THE COURT OF APPEALS
OF
NORTH CAROLINA

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[1] Appointed 1 January 2015. [2] Sworn in 1 January 2015. [3] Sworn in 1 January 2015. [4] Appointed 31 July 2015. [5] Deceased 3 May 2015.
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COURT OF APPEALS

CASES REPORTED

FILED 3 DECEMBER 2013

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Intent—felonious restraint—evidence not sufficient—The trial court erred by denying defendant's motion to dismiss a first-degree burglary charge where the indictment alleged the intent to commit felonious restraint inside an apartment, but the record provided no indication that defendant could have possibly intended to commit the offense of felonious restraint against the victim within the confines of the apartment structure. The facts in this case were indistinguishable from those at issue in *State v. Goldsmith*, 187 N.C. App. 162, in any meaningful way. Moreover, while the continuing offense doctrine might support a finding that defendant actually committed the offense of felonious restraint, it did not suffice to show that defendant intended to commit that offense inside the structure into which he broke and entered. **State v. Allah, 88.**

COSTS

Denial of expert witness fees—travel expenses—testimony—The trial court did not err in an equitable distribution case by denying plaintiff wife's request for $6,651.40 for the costs associated with the travel expenses and testimony of certain expert witnesses. **Simon v. Simon, 76.**

CRIMINAL LAW

Prosecutor's argument—murder conviction—errors concerning intent—remanded for involuntary manslaughter sentencing—no prejudice—There was no plain error in a murder prosecution where the trial court did not limit cross-examination and did not intervene *ex mero motu* in the prosecutor's closing argument where all of the alleged errors related to the State's attempt to show an intentional killing. Even assuming that the trial court erred as contended, defendant cannot show prejudice given that his murder conviction was reversed and the case was remanded for resentencing on involuntary manslaughter. **State v. Hatcher, 114.**

DIVORCE

Classification of profit distributions—The trial court's classification in an equitable distribution case of the 2006 profit distributions received by defendant post separation as divisible property was remanded for further findings of fact. Unless defendant could sufficiently quantify the active post-date of separation component, the 2006 profit distribution should be classified as divisible property and distributed to plaintiff accordingly. Plaintiff's argument as to the 2007 profit distribution was without merit because her interest in the TSCG C stock ended on the date of separation and the parties were separated for the entirety of 2007. **Simon v. Simon, 76.**

Equitable distribution—commission distribution—The trial court's findings of fact and conclusions of law in an equitable distribution case were insufficient to support its denial of plaintiff wife's request to find all of the commissions presented at trial to be divisible. The trial court's decision to deny the admission of business records was error. Thus, this issue was remanded to the trial court for further findings of fact and a possible recalculation and reclassification of property. With regard to the classification of commissions earned after the date of separation, the trial court was instructed to make further findings of fact, and it was to consider the payment journals plaintiff attempted to enter into evidence at trial. **Simon v. Simon,76.**

Equitable distribution—value and classification of stock—The trial court did not err in an equitable distribution case by failing to make a finding as to the value

Fund agreement—coverage—The Industrial Commission did not err in a workers' compensation case by concluding that the Fund Agreement afforded coverage for plaintiffs' claims. **Tovar-Mauricio v. T.R. Driscoll, Inc., 147.**

General casualty policy—intent—reliance on agency relationship—The Industrial Commission did not err in a workers' compensation case by relying upon the alleged agency relationship between Davis-Garvin and the employer to determine the intent of the General Casualty policy. Even if defendant insurance carrier could demonstrate some error in a finding regarding agency, it could not demonstrate that the finding undermined a conclusion of law such that it justified reversal of the Commission's order. **Tovar-Mauricio v. T.R. Driscoll, Inc., 147.**

General casualty policy—no coverage in North Carolina—The Industrial Commission did not err in a workers' compensation case by concluding that the General Casualty policy afforded no coverage for plaintiffs' claims filed in North Carolina. The record indicated that plaintiffs received compensation under the workers' compensation laws of Virginia**. Tovar-Mauricio v. T.R. Driscoll, Inc., 147.**

Mediated settlement agreement—seed money—The Industrial Commission erred in a workers' compensation case by failing to require defendants to pay plaintiff wife $19,582.37 that would have been used as seed money for the mediated settlement agreement. It would have been inequitable for defendants to keep the $19,582.37, despite the purpose of the agreement being frustrated, since the agreement did not condition payment of this sum upon Mr. Holmes' continued survival. **Holmes v. Solon Automated Servs., 44.**

Opinion not contrary to law—federal provision not dispositive—The Industrial Commission did not err as a matter of law in a workers' compensation case by issuing an opinion contrary to the law of North Carolina. Where a non-mandatory provision of federal law recognized the existence of an "association" between asbestos exposure and esophageal cancer, that provision was not dispositive of the issue of whether decedent's esophageal cancer was caused by asbestos exposure. **Wise v. Alcoa, Inc., 159.**

Quashed subpoena—no error—The Industrial Commission did not err in a workers' compensation case by quashing plaintiff's subpoena of defendant's company representative regarding defendant's knowledge of asbestos-related health risks. Defendant had already stipulated that plaintiff was exposed to asbestos during his employment with defendant and defendant's knowledge or lack thereof of the risks of asbestos exposure was not relevant to the issue of whether defendant's exposure to asbestos was the cause of his esophageal cancer. **Wise v. Alcoa, Inc., 159.**

SCHEDULE FOR HEARING APPEALS DURING 2015

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2015:

January 5 and 19

February 2 and 16

March 2 and 16

April 6 and 20

May 4 and 18

June 1

July-None

August 10 and 24

September 7 and 21

October 5 and 19

November 2, 16 and 30

December 14

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CAROMONT HEALTH, INC., GASTON MEMORIAL HOSPITAL, INC. AND CAROMONT AMBULATORY SERVICES, LLC D/B/A CAROMONT ENDOSCOPY CENTER, PETITIONERS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND GREATER GASTON CENTER LLC, RESPONDENT-INTERVENOR

No. COA12-1044

Filed 3 December 2013

Hospitals and Other Medical Facilities—certificate of need—failure to show substantial prejudice

The North Carolina Department of Health and Human Services Certificate of Need Section ("Agency") did not err by dismissing petitioners' petition under N.C.G.S. § 1A-1, Rule 41(b). The Agency properly concluded that petitioner failed to prove that it suffered substantial prejudice from the granting of a certificate of need to respondent intervenor for development of two gastrointestinal endoscopy rooms.

Appeal by petitioners from final agency decision entered 22 March 2012 by the North Carolina Department of Health and Human Services, Division of Health Service Regulation. Heard in the Court of Appeals 13 February 2013.

Bode, Call & Stroupe, L.L.P., by S. Todd Hemphill and Matthew A. Fisher, for petitioners-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for respondent-appellee.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray and Carrie A. Hanger, for respondent-intervenor-appellee.

GEER, Judge.

Petitioners CaroMont Health, Inc., Gaston Memorial Hospital, Inc., and CaroMont Ambulatory Services, LLC, d/b/a CaroMont Endoscopy Center (collectively "CaroMont") appeal from the final agency decision of the N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("the Agency"), dismissing their petition under Rule 41(b) of the Rules of Civil Procedure. We hold that the Agency properly concluded that CaroMont failed to prove that it suffered substantial prejudice from the granting of a certificate of need to Greater Gaston Center LLC ("GGC") for development of two gastrointestinal endoscopy rooms. We, therefore, affirm.

Facts

Our legislature has specifically found "[t]hat demand for gastrointestinal endoscopy services is increasing at a substantially faster rate than the general population given the procedure is recognized as a highly effective means to diagnose and prevent cancer." N.C. Gen. Stat. § 131E-175(12) (2011). For that reason, although "persons proposing to obtain a license to establish an ambulatory surgical facility for the provision of gastrointestinal endoscopy procedures" must obtain a certificate of need ("CON"), the legislature has provided that "[t]he annual State Medical Facilities Plan shall not include policies or need determinations that limit the number of gastrointestinal endoscopy rooms that may be approved." N.C. Gen. Stat. § 131E-178(a)(4) (2011).

In addition, a physician may open a gastrointestinal ("GI") endoscopy room in his or her office at any time without a CON or a license. However, only certain payors will reimburse providers for procedures performed in unlicensed GI endoscopy rooms located in physicians' offices. For example, Medicaid and, in certain circumstances, Medicare will not provide reimbursement for such procedures.

As of 2011, petitioner Gaston Memorial Hospital, an acute care hospital in Gastonia, was the only licensed provider of GI endoscopy rooms in Gaston County, North Carolina. It operated eight GI endoscopy rooms. Petitioner CaroMont Health is the parent corporation of Gaston Memorial Hospital and petitioner CaroMont Ambulatory Services, LLC, d/b/a CaroMont Endoscopy Center ("CAS"). In 2007, because petitioners perceived a need for a freestanding ambulatory surgery center, CaroMont

Health and CAS applied for a CON authorizing CaroMont to move two of the eight licensed GI endoscopy rooms from Gaston Memorial Hospital to a freestanding GI clinic to be called CaroMont Endoscopy Center. Although petitioners were granted the CON on 23 December 2008, the CaroMont Endoscopy Center was still only in development and not yet operational by 2011.

GGC was started by Physicians Endoscopy, LLC, a national endoscopy center development and management company, and five Gaston County gastroenterologists with independent practices who have practiced in Gaston County for a number of years, including Dr. Samuel Drake, Dr. Khaled Elraie, Dr. Nelson Forbes, Dr. Austin Osemeka, and Dr. William Watkins. On or about 15 October 2010, GGC filed an application for a CON to develop a freestanding ambulatory surgery center with two GI endoscopy procedure rooms in Gaston County. The Agency conditionally approved GGC's application on 30 March 2011.

