* Because the evidence tendered was not proof of the contents of another document, the best evidence rule did not bar the admission of the printout. *Id.*

In this case, the State similarly provided an ACIS printout evidencing Defendant's prior conviction. An assistant clerk testified as to its accuracy, and the printout was a certified copy. Following *Waycaster*, this is competent evidence of Defendant's prior conviction, and was properly admitted by the trial court.

NO ERROR.

Judges ARROWOOD and BROOK concur.

STATE OF NORTH CAROLINA
v.
JACK HOWARD HOLLARS

No. COA18-932

Filed 6 August 2019

Mental Illness—competency to stand trial—sua sponte competency hearing—history of mental illness

The trial court violated defendant's due process rights by failing to conduct a sua sponte competency hearing immediately before or during defendant's criminal trial where defendant had a long history of mental illness (including schizophrenia, bipolar disorder, and mild neurocognitive disorder), numerous prior forensic evaluations had reached differing results regarding his competency, there was a five-month gap between his competency hearing and his trial, several physicians and trial judges had expressed concerns about the potential for defendant's condition to deteriorate during trial, and defense counsel raised concerns about defendant's competency on the third day of trial.

Judge BERGER dissenting.

Appeal by Defendant from Judgments entered 12 January 2018 by Judge William H. Coward in Watauga County Superior Court. Heard in the Court of Appeals 28 March 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jack Howard Hollars (Defendant) appeals from his convictions for three counts of Indecent Liberties with a Child and three counts of Second-Degree Sexual Offense. The Record and evidence presented at trial tend to show the following:

Defendant was arrested in connection with this case on 10 February 2012. On 3 September 2013, Defendant was indicted by a Watauga County Grand Jury for one count of Statutory Sexual Offense of a Person Who Is Under 13 Years of Age, three counts of Statutory Sexual Offense of a Person Who Is 13–15 Years of Age, and four counts of Indecent Liberties with a Child. Subsequently, on 4 May 2015, superseding indictments were entered on these offenses, charging Defendant with three counts of Indecent Liberties with a Child and three counts of Second-Degree Sexual Offense. These indictments stemmed from incidents that occurred between 1977 and 1981.

Although Defendant initially waived his right to court-appointed counsel, on 23 April 2012, the trial court in its discretion decided to provide Defendant with court-appointed counsel because Defendant "was not responsive to [the] Court's questions" during his initial appearance. On 4 May 2012, Defendant's counsel filed a motion to have Defendant evaluated because of Defendant's behavior on 1 May 2012. On that date, Defendant's counsel met with Defendant at the Watauga County Jail for approximately one hour. During this visit, "Defendant's thought process [was] scattered and random[,] and he [was] unable to focus." Defendant claimed to have no memory of the events leading to his current charges because "God closed the door and I cannot see." Further, Defendant stated that he would not take any medication because "chemicals in the water at Parris Island in 1968 when he was in the Marine Corps 'messed up [his] brain.' "

On 7 May 2012, Defendant underwent a forensic evaluation by Daymark Recovery Services, which rendered a report on Defendant's capacity to proceed to trial two days later (Daymark Report). The Daymark Report noted some of the same concerns that Defendant's counsel had expressed previously about Defendant's behavior, such as "religious concerns and ideas to an extent that suggested a dysfunctional preoccupation"; Defendant's unwillingness to discuss the nature of the charges that he was facing; and Defendant's aversion to taking his medications. The Daymark Report concluded by stating:

> It is the opinion of the Certified Forensic Evaluator that [Defendant] is not competent to stand trial, and is impaired in providing the expected ability to assist in his defense. [Defendant] showed limited ability to cooperate in even basic discussion of his case with the undersigned despite a history of cooperative interaction over many years. [Defendant] appears psychotic and delusional, and in need of medication and treatment to relieve his condition. It seems likely, given [Defendant's] history, that a reestablishment of his psychotropic medication regimen would reestablish his capacity to proceed to trial. However, it also appears unlikely that he will allow this voluntarily in his current state of mind.

The Daymark Report also recommended further assessment and inpatient treatment of Defendant.

Based on the Daymark Report, the trial court entered an order committing Defendant to Central Regional Hospital for an examination on his capacity to proceed. On 25 July 2012, Dr. David Bartholomew (Dr. Bartholomew) of Central Regional Hospital evaluated Defendant and found him incapable to proceed in a written report dated 9 August 2012 (First Dr. Bartholomew Report). Dr. Bartholomew based his Report on, *inter alia*, Defendant's prior medical records, the Daymark Report, and a 75-minute in-person evaluation of Defendant. The First Dr. Bartholomew Report contained many of the same concerns as the Daymark Report and concluded that:

> [Defendant] has a history of significant mental health problems including psychosis and depression. He is currently not receiving any treatment for his conditions. He is quite impaired at the present time as a result of symptoms of his mental illness. He is unable to describe a reasonable understanding of the nature and objects of the

> proceedings against him. He is not rational about his place in regards to the proceedings. He is unable to assist his attorney in a reasonable manner. [Defendant] is not capable to proceed.

This Report also noted Defendant "may gain capacity if he receives mental health treatment."

Based on the First Dr. Bartholomew Report, the trial court entered an order on 18 September 2012, finding Defendant incapable to proceed and involuntarily committing Defendant to Broughton Hospital. Defendant would remain at Broughton Hospital until, and throughout, his trial in January of 2018. During this time period, Defendant would undergo several other forensic evaluations with differing results.

On 14 May 2013, Dr. Bartholomew entered another report, based on a forensic evaluation from the previous month, finding Defendant competent to stand trial (Second Dr. Bartholomew Report). This Second Dr. Bartholomew Report found that Defendant's "mental health condition has improved with medication" but recommended continued psychiatric treatment of Defendant.

On 31 March 2015, Dr. Bartholomew conducted a third forensic evaluation of Defendant and entered a written report on 14 April 2015 (Third Dr. Bartholomew Report). Although this Report concluded Defendant was capable to proceed, Dr. Bartholomew noted that Defendant "has a longstanding mental illness which has been labeled as schizophrenia, schizoaffective disorder, or bipolar disorder by various clinicians." The Report further recommended that:

> Given his dementia, [Defendant] may not function well at the jail and may likely decompensate again if housed overnight in the jail. If [Defendant's] future court visits will take more than one day, I would recommend that, if possible, he stay at Broughton Hospital each night and be transported to court each morning or day. It is also possible his condition may deteriorate with the stress of a trial so vigilance is suggested if his case proceeds in a trial.

On 5 May 2015, the trial court held a competency hearing where Dr. Bartholomew testified that in his opinion Defendant was competent. However, the trial court had reservations regarding Defendant's capacity and ordered Defendant to undergo an additional psychiatric evaluation before determining Defendant's capacity to stand trial. On 23 July

2015, the trial court appointed Dr. James E. Bellard (Dr. Bellard) to conduct this evaluation.

On 9 October 2015, Dr. Bellard held a forensic interview with Defendant; thereafter, Dr. Bellard found Defendant incompetent to proceed and reduced his findings to a written report on 4 November 2015 (Dr. Bellard Report). The Dr. Bellard Report found Defendant suffered from hallucinations and diagnosed him with schizophrenia and mild neurocognitive disorder. In the Report, Dr. Bellard expressed that "[he] simply cannot see [Defendant] as competent to stand trial" and that if Defendant proceeded to trial, he "would have difficulty refraining from irrational or unmanageable behavior during a trial."

On 7 March 2016, the trial court entered an Order on Defendant's Incapacity to Proceed (Incapacity Order) finding Defendant "lacks capacity to proceed." In the Incapacity Order, the trial court found that "Defendant suffers from Schizophrenia and experiences auditory hallucinations . . . on a regular basis." The trial court also found Defendant had a mild neurocognitive disorder that "impacts his daily life and competency[.]" Lastly, the trial court noted—"Defendant's difficulty maintaining mental stability upon transfer to the jail suggests that he would have difficulty tolerating stress at a trial or while awaiting trial, and he would have difficulty refraining from irrational or unmanageable behavior during a trial."

On 8 December 2016, Dr. Bartholomew conducted another forensic evaluation of Defendant and found he was capable to proceed, based on Defendant's progress with his treatment and continued medication. On 15 August 2017, Dr. Bartholomew and Dr. Reem Utterback (Dr. Utterback) examined Defendant and found him competent in a report dated 24 August 2017 (Final Dr. Bartholomew Report). This Report concluded that "it is reasonable to assume [Defendant] will maintain this [level of] functioning in the foreseeable future and during a trial."

Thereafter, the trial court held a competency hearing on 5 September 2017, finding Defendant competent to stand trial. On 2 January 2018, Defendant filed a Motion to Dismiss citing the delay in prosecuting his case. Defendant contended there was "no physical evidence whatsoever that any crime ever occurred[.]" Defendant further noted his "Capacity to Proceed has been in question since his initial arrest in 2012" and various treatment attempts and psychological issues "account for almost all the delay between Defendant's initial arrest in 2012 and the present." Defendant conceded the delay was "not the fault of the State" but contended the passage of time, in terms of both witness recollection

and Defendant's progressing psychological issues, "has worked to substantially prejudice Defendant." That same day, Defendant also filed a Motion to Quash Indictments and a second Motion to Dismiss, citing double jeopardy and other constitutional concerns. On 5 January 2018, Defendant filed a Supplement to his Motion to Dismiss alleging additional details regarding his mental health.

On 8 January 2018, the matter proceeded to trial, and the trial court did not hold another competency hearing before commencing this trial. After the State's first witness had finished her testimony on 10 January 2018, Defendant's counsel brought to the trial court's attention his concerns regarding Defendant's competency. Specifically, Defendant's counsel stated:

> Your Honor, . . . I just had a brief conversation with [Defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that. . . . I've been asking him how he's doing and if he knows what's going on. And up until just now he's been able to tell me what's been going on. He just told me just a few minutes ago that he didn't know what was going on. . . . I asked him if he understood what was going on. He said, no, he didn't know what [the witness] was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. . . . I feel we need to make sure. And I'm not asking for an evaluation[.] I would just ask for the Court to query him quickly to make sure . . . I'm seeing something that is not there.

The trial court suggested Defendant's lack of understanding was likely attributable to earlier discussions of Rules 403 and 404(b) of the North Carolina Rules of Evidence, not Defendant's mental state. Thereafter, the trial court stated it would address this issue the following morning. The next morning, the ensuing exchange between the trial court and Defendant's counsel occurred:

> THE COURT: Do you have any more information or arguments you want to make as to [Defendant's] capacity this morning?
>
> [DEFENSE COUNSEL]: No, Your Honor. When [Defendant] came in this morning he greeted me like he has other mornings. I interacted with him briefly and

> he interacted like he has been interacting every morning. And I've not had any questions about his capacity this morning. I just had some yesterday evening because he kind of looked at me and the look in his face was like he had no idea who I was.
>
> THE COURT: Yeah, well, any time you get to -- like I said, any time you get to talking about 404(b) and 403 everybody in the courtroom is going to look like that but.
>
> [DEFENSE COUNSEL]: I don't have any concerns this morning.
>
> THE COURT: Okay.

Neither the trial court nor Defendant's counsel raised the issue of Defendant's competency again at trial. On 12 January 2018, the jury returned verdicts finding Defendant guilty on all charges. The trial court entered separate Judgments on each of the charges against Defendant, sentencing Defendant to ten years on each charge of Indecent Liberties with a Child and 40 years on each charge of Second-Degree Sexual Offense to run consecutively in the custody of the North Carolina Department of Adult Correction. Additionally, the trial court entered Judicial Findings and Order for Sex Offenders on each charge. Defendant appeals.

Issue

The dispositive issue in this case is whether the trial court violated Defendant's due-process rights by failing to conduct a competency hearing immediately prior to or during Defendant's trial.

Analysis

I. Standard of Review

"[T]he conviction of an accused person while he is legally incompetent violates due process[.]" *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979) (citations omitted). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

II. Lack of Competency Hearing

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*,

420 U.S. 162, 171, 43 L. Ed. 2d 103, 112-13 (1975). Our North Carolina Supreme Court has held

> under the Due Process Clause of the United States Constitution, a criminal defendant may not be tried unless he is competent. As a result, a trial court has a constitutional duty to institute, *sua sponte*, [a] competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent. In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

State v. Badgett, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (alteration in original) (citations and quotation marks omitted). In addition, "a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55 (2005) (citation omitted). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and *any prior medical opinion on competence to stand trial* are all relevant to a bona fide doubt inquiry." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (alteration in original) (emphasis added) (citation and quotation marks omitted).

Defendant contends the trial court erred by failing to conduct *sua sponte* a competency hearing either immediately before or during the trial because substantial evidence existed before the trial court that indicated Defendant may have been incompetent. We agree with Defendant and believe *McRae* controls our analysis.

In *McRae*, the defendant suffered from schizophrenia and psychosis and had undergone at least six psychiatric evaluations over a seventeen-month period leading up to his first trial, which evaluations had differing results regarding the defendant's competency. *Id.* at 390-91, 533 S.E.2d at 559-60. Immediately following a competency hearing finding him competent, the defendant went to trial; however, this trial resulted in a mistrial. *Id.* at 391, 533 S.E.2d at 560. Thereafter, Defendant underwent an additional evaluation finding him competent, and five days later, the defendant's second trial began. *Id.* Noting "concern[s] about the temporal nature of [the] defendant's competency[,]" this Court held that the trial court erred in failing to conduct a competency hearing immediately prior to the second trial. *Id.* (citation omitted); *see also Meeks*

v. Smith, 512 F. Supp. 335, 338-39 (W.D.N.C. 1981) (finding a bona fide doubt existed as to the defendant's competency where defendant was diagnosed as schizophrenic and underwent seven psychiatric evaluations yielding different conclusions as to defendant's competency).

Here, the trial court was presented with substantial evidence raising a bona fide doubt as to Defendant's competency to stand trial in January of 2018. First, on 8 January 2018, the trial court had access to Defendant's seven prior forensic evaluations. These evaluations found Defendant was psychotic at times, suffered from hallucinations, and had been diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder. Several of these evaluations also noted a temporal aspect to Defendant's mental ability to stand trial. For instance, the Third Dr. Bartholomew Report noted, "It is also possible his condition may deteriorate with the stress of a trial so vigilance is suggested if his case proceeds in a trial." Dr. Bellard expressed similar concerns in his report as well. Our Court has recognized that "[e]vidence of . . . any prior medical opinion on competence to stand trial [is] relevant to a bona fide doubt inquiry." *McRae*, 139 N.C. App. at 390, 533 S.E.2d at 559 (citation and quotation marks omitted).

In addition, Defendant's last forensic evaluation was conducted on 15 August 2017 and reduced to writing on 24 August 2017—the Final Dr. Bartholomew Report. Based on this Report, the trial court conducted a competency hearing and determined Defendant to be competent to stand trial on 5 September 2017. However, Defendant's trial did not begin until 8 January 2018, a full five months after Defendant's competency hearing and almost six months after Defendant's last forensic evaluation. Given the temporal nature of Defendant's mental illness, the appropriate time to conduct a competency hearing was immediately prior to trial. *See id.* at 391, 533 S.E.2d at 560; *Meeks*, 512 F. Supp. at 338-39; *see also State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975) (stating a defendant's competency must be assessed "at the time of trial" (citations omitted)).

In a similar vein, we find it significant that Defendant's prior medical records disclosed numerous concerns about the potential for Defendant's mental stability to drastically deteriorate over a brief period of time and with the stress of trial. Dr. Bartholomew correctly indicated that "vigilance is suggested if [Defendant's] case proceeds in a trial[,]" as "a defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time." *State v. Whitted*, 209 N.C. App. 522, 528-29, 705 S.E.2d 787, 792 (2011) (citation omitted). Because these forensic evaluations suggested a "temporal nature of [Defendant's]

competency[,]" the trial court should have conducted a competency hearing. *See McRae*, 139 N.C. App. at 391, 533 S.E.2d at 560 (citation omitted). Therefore, we conclude the trial court committed prejudicial error in failing to hold a competency hearing.

Further, we find additional support for this conclusion based on the events at trial. For instance, Defendant's counsel questioned Defendant's capacity on the third day of trial. Specifically, defense counsel stated, "I just had a brief conversation with [Defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that." Defense counsel's concerns stemmed from Defendant's responses that he "didn't know what was going on" and "didn't know what [the witness] was talking about." These concerns were raised before the trial court, although a competency hearing was not held at this time.[1] However, our Court has observed that a defendant's demeanor is also relevant to a bona fide-doubt inquiry. *See id.* at 390, 533 S.E.2d at 559 (citation and quotation marks omitted). Moreover, Defendant never had an extended colloquy with the trial court or testified in a manner that demonstrated he was competent to stand trial. *Cf. Staten*, 172 N.C. App. at 679-84, 616 S.E.2d at 655-58 (holding that there was not substantial evidence of defendant's incompetence where defendant engaged in a lengthy voluntariness colloquy with the trial court; defendant's responses were "lucid and responsive"; and his testimony was mostly rational).

In light of Defendant's extensive history of mental illness, including schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder, his seven prior forensic evaluations with divergent findings on his competency, the five-month gap between his competency hearing and his trial, the concerns expressed by physicians and other trial judges about the potential for Defendant to deteriorate during trial and warning of the need for vigilance, the concerns his counsel raised to the trial court regarding his conduct and demeanor on the third day of trial, and the fact that the trial court never had an extended colloquy with Defendant, we conclude substantial evidence existed before the trial court that raised a bona fide doubt as to Defendant's competency to stand trial. Therefore, the trial court erred in failing to institute *sua sponte* a competency hearing for Defendant.

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1. Although by the next morning Defendant's counsel indicated that he no longer had any concerns and the trial court proceeded with the trial, in our view, under the totality of the circumstances—including Defendant's extensive medical history and the gap between Defendant's last competency hearing and trial—there was substantial evidence giving rise to a bona fide doubt regarding Defendant's competency, notwithstanding defense counsel's failure to further pursue a competency hearing during trial.

III. Remedy

Because we have found that the trial court erred by failing to hold a competency hearing immediately prior to or during Defendant's trial, we follow the procedure employed in *McRae* and remand to the trial court for a determination of whether a meaningful retrospective hearing can be conducted on the issue of Defendant's competency at the time of his trial. *See McRae*, 139 N.C. App. at 392, 533 S.E.2d at 560-61 ("The trial court is in the best position to determine whether it can make such a retrospective determination of [a] defendant's competency."). On remand,

> if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required. If the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial may be granted when he is competent to stand trial.

Id. at 392, 533 S.E.2d at 561. In reaching its decision, the trial court must determine if a retrospective determination is still possible as it relates to (1) Defendant's competency immediately prior to trial, (2a) Defendant's competency during trial, and (2b) specifically Defendant's competency during the proceedings on the afternoon of 10 January 2018 when Defendant's trial counsel raised concerns over Defendant's mental state. If the trial court decides a retrospective determination is possible, the trial court must make detailed findings of fact and conclusions of law in a written order. Because it is possible on remand that the trial court concludes Defendant was not competent and orders a new trial, which would moot Defendant's arguments in his Conditional Motion for Appropriate Relief, we dismiss Defendant's Conditional Motion for Appropriate Relief without prejudice.

Conclusion

For the foregoing reasons, we remand this case to the trial court for a hearing to determine Defendant's competency at the time of trial. Further, we dismiss Defendant's Conditional Motion for Appropriate Relief without prejudice.

REMANDED.

Judge MURPHY concurs.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

There was no *bona fide* doubt as to Defendant's competence to stand trial, and there was not substantial evidence before the trial court that Defendant was incompetent. Thus, the trial court did not err when it began Defendant's trial, and proceeded with the trial, without undertaking another competency hearing, and I respectfully dissent.

A defendant lacks capacity to proceed when "he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." *State v. King*, 353 N.C. 457, 465-66, 546 S.E.2d 575, 584 (2001) (citation omitted), *cert. denied*, 534 U.S. 1147 (2002). "[A] conviction cannot stand where the defendant lacks capacity to defend himself." *Id.* at 467, 546 S.E.2d at 585 (citation omitted).

"[A] trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency . . . ." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654 (2005). "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide* doubt inquiry." *Id.* at 678, 616 S.E.2d at 655. "[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Id.* at 681, 616 S.E.2d at 656.

"There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* at 679, 616 S.E.2d at 655 (citations omitted). There must be "evidence before the trial court that defendant was not capable of assisting in his own defense," *State v. Blancher*, 170 N.C. App. 171, 174, 611 S.E.2d 445, 447 (2005), or otherwise lacked capacity to proceed.