CaroMont filed a petition for a contested case hearing on 29 April 2011, challenging the approval of GGC's CON application. GGC intervened by consent on 16 May 2011. Administrative Law Judge Joe L. Webster held a three-day contested case hearing. At the close of CaroMont's evidence, the Agency and GGC moved for dismissal of CaroMont's petition pursuant to Rule 41(b) of the Rules of Civil Procedure.

Judge Webster issued a recommended decision on 19 January 2012 dismissing CaroMont's petition on the basis that CaroMont had failed to demonstrate, as required by N.C. Gen. Stat. § 150B-23(a) (2011), either that its rights were "substantially prejudiced" by the Agency's decision or that the Agency committed error. CaroMont then submitted written exceptions to Judge Webster's recommended decision to the Agency. On 22 March 2012, Mr. Drexel Pratt, Director of the Department of Health and Human Services' Division of Health Service Regulation, issued the final agency decision adopting Judge Webster's decision as the final decision of the Agency. CaroMont timely appealed to this Court.

Discussion

In reviewing a CON determination:

> "[m]odification or reversal of the Agency decision is controlled by the grounds enumerated in [N.C. Gen. Stat. §] 150B–51(b); the decision, findings, or conclusions must be:
>
> (1) In violation of constitutional provisions;

> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B–29(a), 150B–30, or 150B–31 in view of the entire record as submitted; or
>
> (6) Arbitrary and capricious."

Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs., 205 N.C. App. 529, 534, 696 S.E.2d 187, 192 (2010) (quoting *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)), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 739, 753 (2011).

" 'The first four grounds for reversing or modifying an agency's decision . . . are law-based inquiries' " that we review de novo. *Id.* at 535, 696 S.E.2d at 192 (quoting *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 42, 684 S.E.2d 914, 920 (2009)). The final two grounds, however, " 'involve fact-based inquiries' " that " 'are reviewed under the whole-record test.' " *Id.* (quoting *N.C. Dep't of Revenue*, 201 N.C. App. at 42, 684 S.E.2d at 920). Under the "whole record" test, " 'the reviewing court is required to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence[, with s]ubstantial evidence [consisting of] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261, aff'd per curiam, 353 N.C. 258, 538 S.E.2d 566 (2000)).

The final agency decision dismissing CaroMont's contested case petition first concluded that CaroMont failed to meet its burden of proving that it was substantially prejudiced by the Agency's approval of GGC's CON application. CaroMont initially argues, however, that the Agency erred in requiring it to show that it was substantially prejudiced. It contends that it met its burden simply by showing that it was an "affected person" under N.C. Gen. Stat. § 131E-188(a) (2011).

This Court, however, specifically held in *Parkway Urology* that N.C. Gen. Stat. § 131E-188 and its requirement that a petitioner be an affected person "provides only the statutory grounds for and prerequisites to filing a petition for a contested case hearing regarding CONs."

205 N.C. App. at 536, 696 S.E.2d at 193. The Court pointed out that "in order for a petitioner to be entitled to relief," it must comply with N.C. Gen. Stat. § 150B-23(a), which requires that the petitioner allege that an agency has " 'ordered the petitioner to pay a fine or civil penalty, or *has otherwise substantially prejudiced the petitioner's rights*.' " 205 N.C. App. at 536, 696 S.E.2d at 193 (quoting N.C. Gen. Stat. § 150B-23(a) (2009)). The administrative law judge must, therefore, " 'determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights*,' " as well as whether " 'the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.' " *Id.* (quoting *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995)). Consequently, the Court concluded, the appellant's "contention that it was unnecessary for it to show substantial prejudice to be entitled to relief is contrary to our case law and is without merit." *Id.* at 536-37, 696 S.E.2d at 193.

Parkway Urology is controlling. CaroMont was, therefore, required to prove that it was substantially prejudiced by the Agency's decision to grant GGC a CON. *See also Wake Radiology Servs. LLC v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, 716 S.E.2d 87, 2011 WL 3891026, at *5, 2011 N.C. App. LEXIS 1924, at *14 (2011) (unpublished) ("In light of our decision in *Parkway Urology*, which we find to be controlling, we conclude that Wake's status as an 'affected person' pursuant to N.C. Gen. Stat. § 131E-188(c) in no way obviated the necessity for Wake to demonstrate that it was 'substantially prejudiced' by the Department's decision as required by N.C. Gen. Stat. § 150B-23(a)."), *disc. review denied*, 366 N.C. 229, 726 S.E.2d 838 (2012).

CaroMont next contends that it presented sufficient evidence of substantial prejudice. The question before this Court is whether the Agency's decision that CaroMont failed to prove substantial prejudice is supported by substantial evidence when considering the record as a whole or, phrased differently, whether the whole record contains relevant evidence that a reasonable mind might accept as adequate to support the Agency's conclusion that CaroMont failed to show substantial prejudice from the Agency's granting of the CON to GGC. *Parkway Urology*, 205 N.C. App. at 535, 696 S.E.2d at 192.

CaroMont argued to the Agency that it was substantially prejudiced by the approval of GGC's application for two reasons: (1) four of the five gastroenterologist members of GGC are on the medical staff of Gaston Memorial Hospital and will refer some of their patients to GGC instead

of Gaston Memorial Hospital or the CaroMont Endoscopy Center, and (2) Dr. Neville Forbes, who supported the CaroMont Endoscopy Center CON application when it was filed in October 2007, also supported and expressed his intention to perform procedures at GGC. On appeal, CaroMont argues that it was substantially prejudiced because "if the GGC Application is approved, the cases they now perform at [Gaston Memorial Hospital] and had projected to perform at [the CaroMont Endoscopy Center] *will shift* to GGC. . . . CaroMont's evidence shows that *based on the GGC Application's projections*, CaroMont will be significantly financially harmed if the Agency's approval of the GGC Application is upheld." (Emphasis original.)

The Agency, however, concluded with respect to this argument:

> 30. The evidence demonstrated that CaroMont's primary concern is the normal effects of competition. CaroMont complained of the anticipated shift of GI endoscopy cases from Gaston Memorial Hospital and not yet operational CaroMont Endoscopy Center to the freestanding GI endoscopy facility proposed in the GGC Application. The allegations of harm resulting from this shift were no more than the normal effects of competition when physicians or patients may choose one facility over another.
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> . . . .
>
> 32. CaroMont's alleged loss of volume and revenue, even if considered to show other than the normal effects of competition, was speculative and not supported by a preponderance of the evidence because there was no evidence that such alleged loss of volume and revenue was reasonably certain to result from the Agency's decision to approve the GGC Application rather than other factors.
>
> 33. The fact that some physicians have chosen or may choose to perform procedures at the facility proposed by the GGC Application rather than a facility owned by CaroMont does not support or define any legal right that is substantially prejudiced by the Agency's decision to grant GGC a CON to construct a freestanding GI endoscopy center. "[Every one has the] right to enjoy the fruits and advantages of his own enterprise, industry, skill[,] and credit. He has no right to be protected against

competition." *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945).

34. CaroMont "is not being prevented from [benefitting from] 'the fruits and advantages of [its] own enterprise, industry, skill[,] and credit,' but [is] merely being required to compete for such benefit." *Bio-Medical Applications v. N.C. Dep't of Health and Human Servs.*, 179 N.C. App. 4[8]3, 491-92, 634 S.E.2d 572, 578 (2006) (quoting Coleman, 255 N.C. at 506, 35 S.E.2d at 665[])[.]

35. None of the CON Act's findings of fact in N.C. Gen. Stat. § 131E-175 address the importance of protecting any entity's market share, and CaroMont cannot assert protection of its market share as grounds for determining that the CON Section's decision was erroneous or improper.

36. CaroMont provided no testimony or evidence that it has a "right" to treat patients or receive revenue from patients who have yet to be scheduled for a GI endoscopy procedure or yet to be determined to be in need of GI endoscopy services, and are not currently patients of CaroMont. CaroMont witnesses admitted that physicians have the right to practice medicine where they desire and patients have the right to be treated where they wish.

37. There is nothing in the CON Act that restricts a physician's ability to practice medicine where he or she wishes. Similarly, there is nothing in the CON Act that restricts a patient from choosing where to receive health care.

38. Because CaroMont failed to prove by a preponderance of the evidence that the Agency Decision conditionally approving the GGC Application substantially prejudiced CaroMont's rights in any way, CaroMont failed to prove an essential element of its prima facie case. For that reason alone, the relief requested by CaroMont should be denied and CaroMont's case is subject to dismissal without regard to whether it proved Agency error. *See* N.C. Gen. Stat. § 150B-23; *Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, *supra*;

> *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, *supra*; *Bio-Medical Applications v. N.C. Dep't of Health & Human Servs.*, *supra*.

CaroMont cites no authority suggesting the Agency erred in concluding that the alleged harm CaroMont might suffer from the opening of another GI endoscopy center is simply the result of normal competition. This Court held in *Parkway Urology* that harm from normal competition does not amount to substantial prejudice:

> [The non-applicant's] argument, in essence, would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B–23(a). As previously noted, [the non-applicant] qualified as an affected person because it provided similar services to individuals residing within the service area of [the applicant's] proposed [linear accelerator ("LINAC")]. Obtaining the status of an affected person does not satisfy the *prima facie* requirement of a showing of substantial prejudice. *[The non-applicant] was required to provide specific evidence of harm resulting from the award of the CON to [the applicant] that went beyond any harm that necessarily resulted from additional LINAC competition in Area 20*, and NCDHHS concluded that it failed to do so. After a review of the whole record, we determine that NCDHHS properly denied [the non-applicant] relief due to its failure to establish substantial prejudice.

205 N.C. App. at 539, 696 S.E.2d at 195 (emphasis added).

Similarly, in *Novant Health, Inc. v. N.C. Dep't. of Health & Human Servs.*, ___ N.C. App. ___, 734 S.E.2d 138, 2012 WL 5397247, at *3, *4, 2012 N.C. App. LEXIS 1239, at *9, *10 (2012) (unpublished), *disc. review denied*, ___ N.C. ___, 738 S.E.2d 376, *and disc. review denied*, ___ N.C. ___, 738 S.E.2d 398 (2013),[1] this Court considered Novant's "substantial prejudice" argument that the policy allowing North Carolina Baptist Hospital, as an academic medical center teaching hospital, to develop

1. We recognize that an unpublished decision of a prior panel of this Court cannot bind a subsequent panel, *see State v. Pritchard*, 186 N.C. App. 128, 129, 649 S.E.2d 917, 918 (2007), and that Rule 30(e)(3) of the Rules of Appellate Procedure permits the citation to unpublished opinions in a party's brief on appeal only when that party "believes . . . there

an ambulatory surgical center when a non-academic hospital would not be granted approval gave the academic institution "an unfair competitive advantage." Relying on *Parkway Urology*, the Court held that even though Novant would "suffer harm in the market due to [North Carolina Baptist Hospital's] increased ability to provide health care services," a "mere competitive advantage [was] an insufficient basis upon which to argue prejudice." *Novant*, 2012 WL 5397247, at *4, 2012 N.C. App. LEXIS 1239, at *9. Because Novant had "failed to show that its harm [arose] above that posed by mere competition, . . . it [had] failed to demonstrate substantial prejudice." *Id.*, 2012 N.C. App. LEXIS 1239, at *9-10.

Here, it is undisputed that CaroMont was the only provider of GI endoscopy rooms in Gaston County prior to the granting of the CON to GGC. CaroMont's claim of harm arises solely out of the fact that competition would be increased by virtue of the authorization of two additional GI endoscopy rooms located in Gaston County. Patients and doctors in Gaston County would now have a choice between CaroMont's facilities and another separate facility also located in Gaston County.

As the Agency found, and CaroMont does not dispute, CaroMont's CONs for Gaston Memorial Hospital and for CaroMont Endoscopy Center do not guarantee that physicians will continue to "refer patients to the facility and [are] not a guarantee of any particular market share," especially given that the CON Act specifies that no limits shall be placed on the number of GI endoscopy rooms that can be developed in a given county. The Agency further found that "CaroMont offered no evidence that the approval of the GGC Application changed, in any way, Gaston Memorial Hospital and CaroMont Endoscopy Center's ability to take efforts to attract patients to their GI endoscopy procedure rooms. CaroMont is free to recruit new physicians, undertake marketing campaigns, change its staffing, improve its operations, or change its charge structure to seek to attract more physicians and patients to its endoscopy services and to seek to generate more procedure volume and revenue." In other words, GGC's CON requires CaroMont to compete for the endoscopy business to maintain the volumes and revenues it desires.

We see no meaningful distinction between CaroMont's arguments regarding substantial prejudice and the increased competition's impact

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is no published opinion that would serve as well as the unpublished opinion." *State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) (internal quotation marks omitted). As we find both *Wake Radiology* and *Novant* particularly relevant to consideration of the present case and both cases were properly submitted and discussed by the parties, we find the reasoning of those cases persuasive and adopt it here.

on pre-existing competing health service providers found insufficient in *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195, or the "unfair competitive advantage" in *Novant*, 2012 WL 5397247, at *3, 2012 N.C. App. LEXIS 1239, at *9. As the Agency concluded, CaroMont has not met the *Parkway Urology* requirement that it show "specific evidence of harm" going "beyond any harm that necessarily resulted from additional . . . competition" in Gaston County. 205 N.C. App. at 539, 696 S.E.2d at 195.

CaroMont, however, attempts to distinguish *Parkway Urology* on the basis that, in that case, the appellant "did not attempt to present any concrete evidence of a financial impact, but relied solely on its status as an affected person, and the fact that [the CON applicant's] second linear accelerator would compete with [the appellant's] existing ones." CaroMont contends that *Parkway Urology* establishes that "specific evidence of financial harm directly resulting from the award of a CON *is sufficient* to demonstrate substantial prejudice." (Emphasis original.) CaroMont, however, does not reference any citation to *Parkway Urology* to support that contention.

Nothing in *Parkway Urology* suggests that simply quantifying the harm likely to arise out of additional competition resulting from the award of a CON is sufficient to show substantial prejudice — especially in the unique context of GI endoscopy rooms, which may not be limited in number in the State Medical Facilities Plan. Instead, *Parkway Urology* holds that the non-applicant must "provide specific evidence of harm resulting from the award of the CON . . . *that went beyond any harm that necessarily resulted from additional . . . competition*" in the relevant area. *Id.* (emphasis added). Here, although CaroMont presented evidence of specific harm, the harm resulted solely from the CON's introduction of additional competition.

Moreover, the Agency, in any event, determined both that CaroMont's evidence of harm was speculative and that CaroMont failed to show that the specific harm would be the result of the award of the CON. While CaroMont vigorously argues that the testimony of its expert witness, David Legarth, was uncontradicted and that "[n]o evidence was offered attacking the credibility or accuracy of this testimony," it has overlooked the fact that the final agency decision dismissed CaroMont's claims pursuant to Rule 41(b) of the Rules of Civil Procedure.

Rule 41(b) provides in relevant part: "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." This Court has explained that "[a] dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999).

In considering a motion under Rule 41(b), "the trial court is not to take the evidence in the light most favorable to plaintiff." *Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800. Instead, " 'the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him.' " *Id.* (quoting *Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982)). "The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them." *Id.*

In short, even though Mr. Legarth's testimony was not contradicted, the Agency was entitled to determine the credibility of that evidence and the weight to which it was entitled, even in the absence of any opposing evidence. This Court may not overturn the Agency's credibility and weight determinations. *See, e.g.*, *Wake Radiology*, 2011 WL 3891026, at *8, 2011 N.C. App. LEXIS 1924, at *21-22 (rejecting Wake Radiology's argument that its witness' testimony standing alone sufficed to establish " 'substantial prejudice' " because it was "tantamount to a request that we overturn a factual decision that is committed to the Department rather than the appellate courts").

The Agency recognized that Mr. Legarth projected that if physicians associated with GGC performed some of their outpatient endoscopy procedures at GGC's endoscopy center, then CaroMont would lose between $463,000.00 and $925,000.00 in net income per year. The Agency found, however, that "it is not reasonable to rely on Mr. Legarth's projections of loss of endoscopy volume and revenue by CaroMont as a result of the approval of the GGC Application."

More specifically, the Agency first noted that Mr. Legarth was a CON consultant and application preparer. It then found that "Mr. Legarth's testimony does not establish that CaroMont is substantially prejudiced by the CON Section's approval of the GGC Application for any one or more" of five reasons: "(1) CaroMont does not have any legal right to a certain level of volume or revenue; (2) Gaston County patients were seeking treatment at other facilities outside Gaston County and

CaroMont's endoscopy volume and revenue were declining before the CON Section's approval of the GGC Application; (3) the GGC physicians could shift endoscopy volume from CaroMont facilities to other existing facilities or to physician office based endoscopy rooms regardless of whether or not the CON Section approved the GGC Application; (4) the CON Section made a reasonable health planning judgment in determining that GGC's projections of sufficient volume for a total of ten endoscopy rooms in Gaston County were reasonable; and (5) Mr. Legarth could not predict with any reasonable degree of certainty that the projected losses would occur or would be proximately caused in the future as a direct result of the CON Section's approval of the GGC Application."

Regarding the first reason, CaroMont does not cite any authority that would give it a legal right to particular volumes and revenues. However, Mr. Legarth's testimony regarding CaroMont's harm -- based on lost volume and revenues -- assumes that CaroMont is entitled to the volume and revenue existing prior to the issuance of a CON to GGC.

With respect to the second reason, Mr. Legarth's testimony, in projecting losses due to GGC's CON, did not take into account the fact that CaroMont's volume and revenue were already declining prior to the GGC CON because Gaston County patients were seeking treatment outside of Gaston County. In connection with this reason, the Agency found that the CON Section had evidence supporting this patient loss in the form of GGC's application, CaroMont's own application for a CON for the CaroMont Endoscopy Center, and Gaston Memorial Hospital's renewal applications. In addition, both Mr. Legarth and CaroMont's vice president of clinical services acknowledged that the volume of GI endoscopy procedures at Gaston Memorial Hospital had declined before approval of the GGC application.

In addition, the Agency found and Mr. Legarth acknowledged that one doctor had, prior to the GGC application approval, shifted his caseload from Gaston Memorial Hospital to another hospital and that this shifted case load "closely tracked the reduction in the number of endoscopy procedures performed at Gaston Memorial Hospital during the same time period." The Agency then found: "To the extent that the decline in the volume of procedures at Gaston Memorial Hospital was the result of a shift of GI endoscopy patients from Gaston Memorial to other GI endoscopy providers outside Gaston County and the movement of physicians to performing procedures at other facilities, the preponderance of the evidence shows that this occurred before GGC's application was ever filed."