There is no evidence in the record of irrational behavior or change in demeanor by Defendant at trial. The majority rests its reasoning almost entirely on Defendant's prior competency evaluations. While relevant, this factor alone is not controlling.

Defendant underwent multiple competency evaluations prior to trial. The dates of those evaluations, doctors, and results are set forth below:

May 7, 2012	Dr. Murray Hawkinson	Not Competent[1]
July 25, 2012	Dr. David Bartholomew	Not Competent
April 30, 2013	Dr. David Bartholomew	Competent
March 31, 2015	Dr. David Bartholomew	Competent
October 9, 2015	Dr. James Bellard	Not Competent
December 8, 2016	Dr. David Bartholomew	Competent
August 15, 2017	Dr. David Bartholomew Dr. Reem Utterback	Competent
September 5, 2017	Dr. James Bellard	Competent[2]

The reports from evaluations in which Defendant was found not competent each note that either Defendant was not taking medications to address his mental health issues, or that his medication dosage had been reduced prior to the evaluation. There is no such notation for evaluations in which Defendant was deemed competent to proceed.

In addition, Dr. Bartholomew stated in his report from the December 18, 2016 evaluation that "[g]iven the stability of [Defendant's] mental status and functioning for the last year or more at Broughton Hospital, I believe it is reasonable that [Defendant] will maintain this functioning in the foreseeable future and during a trial." A similar notation was made in the report from the August 15, 2017 evaluation by Drs. Bartholomew and Utterback. This is consistent with prior reports that Defendant's condition had improved and that his medication had helped with his symptoms.

Defendant's trial began in January, 2018. At a minimum, the trial court had information that was only four months old that Defendant was competent and would remain competent. This information was based on more than a year's worth of documentation while Defendant was housed in Broughton Hospital. This alone distinguishes this case from *State v. McRae*, 139 N.C. App. 387, 533 S.E.2d 557 (2000), and the majority's conclusion that there were concerns about the temporal nature of Defendant's competency is not reflected in the reports.

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1. Dr. Hawkinson conducted a forensic screening at the Watauga County Jail.

2. Defendant's counsel advised the trial court that Dr. Bellard spoke with Defendant that morning and found him to be competent, and defense counsel conceded to a finding of competence in open court.

In addition, a report from a June 28, 2017 evaluation by Dr. Bellard exists, but was not filed with the Watauga County Clerk of Court and not provided to the trial court. In that report, Dr. Bellard indicates that "[t]he degree to which [Defendant experiences hallucinations] is directly correlated with" Defendant's medication.

Thus, there is nothing in the record that would have required the trial court to conduct another pre-trial hearing. The Bartholomew-Utterback report clearly stated that Defendant was competent and that he would maintain capacity to proceed for the foreseeable future. Defense counsel did not alert the trial court to any concerns at any time between August 15, 2017 and January 8, 2018. To the contrary, defense counsel informed that Court that Dr. Bellard had determined that Defendant was competent to proceed in September 2017 and conceded to a finding that Defendant was competent.

In addition, prior to trial, defense counsel informed the trial court that

> [Defendant]'s been diagnosed with bipolar disorder at various times. He has been - - there are a number of times where they talk through – in the – where the evaluators in these evaluations talk about how he may well be actively psychotic at the point in time in which they were talking to him. I don't have any reason to believe he is that way as he is here today.

Here, "defendant's actions and courtroom behavior [at that time] did not indicate that [he] was incompetent. He participated in the proceedings, his demeanor was appropriate, and his trial counsel represented that he was competent." *State v. Johnson*, 190 N.C. App. 818, 820, 661 S.E.2d 287, 289 (2008). In addition, "where, as here, the defendant has been . . . examined relative to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing." *Id.* at 821, 661 S.E.2d at 289 (citation omitted).

Thus, the trial court did not err in not conducting another pretrial competency hearing because there was no evidence before the trial court that Defendant was incompetent at the time his trial began in January 2018.

Defendant also contends, and the majority agrees, that the trial court erred by failing to intervene *sua sponte* following an exchange between defense counsel and the trial court. I disagree.

There is nothing in the record that indicates Defendant was acting irrationally, or otherwise incompetent on January 8 or 9, 2018, or that his attorney or the trial court had any such concerns. On January 10, 2018, court convened for trial of Defendant's case at 9:32 a.m. Jury selection continued until 11:05 a.m. The court released prospective jurors for a recess at 11:12 a.m., and after the jury left the courtroom, neither defense

counsel nor the prosecutor raised any concerns about Defendant. Court reconvened at 11:32 a.m. and jury selection continued until 12:27 p.m. Jurors were released for lunch at 12:35 p.m. After the jury left the courtroom, there was again no concern raised about Defendant.

After lunch, court resumed at 2:02 p.m. Jury selection was finalized and the jury impaneled at 3:07 p.m. At 3:16 p.m. the jury left the courtroom for the afternoon recess. Again, no issues were raised regarding Defendant when the jury left the courtroom. Court resumed at 3:32 p.m. The trial court provided instructions to the jurors, and opening statements were given by the prosecutor and defense counsel until 3:43 p.m. The State thereafter called the victim to testify as its first witness.

While the victim was testifying, defense counsel made an objection and asked to be heard outside the presence of the jury. The jury was thereafter escorted from the courtroom at 4:27 p.m. The trial court and counsel then engaged in a discussion of 404(b) evidence, and the jury returned at 4:34 p.m. The trial court then gave a limiting instruction to the jury, and the victim continued her testimony. Testimony continued, and the trial court gave an instruction prior to the jury being released for the evening at 5:00 p.m.

The trial court then mentioned 404(b) evidence again and a recess was taken at 5:03 p.m. They went back on the record at 5:03 p.m., at which time, defense counsel stated the following:

> I just had a brief conversation with Mr. Hollars during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that.
>
> . . .
>
> I asked him -- I've been asking him how he's doing and if he knows what's going on *and up until just now* he's been able to tell me what's been going on. *He just told me just a few minutes ago* that he didn't know what was going on.

(Emphasis added).

The trial court replied to defense counsel:

> THE COURT: Well, when we start throwing around 404(b) and 403, you'd have to have graduated from law school to have any inkling of what we're talking about. So I'm not sure what it is you -- I want you to be more specific.
>
> [Defense counsel]: He said -- I asked him -- he said – I asked him if he understood what was going on. He said,

no, he didn't know what she was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. I just – I feel we need to make sure. *And I'm not asking for an evaluation* I would just ask for the Court to query him quickly to make sure that I'm just not -- make sure I'm seeing something that is not there.

THE COURT: Well, I tell you what, it's been a long day, and I'd rather inquire of Mr. Hollars in the morning and give everyone a chance to rest. Give you a chance to talk to him and try to explain to him what's going on, especially with all of these rule numbers. I don't know if anybody could explain that to a non-lawyer and have them understand it.

We could take a poll around here of non-lawyers and see if they understood it. I doubt many of them would. But, you know, essentially what is going on is that the victim in this case has been telling everybody what he did, and that's about a simple concept as you can imagine. Now, if he surely does not understand that for some reason, not that he remembers it or not, or whether he can think of some defense or something, that is not the case.

[Defense counsel]: I understand.

THE COURT: But if the information coming from this woman about what he did, if he can understand that is what is happening, then I would say that the capacity situation hasn't changed any. We've got one, two -- I counted them before, three, four, five, six, capacity evaluations. The latest one was August 15, 2017, and this latest one found him capable of proceeding. We'll talk about it in the morning.

[Defense counsel]: Yes, sir.

THE COURT: Okay, thank you.

There was not substantial evidence before the court at this time, indicating that Defendant was incapable of proceeding, sufficient to require another competency hearing. There is nothing in the record that addresses Defendant's demeanor or behavior during trial on January 10, 2018 that would indicate or suggest Defendant was not competent. At

the end of the day, defense counsel informed the trial court that he and Defendant "had a brief conversation" and Defendant told defense counsel that he did not know what was going on and that Defendant "didn't know what [the victim] was talking about."

As the trial court pointed out, the discussion concerning 404(b) evidence may have been too complicated for Defendant to understand. The trial court also informed defense counsel that Defendant's capacity may be an issue if he did not understand the victim's testimony, not merely that Defendant was denying knowledge of the content of her testimony, or the ability to think of a defense to her testimony. The "brief conversation" by Defendant and defense counsel did not produce "*substantial evidence before the court* indicating that the accused may be mentally incompetent." *Staten*, 172 N.C. App. at 681, 616 S.E.2d at 656. Rather, at this point in the trial, there was the very real probability that Defendant did not understand the intricacies of 404(b) testimony, and that he had in fact heard and understood the victim's testimony. Perhaps at this point he fully comprehended the nature of his situation in relation to the proceedings. While there may be speculation concerning Defendant's competence, there is no *bona fide* doubt as to Defendant's competence.

On January 11, the trial court asked if there was a need "for any further inquiry as to Mr. Hollars' capacity." Defense counsel indicated there was not. Presumably defense counsel had more than a "brief conversation" with Defendant after the conclusion of court on January 10 to better understand Defendant's comments in court at the end of the 404(b) discussion. As this Court has noted, trial courts give "significant weight to defense counsel's representation that a client is competent, since counsel is usually in the best position to determine if his client is able to understand the proceedings and assist in his defense." *Blancher*, 170 N.C. App. at 174, 611 S.E.2d at 447 (citation omitted). Again, there was no substantial evidence before the court that Defendant may be incompetent at this point in the trial.

Even though not required because of the lack of substantial evidence, one could argue that the trial court's inquiry of defense counsel on the morning of January 11 satisfied the requirements of conducting a hearing on competence. *See* N.C. Gen. Stat. § 15A-1002 (b)(1); *See also State v. Gates*, 65 N.C. App. 277, 282, 309 S.E.2d 498, 501 (1983) (When a hearing is required concerning Defendant's capacity to proceed, "no particular procedure is mandated. The method of inquiry is still largely within the discretion of the [court].") The majority implies that the trial court was required to conduct a colloquy with Defendant at this point. While the trial court may do so, it is not required to do so.

Thus, because there was no *bona fid*e doubt as to Defendant's competence to stand trial, there was not substantial evidence before the trial court that Defendant was incompetent. I would find the trial court did not err when it began Defendant's trial, and proceeded with the trial, without undertaking another competency hearing. In addition, I would dismiss Defendant's motion for appropriate relief without prejudice to his right to file an MAR in the trial court.

STATE OF NORTH CAROLINA
v.
DMITRY KONAKH

No. COA18-1249

Filed 6 August 2019

Criminal Law—guilty plea—motion to withdraw—denied—no manifest injustice

After defendant pleaded guilty to three drug-related felonies, the trial court properly denied his motion to withdraw the plea and motion for appropriate relief because defendant failed to show that granting the motions was necessary to prevent manifest injustice. The trial court's unchallenged findings of fact established that defendant did not assert his innocence during the plea hearing or the hearing on the motion to withdraw his plea, he had ample time to discuss plea options with his attorney, his claims of pleading guilty while "dazed and confused" lacked credibility, and the trial court entered the plea after thoroughly questioning defendant about his decision to plead guilty and the consequences of doing so.

Appeal by Defendant from judgment entered 10 April 2018 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Candace A. Hoffman, for the State.

Office of the Appellate Defender, by Emily Holmes Davis, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from an order denying his Motion to Withdraw Plea and Motion for Appropriate Relief. Defendant argues that the trial court erred by denying the motions because circumstances demonstrate that the withdrawal of Defendant's guilty plea would prevent manifest injustice. We affirm.

I. Factual Background and Procedural History

On 10 April 2018, Defendant pled guilty to felony possession with intent to manufacture, sell, or deliver marijuana; felony possession of marijuana; and felony maintaining a vehicle for controlled substance. During the plea hearing, Defendant admitted to transporting and delivering approximately three pounds of marijuana to Asheville; answered affirmatively when asked by the court if he understood the felony charges to which he was pleading guilty; and answered affirmatively when asked by the court if he was, in fact, guilty of all three felony charges. The court consolidated Defendant's three convictions for judgment, sentenced Defendant to a term of 6 to 17 months' imprisonment, suspended the sentence, and placed Defendant on supervised probation for 24 months. The court also assessed $972.50 in costs, ordered Defendant to complete 72 hours of community service within the first 150 days, and required Defendant to report for an initial substance abuse assessment.

On 12 April 2018, Defendant filed a Motion to Withdraw Plea and Motion for Appropriate Relief ("Motion"), alleging that he "felt dazed and confused at the time of the plea due to lack of sleep and due to medications he was taking;" "did not understand he was pleading guilty to three felonies and . . . did not understand what three felonies being consolidated into one judgment meant;" "did not feel he had appropriate time to consider the plea agreement and felt pressured to make a decision regarding his plea;" and believed his decision to plead guilty would "have negative employment ramifications . . . that he was not aware of at the time he entered his plea."

On 16 April 2018, the Motion was heard in superior court. At the hearing, when the State asked Defendant if he had three pounds of marijuana in his car on the date of the offense, Defendant replied, "Yea, I guess." Defendant testified that "nobody threatened or coerced" him into taking a plea, and that he was not promised anything for taking the plea. When asked if he understood what crimes he was charged with and whether he had discussed possible defenses with his attorney, Defendant replied "yes" and "yes, sir." Moreover, when Defendant was asked whether, at the time of the plea hearing, he understood that he was pleading guilty to three felony charges, Defendant replied "yes." Despite these statements

and admissions, however, when asked by the State whether he was asserting his legal innocence, Defendant replied, "I am now."

At the conclusion of the hearing, the court announced extensive findings of fact in support of its conclusion that the Motion was without merit, and denied the Motion. On 24 April 2018, the court entered a written order reflecting its ruling from the bench. The court made the following written findings of fact:

> . . . .
>
> 2. Based on the testimony of the Defendant, as well as the observations and understandings of the Court regarding his trial, the Defendant was not only aware of the factual circumstances against him, he was also aware of the pleas that he had been offered to him by the State and that the Defendant basically simply took a position of not doing anything until the trial date.
>
> 3. On the morning of April 10, 2018, the Court heard the Defendant's Motion to Suppress. That Motion to Suppress was denied prior to the Court's lunch recess at 12:30 pm and that the State was ready to proceed with the Defendant's trial. Following the denial of the Defendant's Motion to Suppress but prior to the lunch recess, the Defendant was given an opportunity to consider whether to accept a plea offer or go to trial. The Court recessed from 12:30 until 2:00 to give the Defendant an opportunity to consider what was available to him and also to consider whether he wanted to proceed at trial. Furthermore, the Court paused for a period of time up to 15 to 30 minutes, from 2:00 to 2:30, to allow the Defendant to further talk with his attorney and consider whether or not he wanted to plead in this matter.
>
> 4. On April 10, 2018 the Defendant appeared before the Court and answered the questions as given to him both orally and written and pursuant to the transcript of the plea.
>
> 5. The Defendant at that time answered those questions clearly, appropriately, and at that time did not exhibit any indications that he was dizzy and he stood through the whole transcript -- during the whole time that the plea was offered to him.

6. The Court did not observe any condition of him that would indicate that he was in any way dizzy, nauseous, sick, or confused. The Defendant answered the Court's questions clearly and appropriately throughout the transcript, even pausing at one time to talk to his attorney about one of the questions.

7. Throughout the entire duration of the plea, the Defendant did not indicate through counsel or directly with the Court that he was dizzy in any respects. At the conclusion of the plea the Defendant asked to speak directly with the Court. During the time the Defendant spoke on his behalf directly to the Court, the Defendant spoke both logically and clearly setting out positions that he was taking in regard to the matter before the Court including admitted responsibility for the charges that he had plead guilty to.

8. The Defendant sought to withdraw his plea after this Court had sentenced him.

9. The Court finds the contentions set forth in the Defendant's Motion for Appropriate Relief filed by the Defendant on April 12, 2018 including that the Defendant was dizzy, nauseous, sick, confused, and did not understand the questions are not credible. It appears to the Court that the Defendant is merely changing his mind after entering into the plea freely and voluntarily and understandingly.

10. The Court also finds that while the Defendant was on cross-examination by the State regarding these matter[s], he indicated that he did not remember various questions asked of him by the Court during the plea. The Court finds his testimony to be untrue and that the Defendant simply does not want to remember those answers, not that he doesn't remember them.

11. The Court finds that the Defendant's appearance, behavior, and ability to communicate with the Court on April 10, 2018, when the plea was entered, were identical to that on April 16, 2018, when the Court heard the Defendant's Motion for Appropriate Relief.

12. The Court renews all the plea adjudication findings that were previously discussed on April 10, 2018.

13. The Defendant entered into and accepted the plea arrangement on April 10, 2018 freely, voluntarily, and understandingly.

14. The Defendant's plea was not entered into in haste, under coercion or at a time when the Defendant was confused.

15. The Court further finds the following in regards to the factors set forth in *State v. Meyer*, 330 N.C. 738, 742-43, 412 S.E.2d 339, 342 (1992); The Defendant did not assert his legal innocence on April 10, 2018 during the plea or in his filed Motion for Appropriate Relief; The State's case and the evidence against the Defendant was insurmountable. At a previous hearing evidence was presented that State and law enforcement had placed a GPS tracker within the boxes where the marijuana was located, and they were tracking both the Defendant as well as the vehicle he was driving at the time. Law enforcement knew and had verified that marijuana was contained in the boxes before the Defendant took possession, and law enforcement conducted surveillance on the Defendant the entire time the marijuana was in his possession. Furthermore, the marijuana was found by the officer at the time that the Defendant was pulled over. In addition, the Defendant admitted to possessing and transporting marijuana to officers; throughout the entire time the Defendant's charges have been pending, he has been represented by counsel. The Defendant has been represented by his own Counsel which was retained in December and that counsel is certainly competent and has represented him as such throughout the entire process including filing and arguing various motions before the Court.

Upon its findings, the court concluded:

. . . .

2. Where a guilty plea is sought to be withdrawn by the defendant after sentencing, it should be granted only to avoid manifest injustice; *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990).

3. Based on the above Findings of Fact the Court finds as a matter of law that no manifest injustice exist[s].

> 4. The Court concludes as a matter of law that the Motion is without merit and that it is not supported by any facts in any respects, thus there is no manifest injustice by denying the Defendant's motion.

Based upon the findings of fact and conclusions of law, the trial court denied the Motion. From the trial court's order denying the Motion, Defendant appeals.

II. Discussion

Defendant argues that the trial court erred by denying his Motion because the circumstances demonstrate that withdrawal of his plea would prevent manifest injustice. We disagree.

A. Standard of Review

When a defendant seeks to withdraw a guilty plea, and the "defendant's motion to withdraw his plea was made post-sentence, it is properly treated as a motion for appropriate relief." *State v. Monroe*, 822 S.E.2d 872, 875 (N.C. Ct. App. 2017) (citation omitted). When reviewing "a trial court's findings on a motion for appropriate relief . . ., [the] findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citations omitted). Unchallenged findings of fact are "presumed to be supported by competent evidence and are binding on appeal." *State v. Evans*, 251 N.C. App. 610, 613, 795 S.E.2d 444, 448 (2017) (brackets and citations omitted). "[T]he trial court's conclusions of law are fully reviewable on appeal." *State v. Johnson*, 126 N.C. App. 271, 273, 485 S.E.2d 315, 316 (1997).

B. Analysis

"When a defendant seeks to withdraw a guilty plea after sentencing, his motion should be granted only where necessary to avoid manifest injustice." *State v. Suites*, 109 N.C. App. 373, 375, 427 S.E.2d 318, 320 (1993) (citations omitted). "Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of the time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times." *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990) (citations omitted). "Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration." *Id.* "A plea is voluntary and knowing if it is made by someone fully aware of the direct consequences of the plea." *Wilkins*, 131 N.C. App at 224,

506 S.E.2d at 277 (citations omitted). Moreover, "[i]n cases where there is evidence that a defendant signs a plea transcript and the trial court makes a careful inquiry of the defendant regarding the plea, this has been held to be sufficient to demonstrate that the plea was entered into freely, understandingly, and voluntarily." *Id.* (citations omitted).

Defendant challenges just two of the trial court's 15 findings of fact. Specifically, Defendant challenges finding 13, that he "entered into . . . the plea . . . freely, voluntarily, and understandingly," and finding 14, that his "plea was not entered into in haste, under coercion or at a time when the Defendant was confused." Defendant does not challenge the court's remaining 13 findings, which are thus binding on appeal. *Evans*, 251 N.C. App. at 613, 795 S.E.2d at 448.