In other words, CaroMont and Mr. Legarth did not show harm due to the approval of the GGC Application because any shift of patients to other providers had already started to occur prior to the approval of the GGC application. These findings are supported by substantial evidence -- indeed, they are not seriously challenged by CaroMont on appeal.

Similarly, with respect to the third reason, although Mr. Legarth admitted that physicians are free to refer patients and perform procedures wherever they choose and move their practices wherever they desire, including into their own offices, he did not take that possibility into account in calculating the purported harm due to the GGC CON. Even in the absence of the GGC CON, CaroMont could lose volume and revenues in the future because of physicians shifting their practices and procedures. On appeal, CaroMont only argues that physicians are unlikely to perform procedures in their own offices because of limitations on reimbursement. CaroMont does not address the ability of doctors to move their practices and procedures to other facilities whenever they wish even though this ability is the basis for their claim of substantial prejudice.

Turning to the fourth reason, the Agency determined that the CON Section made a reasonable health planning judgment in deciding that there was sufficient volume for a total of 10 endoscopy rooms in Gaston County. In support of this determination, the Agency relied on Mr. Legarth's admission that the methodology used by the CON Section and the GGC application's projected total numbers of Gaston County citizens needing GI endoscopy procedures were both reasonable. The Agency noted -- and CaroMont does not dispute -- that "Mr. Legarth's disagreement with the methodology was because he believed the GGC Application was premised on a higher volume of patients choosing to stay in Gaston County than he believed was reasonable."

After acknowledging CaroMont's contention that GGC's projections were not reasonable because not all of the Gaston County residents having procedures done in other counties would return to Gaston County, the Agency weighed the evidence. It found that "[t]he preponderance of the evidence shows that the projected volume of Gaston County GI endoscopy cases in the GGC Application is reasonable and could support all ten GI endoscopy procedure rooms -- both the eight operated by CaroMont and the two proposed by GGC."

In support of this finding, the Agency relied on testimony from the CON Section that the Section performed independent calculations of the volume of endoscopy procedures that would be needed based not

only on the return of Gaston County patients to Gaston County, but also on the projected patient population in the future, the aging of the Gaston County population, and the possibility of recruiting additional gastroenterologists to Gaston County. Those independent calculations demonstrated that "Gaston County did, indeed, need an additional freestanding GI endoscopy facility and that there would be enough GI endoscopy procedures by GGC's projected third year of operation in 2014 to support 10 GI endoscopy rooms." The Agency, therefore, determined that "CaroMont has also not shown harm related to the approval of the GGC Application because there is enough reasonably projected volume of GI endoscopy procedures to support all ten GI endoscopy rooms in Gaston County."

The Agency further explained why it did not find credible Mr. Legarth's opinion to the contrary that CaroMont would be underutilized as a result of GGC's CON. It first questioned his methodology:

> 101. Mr. Legarth, who is not an accountant, projected CaroMont's asserted loss of endoscopy volume and revenue during the first three years of the Greater Gaston Center's operations (identified in the application as the years 2012, 2013, and 2014 but delayed due to the appeal) by combining: (1) the volumes projected for the years 2010, 2011, and 2012 in the proformas contained in the CaroMont Endoscopy Center CON application filed in October 2007; (2) the utilization projections for 2012, 2013 and 2014 contained in the GGC Application filed in October 2011; (3) patient origin data from 2011 License Renewal Applications for the time period October 1, 2009 until September 30, 2010; and (4) CaroMont financial data provided to Mr. Legarth that he did not know how [it] was created or what information was used. *To make his projections, Mr. Legarth used historical data and projections from different years and did not rely upon audited financial statements.*

(Emphasis added.) In other words, in calculating the under-utilization of CaroMont, Mr. Legarth treated actual historical data as the same thing as projections, merged projections from different years in order to develop new projections, and used unaudited financial data.

In addition, the Agency pointed out that when projecting CaroMont's losses in the future, "Mr. Legarth's projections did not take into account the numerous changes CaroMont could make with respect to the

management, and operations of its endoscopy rooms to increase the capacity, utilization, and market share of the rooms but instead assumes that the volumes obtained by CaroMont from October 1, 2009 until September 30, 2010 will remain stagnant." Further, it noted that Mr. Legarth was unaware of the fact that CaroMont had, at the time of the Agency's approval of the GGC application, successfully recruited two additional gastroenterologists. He had not, therefore, in making his projections, taken into account CaroMont's adding additional gastroenterologists to perform endoscopy procedures.

For those reasons, the Agency determined that "it is not reasonable to rely on Mr. Legarth's projections of loss of endoscopy volume and revenue by CaroMont as a result of the approval of the GGC Application." As additional support for its findings, the Agency noted:

> 106. Furthermore, Mr. Legarth could not predict with any reasonable degree of certainty that the losses he projected would occur or would be proximately caused in the future as a direct result of the CON Section's approval of the GGC Application because the decrease in the number of GI endoscopy patients going to Gaston Memorial Hospital began before the approval of the application and CaroMont had the ability to take myriad measures to increase the utilization of its endoscopy rooms.

In sum, the Agency found the applicant's and the CON Section's evidence more credible and entitled to greater weight than CaroMont's evidence. Mr. Legarth may have attempted to quantify projected losses from approval of GGC's CON, but, even assuming these losses went beyond normal competition, the Agency found that the data relied upon by Mr. Legarth was flawed and his analysis omitted critical factors that could diminish the projected losses. Further, Mr. Legarth was unable to predict with any reasonable degree of certainty that the losses would in fact occur or would be caused in the future by the approval of GGC's application because (1) CaroMont's decrease in volume had begun before approval of the application and (2) CaroMont could take steps to increase use of its endoscopy rooms. In other words, as the Agency concluded, Mr. Legarth's projections of harm were speculative.

The Agency's findings regarding Mr. Legarth's testimony and methodology are supported by the record, and the decision of the Agency to credit the projections made by GGC rather than those made by CaroMont " 'has a rational basis in the evidence' " and, therefore, satisfies the whole record test. *Hosp. Grp. of Western N.C., Inc. v. N.C.*

Dep't of Human Res., 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985) (quoting *In re Rogers*, 297 N.C. 49, 65, 253 S.E.2d 912, 922 (1979)). We decline CaroMont's invitation that we ignore Rule 41's requirement that the Agency assess "the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them" and substitute our judgment for the Agency's. *Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800.

In *Wake Radiology*, this Court affirmed the Agency's determination that Wake Radiology failed to show substantial prejudice when the Agency similarly found that the testimony of Wake Radiology's witnesses regarding declines in volumes and payor mix did not address numerous relevant factors, the data underlying the testimony was not reliable, and, because the declines had begun before approval of the CON application, Wake Radiology had "failed to establish how, or to what extent, the service that [the applicant] would be authorized to provide under the CON would result in additional harm to Wake over and above that inherent in existing market conditions." *Wake Radiology*, 2011 WL 3891026, at *9, 2011 N.C. App. LEXIS 1924, at *23-24.

This Court concluded that the Agency's findings and conclusions "provide[d] ample justification" for the Agency's determination that Wake Radiology had failed to establish that it would be substantially prejudiced by the issuance of the requested CON. *Id.*, 2011 N.C. App. LEXIS 1924, at *26. The Court noted that the Agency's "determination that [the Wake Radiology witness'] testimony was speculative, founded on flawed logic, and insufficient to require a finding in Wake's favor [had] ample record support. This determination, in turn, adequately supports the [Agency's] conclusion that Wake failed to satisfy its burden of proof with respect to the 'substantial prejudice' issue. Wake's argument to the contrary amounts to a request that we revisit the [Agency's] factual determinations and reach a different result than that found appropriate by the relevant administrative agency. We are not at liberty to take such a step under the applicable standard of review." *Id.* at *10, 2011 N.C. App. LEXIS 1924, at *27. The Court, therefore, affirmed. *Id.*, 2011 N.C. App. LEXIS 1924, at *28. *See also Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 194 (in affirming Agency's determination that non-applicant had failed to show substantial prejudice, noting that evidence showed that utilization of non-applicant's services had been declining for number of years before CON approval).

We find this case materially indistinguishable from *Wake Radiology*, which is persuasive authority, and *Parkway Urology*. Just as this Court concluded in *Wake Radiology*, it is not enough that the non-applicant's

witness simply attempts to quantify the projected harm. The evidence must both be persuasive and demonstrate that the harm was caused by the CON approval. Because, in this case, the Agency found, after reviewing all of the evidence, that CaroMont's projections of harm were based on flawed data, failed to take into account relevant factors, were not reasonably certain to occur, and were not shown to be caused by the CON approval as opposed to market forces, the Agency was entitled to conclude that CaroMont's evidence was insufficient to show substantial prejudice as a result of the approval of GGC's application. Consequently, we affirm.

Affirmed.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

MARGARET HELENA HENNESSEY (formerly Duckworth), Plaintiff
v.
THOMAS MEREDITH DUCKWORTH, Defendant

No. COA13-629

Filed 3 December 2013

Attorney Fees—domestic action—separation agreement—sufficient findings of fact

The trial court did not err in a domestic case by awarding plaintiff attorneys fees under N.C.G.S. § 50-13.6. The attorney fees provision in a separation agreement between the parties did not apply since there was no determination of a breach of the agreement or order for specific performance. Furthermore, trial court's findings were supported by plaintiff's affidavits and the findings were sufficient to justify awarding plaintiff attorney fees.