Defendant argues that his plea should be withdrawn because he (1) is innocent, (2) pled guilty in haste, and (3) pled guilty in confusion and "based on the erroneous belief that all three convictions would be consolidated into a single conviction."

Defendant's claim of innocence is belied by the record, which indicates that Defendant admitted at the hearing on his Motion that he possessed three pounds of marijuana on the date of the offense. Moreover, the trial court found that Defendant did not assert his legal innocence at the plea hearing or in his filed Motion for Appropriate Relief, and Defendant did not challenge this finding, which is thus binding on appeal. *Id.* Accordingly, Defendant's claim that his innocence requires the withdrawal of his plea is meritless.

Defendant next claims that he pled guilty in haste, and that he had "less than 10 minutes" to think about the plea. However, the court found that Defendant had approximately two hours to consider his options. Defendant did not challenge this finding, which is therefore binding on appeal, *id.*, rendering Defendant's claim that he pled guilty in haste also unavailing.

Lastly, Defendant claims that he pled guilty in confusion and based on a misunderstanding of the law, specifically claiming that he erroneously believed "that all three convictions would be consolidated into one conviction." However, the transcript from the plea hearing reveals that the trial court made a careful inquiry of Defendant regarding his decision to plead, the accuracy of which Defendant confirmed by executing a Transcript of Plea form. These two things demonstrate that the plea was entered into knowingly, voluntarily, and with an understanding of the direct consequences of the plea. *State v. Russell*, 153 N.C. App. 508, 511, 570 S.E.2d 245, 248 (2002); *Wilkins*, 131 N.C. App at 224, 506 S.E.2d

at 277. Moreover, the trial court found Defendant's contentions that he was "confused and did not understand the questions" during the plea hearing "not credible[,]" and Defendant did not challenge this finding, which is thus binding on appeal. *Evans*, 251 N.C. App. at 613, 795 S.E.2d at 448. Defendant's claim that he pled guilty in confusion and based on a misunderstanding of the law is therefore also meritless.

III. Conclusion

Since Defendant was represented by competent counsel, had ample time to consider and discuss the plea with his attorney, and was thoroughly questioned by the trial court about his decision to plead and the effects of his decision to plead guilty to three criminal charges, we conclude that Defendant is unable to establish manifest injustice and unable to show that the trial court erred by denying his Motion. As Defendant entered into the plea knowingly, voluntarily, and with an understanding of the direct consequences, *Wilkins*, 131 N.C. App at 224, 506 S.E.2d at 277, we determine that the trial court properly denied Defendant's Motion.

AFFIRMED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
SAMANTHA MEIAZA MATTHEWS, Defendant

No. COA18-1257

Filed 6 August 2019

1. Appeal and Error—pro se appellant—defective notice of appeal—clear intent to appeal—importance of addressing issue of first impression

In an appeal from an order revoking probation, defendant's petition for a writ of certiorari was allowed under Appellate Rule 21 where—although defendant, acting pro se, filed multiple notices of appeal that did not comply with Appellate Rule 4—defendant's intent to appeal was clear, this intent was frustrated through use of form notices of appeal that the clerk's office provided her, the State was neither confused nor prejudiced by the mistake, and the appeal presented an important issue of first impression regarding a district court's subject matter jurisdiction to revoke probation.

2. Probation and Parole—probation revocation hearing—in district court—subject matter jurisdiction—consent

The district court properly exercised subject matter jurisdiction over defendant's probation revocation hearing pursuant to N.C.G.S. § 7A-271(e), under which the superior court generally has exclusive jurisdiction over probation revocation hearings unless the State and the defendant consent to jurisdiction in the district court. Based on the statute's plain meaning, the word "consent" includes implied consent to jurisdiction, which defendant gave by actively participating at every stage of her revocation hearing, affirmatively requesting alternative relief from the trial court, and declining an opportunity to present further argument after the trial court's oral ruling.

Appeal by Defendant from judgment entered 4 May 2018 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 21 May 2019.

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

Office of the Appellate Defender, by Wyatt Orsbon and Glenn Gerding, for Defendant-Appellant.

INMAN, Judge.

Defendant Samantha Meiaza Matthews ("Defendant") appeals, by petition for writ of certiorari, the district court's revocation of her probation imposed under a conditional discharge. Defendant argues that the district court lacked subject matter jurisdiction to conduct the probation revocation hearing, contending that she did not expressly consent to the district court's exercise of jurisdiction. After thorough review of the record and applicable law, we allow Defendant's petition but hold Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

On 3 February 2017, Defendant was charged by magistrate's order with one count each of felony possession with the intent to manufacture, sell, or deliver ("PWIMSD") Percocet (Schedule II), Hydrocodone (Schedule II), and Diazepam (Schedule IV). On 5 May 2017, Defendant was charged by a bill of information with felony possession of a Schedule IV substance, a class I felony. Defendant and the State entered into a plea agreement that same day. Per the plea agreement, the State

agreed to dismiss the three PWIMSD charges and Defendant agreed to plead guilty to felony possession of a Schedule IV substance and receive supervised probation on a conditional discharge.

The district court accepted the plea agreement and entered a conditional discharge placing Defendant on 12 months of supervised probation. The court also ordered Defendant to pay court costs of $450 and a supervised probation fee, complete 225 hours of community service, and undergo a substance abuse evaluation.

On 4 March 2018, Defendant's probation terms were modified to allow her additional time to complete her community service hours. Defendant's probation officer later filed a violation report on 23 April 2018, asserting that Defendant had only completed 26.1 of her 225 court-ordered community service hours and had not yet paid in full her court costs and supervised probation fee.

On 4 May 2018, the district court held a hearing on the violation report. Defendant's counsel did not object to the district court's jurisdiction during the hearing and fully participated in the proceeding. After Defendant admitted the willfulness of her three violations, Defendant's probation officer testified that Defendant had completed 75 hours of community service at the time of the hearing. The court, in reliance on Defendant's admissions and the officer's testimony, found that Defendant willfully violated her probation and conditional discharge. While the trial court was reciting this finding, Defendant asked the court through counsel if she could speak; Defendant then addressed the court directly and asked for an additional 30 days to complete her community service requirement. The trial court denied Defendant's request.

The trial court entered judgment for felony possession of a Schedule IV substance following the above exchange. As punishment, the court ordered a suspended sentence of 4 to 14 months imprisonment and placed Defendant on supervised probation for 12 months. After sentencing and at the conclusion of the hearing, Defendant directly asked the trial court if a felony would appear on her record. The trial court answered the question "yes"—to which Defendant replied, "Okay"—and then the trial court asked counsel if there was anything further Defendant wished to present to the court; Defendant's counsel responded, "No, Your Honor[.]"

It does not appear from the hearing transcript that Defendant gave oral notice of appeal at the hearing; however, the trial judge checked a box on the "Disposition/Modification of Conditional Discharge" form that Defendant was appealing the order to superior court. The trial judge

also checked and appears to have initialed a box on the judgment itself, stating "[t]he defendant gives notice of appeal from the judgment of the trial court to the Appellate Division[.]" Both the Disposition/Modification of Conditional Discharge and the judgment were entered on 4 May 2018, the day of the hearing revoking Defendant's probation.[1]

Defendant, *pro se*, filed form notices of appeal designating her appeal to the superior court on 11 May 2018 and 17 May 2018; the first notice identified the original judgment entered on her guilty plea as the order appealed, while the second identified the order revoking her probation. Despite these forms designating Defendant's appeal to the superior court, a form judgment in the record signed by the trial court judge indicates that Defendant "[a]ppealed to [the] NC Court of Appeals" on 17 May 2018.[2]

On 18 May 2018, the trial court again called Defendant's case for hearing, and the judge made the following statement on the record:

> [Defendant] came in yesterday and gave notice of appeal. Madam Clerk contacted her this morning to try to get her back in here so we could get this on the record that she did give notice of appeal from that revocation of that conditional discharge.
>
> I just wanted to make sure we had this on the record. I think (*inaudible*) that she did give notice of appeal (*inaudible*).
>
> . . . .
>
> Also, that Madam Clerk did contact and left a message for her that we would try to do this on the record this morning. She has not called Madam Clerk back (*inaudible*) contact with her (*inaudible*) that she did give notice of appeal on May 7th.

The trial judge then completed and filed an appellate entries form, noting Defendant's appeal to this Court.

Defendant's appellate counsel filed a petition for writ of certiorari with this Court on 13 February 2019. In the petition's appendix, Defendant

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1. It is unclear, however, if the portion of the order designating an appeal to the Appellate Division was checked and initialed at the time the order was entered, or if the trial court amended and initialed the order at a later date.

2. This form judgment appears to be a local form created and utilized internally by Wake County's district courts, rather than a standardized form promulgated by the North Carolina Administrative Office of the Courts.

included an email between her appellate counsel and the assistant district attorney assigned to her case in which the district attorney acknowledged Defendant "appeared in court to provide notice of appeal" on 18 May 2018. The State filed a motion to dismiss Defendant's appeal on 12 March 2019, arguing that the actions of Defendant and the trial court recounted above failed to comply with the jurisdictional requirements of Rule 4 of the North Carolina Rules of Appellate Procedure.

II. ANALYSIS

A. Appellate Jurisdiction

[1] In its motion to dismiss, the State argues that Defendant's various notices and related attempts to appeal failed to comply with Rule 4(a)-(b) of the North Carolina Rules of Appellate Procedure. Rule 4(a) requires an appealing party to either give oral notice of appeal at trial or file and serve a written notice of appeal within fourteen days of judgment; Rule 4(b) sets forth the requirements for a written notice of appeal, which include a mandate that the notice "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 4(a)-(b) (2019).

Defendant concedes that her various attempts to appeal fail to comply with the above requirements, but she notes that the State has not shown surprise, confusion, or prejudice and requests that we allow her petition for writ of certiorari. Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, we may exercise our broad discretion to allow review "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21 (2019); *see also State v. Ledbetter*, ___ N.C. ___, ___, 814 S.E.2d 39, 43 (2018) (holding that this Court possesses "the jurisdiction and the discretionary authority . . . [a]bsent specific statutory language limiting the Court of Appeals' jurisdiction . . . to issue the prerogative writs, including certiorari").

In our discretion, we allow Defendant's petition and deny the State's motion to dismiss, as: (1) Defendant, acting *pro se*, made clear her intent to appeal the revocation of probation within ten days of the order's entry; (2) her intent was frustrated only through use of form notices of appeal that appear to have been provided to her by the Wake County clerk's office; (3) the State appears to have understood Defendant's intent to appeal when she filed the defective notices, which the trial court later made clear on the record; and (4) Defendant's appeal presents an issue of first impression concerning a fundamental aspect of the trial court's authority, namely, the district court's subject matter jurisdiction to revoke her probation. *See, e.g.*, *State v. Hill*, 227 N.C. App. 371,

374, 741 S.E.2d 911, 914 (2013) (allowing certiorari for failure to take timely action where the defendant filed, *pro se*, a form notice of appeal on the day after judgment that was provided to him by the jail, was not served on the State, incorrectly designated his appeal as one from district court to superior court, and did not correctly identify all orders appealed from); *State v. Keller*, 198 N.C. App. 639, 642, 680 S.E.2d 212, 214 (2009) (allowing certiorari "[d]ue to the fundamental nature of the errors asserted by defendant" (citation omitted)).

B. Standard of Review

We review challenges to a trial court's subject matter jurisdiction *de novo*. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012). We apply that same standard to questions of statutory interpretation. *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). Under this standard, we "consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

C. District Court Jurisdiction Per N.C. Gen. Stat. § 7A-271(e)

[2] Under the statutory framework setting forth the jurisdiction of our district and superior courts over criminal matters, the superior court generally exercises exclusive jurisdiction over probation revocation hearings even when the underlying felony conviction and probationary sentence were imposed through a guilty plea in district court. N.C. Gen. Stat. § 7A-271(e) (2017). There exists, however, an exception to this general rule; namely, that "the district court shall have jurisdiction to hear these matters with the *consent* of the State and the defendant." *Id.* (emphasis added). By allowing parties to consent to the district court's jurisdiction, then, the legislature modified the common law rule that subject matter jurisdiction "cannot be conferred upon a court by consent, waiver or estoppel." *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967). The statute provides no definition for the word "consent," and neither this Court nor our Supreme Court has had occasion to construe it.

D. Consent to Jurisdiction

Defendant contends that she did not "consent" to the district court's jurisdiction within the meaning of the word as used in Section 7A-271(e), as she never made her "express consent" apparent on the record. The State argues that Defendant's active participation in the hearing without objection constituted implied consent sufficient to confer jurisdiction

on the trial court. Because implied consent is, by definition, consent, and the legislature declined to limit the exception to express consent, we hold that Defendant consented to the district court's jurisdiction and its judgment was free from error.

This Court has, in multiple contexts, recognized implied consent as a form of consent. *See*, *e.g.*, *Montgomery v. Montgomery*, 110 N.C. App. 234, 238, 429 S.E.2d 438, 441 (1993) ("[T]here are many ways in which a defendant may give express or implied consent to the jurisdiction of the court over his person." (citation omitted).[3] For example, we held in *State v. McLeod*, 197 N.C. App. 707, 682 S.E.2d 396 (2009), that a person's words and actions gave police implied consent to search his home when he walked officers through his house and told them where to find an illegally-possessed firearm, even though he never expressly invited them inside to search his home. 197 N.C. App. at 713, 682 S.E.2d at 399. Evidence found during that search was therefore admissible at trial, as the applicable statute provided that "a law-enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, *if consent to the search is given*." N.C. Gen. Stat. § 15A-221(a) (2007) (emphasis added); *McLeod*, 197 N.C. App. at 710-11, 682 S.E.2d at 398. Thus, *McLeod* stands for the proposition that the legislature's use of the word "consent" encompasses both express and implied consent.

Our General Assembly has also recognized implied consent as a form of consent in the civil context. Rule 15(b) of the North Carolina Rules of Civil Procedure provides that "[w]hen issues not raised by the pleadings are tried by the express *or implied* consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (2017) (emphasis added). In interpreting that rule, we have held that, in a non-jury trial, implied consent existed where evidence pertaining to an issue outside the pleadings was introduced and no objection to the evidence was lodged. *Gay v. Gay*, 62 N.C. App. 288, 291, 302 S.E.2d 495, 497 (1983).

As Defendant recognizes, the use of the word "consent" in Section 7A-271(e) is unambiguous, and we must give it "its plain meaning."

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3. Defendant incorrectly asserts that *Montgomery* confuses the concepts of consent and waiver without distinguishing them. A close reading of that decision shows that the Court was not indifferent to, but was instead mindful of, the distinction. *See* 110 N.C. App. at 238, 429 S.E.2d at 440-41 (discussing "the consent by which a defendant waives personal jurisdiction" as a "consent to personal jurisdiction and a waiver of the requirements usually necessary to invoke that jurisdiction").

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Implied consent falls within that plain meaning, and Defendant offers no definition to the contrary. *Cf. McLeod*, 197 N.C. App. at 713, 682 S.E.2d at 399; *see also Consent*, *Black's Law Dictionary* (11th ed. 2019) (including the definition of "implied consent" as a subentry to the definition of "consent"). We see no reason to hold that implied consent is not sufficient to confer subject matter jurisdiction under Section 7A-271(e); as a result, we hold that the State and a defendant may impliedly consent to jurisdiction under the statute.

We also hold that Defendant's conduct in this case constitutes implied consent sufficient to confer jurisdiction. The transcript opens with Defendant waiving a formal reading of the violation report and admitting to the willfulness of her violations through counsel. Following direct examination of the probation officer by the State, Defendant's counsel then cross-examined her about Defendant's community service and good behavior while on probation. The trial court then questioned Defendant's counsel directly about those same issues, and he responded without hesitation. Defendant even interjected into that line of questioning, offering an answer to one of the court's inquiries. Finally, as the trial court was reciting its ruling, Defendant asked if she could address the trial court directly, whereupon she proceeded to state that she had difficulty completing the necessary community service and needed an extension.

Defendant or her counsel participated at every stage in the hearing without protest, and they even declined to object when presented with a final opportunity by the trial court. In other words, the State submitted the case for resolution to the district court, and Defendant willingly participated in its adjudication. Defendant even went so far as to affirmatively request *additional* relief from the trial court in the form of an extension of her probation. Such conduct certainly demonstrates "[c]onsent inferred from one's conduct rather than from one's direct expression" to the trial court's jurisdiction to hear the revocation of her probation. *Consent*, *Black's Law Dictionary*; *cf. McLeod*, 197 N.C. App. at 713, 682 S.E.2d at 399; Gay, 62 N.C. App. at 291, 302 S.E.2d at 497.

We are unpersuaded by Defendant's argument that consent must be established at the beginning of the probation violation proceedings. Defendant cites two cases for this proposition: *Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010), and *In re T.K.*, ___ N.C. App. ___, 800 S.E.2d 463, *disc. rev. denied*, 370 N.C. 216, 804 S.E.2d 527, 528 (2017). In *Boseman*, our Supreme Court held that a trial court lacks jurisdiction if it is not invoked by a proper pleading. 364 N.C. at 547, 704 S.E.2d at 501. In *T.K.*, we wrote that "[b]efore a court can address any

matter on the merits, it must have jurisdiction," ___ N.C. App. at ___, 800 S.E.2d at 465, and held that because a juvenile petition lacked certain statutorily required signatures, it failed to invoke the jurisdiction of the trial court. *Id.* at ___, 800 S.E.2d at 467. Here, the State appropriately invoked the district court's jurisdiction by filing a violation report that complied with the statute governing such reports. *See* N.C. Gen. Stat. § 15A-1345(e) (2017) (imposing various notice requirements on probation violation reports); *State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 555 (2017) (holding a probation violation report that satisfies N.C. Gen. Stat. § 15A-1345(e)'s notice requirements confers jurisdiction on the trial court to revoke probation). Thus, the probation violation report was a sufficient pleading to invoke the district court's jurisdiction. Then, as explained *supra*, the trial court entered its judgment on the merits only after Defendant had participated fully in the hearing, affirmatively requested alternative relief from the trial court, and declined an opportunity to present further argument after the trial court's oral ruling, *i.e.*, after she had impliedly consented to its jurisdiction.

We are similarly unpersuaded by Defendant's argument that her conduct was somehow exclusively a form of estoppel or waiver, neither of which are mentioned in Section 7A-271(e) and are thus insufficient to confer subject matter jurisdiction under the otherwise-unmodified common law. Although Defendant repeats that consent, waiver, and estoppel "are 'not synonymous' " throughout her briefs by quoting our Supreme Court's decision in *Lenoir Mem'l Hosp., Inc. v. Stancil*, 263 N.C. 630, 633, 139 S.E.2d 901, 903 (1965), she fails to identify—outside of conclusory statements—how her conduct constitutes waiver or estoppel rather than consent. *Lenoir* is itself completely silent on consent, as the word is entirely absent from the opinion, and the full passage quoted by Defendant is far from an unqualified statement of general applicability: "Though often used interchangeably *with reference to insurance contracts*, the terms *waiver* and *estoppel* are not synonymous." *Id.* (first emphasis added).[4] Absent persuasive or binding authority, we reject Defendant's argument that she assented to jurisdiction through waiver or estoppel rather than consent.

III. CONCLUSION

For the foregoing reasons, we hold that Defendant consented to the trial court's subject matter jurisdiction within the meaning of

4. Indeed, the only case discussing the meaning of the word "consent" that Defendant cites is a decision from the Court of Appeals for the Tenth Circuit that attempts to interpret language found in a city ordinance in Denver, Colorado, and that state's statutes. *United States v. Abeyta*, 877 F.3d 935 (10th Cir. 2017).

Section 7A-271(e), and the trial court possessed jurisdiction to revoke her probation.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER DAVID PATTERSON, DEFENDANT

No. COA18-1052

Filed 6 August 2019

Sexual Offenders—failure to return address verification form—N.C.G.S. § 14-208.9A—definition of "business day"

In a prosecution for failure by a registered sex offender to timely return an address verification form, the Court of Appeals construed the term "business day" in section 14-208.9A to mean any calendar day other than Saturday, Sunday, or a legal holiday listed in N.C.G.S. § 103-4. Defendant was entitled to dismissal of the charge where he responded within three business days, excluding Columbus Day, a legal holiday.

Judge DILLON dissenting.

Appeal by Defendant from judgment entered 28 March 2018 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State-Appellee.

Sharon L. Smith for Defendant-Appellant.

COLLINS, Judge.

This case requires us to determine the definition of "business day" for purposes of Chapter 27A of our General Statutes. Defendant Christopher David Patterson appeals from judgment entered upon a jury

verdict of guilty of failing to register as a sex offender by failing to timely return an address verification form. Defendant argues there was insufficient evidence of his willful failure to return the address verification form within three business days after receipt because Columbus Day could not be counted as a business day. We hold that the term "business day," as used in Chapter 27A, means any calendar day except Saturday, Sunday, or legal holidays declared in N.C. Gen. Stat. § 103-4. Because Columbus day is a legal holiday pursuant to N.C. Gen. Stat. § 103-4, there was insufficient evidence that Defendant willfully failed to return the address verification form within three business days after receipt. The trial court erred by denying Defendant's motion to dismiss and we thus vacate Defendant's conviction.

I. Background

On or about 8 March 2012, Defendant was convicted of a sex offense in violation of N.C. Gen. Stat. § 14-27.7(b), which requires registration under N.C. Gen. Stat. § 14-208.7. On or about 12 March 2012, Defendant registered as a sex offender with the Rowan County Sheriff's Department.

Every year on the anniversary of a person's initial registration date, and again six months after that date, the Department of Public Safety mails an address verification form to the last reported address of the person. Once the person receives the form, he has three business days to take the form to the sheriff's office to be signed.

Rowan County Sheriff's Deputy John Lombard, a twenty-three-year employee of the department and an acquaintance of Defendant's since kindergarten, was in charge of the sex offender registry in Rowan County in 2012. Lombard testified that when the address verification form was returned to the sheriff's department as undeliverable,[1] "I would normally call [Defendant], and he would come in and sign the [form]." In May 2014, Lombard moved to another position within the sheriff's department and Deputy Karen Brindle was put in charge of the sex offender registry.

Around October 2014, an address verification form was mailed to Defendant, but was returned to the Rowan County Sheriff's Department as undeliverable. On Thursday, 9 October 2014, Brindle instructed Lieutenant Larry St. Clair to deliver the address verification form to Defendant at his place of employment. On that day, St. Clair found Defendant at his place of employment, and told Defendant that "he needed to contact Ms.

1. Lombard and Defendant testified that there was an issue with Defendant's address, and that the address verification forms, mailed out of Raleigh, would return to the Rowan County Sheriff's Department as "undeliverable."

Brindle to set up an appointment to come up and verify the information she was needing." St. Claire had Defendant sign a card acknowledging that he needed to set up an appointment and left the address verification form with Defendant. The telephone call log entered into evidence by the State showed that Defendant called Brindle on Thursday, 9 October 2014; Monday, 13 October 2014; Tuesday, 14 October 2014, at which time he left Brindle a voicemail; and twice on Wednesday, 15 October 2014. Brindle testified that she did not return any of Defendant's calls or respond to his voicemail.

After the unsuccessful attempts to set up an appointment with Brindle as instructed, Defendant appeared in person at the sheriff's department on 15 October 2014 and asked to meet with Brindle. Defendant testified that he understood the form had to be returned within three business days, and thought Columbus Day was not a business day. He testified, "I thought by showing up on Wednesday I -- I was complying with my requirement." He further explained that he thought "Friday would have been the first [business day]. Obviously, the weekend didn't count. I knew that Monday was a federal holiday, so it was my assumption that -- that that Monday didn't count as a business day. That was my assumption, so I knew in my mind, I had until Wednesday to get with the sheriff's department." Defendant testified, "I took Wednesday off on purpose in case I had to meet with her at that point."

Upon his arrival at the sheriff's office, Defendant was told to wait in the lobby. Unbeknownst to Defendant, at some point on 15 October 2014, the Rowan County District Court found probable cause that Defendant "unlawfully, willfully, and feloniously" failed to return an address verification form as required by N.C. Gen. Stat. § 14-208.9A and issued a warrant for Defendant's arrest. After waiting in the lobby, an officer approached Defendant, handcuffed him, and arrested him for failing to register as a sex offender by failing to return the address verification form.

On 16 October 2014, Defendant was brought to court for his first appearance. After paying his bond, Defendant saw Brindle in the lobby of the sheriff's department. Defendant approached and handed her the signed address verification form. Brindle testified that Defendant twice apologized to her "for making a mistake."

On 8 December 2014, a Rowan County grand jury indicted Defendant for failure to register as a sex offender by failing to return an address verification form as required under N.C. Gen. Stat. § 14-208.9A. Defendant was tried by a jury on 27 and 28 March 2018 in superior court. At the

close of the State's evidence and again at the close of all the evidence, Defendant moved to dismiss for insufficient evidence; the court denied the motions. The jury found Defendant guilty of failing to register as a sex offender. The court sentenced Defendant to a term of 19-32 months' imprisonment, suspended the sentence, and placed Defendant on supervised probation for 36 months. Additionally, the court required Defendant to complete 24 hours of community service during the first 180 days of probation. The court also imposed a fine of $250, and assessed costs and fees in the amount of $3,215.50. Defendant gave proper notice of appeal in open court.

II. Discussion

On appeal, Defendant argues there was insufficient evidence of his failure to register as a sex offender under N.C. Gen. Stat. § 14-208.9A because there was insufficient evidence that he (1) failed to return the address verification form within three business days after receipt or (2) acted willfully if he had, in fact, failed to return the form within three business days after receipt.

A. Standard of Review

"This Court reviews a trial court's denial of a motion to dismiss *de novo*[.]" *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted). Moreover, "[i]ssues of statutory construction are questions of law which we review *de novo* on appeal[.]" *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016). Upon *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

Upon a defendant's motion to dismiss, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Worley*, 198 N.C. App 329, 333, 679 S.E.2d 857, 861 (2009) (quotation marks and citations omitted). "[T]he trial court must consider the record evidence in the light most favorable to the State . . . ." *Id.* (citation omitted). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence "may be used to explain or clarify that offered by the State." *Id.* (citation omitted).

B. Analysis

A person required to register as a sex offender pursuant to Article 27A, and who "willfully" fails to return an address verification form required under N.C. Gen. Stat. § 14-208.9A, is guilty of a Class F Felony. N.C. Gen. Stat. § 14-208.11 (a)(3) (2018). N.C. Gen. Stat. § 14-208.9A provides:

> (1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Department of Public Safety shall mail a nonforwardable verification form to the last reported address of the person.
>
> (2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.
>
> (3) The verification form shall be signed by the person . . . .
>
> . . . .
>
> (4) If the person fails to return the verification form in person to the sheriff within three business days after receipt of the form, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11. . . .

N.C. Gen. Stat. § 14-208.9A(a).

1. Business Days

Defendant moved to dismiss the charge at the end of the State's case-in-chief, arguing there was insufficient evidence that Defendant willfully failed to return the form within three business days as Columbus Day was not a "business day." Whether Columbus Day is a "business day" for purposes of N.C. Gen. Stat. § 14-208.9A appears to be an issue of first impression for this Court.

"In North Carolina, the cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished." *State v. Huckelba*, 240 N.C. App. 544, 559, 771 S.E.2d 809, 821 (2015) (internal quotation marks and citation omitted), *rev'd per curiam on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015). "Generally, the intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act[,] and what the act seeks to accomplish." *Id.* (internal quotation marks, brackets, and citation omitted). Moreover, "criminal statutes are to be strictly construed against the State." *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (internal quotation marks and citation omitted).

Article 27A does not define "business day." Our General Statutes define and use the term "business day" in various ways, including: (1) any day other than Saturday, Sunday, or a legal holiday;[2] (2) any day other than Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions;[3] (3) any calendar day except Sunday and legal holidays;[4] (4) any calendar day except Sunday and some designated legal holidays;[5] and (5) "a weekday other than one on which there is both a State employee holiday and neither house is in session."[6] In a dissenting opinion from our Supreme Court, Justice Beasley (now Chief Justice Beasley) noted in dicta, "[t]hough not defined in this context by the legislature, we assume that a business day occurs Monday through Friday during 'bankers' hours.' " *State v. Williams*, 368 N.C. 620, 630 n.3, 781 S.E.2d 268, 275 n.3 (2016) (Beasley, J., dissenting) (addressing the necessity of including the phrase "within three business days" in an indictment for failure to timely notify the sheriff of a change of address pursuant to N.C. Gen. Stat. § 14-208.9). According to state and federal law, "Columbus Day, the second Monday in October" is declared to be a

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2. *See*, *e.g.*, N.C. Gen. Stat. § 66-209 (governing invention development services and defining business day as "any day other than a Saturday, Sunday, or legal holiday"); N.C. Gen. Stat. § 58-87-1 (governing the Volunteer Fire Department Fund and stating, "The Commissioner must award the grants on May 15, or on the first business day after May 15 if May 15 falls on a weekend or a holiday . . . ."); N.C. Gen. Stat. § 105-395.1 (governing payment of taxes; "When the last day for doing an act required or permitted by this Subchapter falls on a [Saturday or Sunday, or a holiday], the act is considered to be done within the prescribed time limit if it is done on the next business day."); N.C. Gen. Stat. § 1A-1, Rule 6 (computing time for civil filings; "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.").

3. *See*, *e.g.*, N.C. Gen. Stat. § 1A-1, Rule 6 (computing time for civil filings; "The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.").

4. *See*, *e.g.*, N.C. Gen. Stat. § 143-143.21A (governing purchase agreements and buyer cancellations and defining business day as "any day except Sunday and legal holidays"); N.C. Gen. Stat. § 66-232 (entitled the Membership Camping Act and defining business day as "any day except Sunday or a legal holiday.").

5. *See*, *e.g.*, N.C. Gen. Stat. § 14-401.13 (governing the failure to give right to cancel in off-premises sale, lease, or rental of consumer goods or services and defining business day as "[a]ny calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and Good Friday.").

6. *See* N.C. Gen. Stat. § 120-33 (governing the duties of the enrolling clerk in the Legislative Services Commission and defining business day).

state and federal legal public holiday. N.C. Gen. Stat. § 103-4 (11) (2018); 5 U.S.C. § 6103(a) (2018).

As illustrated by the fact that "business day" is defined and used in various different ways in our General Statutes, the plain language of N.C. Gen. Stat. § 14-208.9A(a) is ambiguous—it does not make clear what a "business day" is. We therefore look to the legislative history of the statute and "the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Huckelba*, 240 N.C. App. at 559-60, 771 S.E.2d at 821 (internal quotation marks and citation omitted).

In 1995, North Carolina enacted Article 27A, "requiring individuals convicted of certain sex-related offenses to register their addresses and other information with law enforcement agencies." *State v. White*, 162 N.C. App. 183, 185, 590 S.E.2d 448, 450 (2004). "The stated purpose of the law is to curtail recidivism because 'sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest.' " *Id.* (quoting N.C. Gen. Stat. § 14-208.5). Registered offenders were required to "sign and return the [form] verifying his or her current address" within "ten days of receipt." *Id.* at 186, 590 S.E.2d at 451 (citing N.C. Gen. Stat. § 14-208.9A(4) (2003)).

"In 2006 Congress enacted the Sex Offender Registration and Notification Act (SORNA) to provide a comprehensive system for nationwide sex offender registration." *Williams*, 368 N.C. at 629, 781 S.E.2d at 274 (citing *United States v. Price*, 777 F.3d 700, 703 (4th Cir.), *cert. denied*, 135 S. Ct. 2911, 192 L. Ed. 2d 941 (2015)) (footnote omitted).

> "Congress through SORNA has not commandeered . . . nor compelled the state[s] to comply with its requirements. Congress has simply placed conditions on the receipt of federal funds. A state is free to keep its existing sex-offender registry system in place (and risk losing funding) or adhere to SORNA's requirements (and maintain funding)."

Williams, 368 N.C. at 629, 781 S.E.2d at 274-275 (quoting *United States v. White*, 782 F.3d 1118, 1128 (10th Cir. 2015)) (quotations omitted).

N.C. Session Law 2008-117, effective 1 December 2008 and applicable to offenses committed on or after that date, substituted "three business days" for "10 days" in N.C. Gen. Stat. § 14-208.9A(a)(2) and (a)(4).[7]

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7. The same or similar substitution was made in sections 14-208.7, 14-208.9, 14-208.27, and 14-208.28.

The session law also substituted "three business days" for "72 hours" in N.C. Gen. Stat. § 14-208.9A(c). It is evident from these changes that a "business day" is not synonymous with a "day" or a 24-hour period—the word "business" imports meaning. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("[The court] give[s] every word of the statute effect, presuming that the legislature carefully chose each word used.").

The purpose of the session law was "to amend the sex offender registration requirements to be more stringent," 2007 Filed Edition of H933, https://www.ncleg.gov/Sessions/2007/Bills/House/PDF/H933v6.pdf (last visited June 12, 2019), to comply with SORNA requirements by "shorten[ing] the 'grace period' during which an offender must report an address change" or verify an address. *Williams*, 368 N.C. at 630, 781 S.E.2d at 275. Shortening the grace period for reporting is achieved under even the most expansive statutory definition of business day which effectively allows six days for reporting (Saturday + Sunday + Holiday + three weekdays) as opposed to ten (or eleven if the last day of the ten-day period falls on a Sunday).

Moreover, Justice Beasley has opined that

> [t]he legislature's deliberate change from "day" to "business day" alleviates confusion for offenders and law enforcement. For example, if a defendant's address changes on Thursday, without this business day requirement, it would be unclear whether that defendant is required to report his change of address to the sheriff by the following Sunday or by the following Tuesday.

Id. While this change alleviates confusion regarding whether a defendant is required to report on Sunday,[8] as every statutory definition of business day excludes Sunday, it did not alleviate confusion in this case regarding whether Defendant was required to report on Columbus Day, a legal holiday which is excluded from some but not all statutory definitions of business day.

The issue of whether Columbus Day was a business day was discussed extensively in the context of Defendant's motions to dismiss, the jury charge, and the arguments allowed to be made in closing. The parties acknowledged that the General Assembly left the term "business day" undefined and offered various definitions of the term. The trial

8. The Supreme Court's calculation requires an inference that a defendant is not required to report on a Saturday either.

court remarked, "I can't believe that we don't have any cases in North Carolina that have looked at how many -- what counts as a business day for the purposes of determining the limitations in the sex-offender registry statutes."

As neither the plain language nor the legislative intent of the statute clearly assigns meaning to the term "business day," we analyze N.C. Gen. Stat. § 14-208.9A under a third and final principle of statutory construction, the rule of lenity. "In construing ambiguous criminal statutes," the rule of lenity "requires us to strictly construe the statute." *State v. Howell*, 370 N.C. 647, 659, 811 S.E.2d 570, 577-78 (2018) (internal quotation marks and citations omitted). However,

> [t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

State v. Raines, 319 N.C. 258, 263, 354 S.E.2d 486, 490 (1987) (quoting *United States v. Brown*, 333 U.S. 18, 25-26 (1948)). We hold that the term "business day," as used in Chapter 27A, means any calendar day except Saturday, Sunday, or legal holidays declared in N.C. Gen. Stat. § 103-4. This construction effectuates the purpose of Session Law 2008-117 to shorten the grace period for reporting, and alleviates confusion for offenders and law enforcement, thus giving the term its "fair meaning in accord with the manifest intent of the lawmakers." *Raines*, 319 N.C. at 263, 354 S.E.2d at 490 (quotation marks and citation omitted).

In denying Defendant's motion to dismiss, the trial court explained:

> I do think it's an issue of fact for the jury to determine whether or not there's been testimony that it was not, in fact, a holiday, there's been testimony that it was. . . . I think ultimately, the jury is going have to decide whether they consider that that was a business day. I don't think that's -- I can't take a judicial notice of the fact that Columbus Day is a holiday. It's not a state holiday. We don't have -- we don't shutdown -- as far as I know, shut down state offices on Columbus Day.

The trial court erroneously concluded that the statutory construction of N.C. Gen. Stat. § 14-208.9A and the meaning of "business day" is a question of fact for the jury; it is a question of law for the court. *State*

v. Marino, No. COA18-1135, 2019 N.C. App. LEXIS 472, at *5 (Ct. App. May 21, 2019) ("Issues of statutory construction are questions of law which we review de novo on appeal.") (internal quotation marks, brackets, and citation omitted). Moreover, the trial court erroneously concluded that it could not take judicial notice of the fact that Columbus Day is a legal holiday as "[i]t is generally held that the courts are bound to take judicial notice of what days are legal holidays." *State v. Brunson*, 285 N.C. 295, 302, 204 S.E.2d 661, 665 (1974) (internal quotation marks and citations omitted).

Citing *Southpark Mall Ltd. P'ship v. CLT Food Mgmt. Inc.*, 142 N.C. App. 675, 679, 544 S.E.2d 14, 17 (2001) for the proposition the "the term 'business day' in a commercial lease is any day the property was open for business[,]" the dissent thus concludes, "because the Rowan County Sheriff's Office was open for regular business to the public on Columbus Day, . . . Columbus Day counted as a 'business day' for purposes of Section 14-208.9A[.]" However here, unlike the imposition of civil liability in *Southpark Mall*, the State seeks to impose criminal liability, under a statute that does not clearly define the term "business day." N.C. Gen. Stat. § 14-208.9A. Under the rules of statutory construction, the rule of lenity "requires us to strictly construe the statute." *Hinton*, 361 N.C. at 211, 639 S.E.2d at 440. Moreover, *Southpark Mall* is inapposite as it involved the meaning of the term "five (5) days" in a commercial lease agreement. This Court rejected Defendants' argument that the phrase "days" should be construed as "business days," and concluded that "five (5) days" unambiguously meant five calendar days. Furthermore, the dissent's determination of which " 'public holidays' in Section 103-4 . . . are clearly 'business days' " is a determination for the legislature, not this Court.

As we hold that a "business day" is any calendar day except Saturday, Sunday, or legal holidays declared in N.C. Gen. Stat. § 103-4, and Columbus Day is a legal holiday declared in N.C. Gen. Stat. § 103-4, the trial court erred in denying Defendant's motion to dismiss for insufficient evidence where Defendant received the address verification form on Thursday, 9 October 2014 and appeared in person at the sheriff's department to sign the form on Wednesday, 15 October 2014, a period of three business days – excluding Saturday the 11th, Sunday the 12th, and Monday, Columbus Day, the 13th – after he received the form.

C. Willful Failure to Return Form

In light of our holding, we need not reach Defendant's argument that the trial court erred by denying his motion to dismiss where there was

insufficient evidence that he willfully failed to return the address verification form within three business days after receipt.

III. Conclusion

As there was insufficient evidence that Defendant willfully failed to return the verification form within three business days after he received it, the trial court erred in denying Defendant's motions to dismiss. Accordingly, we vacate Defendant's conviction.

VACATED.

Judge INMAN concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

As explained below, because I conclude that Columbus Day is a "business day" under Section 14-208.7 *and* because the jury found that Defendant's one-day tardiness was willful, I dissent.

Section 14-208.7 requires one with a reportable conviction to register his address initially within three business days by reporting "in person at the appropriate sheriff's office[.]" N.C. Gen. Stat. § 14-208.7 (2014). Section 14-208.9A requires that person to verify his address every six months by returning a verification form "in person to the sheriff within three business days after the receipt of the form." N.C. Gen. Stat. § 14-208.9A (2014). And Section 14-208.11 makes it a crime for a person to "willfully" fail to return his verification notice as required in Section 14-208.9A. N.C. Gen. Stat. § 14-208.11(a)(3) (2014).

Here, the evidence showed that Defendant received his verification form on Thursday, 9 October 2014 but did not return the form to the Rowan County Sheriff's Office until Wednesday, 15 October 2014, *four* business days later.

I. Analysis

A. Columbus Day is a "Business Day"

The majority concludes that Defendant's return of his form was timely because Monday, 13 October 2014 should not count as one of the business days since it was Columbus Day. The majority concludes that it was error for the jury to be allowed to determine that Columbus Day is a business day. I agree with the majority that the meaning of "business

days" as used in our General Statutes is a question of law. But conclude, as a matter of law, that Columbus Day is a business day, in the context of Section 14.208.9A, for the reasons stated below. Therefore, since I believe that the jury resolved the issue correctly anyway, any error in allowing the jury to pass on this issue was harmless in this case.