Appeal by defendant from Order entered 31 December 2012 by Judge George J. Franks in District Court, Cumberland County. Heard in the Court of Appeals 22 October 2013.

Lewis, Deese, Nance, Briggs & Hardin, LLP, by Victoria Gillispie Hardin, for plaintiff-appellee.

Ferrier Law, P.L.L.C., by Kimberly M. Ferrier, for defendant-appellant.

STROUD, Judge.

Thomas Duckworth ("defendant") appeals from an order entered 31 December 2012 awarding his former wife, Margaret Hennessey ("plaintiff"), attorney's fees. For the following reasons, we affirm.

I. Background

Plaintiff and defendant were married in January 2006, separated in June 2009, and later divorced. The parties have one minor child, born December 2005.

On or about 21 August 2009, plaintiff and defendant entered into a separation agreement ("the Agreement") that addressed property distribution, custody of the parties' minor child, alimony, and the relief available in case of breach, including attorney's fees. The Agreement was not incorporated into the divorce decree or other court order.

On 16 November 2009, plaintiff filed a complaint for a custody order "preserving and protecting the status quo of the minor child," child support based upon the child support guidelines, a temporary restraining order prohibiting defendant from harassing her, specific performance of the alimony provisions in the Agreement, and attorney's fees. Defendant answered and brought counterclaims based upon Chapter 50 seeking emergency custody as well as permanent primary custody, guidelines child support, and attorney's fees based upon these claims; defendant did not bring any claim for enforcement of the Agreement against plaintiff. After years of litigation, including a number of temporary custody orders, discovery, and cross-motions on various topics, the parties executed a consent order, entered 30 November 2012, to resolve all outstanding issues between them other than attorney's fees.

Under the 2012 consent order, the parties shared legal and physical custody of their child under a detailed custodial schedule, a parenting coordinator was appointed, child support was adjusted, and defendant was required to pay plaintiff $8,072. All outstanding claims for breach of contract, contempt, and other issues not explicitly resolved by the order were dismissed. The property distribution provisions of the original separation agreement were not affected by the consent order.

On 6 December 2012, the trial court held a hearing regarding both parties' requests for an award of attorney's fees and allowed plaintiff's request for attorney's fees by order entered 31 December 2012. It also denied defendant's claim for attorney's fees. The trial court found that plaintiff was unemployed, that she stopped working while pregnant

with the parties' child and has not worked since,[1] that she does not have any income, and that her current bank statement reflected a balance of $717.07. The trial court found that defendant, by contrast, is a Lieutenant Colonel in the United States Army and "earns a gross income of approximately $10,883.06 per month." Finally, the court found that plaintiff's actions for "custody and support were filed in good faith[] [and] that [she] has insufficient means to defray the costs of her action." As an alternate ground to support its order, the trial court concluded that Rule 11 sanctions were appropriate because defendant had fired two attorneys in bad faith, unnecessarily delaying the proceedings. The court awarded plaintiff $11,282.50 in attorney's fees. Defendant filed timely notice of appeal to this Court.

II. Basis for Attorney's Fee Award

On appeal, defendant argues that the trial court erred in awarding attorney's fees to plaintiff because the Agreement should have precluded such an award and, in any event, the trial court did not make adequate findings supported by the evidence to justify a statutory award of attorney's fees. We disagree.

Defendant primarily argues on appeal that the trial court erred in awarding attorney's fees under N.C. Gen. Stat. § 50-13.6 rather than under the Agreement and that the court could not award attorney's fees to plaintiff under the Agreement because the Agreement provides that "the losing party" is responsible for "all legal fees and costs." Defendant contends that plaintiff is the "losing party" here.

To decide this issue, we must first identify the basis of the attorney's fee award. "The recovery of attorney's fees is a right created by statute. [Generally,] [a] party can recover attorney's fees only if such a recovery is expressly authorized by statute." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citations and quotation marks omitted). Attorney's fees may be awarded on a claim for child custody or support pursuant to N.C. Gen. Stat. § 50-13.6. However, attorney's fees may also be awarded under a separation agreement entered into pursuant to N.C. Gen. Stat. § 52-10.1 that provides for attorney's fees, unless the provision is otherwise contrary to public policy. *Bromhal v. Stott*, 341 N.C. 702, 705, 462 S.E.2d 219, 221 (1995); *Edwards v. Edwards*, 102 N.C. App. 706, 712-13, 403 S.E.2d 530, 533-34, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 518 (1991).

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1. One of the provisions of the Agreement was that "Wife agrees to remain a stay-at-home parent until such time as the minor child starts school in August, 2011."

Here, plaintiff requested attorney's fees under both the Agreement and N.C. Gen. Stat. § 50-13.6; defendant requested attorney's fees in his counterclaim under N.C. Gen. Stat. § 50-13.6.[2] Thus, based upon the parties' pleadings, and depending upon the issues addressed, the trial court might have the option of awarding attorney's fees under the Agreement, under N.C. Gen. Stat. § 50-13.6, or both.

A. Separation Agreement

Although the custody and support provisions of the Agreement were superseded by the consent order regarding custody and support, the Agreement was never incorporated into a court order. Therefore, it remained "a contract, to be enforced and modified under traditional contract principles." *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

> It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties.

Lynn v. Lynn, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (citations, quotation marks, and ellipses omitted), *disc. rev. denied*, 364 N.C. 613, 705 S.E.2d 736 (2010).

The full attorney's fees provision in the separation agreement states:

> 28. **COUNSEL FEES UPON BREACH** In the event it becomes necessary to institute legal action to enforce compliance with the terms of this Agreement or by reason of the breach by either party of this Agreement, then the parties agree that at the conclusion of such legal proceeding, the losing party shall be solely responsible for all legal fees and costs incurred by the other party, such fees and costs to be taxed the [sic] Court. The amount so awarded shall be in the sole discretion of the presiding judge and

2. Neither plaintiff nor defendant cited a particular statute in their pleadings, but the wording of the requests is clearly based upon N.C. Gen. Stat. § 50-13.6. We also note that attorney's fees may be awarded based upon N.C. Gen. Stat. § 1A-1, Rule 11, and that plaintiff also filed a motion based upon this rule. This basis was an alternative in the trial court's order, but we will discuss that separately below.

> the award shall be made without regard to the financial ability of either party to pay, but rather shall be based upon fees and expenses determined by the Court to be reasonable and incurred by the prevailing party. It is the intent of this paragraph to induce both Husband and Wife to comply fully with the terms of this Agreement to the end that no litigation as between these parties is necessary in the areas dealt with by this Agreement. In the event of litigation, it is the further intent to specifically provide that the losing party pays all reasonable fees and costs that either side may incur.

Given that this case involved several claims and was resolved by consent order, it is difficult to say who was the "losing party" and who was the "prevailing party." Plaintiff sought four types of substantive relief in her complaint: (1) a custody order preserving the status quo, (2) guideline child support, (3) a TRO, and (4) specific performance of the separation agreement's alimony provisions. In his counterclaim, Defendant sought primary physical custody of the parties' minor child and attorney's fees based upon N.C. Gen. Stat. § 50-13.6. In addition, both parties filed numerous motions which we have not listed here in detail, related to their respective claims.

Neither party was a clear winner or loser, although plaintiff prevailed on more of the issues she raised than defendant. Plaintiff did receive a "mutual" TRO by consent of the parties, based upon N.C. Gen. Stat. § 1A-1, Rule 65, restraining each party from harassing the other, but there is no attorney's fee claim under Rule 65, nor does this TRO appear to be based upon any specific provision of the Agreement.[3] Plaintiff was not able to preserve the "status quo" for custody, as defendant was ultimately awarded greater responsibility under the 2012 consent order than under the 2009 agreement. Plaintiff was not awarded specific performance of the alimony provisions in the 2009 agreement—although defendant did agree to pay her $8,072, apparently to settle that claim.

Defendant also did not prevail on his sole request in his counterclaim for primary physical custody. In addition, defendant's counterclaim for primary custody was not an action which was necessary "to enforce compliance with the terms of this Agreement or by reason of the breach by either party of this Agreement," as he was not seeking to continue the

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3. There was a general "no harassment" provision in the Agreement but it was not mentioned in Plaintiff's complaint, and since each party was ordered not to harass the other, there is no "winner" or "loser" here, even if it was based upon the Agreement.

custodial arrangement under the Agreement and he did not claim that plaintiff had breached the custodial terms of the Agreement. Instead, he was actually seeking a modification of the custody arrangement giving him custodial rights superior to those he had under the Agreement.

Further, the issues of breach and specific performance were dismissed and not addressed in the 2012 consent order. The way the action was resolved, it was not treated as one for breach of the Agreement or for specific performance. Instead, the action essentially became one for Chapter 50 child custody and child support—completely separate from whatever the 2009 agreement provided.[4] Although the Agreement expresses the general intent "that the losing party pays all reasonable fees and costs that either side may incur" in litigation, it also does not preclude an award of statutory attorney fees in this situation, in which both parties requested statutory attorney fees under N.C. Gen. Stat. § 50-16.3 and there is no breach of agreement, specific performance, or a clear winner or loser.

We hold that the attorney's fees provision in the Agreement, by its plain terms, does not apply here, since there was no determination of a "breach" of the agreement or order for specific performance. Therefore, we must next consider whether the award of attorney's fees was justified under N.C. Gen. Stat. § 50-13.6 (2011).