I conclude that the term "business days," as used in these Sections, includes any weekday that the "sheriff's office" is open for regular business and may receive a verification form as required in Section 14-208.9A. *See Southpark Mall Ltd. P'ship v. CLT Food Mgmt. Inc.*, 142 N.C. App. 675, 679, 544 S.E.2d 14, 17 (2001) (stating that the term "business day" in a commercial lease is any day the property was open for business). And because the Rowan County Sheriff's Office was open for regular business to the public on Columbus Day, I conclude that Columbus Day counted as a "business day" for purposes of Section 14-208.9A, which requires one with a reportable conviction to verify his address by returning a completed verification form "to the sheriff[.]" N.C. Gen. Stat. § 14-208.9A.

The majority reasons that Columbus Day is not a "business day," citing Section 103-4 of our General Statutes, which designates certain days as "public holidays" in our State. *See* N.C. Gen. Stat. § 103-4(a)(11) (2014). I do not believe that there is any ambiguity that the General Assembly did not intend for "business days," as used in Section 14-208.9A, to exclude the days it has designated as "public holidays" in Section 103-4(a). Admittedly, *some* of the public holidays listed in Section 103-4 are days which would also be considered *non*-business days for the Rowan County Sheriff's Office, such as New Year's Day, Martin Luther King, Jr.'s Birthday, and Christmas Day. *See* N.C. Gen. Stat. § 103-4(a)(1), (1a), and (15).[1]

But there are a number of days listed as "public holidays" in Section 103-4 which are clearly "business days" (where they fall on a weekday), which no one would reasonably expect the Sheriff's Office to be closed for regular business to the public, such as Robert E. Lee's Birthday (January 19), Greek Independence Day (March 25), Anniversary of the signing of the Halifax Resolves (April 12), Confederate Memorial Day (May 10), Anniversary of the Mecklenburg Declaration of Independence (May 20), and Election Day (Tuesday after first Monday in November in even-numbered years). *See* N.C. Gen. Stat. § 103-4(a)(2), (3a), (4), (5), (6), and (13).[2]

1. These days are listed on Rowan County's government website as *observed* public holidays in which Rowan County offices are closed.

2. These days are not included in the list of Rowan County's observed holidays on its website.

Therefore, since the Rowan County Sheriff's Office was open to the public for the transaction of regular business on Columbus Day, I conclude that Columbus Day was a business day under Section 14-208.9A.

B. There Was Sufficient Evidence that Defendant Acted Willfully.

I conclude that there was sufficient evidence from which the jury could find that Defendant's tardiness was willful. That is, the jury was free to find that Defendant did not act willfully if they had believed his story that he thought Columbus Day was not a business day. I note, though, that Defendant did testify that he attempted to call the Sheriff's Office on Columbus Day, testimony from which the jury could infer that Defendant understood Columbus Day to be a business day. The jury made its call, and we should not disturb its determination.

II. Conclusion

The General Assembly in its role has enacted a law to make it a crime for one with a reportable conviction to fail willfully to turn in his verification form in person at the Sheriff's Office in his county within three business days.

The District Attorney's office in its role decided to prosecute Defendant for delivering his verification form one day late. *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991) ("The clear mandate of [N.C. Const. art. IV, § 18] is that the responsibility and authority to prosecute all criminal actions . . . is vested solely in the several District Attorneys of the State.").

The jury in its role resolved conflicts in the evidence and reached a guilty verdict.

Perhaps, if I was the prosecutor, I would have chosen not to prosecute Defendant for returning his verification form one day late. Perhaps, if I was on the jury, I would have believed Defendant's story regarding his belief about Columbus Day and his honest attempts to return his form earlier than he did and, therefore, not found his tardiness to have been willful. But my role as an appellate judge is not to make such decisions, but rather simply to apply the law. The prosecutor and the jury have made their decisions and have done so within the perimeters of the law, as enacted by our General Assembly. Accordingly, my vote is to conclude that Defendant had a fair trial, free from reversible error.

STATE OF NORTH CAROLINA
v.
MORQUEL DESHAWN REDMOND

No. COA18-801

Filed 6 August 2019

Robbery—with a dangerous weapon—jury instruction—lesser-included offense—common law robbery

At a trial for robbery with a dangerous weapon, where defendant stole cash from a tobacco store after threatening an employee with a box cutter, the trial court did not commit prejudicial error by declining to instruct the jury on the lesser-included offense of common law robbery, even though the judge did not determine that the box cutter was a dangerous or deadly weapon as a matter of law but instead submitted the issue to the jury. The State's evidence was clear and positive as to the "dangerous weapon" element of the charged offense, and there was no conflicting evidence relating to that or any other element.

Appeal by defendant from judgment entered 11 December 2017 by Judge Charles H. Henry in Superior Court, Lenoir County. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

STROUD, Judge.

Morquel Redmond appeals his conviction of robbery with a dangerous weapon. Defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of common law robbery. Because the trial court could have found the box cutter to be a dangerous weapon as a matter of law, despite submitting this issue to the jury, Defendant was not entitled to a jury instruction on the lesser included offense of common law robbery. Defendant's trial was free of prejudicial error.

I. Background

The State's evidence tended to show that on 20 March 2015, Defendant robbed a Tobacco Road Outlet in Kinston. Linda Walston

was working in the store at the time of the robbery. Defendant and Ms. Walston struggled until Defendant brandished a box cutter and threatened her. Defendant then dragged Ms. Walston to the back room of the store and tied her up with a cord. Defendant took cash out of the register and fled, leaving Ms. Walston tied up.

Law enforcement officers identified Defendant from video surveillance images from the store, with the help of Defendant's mother. Defendant was taken into custody, and officers searched his vehicle and found two box cutters. Defendant was indicted for robbery with a dangerous weapon and first degree kidnapping. At trial, after a *Harbison* inquiry, Defendant admitted that he committed the offenses of common law robbery and second-degree kidnapping. Ms. Walston testified about the events of 20 March 2015, and the State introduced video surveillance from the store during the robbery. Defendant did not present any evidence. During the charge conference, Defendant's counsel requested an instruction on common law robbery which was denied by the trial court. Defendant was found guilty of robbery with a dangerous weapon and first-degree kidnapping and sentenced within the presumptive range. Defendant timely appealed and only challenges his robbery with a dangerous weapon conviction.

II. Standard of Review

Defendant argues that "the trial court erred when it refused to issue a lesser include[d] offense instruction for common law robbery." The State contends that "Defendant is not entitled to an instruction on the lesser included offense because the evidence does not show that a rational jury would find him guilty of common law robbery given the extensive testimony [presented at Defendant's trial]."

> We review *de novo* the trial court's decision regarding its jury instructions. The trial court must "instruct the jury on all substantial features of a case raised by the evidence." "Failure to instruct upon all substantive or material features of the crime charged is error." On the other hand, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial."
>
> "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." If, however, "the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence

> showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense."

State v. Clevinger, ___ N.C. App. ___, ___, 791 S.E.2d 248, 255 (2016) (citations omitted).

Because Defendant requested a jury instruction on common law robbery, we review the instructions *de novo*.

III. Lesser Included Offense

A defendant is "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000). Only one element distinguishes common law robbery and robbery with a dangerous weapon, and that element is the use of a dangerous weapon:

> Robbery with a dangerous weapon consists of the following elements: (1) the unlawful taking or an 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. Common law robbery is a lesser-included offense of robbery with a dangerous weapon. The difference between the two offenses is that robbery with a dangerous weapon is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened.
>
> A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm. Relevant here, the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death. The dangerous or deadly character of a weapon with which the accused was armed in committing a robbery may be established by circumstantial evidence.

Clevinger, ___ N.C. App. at ___, 791 S.E.2d at 255 (citations, quotation marks, and brackets omitted).

Defendant raises three arguments in his brief: "(1) the State never presented the box cutter, (2) Walston did not suffer any injuries from

the box cutter, and (3) the trial court did not find the box cutter to be a deadly weapon as a matter of law[.]" The State's failure to present the box cutter as evidence, and the absence of injuries are facts the jury could consider in its determination of whether the box cutter was used as a "dangerous weapon," but neither are required for a weapon to be a "dangerous weapon" under the law. *See id*. The weight to give to the evidence is for the jury to determine. *See State v. Collins*, 30 N.C. 407, 412-13 (1848) ("Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if, produced, whether it was the one used, are questions of fact[.]").

Next, physical injuries are not required for a dangerous weapon to be considered dangerous. *See State v. Young*, 317 N.C. 396, 417, 346 S.E.2d 626, 638 (1986) ("In order to be characterized as a 'dangerous or deadly weapon,' an instrumentality need not have actually inflicted serious injury. A dangerous or deadly weapon is 'any article, instrument or substance which is likely to produce death or great bodily injury.' ").

The main issue here is whether the trial court was required to give the lesser included offense instruction on common law robbery where the judge did not instruct the jury that the box cutter was a deadly weapon as a matter of law but instead submitted this factual issue to the jury. Almost anything can be a dangerous weapon, depending upon the manner of use in a particular case:

> But where it may or may not be likely to produce such results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. 'Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used,' the question is for the jury. 'If its character as being deadly or not, depended upon the facts and circumstances, it became a question for the jury with proper instructions from the court.'

State v. Perry, 226 N.C. 530, 535, 39 S.E.2d 460, 464 (1946) (citations omitted).

Defendant is correct that the trial court did not find the box cutter to be a deadly weapon as a matter of law, but this does not end the inquiry. Our Court has held that if the trial court could have determined the weapon to be a deadly weapon as a matter of law based upon the evidence, but instead submitted that issue to the jury, its failure to give

an instruction on the lesser-included offense is not prejudicial error. *Clevinger*, ___ N.C. App. at ___, 791 S.E.2d at 256. This Court has rejected

> the proposition that where the trial court submits to the jury the question of whether a dangerous weapon was used to commit a robbery, it must also submit an instruction for common law robbery. That may be the rule when there is evidence of common law robbery, but as our Supreme Court has held repeatedly, an instruction for the lesser-included offense is not required when there is no evidence to support it:
>
> > The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.

Id. at ___, 791 S.E.2d at 255-56 (quoting *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E.2d 545, 547 (1954)).

We therefore turn to the evidence presented at trial to determine if there was any "*conflicting evidence* relating to the elements of the crime charged." *Id.* at ___, 791 S.E.2d at 256. At trial, Ms. Walston's testimony about the incident included a description of the box cutter:

> Q. At around the ten o'clock hour did an individual wearing a red hoodie come into your store?
>
> A. Yes.
>
> Q. Can you tell us what happened when he came into the store?
>
> A. He asked -- he was looking his uncle something for his birthday. He was asking about some cigars behind the counter and I was price checking them and giving him some prices and he said he needed to leave and go get some money. He'd be back in a little bit and he left.

He came back. When he came back, he asked me about the premium cigars that was in the little humidor in the back, he said are they expensive. I said there's some pretty expensive ones in there. He said, well, just grab me two of the most expensive ones you've got. I'll just get him those.

So, I walked into the room and grabbed two cigars. As I come out the door, I handed him the two cigars and started around the end of the counter to go back to the cash register. When I did, he throwed me up against the chewing tobacco and started fighting me and, of course, I started fighting back.

We proceeded to fight. I fell on the floor. He started choking me. He ripped the buttons off my shirt. Then he somehow managed to get the box cutter. I don't know if he had it because after it was all done and everything I had cuts on the ends of my boots, which I didn't see it until he actually put it in my face and said that he was going to kill me if I didn't cooperate.

Q. What did he put it in your face?

A. Right to my face.

Q. What was the item that he put –

A. A box cutter.

Q. And can you describe the box cutter?

A. A box cutter. That's all I know. I know what a box cutter looks like. I mean, it was a box cutter.

Q. And when you say a box cutter, does it have a particular part on a box cutter that has a razorblade?

A. It has an angled blade that sticks out the end of it, yes.

Q. Was that part facing you?

A. Yes.

Q. About how close was it to you?

A. Close enough that I cooperated.

Q. Where was it pointed?

A. In my face.

On cross-examination, Defendant's counsel asked Ms. Walston about the box cutter:

> Q. Okay. And you testified to the jury that you saw a box cutter, is that right?
>
> A. Yes.
>
> Q. Now, what I know to be a box cutter is a razorblade which is enclosed inside of a metal cover --
>
> A. Yeah.
>
> Q. -- is that correct?
>
> A. Correct.
>
> Q. And essentially what you do with a box cutter is you put the razorblade out and you pull --
>
> A. And you open a box.
>
> Q. -- pull it down and it opens a box?
>
> . . . .
>
> Q. And specifically the box cutter, do you remember if it was silver, black? Do you remember any color about it?
>
> A. I believe it was silver. I do. I know the razor part was silver.
>
> Q. Okay.
>
> A. That was in my face.

Although the weapon used here was a box cutter instead of a chef's knife, the facts here as to the use of the weapon are quite similar to *Clevenger*, where

> during the robbery, the man identified as defendant grabbed McDade's fifteen-year-old daughter, pulled her head back, and held the knife against her neck as he threatened to slit her throat. The State's evidence was clear and positive as to the dangerous weapon element, and there was no evidence from which a rational juror could find that the knife, based on its nature and the manner in which it was used, was anything other than a dangerous weapon.

Id. at ___, 791 S.E.2d at 256 (2016). The court in *Clevinger* held that since there was no conflicting evidence about the knife or its use, the trial court did not err by failing to give an instruction on common law robbery:

> Nor was there any evidence that a knife was not used during the robbery, that the knife used was different than the one from the knife set, or that the knife was used in a non-threatening manner. If the jury believed the State's evidence—that defendant robbed the SBC with the missing chef's knife—then it was required to find him guilty of robbery with a dangerous weapon. But if the jury was not convinced that defendant was the robber, then it was required to acquit him altogether. On the facts of this case, therefore, defendant was not entitled to a lesser-included instruction for common law robbery: he was either guilty of robbing the SBC by the threatened use of the chef's knife, or he was not guilty at all.

Id. at ___, 791 S.E.2d at 256 (citations omitted).

Here, the State's evidence was positive that the defendant held the box cutter, with the blade extended, in Ms. Walston's face and threatened to kill her if she did not cooperate. *See id.* ("Nor was there any evidence that a knife was not used during the robbery, that the knife used was different than the one from the knife set, or that the knife was used in a non-threatening manner."). A box cutter is one type of weapon which has been treated as deadly as a matter of law. *See State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E.2d 198, 199 (1985) ("The cutter has an exposed, sharply pointed razor blade clearly capable of producing death or great bodily harm. The victim testified that defendant held the cutter a couple of inches from her side as he instructed her to open the cash register. From that position a slight movement of defendant's hand in the direction of the victim's side clearly could have resulted in death or great bodily harm. Accordingly . . . we hold that the court did not err by instructing that the weapon was dangerous *per se*."). Therefore, as in *Clevinger*, Defendant was either guilty of robbing the Tobacco Road Outlet with the threat of using the open box cutter or he was not guilty at all. *See Clevinger*, ___ N.C. App at ___, 791 S.E.2d at 256. ("On the facts of this case, therefore, defendant was not entitled to a lesser-included instruction for common law robbery: he was either guilty of robbing the SBC by the threatened use of the chef's knife, or he was not guilty at all.").

IV. Conclusion

The trial court did not err in failing to instruct the jury on common law robbery.

NO ERROR.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JESSE JAMES TUCKER

No. COA18-1295

Filed 6 August 2019

Satellite-Based Monitoring—lifetime—sentence vacated—failure to present evidence—effective deterrence

A sentence imposing lifetime satellite-based monitoring (SBM) on defendant, a convicted sex-offender, was vacated where the State failed to present evidence—such as empirical or statistical reports—establishing that lifetime SBM effectively protects the public from sex offenders by deterring recidivism.

Judge BERGER dissenting.

Appeal by defendant from order entered 4 April 2018 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant.

DIETZ, Judge.

Defendant Jesse James Tucker appeals the trial court's imposition of lifetime satellite-based monitoring. We vacate the trial court's order

for the reasons discussed in *State v. Griffin*, __ N.C. App. __, 818 S.E.2d 336 (2018).

In *Griffin*, this Court held that the Fourth Amendment prohibits a trial court from imposing lifetime satellite-based monitoring on a convicted sex offender unless the State presents evidence that this type of monitoring "is effective to protect the public from sex offenders." *Id.* at __, 818 S.E.2d at 337. The Court further held that the efficacy of satellite-based monitoring is not self-evident—that is, that the State cannot rely solely on the common-sense assumption "that an offender's awareness his location is being monitored does in fact deter him from committing additional offenses." *Id.* at __, 818 S.E.2d at 341. Likewise, the Court held that the State cannot rely on "decisions from other jurisdictions stating that [satellite-based monitoring] curtails sex offender recidivism." *Id.* Simply put, after *Griffin*, trial courts cannot impose satellite-based monitoring unless the State presents actual evidence—such as "empirical or statistical reports"—establishing that lifetime satellite-based monitoring prevents recidivism. *Id.*

Here, the State did not present the sort of evidence required by *Griffin*—likely because the hearing in this case occurred before this Court decided *Griffin*. Nevertheless, *Griffin* is controlling precedent on direct appeal. Although the Supreme Court stayed the judgment of this Court in *Griffin*, it did not stay our mandate. *See State v. Griffin*, __ N.C. __, 817 S.E.2d 210 (2018). Moreover, *Griffin* largely relies on the reasoning of *State v. Grady*, __ N.C. App. __, __, 817 S.E.2d 18, 27–28 (2018) (*Grady II*), which the Supreme Court has not stayed. Thus, we are bound by the *Griffin* holding in this appeal. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We therefore vacate the imposition of lifetime satellite-based monitoring in this case.

We note that there is disagreement amongst the judges of this Court concerning the holdings of *Griffin* and its companion cases, and that review of several of those cases is pending in our Supreme Court. *See*, *e.g.*, *Griffin*, __ N.C. App. at __, 818 S.E.2d at 342–44 (Bryant, J., dissenting); *Grady*, __ N.C. App. at __, 817 S.E.2d at 28–31 (Bryant, J., dissenting); *State v. Westbrook*, __ N.C. App. __, 817 S.E.2d 794, 2018 WL 4200974, at *4–7 (2018) (Dillon, J. dissenting) (unpublished); *State v. White*, __ N.C. App. __, 817 S.E.2d 795, 2018 WL 4200979, at *9 (2018) (Dillon, J., dissenting) (unpublished); *State v. Gordon*, __ N.C. App. __, __, 820 S.E.2d 339, 349–50 (2018) (Dietz, J., concurring in the judgment). Thus, although we reject the State's arguments as squarely precluded by *Griffin* and *Grady II*, we observe that the State has preserved those arguments for further review in the Supreme Court.

VACATED.

Judge HAMPSON concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

This Court is compelled by *Griffin* to vacate the trial court's order of lifetime satellite-based monitoring in this case. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). "Our panel is following [*Griffin*], as we should. However, I write separately to dissent because I believe [*Griffin*] is wrongfully decided[.]" *Watson v. Joyner-Watson*, ___ N.C. ___, ___, 823 S.E.2d 122, 126, (*Dillon, J., dissenting*) (2018).[1]

Here, Defendant entered an *Alford* plea to two counts of indecent liberties with a child. The State's factual recitation during the plea tended to show that there were two separate victims in this case, one was a seven year old girl and the other a nine year old girl. Defendant exposed his penis to the seven year old victim and instructed her to touch his penis. Defendant also pulled down the seven year old's pants and underwear and performed oral sex on the victim. As for the nine year old victim, the State's factual showing established that Defendant rubbed the girl's vagina. In addition, Defendant admitted that he was a recidivist, having been previously convicted of indecent liberties with a child in 2004.

When the trial court conducted a hearing on imposing lifetime SBM, the State presented a host of statistical information which showed high rates of recidivism among sex offenders. Relevant here, one study

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1. *Griffin* misconstrued *Grady II*. Underlying the analysis in *Grady II* is a totality of the circumstances approach for determining the reasonableness of imposing lifetime SBM, as instructed by the U.S. Supreme Court. One factor that could be considered includes information regarding the efficacy of North Carolina's SBM program. But this is not the only means by which the State could establish reasonableness. *Griffin*, however, effectively eliminated the individualized determinations clearly called for in *Grady II* in favor of a single factor test that solely concerns efficacy showings unique to North Carolina's program.

It could be argued that this Court, upon a proper review, could simply take judicial notice that the SBM program is beneficial in deterring sex offenders from re-offending. Upon such a finding, *Griffin* would forever be satisfied. Such a result, however, would be contrary to the individualized determinations called for by the Fourth Amendment, the U.S. Supreme Court's directive in *Grady I*, and this Court's prior holding in *Grady II*.

showed that sex offenders who victimized children and had more than one prior arrest had a recidivism rate of 44.3 percent. In addition, the State provided a North Carolina recidivism study of 988 sex offenders which showed 26 percent of registered sex offenders were rearrested. Based upon this showing, the trial court found that Defendant was a recidivist and that he committed a sexually violent offense; that the purpose of SBM was to deter future criminal acts by Defendant against children; and that imposing lifetime SBM on Defendant was reasonable.