B. N.C. Gen. Stat. § 50-13.6

Defendant contends that the trial court erred in awarding attorney's fees under N.C. Gen. Stat. § 50-13.6 because its findings were inadequate, they did not reflect the evidence before the trial court, and because the trial court prevented him from presenting evidence about his ability to pay. Again, we disagree.

N.C. Gen. Stat. § 50-13.6 provides:

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

4. It is well established that the custody and support provisions of a separation agreement are always subject to later modification by the court. *See Kiger v. Kiger*, 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962) (noting that separation agreements "are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children." (citation omitted)).

> means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . . .

To award attorney's fees in an action for custody and support,

> [t]he trial court must make specific findings of fact relevant to: (1) The movant's ability to defray the cost of the suit, specifically that the movant is unable to employ counsel so that he may proceed to meet the other litigant in the suit; (2) whether the movant has initiated the action in good faith; (3) the attorney's skill; (4) the attorney's hourly rate charged; and (5) the nature and extent of the legal services performed.

Cameron v. Cameron, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (citations omitted). Defendant only challenges the trial court's conclusion that plaintiff has insufficient means to defray the expenses of the suit.

> [T]he trial judge has the discretion to award attorney's fees once the statutory requirements of G.S. Sec. 50-13.6 (1984) have been met. While whether the statutory requirements have been met is a question of law, reviewable on appeal, the amount of attorney's fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion.

Atwell v. Atwell, 74 N.C. App. 231, 237-38, 328 S.E.2d 47, 51 (1985) (citation omitted).

Here, the trial court found that plaintiff is currently unemployed, that she stopped working while she was pregnant with the parties' child, and that she had not been employed since. The trial court also noted that plaintiff's bank statement reflected a balance of $717.07. The trial court found that plaintiff had incurred a total of $28,260 in attorney's fees for approximately 141 hours of work and that those fees—as well as the nature and scope of the representation—were reasonable. Additionally, the trial court made findings about defendant's monthly income of approximately $10,883. Further, there was evidence that plaintiff had no assets other than a savings account with a $197 balance, a 401K worth approximately $900, and a 2006 Honda Pilot. The expense of plaintiff's attorney's fees alone far exceeded the value of all of her assets combined.

The trial court concluded that plaintiff's actions were filed in good faith and that she had insufficient means to defray the costs of her action. These conclusions were supported by adequate findings relevant to "whether plaintiff, as litigant, is able to meet defendant, as litigant, on substantially even terms with respect to representation by counsel." *Quick v. Quick*, 305 N.C. 446, 461, 290 S.E.2d 653, 663 (1982). Each one of these findings was supported by averments in plaintiff's affidavits and the record evidence.

Defendant further argues that the trial court did not review the affidavits submitted by the parties. That fact is certainly not evident from the transcript and all of the parties' relevant affidavits and evidence on their respective incomes and employment statuses are in the record. In fact, the order provides specifically "that by and through counsel, the parties consented to proceed with the hearing for attorneys' fees via affidavit and have waived the opportunity to present sworn testimony." The transcript of the hearing fully supports this statement, as defendant's counsel repeatedly referred to the affidavits. Additionally, despite defendant's argument on appeal that he was unable to introduce evidence of his expenses, there is no indication whatsoever that defendant attempted to introduce such evidence or that the trial court refused to receive anything that he did offer to present. We see no basis for determining that the affidavits were not properly before the trial court or that the trial court improperly excluded other evidence. We will not presume error where none is shown in the record. *See King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001).

Finally, defendant argues that the trial court's findings are invalid because the findings in the written order "do not accurately reflect" what the trial court said from the bench at the hearing. Defendant cites no law in support of the contention that a trial judge is restricted to findings he rendered at a hearing when entering a written order. This argument is meritless. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2011) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."); *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 321, 438 S.E.2d 471, 475 (1994) (holding, under the former version of Rule 58, that the trial court's oral rendition of judgment did not constitute entry of judgment because the court had simply announced his intended judgment without making the necessary findings and conclusions); *In re Hawkins*, 120 N.C. App. 585, 589, 463 S.E.2d 268, 271 (1995) (noting that "the trial court's announcement in open court was not yet final as to be suitable for appellate review[] [because] [t]he findings of fact and conclusions of law were not set forth in final form."); *Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 494 (1999) ("Announcement of

judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." (citation and quotation marks omitted)).

We hold that the trial court's findings were supported by plaintiff's affidavits and that the findings were sufficient to justify awarding plaintiff attorney's fees. Defendant does not challenge the amount of attorney's fees as unreasonable or unjustified, nor does he contest that this action is one for custody and support.

Because we uphold the trial court's award of attorney's fees we need not address the court's alternate ground of Rule 11 sanctions. Yet, we do feel compelled to note that Rule 11 would not seem to apply to defendant's decisions to change counsel during the course of litigation. Although the trial court made other findings which would be proper considerations under Rule 11, one of the trial court's primary findings in support of Rule 11 sanctions was that

> Defendant's present counsel, Kimberly M. Ferrier, is his third attorney; and that the Defendant caused unnecessary delays and expenses in the litigation due, in part, to his changing attorneys; and that Defendant's actions were in bad faith.

A litigant may wish to change counsel for many reasons, some perfectly valid and some foolish or even in "bad faith," and although the record before us does offer hints of the personal animosity between various counsel for the parties, it does not give any indication of the reasons for defendant's changes in counsel, only that they occurred.[5]

III. Conclusion

We hold that the trial court properly awarded attorney's fees to plaintiff under N.C. Gen. Stat. § 50-13.6. Therefore, we affirm the trial court's order.

AFFIRMED.

Judges MCGEE and BRYANT concur.

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5. We further note that, in his appellate brief, defendant's counsel repeatedly used the phrase "upon information and belief" before making various factual assertions and made other statements of fact that were apparently from personal recollection or at the very least are not based upon the record. Such arguments are wholly inappropriate. *See Sood v. Sood*, ___ N.C. App. ___, ___ n.4, 732 S.E.2d 603, 608 n.4 (admonishing counsel for including "his personal recollection of events at trial or after as part of his argument in an appellate brief."), *cert. denied, disc. rev. denied, and app. dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012); N.C.R. App. P 9(a). Appellate counsel should make arguments based on the facts in the record, not "upon information and belief."

JUDITH TEEL HERRING, PLAINTIFF
v.
JAMES DALLAS HERRING, DEFENDANT

No. COA13-544

Filed 3 December 2013

Divorce—separation agreement—motion to set aside—mutual mistake—mistake of law

The trial court did not err by denying defendant ex-husband's motions to set aside a separation agreement entered into by the parties and equitably distribute plaintiff's TSERS pension based on alleged mutual mistake. The mutual mistake, if any, was a "bare mistake of law" regarding the valuation of defined benefit plans for purposes of equitable distribution.

Appeal by defendant from order entered on 29 November 2012 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 23 October 2013.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay, for plaintiff-appellee.

Christy E. Wilhelm for defendant-appellant.

DAVIS, Judge.

James Dallas Herring ("Defendant") appeals from the trial court's order denying his motion to set aside a separation agreement entered into by him and his former wife. The issue before us is whether the separation agreement should be rescinded based on the ground of mutual mistake. After careful review, we affirm the trial court's order.

Factual Background

Judith Teel Herring ("Plaintiff") and Defendant were married on 27 April 1985 and separated on 21 June 1998. On 11 May 2007, the parties executed a separation agreement ("Separation Agreement") to "confirm their separation and make arrangements in connection therewith; including settlement of their property rights, and other rights and obligations growing out of the marriage relationship." The Separation Agreement distributed the parties' real and personal property, including the parties' marital home, vehicles, bank accounts, and retirement accounts.

Specifically, the Separation Agreement stated that Plaintiff would "retain all bank checking, savings, mutual fund, money market, stocks, 401K, 456B retirement and governmental employees retirement accounts which are presently titled in her name only as her separate property." The Separation Agreement also provided that Defendant would likewise "retain all bank checking, savings, mutual fund, money market, stocks and 401K retirement accounts which are presently titled in his name only as his separate property." The Separation Agreement contained a provision specifying that "[t]his agreement contains the entire undertaking of the parties, and there are no representations, warranties, covenants or undertakings other than those expressed and set forth herein." Finally, the Agreement provided that Defendant would pay Plaintiff a distributional award of $31,500 and that Plaintiff would execute a quitclaim deed conveying her interest in the marital home to Defendant.

On 21 February 2012, Plaintiff filed a complaint for absolute divorce and alleged that the parties had "agreed upon and completed a division of all property subject to equitable distribution considerations as defined by the North Carolina General Statutes, and there remains no division of property to be further considered by the Court." On 5 April 2012, Defendant filed an answer and counterclaim seeking equitable distribution and to set aside the Separation Agreement on grounds of mistake, misrepresentation, or fraud. Specifically, Defendant contended that "[t]he parties were mistaken as to the actual marital value of Plaintiff's Governmental Employees Retirement. The actual value was far greater than the $27,499 value divided by the parties."

The matter was heard on 10 October and 20 November 2012, and on 29 November 2012, the trial court entered an order denying Defendant's motion to set aside the Separation Agreement and likewise denying his claim for equitable distribution. Defendant appealed to this Court.

Analysis

On appeal, Defendant argues that the trial court erred by failing to rescind or reform the parties' Separation Agreement based on a mutual mistake of fact.[1] We disagree.

"A marital separation agreement is subject to the same rules pertaining to enforcement as any other contract." *Gilmore v. Garner*,

1. Defendant makes no argument in his brief regarding the trial court's rejection of his fraud and misrepresentation theories. These issues are thereby deemed abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

157 N.C. App. 664, 669, 580 S.E.2d 15, 19 (2003). Thus, like any other contract, a separation agreement may be set aside or reformed based on grounds such as fraud, mutual mistake of fact, or unilateral mistake of fact procured by fraud. *See Searcy v. Searcy*, ___ N.C. App. ___, ___, 715 S.E.2d 853, 857 (2011) ("Separation and property settlement agreements are contracts and as such are subject to rescission on the grounds of (1) lack of mental capacity, (2) mistake, (3) fraud, (4) duress, or (5) undue influence.") (citation, quotation marks, and alteration omitted).

"A mutual mistake of fact is a mistake common to both parties and by reason of it each has done what neither intended." *Lancaster v. Lancaster*, 138 N.C. App. 459, 465, 530 S.E.2d 82, 86 (2000) (citation and quotation marks omitted). To support the rescission or reformation of an otherwise valid and binding contract, the mutual mistake

> must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, . . . the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.

MacKay v. McIntosh, 270 N.C. 69, 73, 153 S.E.2d 800, 804 (1967). Thus, neither unilateral mistakes of fact nor mutual mistakes of law are, standing alone, sufficient to set aside or reform a contract. *See Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990) ("A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract."); *Durham v. Creech*, 32 N.C. App. 55, 60, 231 S.Ed.2d 163, 167 (1977) ("A bare mistake of law generally affords no grounds for reformation.").

The party seeking to reform or rescind the contract bears the burden of proving the existence of a mutual mistake by clear, cogent, and convincing evidence. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 249, 580 S.E.2d 743, 748, *disc. review denied*, 357 N.C. 461, 586 S.E.2d 99 (2003). Here, Defendant contends that the parties shared a mutual misunderstanding as to the proper value of Plaintiff's Teachers' and State Employees' Retirement System ("TSERS") retirement benefits. Specifically, Defendant argues that the parties' mutual mistake was basing their calculation of the TSERS pension solely upon Plaintiff's contributions to the account rather than upon the expected future value of the pension if Plaintiff continued working for the State. We conclude that Defendant failed to adequately establish that the TSERS pension value used by the parties in calculating the distributional award to Plaintiff set

forth in the Separation Agreement constituted a mistake of fact common to both parties sufficient to compel the setting aside of the Agreement.

Defendant argues that Plaintiff's testimony at the hearing on his motion to set aside the Separation Agreement was "an acknowledgement of the mutual mistake" because she testified that "[a]s far as I knew, 27,000 was what was in there at that point 'cause that's all I would have gotten. That's how we looked at it at the time we did this." However, this statement does not establish that Plaintiff misunderstood the nature of her pension or was unaware of the potential future benefits she would receive if she continued her service with the State for the prescribed period of time. Indeed, Plaintiff's earlier testimony that if she "had retired on that date, that would have been the amount of money that [she] would have gotten" indicates that her intent had been to value the pension as if she had terminated her service and withdrawn the pension funds on the date of separation.

We are not persuaded that these statements demonstrate by clear, cogent, and convincing evidence that Plaintiff was wholly ignorant of the fact that, as a defined benefit plan,[2] her TSERS pension would eventually be worth more than just her contributions and the accumulated interest. Defendant's unilateral assertions that (1) the parties intended to use the actual value of the TSERS account in calculating a distributional award; and (2) they were unaware that the pension was worth more than Plaintiff's contributions are insufficient to establish the existence of a mutual mistake of material fact. *See Lancaster*, 138 N.C. App. at 465-66, 530 S.E.2d at 86 ("Although [the defendant] argues that the separation agreement contains 'mutual mistakes,' [the plaintiff] offers no such argument, thereby negating the contention that the alleged mistakes were 'mutual.' ").

Moreover, we believe that the mistake alleged by Defendant would more accurately be characterized as a mistake of law, which does not afford a basis for rescinding or reforming a separation agreement. Defendant is essentially asserting that the parties misunderstood the value of the TSERS pension because they did not treat the pension as

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2. "In a defined benefit plan the employee's pension is determined without reference to contributions [by the employee] and is based on factors such as years of service and compensation received." *Cochran v. Cochran*, 198 N.C. App. 224, 227, 679 S.E.2d 469, 472 (2009) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010). In equitable distribution actions, defined benefit plans are valued by our courts using the five-step method outlined in *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595-96 (1994).

a defined benefit plan and calculate its worth accordingly. Thus, if the parties were mutually mistaken about anything, the mistake would have concerned how the TSERS pension would have been valued and distributed under North Carolina's equitable distribution law.

In *Dalton v. Dalton*, 164 N.C. App. 584, 586, 596 S.E.2d 331, 333 (2004), the defendant argued that the trial court should have set aside the parties' separation agreement on several grounds, including the parties' mutual mistake as to how retirement accounts were distributed under North Carolina's equitable distribution system. The defendant asserted that the parties' belief that "the law in North Carolina required each of them to retain their respective retirement savings account as their separate property" was a mutual mistake requiring rescission. *Id.* at 586, 596 S.E.2d at 332. Our Court concluded that the alleged mistake did not support rescission of the contract, stating that

> in the instant case, the separation agreement succeeded in accomplishing the intention of the parties. Specifically, the parties intended to distribute their retirement benefits pursuant to an erroneous understanding of North Carolina law. That the parties' distribution scheme, in actuality, differed from that established by North Carolina law constitutes merely a "bare mistake of law."

Id. at 588, 596 S.E.2d at 334. Likewise, we believe that the mutual mistake here, if any, is a "bare mistake of law" regarding the valuation of defined benefit plans for purposes of equitable distribution. As such, it fails as a basis for rescission.

Finally, in a related argument, Defendant asserts that the trial court's refusal to value the TSERS account using the defined benefit plan valuation method outlined in *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595-96 (1994), led to its erroneous conclusion that there was no mutual mistake of fact. This argument is without merit.

While Defendant is correct that a trial court is required to utilize the *Bishop* method when distributing a defined benefit plan in an equitable distribution action, it is well established that parties "may agree in a separation agreement to distribute their property in any fashion they desire without resorting to litigation for equitable distribution." *Lee v. Lee*, 93 N.C. App. 584, 586, 378 S.E.2d 554, 555 (1989). Indeed, "[b]y executing a written separation agreement, married parties forego their statutory rights to equitable distribution and decide between themselves how to divide their marital estate following divorce." *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 435, 610 S.E.2d 301, 303 (2005).

Here, the Separation Agreement addresses and distributes the TSERS account in the provision stating "[t]he Wife shall hereinafter retain . . . governmental employees retirement accounts which are presently titled in her name only as her separate property." As Defendant has failed to meet his burden of proving a mutual mistake requiring reformation or rescission of the Separation Agreement, the trial court was neither obligated nor permitted to disregard the parties' contractual agreement and instead conduct its own valuation and distribution of the TSERS pension using the *Bishop* method. *See Lee*, 93 N.C. App. at 586, 378 S.E.2d at 555 ("A validly drawn separation agreement which distributes all of the parties' property . . . bars an equitable distribution claim.").

Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to (1) set aside the Separation Agreement; and (2) equitably distribute Plaintiff's TSERS pension.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

HIGH POINT BANK AND TRUST COMPANY, Plaintiff-Appellant
v.
HIGHMARK PROPERTIES, LLC; MITCHELL BLEVINS, CYNTHIA BLEVINS, CHARLES WILLIAMS and JANICE WILLIAMS, Defendants-Appellees

No. COA13-331

Filed 3 December 2013

1. Parties—foreclosure and deficiency—borrower—voluntary dismissal and joinder

In an action involving the purchase of real estate for development, with guaranty agreements, default, foreclosure, and a dispute over the amount of the deficiency, the trial court did not abuse its discretion by joining the borrower (defendant Highmark Properties, Inc.), which plaintiff had earlier dismissed voluntarily.

2. Guaranty—real estate deficiency—offset

In an action arising from the foreclosure of real estate purchased for development, with guaranty agreements and a deficiency after a foreclosure sale, the guarantors were only responsible for

the borrower's indebtedness. While plaintiff argued that the defense and offset provided in N.C.G.S. § 45-21.36 was personal to the borrower and not available to the guarantors, in this case the borrower was allowed the offset defense, not the guarantors, and the guarantors' liability was established once the jury and the trial court determined the borrower's indebtedness.

Judge DILLON concurs in part and concurs in result only in part.

Appeal by Plaintiff from orders entered 19 September 2011 and 4 October 2011 by Judge Ronald E. Spivey and judgment entered 11 July 2012 by Judge Stuart Albright in Superior Court, Guilford County. Heard in the Court of Appeals 24 September 2013.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for Plaintiff-Appellant.

Wells Jenkins Lucas and Jenkins PLLC, by Ellis B. Drew, III and Ann G. Sugg, for Defendants-Appellees.

Brooks Pierce McLendon Humphrey & Leonard LLP, by Robert A. Singer, S. Leigh Rodenbough IV, Kathleen A. Gleason, and Joseph A. Ponzi, for the North Carolina Bankers Association, amicus curiae.

McGEE, Judge.