In 2006, the General Assembly established the "continuous satellite-based monitoring system" to monitor certain sex offenders. Individuals subject to SBM include defendants who were convicted of "reportable convictions" and were (1) classified as sexually violent predators, (2) recidivists, or (3) "convicted of an aggravated offense." N.C. Gen. Stat. § 14-208.40(a)(1) (2017). If a trial court determines, based upon evidence presented by the prosecutor, that a convicted sex offender was "classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.23 or G.S. 14-27.28, the court shall order the offender to enroll in a satellite-based monitoring program for life." N.C. Gen. Stat. § 14-208.40A (2017). By the plain language of Section 14-208.40A, Defendant would be required to enroll in lifetime SBM.

However, the United States Supreme Court has stated that the government "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady v. North Carolina*, 135 S. Ct. 1368, 1370, 191 L. Ed. 2d 459, 462 (2015). Thus, because North Carolina's SBM "program is plainly designed to obtain information[,]" monitoring through an ankle bracelet pursuant to the program constitutes a search under the Fourth Amendment. *Id.* at 1371, 191 L. Ed. 2d at 461 (2015). The Supreme Court stated in *Grady* that "[t]he Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at 1371, 191 L. Ed. 2d at 462.

Thus, the U.S. Supreme Court's opinion in *Grady v. North Carolina* merely applied the Fourth Amendment's requirement of reasonableness to SBM decisions. This should not have disturbed our SBM jurisprudence to the extent that it has. However, *Griffin* seized upon the opportunity provided by *Grady I* and *Grady II* to reimagine the Fourth Amendment, and this Court has been moving the goal posts for trial judges and prosecutors at every turn.

Reasonableness under the Fourth Amendment is intended to be a totality of the circumstances inquiry that includes consideration of "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* This Court has acknowledged that recidivist sex offenders have an expectation of privacy that is "appreciably diminished as compared to law-abiding citizens." *Grady II* ___ N.C. App. at ___, 817 S.E.2d at 28.

In *Griffin*, a case that did not involve a recidivist sex offender or lifetime SBM, this Court abandoned the reasonableness requirement based upon the totality of the circumstances familiar to Fourth Amendment inquiries, and instead manufactured a singular means by which reasonableness could be established. *Griffin's* new requirement is not only contrary to Fourth Amendment jurisprudence, but as the majority points out, lacking in common sense. Judge Bryant dissented in two recent SBM cases, including *Griffin*. Her reasoning provides the proper framework for analyzing SBM cases pursuant to the United States Supreme Court's direction in *Grady*. *See Grady II*, ___ N.C. App. ___, 817 S.E.2d 18 (*Bryant, J., dissenting*); *Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (*Bryant, J., dissenting*).

Here, Defendant is not simply susceptible of re-offending; Defendant actually re-offended. Defendant is an admitted recidivist who victimized two more children. Further, the trial court determined that Defendant engaged in a sexually violent offense. Defendant has a diminished expectation of privacy, and use of an ankle monitor is a lesser intrusive means of monitoring Defendant and collecting relevant data. The State has a legitimate governmental interest in protecting children and communities from convicted sex offenders, and the government's interest outweighs Defendant's diminished privacy interests. Because imposition of lifetime SBM is reasonable under the circumstances, and thus reasonable under the Fourth Amendment, *Griffin's* required showing is irrelevant to this individual defendant.

The trial court's order of lifetime SBM for Defendant should be affirmed.

STERLING TITLE CO. v. MARTIN

[266 N.C. App. 593 (2019)]

STERLING TITLE COMPANY, PLAINTIFF
v.
LAURA LOUISE MARTIN AND MAGNOLIA TITLE COMPANY, LLC, DEFENDANTS

No. COA18-1189

Filed 6 August 2019

1. Employer and Employee—covenant not to compete—restrictions—temporal and territorial—reasonableness

Restrictions in a covenant not to compete were unreasonably broad and therefore unenforceable where a title insurance company's former employee (an insurance underwriter) was prohibited from providing similar services for one year following termination to any customer with whom she had contact over the course of her employment, regardless of the customer's location and despite the employee's span of service of nearly ten years, which meant the covenant's reach amounted to an eleven-year restriction.

2. Trade Secrets—misappropriation—customer contact information—readily available

A title insurance company's claim under the North Carolina Trade Secrets Protection Act was properly dismissed where the customer information taken by a former employee, consisting of names and email addresses, was readily accessible and not entitled to trade secret protection.

3. Employer and Employee—covenant not to compete—breach of implied duty of good faith and fair dealing—enforceable contract required

Where a title insurance company's covenant not to compete was overly broad and therefore unenforceable, its claim against a former employee for breach of the implied duty of good faith and fair dealing was properly dismissed, since the claim rested on the existence of an enforceable contract.

4. Unfair Trade Practices—misappropriation of trade secrets—failure to state a claim

Where a title insurance company's claim for misappropriation of trade secrets was properly dismissed for failure to state a claim (since its customers' contact information did not constitute a trade secret subject to protection), plaintiff's claim that the dismissed violation also constituted an unfair and deceptive trade practice likewise had no merit.

5. Appeal and Error—abandonment of issues—conversion claim—remaining breach of contract claims

In an appeal from dismissal of multiple claims against a former employee, a title insurance company abandoned any issues related to its claims for conversion and breach of contract where it failed to raise any challenges to those dismissals.

Appeal by plaintiff from order entered 3 July 2018 by Judge Vince Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 April 2019.

Vann Attorneys, PLLC, by Joseph A. Davies, James R. Vann, and J.D. Hensarling, for plaintiff-appellant.

Forrest Firm, P.C., by John D. Burns, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Sterling Title Company appeals from the trial court's order granting Defendants Laura Louise Martin and Magnolia Title Company, LLC's motion to dismiss Plaintiff's claims for breach of the parties' non-compete agreement, breach of the implied duty of good faith and fair dealing, violation of the North Carolina Trade Secrets Protection Act, unfair and deceptive trade practices, and conversion. We affirm.

Background

Plaintiff is a title insurance company located in Raleigh, North Carolina. Defendant Martin began working for Plaintiff as an underwriter in October 2007. Defendant Martin's duties in that role included "underwriting title, developing and maintaining business relationships with [Plaintiff's] clients, serving in a management role, and developing and selling business and maintaining accounts for [Plaintiff's] clients throughout the State of North Carolina." In 2008, Defendant Martin was licensed to practice law in North Carolina.

As part of her employment contract, Defendant Martin signed a Proprietary Information, Inventions, Non-Competition and Non-Solicitation Agreement ("Non-Compete Agreement" or "Agreement"). The Agreement included the following relevant provisions at issue on appeal:

> 3. No Conflicts or Solicitation.
>
> . . . . I also agree that for the period of my employment by the Company and for one (1) year after the date of

> termination of my employment with the Company I will not, either directly or through others: . . . . (c) solicit or attempt to solicit any customer or partner of the Company with whom I had contact during my employment with the Company to purchase a product or service competitive with a product or service of the Company; . . . or (d) provide products or services competitive with a product or service of the Company to any customer or partner of the Company with whom I had contact during my employment with the Company.

On 10 May 2017, while still employed by Plaintiff, Defendant Martin formed Magnolia Title Company, LLC, which, according to its website, "is an attorney-owned independent title agency providing real estate practitioners with extensive knowledge and exceptional service for 4 national title underwriters." Defendant Martin resigned from her employment with Plaintiff on 31 May 2017.

According to Plaintiff, within one year of resigning from her employment, Defendant Martin, through Defendant Magnolia Title Company,

> 35. . . . is and/or has solicited received, and/or has written business for at least one Sterling Title client in New Hanover County, North Carolina. As part of her job duties, Defendant Martin would travel to New Hanover County purportedly to meet with clients, to maintain accounts, and to develop and further business for Sterling Title. . . .
>
> 36. Plaintiff has learned, upon information and belief, that Defendants Martin and/or Magnolia Title have contacted, marketed to, and/or solicited business from Sterling Title clients in furtherance of their business development and scheme. Upon information and belief, Defendants Martin and Magnolia Title did so in direct violation of the Non-Compete Agreement and in an effort to compete directly with Sterling Title and/or to take clients from Sterling Title.
>
> 37. Upon information and belief, Defendants have contacted and/or visited with several of Sterling Title customers with whom Defendant Martin worked while employed by Sterling Title in an effort to obtain additional accounts and business on behalf of Defendant Magnolia Title.

After Defendant Martin's resignation, Plaintiff hired digital forensics examiner Derek Ellington to examine the company computer that

Defendant Martin used while working for Plaintiff. Ellington's affidavit was filed contemporaneously with Plaintiff's complaint ("Ellington Affidavit"). According to the Ellington Affidavit, on 28 April 2017, "a folder called *Magnolia* was created within the Personal folder of the main Dropbox folder [that Defendant Martin had installed] on the Sterling Title Company Dell computer." The folder was found to contain "a list of 51 names and email addresses" in a spreadsheet entitled "*Happy_Hour_with_Carolina_Bank_Sterling_-guest_list-03-22-13(1).xlsx*," which, according to the Ellington Affidavit, "is consistent with being a contact list for Sterling Title Company."

On 7 November 2017, Plaintiff filed a complaint against Defendant Martin asserting claims for breach of the Non-Compete Agreement and breach of the implied duty of good faith and fair dealing. Plaintiff also asserted claims against both Defendants for violation of the North Carolina Trade Secrets Protection Act, unfair and deceptive trade practices, and conversion. On 10 January 2018, Defendants filed a motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that "the Restrictive Covenants at issue are unenforceable as a matter of law," and that the allegations in the complaint otherwise failed to state a claim upon which relief could be granted. By order entered 3 July 2018, the trial court dismissed Plaintiff's complaint with prejudice, concluding that the Non-Compete Agreement was "unenforceable against the Defendants under North Carolina law," and that the complaint otherwise failed to state a claim for which relief could be granted. Plaintiff timely appealed.

On appeal, Plaintiff argues that the trial court erred in granting Defendants' motion to dismiss because (1) the Non-Compete Agreement is a valid and enforceable contract, and (2) the complaint otherwise states cognizable claims for relief as to each of Plaintiff's asserted causes of actions.

Discussion

I. Standard of Review

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

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

Id. at 784, 618 S.E.2d at 204 (quotation marks omitted).

II. Covenant Not to Compete

[1] It is well established that "[a] covenant in an employment agreement providing that an employee will not compete with his former employer is not viewed favorably in modern law." *Hartman v. Odell and Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994) (quotation marks omitted), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). In order to be enforceable, an otherwise procedurally valid covenant not to compete must be both (1) "reasonable as to time and territory," and (2) "designed to protect a legitimate business interest of the employer." *Id.* "The reasonableness of a non-compete agreement is a matter of law for the court to decide." *Farr Assocs. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000). "In evaluating reasonableness as to time and territory restrictions, we must consider each element in tandem . . . . Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable." *Id.* at 280, 530 S.E.2d at 881 (citation omitted).

In the instant case, there is no question but that the Non-Compete Agreement is designed to protect Plaintiff's legitimate business interest, i.e., maintaining customer relationships. *See United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 651, 370 S.E.2d 375, 381 (1988) ("[P]rotection of customer relationships and goodwill against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer."); *Farr*, 138 N.C. App. at 280, 530 S.E.2d at 881 ("[An employer's] desire to keep its client base intact when its employees depart is a legitimate business interest."). Nevertheless, "[i]f a contract . . . in restraint of competition is too broad to be a reasonable protection to the employer's business it will not be enforced." *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828, *reh'g denied*, 325 N.C. 231, 381 S.E.2d 792, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 531 (1989).

We therefore must consider the scope of the temporal and territorial restrictions in the Non-Compete Agreement in order to determine

whether the Agreement is enforceable as a matter of law. "If not, then the trial court properly granted" Defendants' motion to dismiss Plaintiff's breach of contract claim. *Farr*, 138 N.C. App. at 279, 530 S.E.2d at 880.

a. Reasonableness as to Territory

This Court has identified the following factors as relevant to the determination of whether the geographic scope of a non-compete agreement is reasonable:

> (1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Hartman, 117 N.C. App. at 312, 450 S.E.2d at 917.

Generally, "[w]here the alleged primary concern is the employee's knowledge of the customers, the territory should only be limited to areas in which the employee made contacts during the period of his employment." *Id.* at 313, 450 S.E.2d at 917 (quotation marks omitted). Indeed, our courts have also recognized "the validity of geographic restrictions that are limited not by area, but by a client-based restriction." *Farr*, 138 N.C. App. at 281, 530 S.E.2d at 882 (citation omitted).

The Non-Compete Agreement in the present case does not prevent Defendant Martin from operating within any particular locale. Instead, it prevents Defendant Martin from soliciting or providing a competitive product or service to any "customer or partner of [Plaintiff] with whom [she] had contact during [her] employment with [Plaintiff]." This client-based restriction is, on its face, very broad. It prohibits Defendant Martin from soliciting or providing competitive services to all of Plaintiff's current or former clients with whom Defendant Martin had any form of "contact" during her employment, regardless of the client's location, the extent of the client's "contact" with Defendant Martin during her employment,[1] or the amount of time that has passed since the client

1. As in *Farr*, the Non-Compete Agreement in this case does not define "customer or partner," and thus the restriction would "extend to clients' offices that never contacted" either Plaintiff or Defendant Martin. *Farr*, 138 N.C. App. at 282, 530 S.E.2d at 882 ("If [the employer] worked for a client in one city, but that client has offices in *other* cities, the non-compete agreement ostensibly prevents [the employee] from working for that client in *any* of its offices, not merely the office with which [the employer] once worked. [This] factor[ ] work[s] to expand the reach of the covenant.").

ceased doing business with Plaintiff. The expansiveness of this restriction suggests that the Non-Compete Agreement is unreasonable. *See id.* at 282, 530 S.E.2d at 882 ("Although [the employer] had a legitimate reason for wanting to prevent departing employees from misappropriating clients, the number of clients embraced by the covenant, as compared to the number of clients serviced by [the employee], is unreasonable.").

b. Reasonableness as to Time

Although we conclude that the client-based restriction in the instant case tends to indicate that the Non-Compete Agreement is unreasonable, we next consider the temporal restriction in order to determine whether "the combined effect of the two" nevertheless renders the Non-Compete Agreement enforceable. *Id.* at 280, 530 S.E.2d at 881 ("A longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*.").

"[T]ime restrictions of a certain length are presumed unreasonable absent a showing of special circumstances. A five-year time restriction is the outer boundary which our courts have considered reasonable . . . ." *Id.* Even so, "only 'extreme conditions' will support a five-year covenant." *Hartman*, 117 N.C. App. at 315, 450 S.E.2d at 918.

Moreover, the time period identified in a non-compete agreement will not always be controlling as the operative time restriction in each case. "[W]hen a non-compete agreement reaches back to include clients of the employer during some period in the past, the look-back period must be added to the restrictive period to determine the real scope of the time limitation." *Farr*, 138 N.C. App. at 280, 530 S.E.2d at 881.

In the instant case, although the applicable time restriction in the Non-Compete Agreement is stated as "the period of [Defendant Martin's] employment . . . and for one (1) year after the date of termination," the Agreement also restricts Defendant Martin from soliciting or providing competitive services to any of Plaintiff's customers with whom she had contact during her employment, a period of roughly ten years. Thus, "[o]n an operative level," the Agreement is in essence an 11-year restriction. *Professional Liab. Consultants v. Todd*, 122 N.C. App. 212, 219, 468 S.E.2d 578, 582 (Smith, J., dissenting), *rev'd for the reasons stated in the dissent*, 345 N.C. 176, 478 S.E.2d 201 (1996). That is, the Agreement prevents Defendant Martin, for a period of one year, from doing business with Plaintiff's former or current clients with whom Defendant Martin had any contact during the past ten years, even if the customer ceased doing business with Plaintiff nine years and 11 months ago. Such a restriction is "patently unreasonable." *Id.* at 219, 468 S.E.2d at 583.

Accordingly, in light of its overarching temporal and territorial restrictions, we conclude that the Non-Compete Agreement is "unreasonably broad and therefore unenforceable." *Farr*, 138 N.C. App. at 283, 530 S.E.2d at 883. Accordingly, the trial court properly granted Defendants' motion to dismiss Plaintiff's claims for breach of contract.

c. Sufficiency of the Allegations

The trial court's dismissal of Plaintiff's breach of contract claim was also proper in that Plaintiff's complaint fails to allege facts sufficient to establish a breach of the Non-Compete Agreement, even assuming it were enforceable. Plaintiff argues that "Paragraphs 35-37 of the Complaint allege facts sufficient to establish a breach of the contract, particularly at the 12(b)(6) stage." Paragraphs 36 and 37, however, set forth nothing more than Plaintiff's "belief" that Defendant Martin has "contacted and/or visited with *several of [Plaintiff's] customers*," wholly failing to identify any such customer that she is alleged to have solicited in breach of the Agreement. (Emphasis added). *See Feltman v. City of Wilson*, 238 N.C. App. 246, 252, 767 S.E.2d 615, 620 (2014) ("Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial . . . ."). Moreover, while paragraph 35 of the complaint alleges that Defendant Martin "is and/or has solicited received, and/or has written business for at least one [of Plaintiff's clients] in New Hanover County, North Carolina," the complaint fails to allege that this unnamed New Hanover County client was, in fact, one "with whom [Defendant Martin] had contact during [her] employment." Accordingly, even assuming the Non-Compete Agreement to be enforceable, Plaintiff has not pleaded sufficient facts to establish a breach of the Agreement.

III. Trade Secrets Protection Act Claim

[2] Plaintiff's third cause of action is against both Defendants for violation of the North Carolina Trade Secrets Protection Act.

Chapter 66, Article 24, section 153 of the North Carolina General Statutes provides that an "owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret." N.C. Gen. Stat. § 66-153 (2017). For purposes of the Act, a "trade secret" means

> [b]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable

> through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. § 66-152(3).

Under North Carolina law, "[t]o plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510, 606 S.E.2d 359, 364 (2004) (quotation marks omitted). In determining whether the information identified in a complaint constitutes a "trade secret" for purposes of the Act, relevant factors include:

> (1) the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003). Information will not merit trade secret protection where the information is "either generally known in the industry . . . or [is] readily ascertainable by reverse engineering." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 470, 579 S.E.2d 449, 454 (2003).

In the instant case, Plaintiff alleges that Defendants misappropriated its trade secrets, to wit: "Plaintiff's customer identity and customer account information." In particular, the Ellington Affidavit attached to Plaintiff's complaint states that Defendant Martin saved to her personal Dropbox folder a document titled "*Happy_Hour_with_Carolina_Bank_Sterling_-guest_list-03-22-12(1).xlsx*," which is purportedly "a list of 51 names and email addresses and is consistent with being a contact list for Sterling Title Company." Plaintiff maintains that "[b]ecause the Complaint clearly identifies a specific document which was misappropriated," i.e., the contact list, Plaintiff "has sufficiently pled misappropriation of trade secrets." Nevertheless, even assuming that Plaintiff's identification of this document is sufficient to allege the

existence of a trade secret, we conclude as a matter of law that such a document does not merit trade secret protection under the Act.

The guest list is identified as containing the "names and email addresses" of Plaintiff's "contact[s]." Although "information regarding customer lists . . . can qualify as a trade secret under [the Act]," *Krawiec v. Manly*, 370 N.C. 602, 610, 811 S.E.2d 542, 548 (2018), such is the case only to the extent that the information is not "generally known or readily ascertainable through independent development or reverse engineering." N.C. Gen. Stat. § 66-152(3)(a); *Krawiec*, 370 N.C. at 610, 811 S.E.2d at 548. Assuming that the 51 "contacts" are, in fact, Plaintiff's customers, Plaintiff fails to allege—and there is nothing in the pleadings to support—"that the lists contained any information that would not be readily accessible" to Defendant Martin but for her employment with Plaintiff.[2] *Krawiec*, 370 N.C. at 611, 811 S.E.2d at 549. Thus, because the complaint fails to identify Plaintiff's "customer identity and customer account information" as consisting of anything other than the e-mail addresses of 51 "contacts," Plaintiff has failed to allege a trade secret deserving of protection under the Act. *See id.* at 610, 811 S.E.2d at 548 ("[I]n light of the requirements of subsection 66-152(3), a customer database [does] not constitute a trade secret when the record show[s] that defendants could have compiled a similar database through public listings such as trade show and seminar attendance lists." (quotation marks omitted)).

Accordingly, the trial court properly dismissed Plaintiff's claim for violation of the North Carolina Trade Secrets Protection Act.

IV. Remaining Claims

[3] Plaintiff's second cause of action is against Defendant Martin for breach of the implied duty of good faith and fair dealing under the Non-Compete Agreement. The trial court's dismissal of this claim was proper in light of our holding that the Non-Compete Agreement is unenforceable. Because Plaintiff cannot establish the existence of an enforceable contract, Plaintiff cannot state a claim that Defendant Martin "somehow breached implied terms" of that contract. *Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012).

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2. In fact, as Defendants argued at the hearing on their motion to dismiss, the business at issue in this case "is the provision of title insurance. Your customers are real estate attorneys licensed in the state . . . you're selling title insurance in. It's no secret who the potential customers of these companies are. You can go to the state bar and look up the real estate lawyers in your town."

[4] Plaintiff next challenges the trial court's dismissal of its claim against Defendants for unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. In doing so, however, Plaintiff only argues that, because its complaint properly stated a claim for violation of the Trade Secrets Protection Act, the complaint therefore also sufficiently stated a claim for unfair and deceptive trade practices. *See Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) ("If the violation of the Trade Secrets Protection Act satisfies [the] three prong test [to maintain a cause of action for unfair trade practices], it would be a violation of N.C. Gen. Stat. § 75-1.1."), *cert. dismissed and disc. review denied*, 333 N.C. 344, 427 S.E.2d 617 (1993). Because we conclude that Plaintiff's complaint fails to state a claim for violation of the Trade Secrets Protection Act, the trial court's order cannot be disturbed on this ground.

[5] Lastly, Plaintiff does not challenge the trial court's dismissal of its conversion claim, nor does it challenge the trial court's dismissal of its breach of contract claim except as it relates to the non-compete and non-solicitation restrictions. Accordingly, Plaintiff has abandoned any such challenges not presented. *See* N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

Conclusion

For the reasons contained herein, we affirm the trial court's order granting Defendants' motion to dismiss.

AFFIRMED.

Judges DIETZ and MURPHY concur.

SUAREZ v. AM. RAMP CO.

[266 N.C. App. 604 (2019)]

GAVIN SUAREZ, MINOR CHILD, BY AND THROUGH GUARDIAN AD LITEM, RICHARD P. NORDAN, ESQ.; ERIC SUAREZ AND JEAN SUAREZ, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF GAVIN SUAREZ, PLAINTIFFS

v.

AMERICAN RAMP COMPANY (ARC); TOWN OF SWANSBORO, DEFENDANTS

v.

ALAINA HESS, THIRD-PARTY DEFENDANT

No. COA19-36

Filed 6 August 2019

1. Appeal and Error—interlocutory appeal—pending claims against one defendant—risk of inconsistent verdicts—substantial right

In a negligence action brought by plaintiff parents and their eighteen-month-old child, where the child suffered severe burns at a town-owned skateboard park upon falling onto a hot metal ramp, the trial court's dismissal of plaintiffs' claims against the town was immediately appealable even though all claims against the ramp manufacturer remained pending. Holding separate trials against each defendant would have carried a risk of inconsistent verdicts on common factual issues (namely causation and damages) and therefore the appeal affected a substantial right.

2. Cities and Towns—injury at town-owned skateboard park—town's liability—section 99E-21—no complete immunity defense

The trial court improperly dismissed a negligence action brought against a town by parents of an eighteen-month-old child who suffered severe burns at a town-owned skateboard park (after he fell onto a hot metal ramp), because N.C.G.S. § 99E-21—which applies to governmental entities operating skateboard parks and limits their liability for injuries resulting from "hazardous recreational activities"—did not provide a complete immunity defense. Further, even if section 99E-21 applied to the case (which it did not, because the child was not engaging in the covered activity when he was injured), plaintiffs expressly alleged the town engaged in acts falling under the two statutory exceptions to limited governmental liability in N.C.G.S. § 99E-25(c).

3. Premises Liability—injury at town-owned skateboard park—duty to warn or take steps to prevent—hazardous condition—sufficiency of pleading

The trial court erred by dismissing negligence claims brought against a town by parents of an eighteen-month-old child who suffered severe burns at a town-owned skateboard park (after he fell onto a hot metal ramp), where plaintiffs adequately alleged that the town knew or should have known that the heat-attracting ramps—which were installed in a hot climate area lacking natural shade—presented a risk of burn injuries, and therefore the town owed a duty to warn or take steps to prevent such injuries. Further, the allegations in the complaint did not establish the hot metal ramp to be an "open and obvious condition" for which no duty to warn existed.

4. Premises Liability—injury at town-owned skateboard park—gross negligence—sufficiency of pleading

The trial court erred by dismissing a claim of gross negligence brought against a town by parents of an eighteen-month-old child who suffered severe burns at a town-owned skateboard park (after he fell onto a hot metal ramp), where plaintiffs adequately alleged that the town acted with conscious or reckless disregard for others' safety when it placed heat-attracting ramps in a hot climate area without natural shade, did not inspect the ramps, failed to take steps to prevent the ramps from overheating, and failed to warn others of the risk of burn injuries.

Appeal by Plaintiffs from Order entered 4 September 2018 by Judge Albert D. Kirby, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 8 May 2019.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and John R. Taylor, for plaintiffs-appellants.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier, and Ward and Smith, PA, by Michael J. Parrish, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Gavin Suarez (minor Plaintiff), by and through his Guardian *ad Litem*, and his parents, Eric and Jean Suarez, (collectively, Plaintiffs) appeal from the trial court's Order dismissing their

Complaint against the Town of Swansboro (Town).[1] The Record before us tends to show the following:

On 21 June 2017, Plaintiffs filed a Complaint against the Town and ARC.[2] The Complaint alleged, in relevant part, that the Town, a North Carolina municipal corporation, owned the Swansboro Skate Park (Skate Park). In the fall of 2011, the Town sent out an invitation for proposals for the construction of a skateboarding park. The Town specifically requested skateboarding ramps be made of "stainless steel or other corrosion resistant material" and indicated that the ramps would "be installed by the Public Works Department of [the Town], under the direction of a certified playground safety inspector who is a Town Employee."

The Town contracted with ARC to design, manufacture, and sell to the Town skateboarding ramps for the Skate Park. The Complaint further alleged the Town and ARC agreed to the sale and purchase of the ramps containing a "heat-attractive surface" and did so knowing the Skate Park was located in a hot-climate area with a lack of natural shade and in direct sunlight, presenting the risk of potential burn injuries. In December 2011, an employee or agent of ARC inspected the installed ramps. However, this inspection did not include any checks related to hazards of burn injuries or overheating of the ramps. Plaintiffs alleged ARC and the Town willfully and wantonly chose not to inspect the ramps installed at the Skate Park for "burn injury potential." The Skate Park opened in early 2012. While the Town posted signs at the Skate Park, none of these signs warned visitors that the ramps may become hot enough to cause burn injuries. As such the Complaint alleged: "Pursuant to N.C. Gen. Stat. § 99E-25(c)(1) . . . [the Town] . . . failed to guard against or warn of a dangerous condition of which guests and participants at the Skate Park did not have notice and cannot reasonably be expected to have notice."

On 14 August 2014, the minor Plaintiff and his older brother were being supervised by their babysitter, Hess. It was a nice warm summer day, and Hess took the children to the municipal park where the Skate Park was located. When they arrived, the Skate Park was not being used. The minor Plaintiff's older brother wanted to see the Skate Park, and

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1. Defendant American Ramp Company (ARC) and Third-Party Defendant Alaina Hess (Hess) are not parties to the instant appeal.

2. We accept the factual allegations of the Complaint as true for the sole purpose of reviewing the Order dismissing Plaintiffs' claims against the Town on the face of the Complaint. As such, this opinion should not be construed as judicially establishing any fact at issue in this case.

Hess allowed the children to explore the Skate Park. The group had only been in the Skate Park for a matter of minutes when the minor Plaintiff (then just shy of 18 months old) followed his older brother up a ramp and fell. The minor Plaintiff immediately began screaming and crying. Hess took the child to a bathroom to clean up and observed the skin on his hands and both of his legs had bubbled up into large blisters. Hess ultimately took the minor Plaintiff to Carteret General Hospital where the minor Plaintiff's mother worked. The minor Plaintiff was subsequently transferred by helicopter to the UNC Hospital Pediatric Burn Department.

The Complaint alleged the Plaintiffs suffered damages as a result of the minor Plaintiff's burn injuries caused by the hot ramp. It further alleged Plaintiffs and Hess did not have and could not have had notice of the hazardous condition at the Skate Park. Plaintiffs asserted claims against both ARC and the Town. Against the Town specifically, Plaintiffs claimed both negligence and gross negligence by the Town, grounded in allegations of failure to warn, failure to inspect and maintain, and failure to take corrective measures or precautions to prevent hot skateboarding ramps.

On 1 September 2017, ARC filed its Answer. In its Answer, ARC raised several defenses, including, *inter alia*, the possibility of intervening negligence of a third party. The third party in question, Hess, was served with summons as a third-party defendant. On 19 July 2018, the Town filed an Amended Answer, which included a Motion to Dismiss asserting "Plaintiffs' Complaint fails to establish jurisdiction over the Town and fails to state a claim against the Town upon which relief may be granted" pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. Town also raised the defenses of the intervening negligence of Hess, the contributory negligence of the minor Plaintiff, and governmental immunity, among others.

The Town's Motion to Dismiss came on for hearing on 13 August 2018 in Onslow County Superior Court. At this hearing, the Town argued (1) it was entitled to immunity from suit under the provisions of N.C. Gen. Stat. § 99E-21 *et seq.*, which provide certain protections for governmental operators of skateboarding parks; and (2) alternatively, Plaintiffs' Complaint failed to plead essential elements of a premise-liability claim against the Town to support either negligence or gross-negligence claims. On 4 September 2018, the trial court entered its Order granting the Town's Motion to Dismiss "pursuant to [Rule] 12(b)(1) and/or (6)[.]" The trial court dismissed all claims against the Town with prejudice. Plaintiffs filed Notice of Appeal on 25 September 2018.

Appellate Jurisdiction

[1] As an initial matter, we must determine whether this appeal is properly before us. As Plaintiffs acknowledge, this appeal is interlocutory because it leaves Plaintiffs' claims against ARC pending. *See*, *e.g.*, *Cunningham v. Brown*, 51 N.C. App. 264, 266, 276 S.E.2d 718, 721 (1981) (holding that "[a]n order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" is interlocutory and generally not appealable). The Town, in turn, has filed a Motion to Dismiss the Appeal on this basis.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citations omitted). "Notwithstanding this cardinal tenet of appellate practice, immediate appeal of interlocutory orders and judgments is available in at least two instances." *Id.* at 161, 522 S.E.2d at 579. First, under N.C.R. Civ. P. 54(b), "immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay." *Id.* at 161-62, 522 S.E.2d at 579 (citations omitted). Here, the trial court did not include a Rule 54(b) certification in its Order.[3]

Second, "immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' " *Id.* at 162, 522 S.E.2d at 579 (citations omitted). "[A]n interlocutory order affects a substantial right if the order 'deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered.' " *Id.* (alteration in original) (citation omitted) (quoting *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991)). Here, Plaintiffs contend the possibility of inconsistent verdicts on overlapping factual issues against the two Defendants in this case is such a substantial right.

"[T]he right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right." *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (alteration in original) (citation and quotation marks omitted). We have explained:

> This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the

3. It is unclear why the trial court's Order does not contain a Rule 54(b) certification, except to say the Record before us does not reflect Plaintiffs requested one.

> appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989) (alteration in original) (citation omitted) (quoting *Green*, 305 N.C. at 608, 290 S.E.2d at 596).

Here, Plaintiffs identify a number of potentially overlapping factual issues that may result in inconsistent verdicts should they be required to pursue separate trials against the Town and ARC, which they maintain affects a substantial right. We agree with Plaintiffs. At a minimum, separate trials would potentially raise inconsistencies in issues of both causation and damages. This gives rise to a substantial right allowing for an immediate appeal. *See Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982) ("[T]he plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries is indeed a substantial right."). In particular, we note a key issue in any trial against both Defendants will be the intervening or superseding negligence of Hess, and different juries could reach inconsistent verdicts on that question. *Cf. Hoots v. Pryor*, 106 N.C. App. 397, 402, 417 S.E.2d 269, 273 (1992) (holding that a scenario where one trial might find a party contributorily negligent while another might not creates a substantial risk of inconsistent verdicts). Therefore, we conclude Plaintiffs' interlocutory appeal is properly before us as affecting a substantial right. Thus, we deny the Town's Motion to Dismiss the Appeal.

Issues

The dispositive issues in this case are: (I) Whether Plaintiffs' Complaint states claims against the Town sufficient to withstand the special liability provisions of N.C. Gen. Stat. § 99E-21 *et seq.*; (II) Whether Plaintiffs adequately alleged the Town knew or should have known of the hazardous condition caused by the hot metal ramp; and (III) Whether the Plaintiffs adequately alleged claims for gross negligence sufficient to withstand the Town's Motion to Dismiss.

Standard of Review

The trial court's Order states the Town's Motion to Dismiss was based on N.C.R. Civ. P. "12(b)(1) and/or (6)." However, the Order does not identify the particular rule or rules upon which it actually based its dismissal. "While we apply a *de novo* standard when reviewing either a

Rule 12(b)(1) or 12(b)(6) dismissal, identifying the precise civil procedure rule underlying a dismissal is critical because it dictates our scope of review." *Holton v. Holton*, ___ N.C. App. ___, ___, 813 S.E.2d 649, 654 (2018). The primary difference is that "[u]nlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) (citation and quotation marks omitted).

Here, it is apparent the trial court limited its consideration to the face of the Complaint in compliance with Rule 12(b)(6). Moreover, to the extent the trial court perceived the Town's Motion to Dismiss as raising an immunity defense, our Courts generally recognize immunity as a defense that can be raised under Rules 12(b)(1), 12(b)(2), or 12(b)(6).[4] *See generally Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 677 S.E.2d 203 (2009). In any event, as discussed herein, we determine the Town's Motion to Dismiss did not implicate an immunity defense and thus did not implicate subject-matter jurisdiction under Rule 12(b)(1). In addition, the trial court dismissed Plaintiffs' claims "with prejudice," which further indicates it was relying on Rule 12(b)(6) and not Rule 12(b)(1). *See Holton*, ___ N.C. App. at ___, 813 S.E.2d at 655 (dismissal under Rule 12(b)(1) is without prejudice (citation omitted)). It follows then that the trial court's dismissal in this case was premised on Rule 12(b)(6), and we review this matter as such.

"The standard of review of an order granting a [Rule] 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Gilmore v. Gilmore*, 229 N.C. App. 347, 350, 748 S.E.2d 42, 45 (2013) (alteration in original) (citation and quotation marks omitted). "On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.* (citation and quotation marks omitted).

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4. This raises a tangled issue that we need not address here. It remains somewhat of an open question in North Carolina as to under which section of Rule 12 sovereign immunity falls. *See Lake v. State Health Plan for Teachers & State Emps.*, 234 N.C. App. 368, 370-71 n.3, 760 S.E.2d 268, 271 n.3 (2014) (citations omitted). See *Can Am S., LLC v. State of N.C.*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014), for a discussion of why this matters under North Carolina appellate practice for purposes of appealability.

Analysis

I. N.C. Gen. Stat. § 99E-21 *et seq.*

[2] The primary issue argued before both the trial court and this Court is whether Article 3 of Chapter 99E of our General Statutes, entitled "Hazardous Recreation Parks Safety and Liability" (Hazardous Recreational Activities Act), serves as a complete bar to Plaintiffs' Complaint. *See* N.C. Gen. Stat. § 99E-21 *et seq.* (2017). The Town contends the Hazardous Recreational Activities Act serves as a complete immunity defense to Plaintiffs' claims akin to governmental or sovereign immunity. We disagree.

The Hazardous Recreational Activities Act serves to limit the liability of governmental entities operating skateboard parks used for skateboarding, inline skating, or freestyle bicycling.[5] Its stated purpose

> is to encourage governmental owners or lessees of property to make land available to a governmental entity for skateboarding, inline skating, or freestyle bicycling. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, if insurance can be obtained for such activities. It is also recognized that risks and dangers are inherent in these activities, which risks and dangers should be assumed by those participating in those activities.

N.C. Gen. Stat. § 99E-21 (2017).

This purpose is carried out in two ways. First, the Statutes impose duties upon those engaged in "hazardous recreational activities"—"Any person who participates in or assists in hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself or other persons or property that result from these activities." *Id.* § 99E-24(a) (2017). The same is true for "[a]ny person who observes hazardous recreational activities[.]" *Id.*

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5. Article 3 to Chapter 99E of our General Statutes was enacted in 2003 in legislation titled: An Act to Establish the Duties of Operators of Skateboard Parks, to Establish the Duties of Persons Who Engage in Certain Hazardous Recreational Activities, and to Limit the Liability of Governmental Entities for Damage or Injuries that Arise Out of a Person's Participation in Certain Hazardous Recreational Activities and that Occur in an Area Designated for Certain Hazardous Recreational Activities. 2003 N.C. Sess. Law 334 (N.C. 2003).

Second, the Hazardous Recreational Activities Act limits liability for governmental entities and employees:

> No governmental entity or public employee who has complied with G.S. 99E-23 shall be liable to any person who voluntarily participates in hazardous recreation activities for any damage or injury to property or persons that arises out of a person's participation in the activity and that takes place in an area designated for the activity.

Id. § 99E-25(b) (2017). In turn, N.C. Gen. Stat. § 99E-23 simply requires governmental operators of skateboard parks to require the use of helmets, elbow pads, and kneepads while skateboarding at a skateboard park. *Id.* § 99E-23 (2017).

The protections against liability afforded governmental entities under these statutes are, however, not unlimited. First, Section 99E-25 itself provides two exceptions to its limitation on liability:

> (1) The failure of the governmental entity or public employee to guard against or warn of a dangerous condition of which a participant does not have and cannot reasonably be expected to have had notice.
>
> (2) An act of gross negligence by the governmental entity or public employee that is the proximate cause of the injury.

Id. § 99E-25(c)(1)-(2).

Second, these statutes, by their plain language, only apply to persons engaging in "hazardous recreational activities," which is narrowly defined as only including "[s]kateboarding, inline skating, or freestyle bicycling." *Id.* § 99E-22(2) (2017). Further, "inherent risk" is defined as: "Those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, and freestyle bicycling." *Id.* § 99E-22(3).

When construing these statutory provisions together, it is evident the Hazardous Recreational Activities Act is not intended to give a governmental actor blanket immunity from every negligence or premise-liability claim arising in a skateboard park. Rather, it operates to limit liability of governmental entities for the *increased* risk of injuries caused by skateboarding, inline skating, and freestyle bicycling that is inherent in those activities. This distinction is important because immunity serves as more than an affirmative defense because it "not

only prevents courts from entering judgments against our state government, but also protects the government from being haled into court in the first instance." *Ballard v. Shelley*, ___ N.C. App. ___, ___, 811 S.E.2d 603, 605 (2018) (citation omitted). Here, N.C. Gen. Stat. § 99E-21 *et seq*. does not bar all claims by an injured person covered under the Act but rather limits those claims and provides for additional defenses. Indeed, we find this distinction further supported by the statutes themselves. Chapter 99E is entitled "Special Liability Provisions," and each article addresses standards of liability for different types of potentially hazardous activities. The Hazardous Recreational Activities Act itself differentiates its provisions from immunity: "Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances." N.C. Gen. Stat. § 99E-25(d). Governmental or sovereign immunity is thus an additional defense that may apply to a particular claim, including a claim falling under Section 99E-21 *et seq*.[6]

In this case, on the face of the Complaint, the 18-month-old Plaintiff was not engaged in a "hazardous recreational activity," as narrowly defined by the statute, but rather was simply playing with his brother within the Skate Park when he contacted the hot metal on the ramp. Indeed, it is not apparent, and certainly not on the face of this Complaint, that severe burns caused by scorching hot metal is an inherent risk of skateboarding or other hazardous recreational activity, such that the minor Plaintiff assumed the risk of such injuries under N.C. Gen. Stat. § 99E-24.

Moreover, even assuming the minor Plaintiff's conduct falls within the ambit of the Hazardous Recreational Activities Act and the limitation of liability under N.C. Gen. Stat. § 99E-25(b), Plaintiffs, in their Complaint, expressly alleged the Town engaged in acts falling under the two statutory exceptions in Section 99E-25(c). First, the Complaint alleges the Town failed to guard against or warn of a dangerous condition of which Plaintiffs and Hess had no notice and could not reasonably be expected to have had notice. Specifically, the Complaint alleges the Town failed to inspect the ramps, take precautions against the ramps becoming dangerously hot, or warn of the potential danger of the hot metal ramps. The Complaint further specifically alleges Plaintiffs and Hess had no notice of the dangerous condition and could not reasonably be expected to have had notice of the burning hot metal. Additionally,

6. Indeed, in the trial court below, the Town tabled its arguments regarding governmental or sovereign immunity for potential later proceedings. We, obviously, express no opinion on the merits or applicability of such immunity defenses to this case.

the Complaint also alleges the Town engaged in gross negligence by willfully and wantonly choosing not to inspect the ramps, despite knowing the ramps were constructed of metal and left in an unshaded area of the park. Consequently, the Complaint alleges claims not barred by Section 99E-25(b). As such, to the extent the trial court dismissed the Complaint against the Town on the basis of the Hazardous Recreational Activities Act on the face of the Complaint, this was error and we reverse the trial court on this ground.

II. The Town's Actual or Constructive Knowledge of a Dangerous Condition

[3] Plaintiffs also argue the trial court erred in dismissing their negligence claims against the Town. The Town contends the trial court correctly dismissed Plaintiffs' claims, arguing the allegations in the Complaint fail to allege the Town breached any duty owed to the Plaintiffs. Specifically, the Town asserts it had no duty to Plaintiffs to warn or take steps to prevent the burn injuries to the minor Plaintiff because there is no allegation the Town knew or should have known of the dangerous condition. *See generally Steele v. City of Durham*, 245 N.C. App. 318, 325, 782 S.E.2d 331, 336 (2016).

However, the Complaint alleges that the Town and ARC contracted for the design, manufacture, and sale of the "heat-attractive" ramps with both Defendants knowing the planned location of the skate park "and its lack of natural shade, and direct natural sunlight." Further, the Complaint alleges the Defendants "knew or should have known that the heat-attractive ramps placed in a location with full, direct sunlight in a hot climate present a risk of potential burn injuries to skin that touches the ramps" and "chose to recommend, install and approve for public use ramps with heat-attractive surfaces in a location with full, direct sunlight in a hot climate[.]" In their claim directed against the Town, Plaintiffs again expressly alleged the Town "knew, or by a reasonable inspection should have discovered, the hazardous, dangerous, and unsafe condition with the hot skateboarding ramps at the Skate Park[.]" Thus, the Complaint clearly alleges the Town knew or should reasonably have known of the alleged dangerous condition.

Nevertheless, the Town maintains it had no duty to warn of the alleged dangerous condition because it constituted a known and obvious danger of which Hess or the Suarez children had equal or superior knowledge to the Town. *See generally Waddell v. Metropolitan Sewerage Dist. of Buncombe Cnty.*, 207 N.C. App. 129, 134, 699 S.E.2d 469, 472 (2010); *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999); *Farrelly v. Hamilton Square*, 119 N.C. App.

541, 546, 459 S.E.2d 23, 27 (1995). However, the Complaint quite plainly and repeatedly alleges Plaintiffs and Hess did not have notice of the condition and, moreover, could not reasonably be expected to have had notice. The Complaint alleges the Town failed to warn of the "hidden perils and unsafe condition of hot skateboarding ramps," that Plaintiffs and Hess had no notice of the dangerous condition and could not reasonably have been expected to discover the condition, and that, indeed, Hess had no opportunity to inspect the ramp prior to the 18-month-old Plaintiff contacting the searing hot metal.

Even accepting the premise implicit in the Town's argument—that it is known and obvious metal becomes hot in the North Carolina summer sun—it does not necessarily follow that the hot metal ramp in this case constituted an open and obvious dangerous condition. At this preliminary stage of the litigation, a number of variables remain, including, *inter alia*, the actual appearance of the ramps (*i.e.*, is it apparent they are, in fact, metal) and the layout of the park itself (*i.e.*, would the condition be hidden from someone entering the park). Further discovery and litigation may ultimately lead to the conclusion that the hot metal ramp constituted an open and obvious condition; however, at this stage of the litigation, the allegations of the Complaint do not establish the hot metal ramp to be an open and obvious condition. As such, we reverse the trial court's Order dismissing Plaintiffs' negligence claims under Rule 12(b)(6).

III. Gross Negligence

[4] In addition to the arguments raised by Plaintiffs, the Town further contends Plaintiffs failed to allege the Town acted with conscious or reckless disregard for the rights and safety of others to support a gross-negligence claim. "Gross negligence has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)). "Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Id.* (citation omitted).

In this case, we have already determined Plaintiffs adequately stated negligence claims against the Town. Moreover, Plaintiffs' Complaint alleges that notwithstanding the Town's knowledge and decision to use heat-attractive ramps and place them in an unshaded, direct sun-lit area, the Town failed to inspect and maintain the Skate Park, warn of the danger of the hot metal ramps, or take steps to prevent the ramps from

overheating. The Complaint further expressly alleges that in so failing, the Town acted "wantonly, recklessly and with conscious and intentional disregard for the rights and safety of others[.]"

Therefore, we conclude Plaintiffs' Complaint adequately states a claim for gross negligence to survive the Town's Motion to Dismiss under Rule 12(b)(6). Thus, at this stage of the litigation, the Town is not entitled to dismissal of Plaintiffs' gross-negligence claims.

Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's Order dismissing Plaintiffs' claims against the Town.

REVERSED.

Judges STROUD and YOUNG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 AUGUST 2019)

ANDERSON v. TREDWELL No. 19-31	Alleghany (18CVD77)	Reversed
BUTTACAVOLI v. BUTTACAVOLI No. 18-1033	Buncombe (17CVD5594)	Affirmed
CARNEY v. WAKE CTY. SHERIFF'S OFFICE No. 18-1299	Wake (18CVS1102)	Affirmed
EVERBANK COMMERCIAL FIN., INC. v. THE HUNOVAL LAW FIRM, PLLC No. 18-909	Lincoln (17CVS661)	Affirmed in Part and Reversed in Part
FOXX v. FOXX No. 18-728	Catawba (16CVD1496)	Vacated and Remanded
GARLOCK v. ROLAND No. 18-755	Buncombe (17CVD559)	Vacated and Remanded
HUTTON v. THE DAVEY TREE EXPERT CO. No. 18-1148	Guilford (17CVS6104)	DISMISSED IN PART, AFFIRMED IN PART
MANGUM v. BOND No. 19-19	Durham (18CVS1500)	Affirmed
PACHAS v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 17-710-2	Mecklenburg (15CVS19217)	Reversed and Remanded
QUALITY BUILT ADVANTAGE, INC. v. GRAHAM No. 18-1230	Moore (18CVD699)	Affirmed in part; Dismissed in part.
REIS v. CARSWELL No. 18-1039	Lincoln (18CVS270)	Dismissed
STATE v. ALCON No. 19-22	Davidson (13CRS57137)	Reversed and Remanded.
STATE v. BIVENS No. 18-800	Pitt (16CRS58158) (16CRS58168)	Vacated and Remanded
STATE v. BRADLEY No. 18-1297	Craven (15CRS54178-80) (16CRS270) (16CRS329)	No error in part; no prejudicial error in part

STATE v. BREWER No. 18-1246	Mecklenburg (17CRS31422) (17CRS31425)	No Error
STATE v. BYRD No. 18-1028	Forsyth (16CRS4707) (16CRS57967)	No Error
STATE v. COX No. 19-160	Caldwell (18CRS781)	Affirmed
STATE v. DAVIS No. 18-559	Lee (15CRS52601) (15CRS52604) (15CRS52605)	Dismissed in Part; No error in Part.
STATE v. ESQUIVEL-LOPEZ No. 18-1258	Forsyth (04CRS50501)	Affirmed
STATE v. FANCHER No. 18-1115	Clay (15CRS44) (15CRS50154) (16CRS28) (17CRS115)	No Plain Error
STATE v. FELTS No. 18-823	Onslow (16CRS50907)	Vacated in Part; Remanded for Resentencing
STATE v. FLOWERS No. 18-832	Jackson (16CRS51385)	No Error.
STATE v. GRIGGS No. 18-1000	Dare (17CRS268) (17CRS50085)	No error in part; remanded for resentencing.
STATE v. HARRINGTON No. 18-644	Cumberland (16CRS64352)	No Error in Part; Remanded in Part.
STATE v. HOLLIDAY No. 18-1144	New Hanover (16CRS56627)	No error in part; vacated and remanded in part.
STATE v. IBRAHIM No. 18-1081	Guilford (16CRS31493)	No Error
STATE v. McBRIDE No. 18-1282	Hoke (16CRS51260) (16CRS51270) (16CRS51287-88)	Vacated and Remanded

STATE v. McCOY No. 19-85	Guilford (16CRS78855) (16CRS78857) (16CRS87504)	Dismissed
STATE v. MIDDLETON No. 18-131	Mecklenburg (16CRS212004-6)	No Error
STATE v. NEWSUAN No. 18-683	Harnett (17CRS50372-73) (17CRS50415)	No Error
STATE v. POPE No. 18-1151	Sampson (16CRS53051)	No Error
STATE v. PRUDENTE-ANORVE No. 18-827	Forsyth (16CRS59105) (16CRS59400)	No Error in Part; Remanded in Part
STATE v. RAYNOR No. 18-942	Sampson (16CRS52798) (16CRS52808-10) (16CRS53237)	No Error
STATE v. SCRUGGS No. 18-1217	Cleveland (17CRS50072-73)	No Error
STATE v. SIMMONS No. 18-1106	Forsyth (14CRS50227)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. STRUDWICK No. 18-794	Mecklenburg (16CRS210771)	Reversed
STATE v. THOMPSON No. 18-1146	Guilford (17CRS78147-48)	Affirmed
STATE v. WASHINGTON No. 18-984	Mecklenburg (16CRS21580) (16CRS21582) (16CRS21585)	No Plain Error
STATE v. YOURSE No. 18-776	Guilford (16CRS70187) (17CRS24154)	No Error
YOUNCE v. YOUNCE No. 18-962	Caldwell (17CVS42)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

though all claims against the ramp manufacturer remained pending. Holding separate trials against each defendant would have carried a risk of inconsistent verdicts on common factual issues (namely causation and damages) and therefore the appeal affected a substantial right. **Suarez v. Am. Ramp Co., 604.**

Interlocutory appeal—reversal of special-use permit—remand for rehearing—substantial right—The trial court's order—which reversed the decision of a city-county Board of Adjustment allowing a special-use permit for a middle school and instructed the Board to reopen the public hearing on the matter—was interlocutory because it remanded the case to a municipal body for further proceedings. The appeal was dismissed where the building contractor failed to show a substantial right would be lost absent appellate review. **Coates v. Durham Cty., 271.**

Interlocutory appeal—Uniform Deployed Parents Custody and Visitation Act—custodial responsibility order—In a case of first impression, the Court of Appeals had jurisdiction under N.C.G.S. § 50-19.1 to immediately review an appeal from a custodial responsibility order entered pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) because, although the order was technically temporary, it constituted a final order (as to custody issues raised under the UDPCVA) within the meaning of Civil Procedure Rule 54(b) but for the other pending claims. **Roybal v. Raulli, 318.**

Interlocutory orders—substantial right—judicial foreclosure of party's home—A partial summary judgment order directing the judicial sale of defendant's home was immediately appealable as affecting a substantial right that would be lost absent appellate review. **Wells Fargo Bank, N.A. v. Stocks, 228.**

Mootness—contested case—state agency's hiring decision—alleged failure to apply veteran's preference—In an appeal from a contested case where a state agency employee was not hired for an internal position that she applied for, the issue of whether the state agency improperly applied a veteran's preference (pursuant to N.C.G.S. § 126-80) was dismissed as moot. The employee conceded that, even if the agency improperly applied the veteran's preference, that failure was harmless because she still got to interview for the job and competed against applicants with substantially equal qualifications. **Johnson v. N.C. Dep't of Pub. Safety, 50.**

Notice of appeal—timeliness—final judgment—A board of education timely filed its notice of appeal from the trial court's order providing relief from a forfeited bail bond where the trial court's oral ruling—at which time the clerk stamped "forfeiture stricken" on the forfeiture notice, the trial court signed and dated the stamp, and the clerk wrote "entered" and the date next to the stamp—was not a final order. The stamped notice was not served on the parties (as required by Civil Procedure Rule 58), and the trial court's and parties' actions indicated that nobody thought the oral ruling was a final order. The board of education timely filed a notice of appeal from the final judgment, which was entered approximately two months later. **State of N.C. v. Ortiz, 512.**

Preservation of issues—motion to amend complaint—ruling not obtained—A property owner who failed to obtain a ruling on his motion to amend or supplement his complaint against a town (for claims related to the assessment of fees for sewer service availability) did not preserve for appellate review any issue regarding his motion. **Boles v. Town of Oak Island, 142.**

CHILD CUSTODY AND SUPPORT—Continued

between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), a prior custody order regarding the parties' daughter constituted a "prior judicial order designating custodial responsibility of a child in the event of deployment" (N.C.G.S. § 50A-373). Further, where the UDPCVA's standard for modifying prior custody orders was less stringent than the standard for modifying custody orders under Chapter 50 of the General Statutes, the trial court did not abuse its discretion by determining that the "circumstances required" no change to the prior order's provisions addressing caretaking or decision-making authority over the daughter. **Roybal v. Raulli, 318.**

Uniform Deployed Parents Custody and Visitation Act—custodial responsibility—prior judicial order—temporary custody order—no modification—In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court properly treated a temporary custody order it had previously entered as to the parties' son as a "prior judicial order designating custodial responsibility of a child in the event of deployment" (N.C.G.S. § 50A-373), because the term "prior judicial order" included temporary orders. Further, under the UDPCVA's lenient standard for modifying prior custody orders, the trial court did not abuse its discretion by determining that the "circumstances required" no change to the prior order's provisions addressing caretaking or decision-making authority over the parties' son. **Roybal v. Raulli, 318.**

Uniform Deployed Parents Custody and Visitation Act—decision-making authority—non-parent—denied—In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its discretion by denying decision-making authority—one type of "custodial responsibility" under the UDPCVA—to the stepmother over the parties' daughter. The UDPCVA allowed the court to grant decision-making authority "if the deploying parent is unable to exercise that authority" (N.C.G.S. § 50A-374), but the father failed to present any evidence that he would be unable to communicate with the mother—and thereby exercise decision-making authority over his daughter—during his deployment. **Roybal v. Raulli, 318.**

Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied—In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its discretion by granting the stepmother "limited contact" with the parties' daughter on a shorter schedule than what the father was granted under a prior custody order. The prior order did not address granting limited contact to a non-parent with the daughter, so the trial court was not bound by that order when determining the amount of limited contact to grant the stepmother. **Roybal v. Raulli, 318.**

Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied—In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to

CONSTITUTIONAL LAW—Continued

principles because, among other things, the legislation neither changed the parties' obligations nor barred plaintiff from asserting its rights under the lease or from seeking legal remedies through judicial action. **N.C. Indian Cultural Ctr., Inc. v. Sanders, 62.**

CONTEMPT

Criminal—required findings—opportunity to be heard—A defendant who was held in criminal contempt for using profanity in the courtroom was not given an opportunity to be heard as required by N.C.G.S. § 5A-14(b), rendering the court's order and judgment of contempt deficient. Not only was there no record of the proceeding or any evidence, but the court's striking out of preprinted language on the form order (stating that defendant had notice and an opportunity to respond) established the lack of the required procedural safeguards. **State v. Tincher, 393.**

CONTRACTS

Breach—implied covenant of good faith and fair dealing—involuntary dismissal—proper—In a dispute between former co-franchisees for a restaurant chain, where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations in exchange for various financial benefits, the trial court properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim for breach of the implied covenant of good faith and fair dealing. The record showed that plaintiff received the benefits he bargained for under the contract. **Musselwhite v. Cheshire, 166.**

Claims against former co-franchisee—unilateral mistake—mutual mistake—agreement divesting corporate interests—involuntary dismissal—In a dispute between former co-franchisees for a restaurant chain, the trial court—pursuant to Civil Procedure Rule 41(b)—properly dismissed plaintiff's action seeking to set aside an agreement in which plaintiff sold back his interests in the parties' two limited liability corporations (LLCs). Plaintiff did not show a right to relief based on unilateral mistake because he failed to show that defendant defrauded him or subjected him to imposition, undue influence, or other oppressive circumstances when the parties executed the agreement. Also, plaintiff did not show a right to relief based on mutual mistake where defendant denied operating on a mistaken belief (namely, that the restaurant chain required plaintiff to divest his LLC interests) when executing the agreement. **Musselwhite v. Cheshire, 166.**

Express contract—unjust enrichment claim—not actionable—In a dispute between former co-franchisees for a restaurant chain, where plaintiff executed an express contract agreeing to divest himself of his interests in the parties' two limited liability corporations (LLCs) in exchange for financial benefits, the trial court properly dismissed plaintiff's unjust enrichment claim pursuant to Civil Procedure Rule 41(b). **Musselwhite v. Cheshire, 166.**

Former business partners—agreement divesting corporate interests—unconscionability—involuntary dismissal—proper—In a dispute between former business partners, where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations (LLCs), the trial court properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim alleging unconscionability. The record showed that the parties negotiated the contract upon the same information and on equal terms, plaintiff understood what he was

STIPULATIONS

Habitual larceny—stipulation to prior convictions—authority of counsel—In a prosecution for habitual larceny, the record contained no evidence that defense counsel lacked authority to stipulate to defendant's prior larceny convictions, since attorneys are presumed to have authority to act on behalf of their clients, and because defendant's statement in court did not amount to a denial of the existence of his prior convictions but an objection to their use where they predated the enactment of the habitual larceny statute. **State v. Edgerton, 521.**

TERMINATION OF PARENTAL RIGHTS

Best interests of child—statutory factors—The trial court did not abuse its discretion by concluding that termination of a mother's parental rights was in the best interests of her children after it considered and weighed the factors contained in N.C.G.S. § 7B-1110(a), including the mother's attempts to maintain sobriety and the bond between the children and their parents and other family members. The Court of Appeals rejected the mother's argument that the trial court was required to make findings regarding reunification pursuant to section 7B-906.2(b), particularly where reunification was not the primary permanent plan at the time of the termination hearing. **In re T.H., 41.**

Grounds for termination—failure to make reasonable progress—sufficiency of evidence—The trial court erred by concluding that grounds of willful failure to make reasonable progress existed to terminate a mother's parental rights where the children were removed from the mother's care after one child spilled a chemical cleaning product onto herself. While the trial court found that the mother had not been consistent in her treatment or fully compliant with her case plan, such findings did not support a conclusion of willful failure to make reasonable progress—especially where the evidence of willfulness was lacking and the mother presented evidence of numerous activities and accomplishments in compliance with her case plan. **In re C.N., 463.**

Grounds for termination—neglect—sufficiency of evidence—probability of repetition of neglect—The trial court erred by concluding that grounds of neglect existed to terminate a mother's parental rights where the children were removed from the mother's care after one child spilled a chemical cleaning product onto herself. The mother had made some progress on her case plan, and the evidence was insufficient to support a conclusion that the neglect was ongoing and that there was a probability of repetition of neglect. **In re C.N., 463.**

No-merit brief—neglect—No prejudicial error occurred in a proceeding to terminate a father's parental rights to his children on the ground of neglect, where the trial court's conclusions were supported by sufficient findings, which were in turn supported by clear, cogent, and convincing evidence. **In re T.H., 41.**

Subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—initial custody determination in out-of-state court—The trial court lacked subject matter jurisdiction to terminate a mother's parental rights where a California court had entered an initial child custody determination regarding the child, the California court did not determine it no longer had exclusive, continuing jurisdiction or that North Carolina would be a more convenient forum (N.C.G.S. § 50A-203(1)), and the mother had resided in California throughout the duration of the termination proceedings (N.C.G.S. § 50A-203(2)). **In re D.A.Y., 33.**