At all times relevant to this appeal, Highmark Properties, LLC ("Borrower") was a company involved in real estate development. Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams ("Guarantors" and, together with Borrower, "Defendants"), were Borrower's members. High Point Bank and Trust Company ("Plaintiff") was a financial institution, with its principal place of business in Guilford County, North Carolina. Borrower obtained loans totaling $6,450,000.00 from Plaintiff, through two promissory notes: one executed on 18 January 2007 for $4,700,000.00 ("first note"), and one executed on 2 May 2007 for $1,750,000.00 ("second note"), for the purposes of developing real estate. The two notes were secured by deeds of trust to two parcels of real property ("the property") owned by Borrower. The first note was secured by the first parcel of real property, and the second note was secured by the second parcel of real property. Contemporaneously with the promissory notes, Plaintiff and Guarantors executed guaranty agreements whereby

Guarantors "guarantee[d] full and punctual payment and satisfaction of the indebtedness of Borrower to Lender [Plaintiff], and the performance and discharge of all Borrower's obligations under the Note[s][.]"

Borrower defaulted with an indebtedness of $3,541,356.00 remaining on the first note, and $1,336,556.00 remaining on the second note. Plaintiff filed a complaint on 19 October 2010 initiating an action against Defendants on the two notes, seeking to recover this outstanding indebtedness.

Plaintiff sold both parcels of the property at foreclosure sales on 8 February 2011. Plaintiff was the sole bidder, and purchased the first parcel for $2,578,070.00 and the second parcel for $720,000.00. Plaintiff filed a motion for summary judgment on 28 July 2011. Plaintiff then voluntarily dismissed Borrower from Plaintiff's action on 18 August 2011. Guarantors filed a motion on 2 September 2011 to rejoin Borrower as a defendant in the action, and simultaneously filed a motion for leave to file a third-party complaint against Borrower. Plaintiff filed a motion *in limine*, requesting that the trial court issue an "order excluding all evidence involving or relating . . . to the value of the properties foreclosed on[.]" Plaintiff's motion was in response to its belief that Guarantors intended

> to present certain evidence in support of two separate defenses. In particular, the Guarantors are offering evidence relating to . . . the value of the properties foreclosed on in support of the defense under N.C. Gen. Stat. § 45-21.36 that the bid amount at the foreclosure sale was substantially less than the true market value of the property[.]

In its motion, Plaintiff argued that the defense under N.C. Gen. Stat. § 45-21.36, allowing an offset on the amount owed on the notes based on the value of the property, was not available to Guarantors.

The trial court, by order entered 19 September 2011, ruled that joinder of Borrower to the action was "appropriate under N.C.G.S. § 26-12[,]" and that, pursuant to the North Carolina Rules of Civil Procedure, Borrower was a necessary party pursuant to Rule 19, or a permissive party pursuant to Rule 20, "and should be joined." The trial court further found "that [Borrower] is a going concern; is not in bankruptcy; is not dissolved; and is subject to the jurisdiction of this Court. In fact, [] Plaintiff sued [Borrower], and [Borrower] was a party until August 18, 2011, when Plaintiff filed a Dismissal without prejudice as

to [Borrower]." The trial court also denied Guarantors' motion to file a third-party complaint against Borrower.

By order entered 4 October 2011, the trial court entered summary judgment against Guarantors on the issue of liability, and further ruled that "[t]he value of the property securing payment of the Notes and its effect, if any, on the deficiency owed are the sole unresolved issues remaining for trial." Defendants, now including both Borrower and Guarantors, filed a motion to amend their answer so they could "assert N.C.G.S. § 45-21.36 specifically as a defense." Plaintiff consented to Defendants' motion to amend, and leave for Defendants to file an amended answer was granted by consent order entered 18 April 2012. Defendants' amended answer was filed that same date.

Plaintiff and Defendants stipulated to the following relevant facts by pretrial order entered 18 April 2012: (1) "all parties have been correctly designated, and there is no question as to misjoinder[,]" (2) "[t]he total deficiency on the First Note following the foreclosure sale . . . was . . . $963,286[,]" (3) "[t]he total deficiency on the Second Note following the foreclosure sale . . . was . . . $616,556[,]" (4) "that the single remaining issue for trial is . . . Defendants' affirmative defense under N.C. Gen. Stat. § 45-21.36[,]" and (5) this issue included whether the amount paid by Plaintiff at the foreclosure sales for the two parcels of the property "was substantially less than [the] true value."

Following a trial in which Plaintiff and Defendants submitted evidence related to the fair market value of the real property, the jury decided on 20 April 2012, that the amounts paid by Plaintiff for the parcels of real property at foreclosure were substantially less than the fair market value of the parcels. The jury determined the fair market value of parcel one was $3,723,000.00, and the fair market value of parcel two was $1,034,000.00. Judgment was entered 11 July 2012, in which the trial court ruled that Borrower's indebtedness on the first note was $0.00, because the jury had determined that the fair market value of the first parcel of the property was greater than Borrower's remaining debt of $3,541,356.00. The trial court ruled that Borrower's indebtedness on the second note was reduced to $302,556.00, because the jury had determined the fair market value of parcel two was $1,034,000.00, and Borrower's remaining debt was $1,336,556.00. The trial court then ruled that Borrower and Guarantors were jointly and severally liable, and ordered Defendants to pay Plaintiff $302,556.00 for the remaining uncollected debt, as well as granting Plaintiff attorney's fees and interest. Plaintiff appeals.

I.

The issues on appeal are whether: (1) reducing the liability of Guarantors based upon N.C. Gen. Stat. § 45-21.36 was improper, (2) N.C. Gen. Stat. § 26-12 "enlarge[d] the scope of available defenses," and (3) joinder of Borrower as a party-defendant was improper.

II.

[1] "[A] guarantor stands in the shoes of the debtor with respect to liability[.]" *Gregory Poole Equipment Co. v. Murray*, 105 N.C. App. 642, 646, 414 S.E.2d 563, 566 (1992). Therefore, upon Borrower's default, Guarantors were responsible to Plaintiff for Borrower's remaining liability on the first and second notes. Stated otherwise, and to use language from the guaranty agreements drafted by Plaintiff, Guarantors were liable for any remaining "indebtedness of Borrower to Lender [Plaintiff]."

After Plaintiff voluntarily dismissed Borrower from this action, Guarantors moved to re-join Borrower pursuant to, *inter alia*, N.C. Gen. Stat. § 26-12, which states in relevant part:

> When any [guarantor] is sued by the holder of the obligation, the court, on motion of the [guarantor] may join the principal as an additional party defendant, provided the principal is found to be or can be made subject to the jurisdiction of the court. Upon such joinder the [guarantor] shall have all rights, defenses, counterclaims, and setoffs which would have been available to him if the principal and [guarantor] had been originally sued together.

N.C. Gen. Stat. § 26-12(b) (2011). So long as Plaintiff was subject to the jurisdiction of the trial court, and that is not disputed in this case, the trial court's joinder of Plaintiff upon Guarantors' request was discretionary. "[T]he use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act. [A] discretionary order of the trial court is conclusive on appeal absent a showing of abuse of discretion." *Brock and Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 38-39 (2010) (quotation marks and citations omitted).

Plaintiff makes no argument that the trial court abused its discretion in joining Borrower to Plaintiff's suit seeking recovery for Borrower's default, and we find none. Plaintiff seemed to concede joinder was proper at oral argument, but argues in its brief that joinder pursuant to N.C.G.S. § 26-12(b) was improper as a matter of law because

Guarantors were thereby able to benefit from Borrower's offset defense. The only authority relied upon by Plaintiff in support of this argument is *Poughkeepsie Sav. Bank, FSB v. Harris*, 833 F. Supp. 551 (W.D.N.C. 1993). This opinion is not binding on this Court. More importantly, the trial court in *Poughkeepsie*, assuming *arguendo*, that N.C.G.S. § 26-12(b) "binds a federal court sitting in diversity," recognized that joinder pursuant to N.C.G.S. § 26-12(b) is discretionary, and decided, in its discretion, against joinder. *Id.* at 554. We hold the trial court did not abuse its discretion in joining Borrower pursuant to N.C.G.S. § 26-12(b).

Once joined, Borrower was entitled to assert the defense of offset pursuant to N.C. Gen. Stat. § 45-21.36 (2011) in order to determine Borrower's indebtedness to Plaintiff. N.C.G.S. § 45-21.36 states in relevant part:

> When 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.G.S. § 45-21.36. This Court has stated:

> N.C. Gen. Stat. § 45-21.36 applies well-settled principles of equity to provide protection for debtors whose property has been sold and purchased by their creditors for a sum less than its fair value. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936), *aff'd*, 300 U.S. 124, 81 L.Ed. 552 (1937).

NCNB v. O'Neill, 102 N.C. App. 313, 316, 401 S.E.2d 858, 859 (1991). N.C.G.S. § 45-21.36 is a statute based in equity enacted to prevent "abuse

leading to a windfall," *Id.* at 316, 401 S.E.2d at 859, it "does not relieve the [borrower] of its debt[,] . . . [i]t simply limits the plaintiff to what it bargained for – repayment in full plus interest." *Id.* at 317, 401 S.E.2d at 860 (citations omitted).

After the jury in the present case determined the fair market value of the property, the trial court determined that "[Borrower's] indebtedness on the First Note was reduced to $0.00[,]" and that "[Borrower's] indebtedness on the Second Note was reduced to $302,556.00." The trial court then ruled that Guarantors were jointly and severally liable with Borrower for $302,556.00.

Pursuant to established principles of surety law, *Gregory Poole*, 105 N.C. App. at 646, 414 S.E.2d at 566, and the guaranty agreements drafted by Plaintiff, Guarantors were liable to Plaintiff for "the Indebtedness of Borrower to [Plaintiff.]"[1] The guaranty agreements state: "The word 'Indebtedness' means Borrower's indebtedness to [Plaintiff] as more particularly described in this Guaranty[,]" and further state:

> The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees arising from any and all debts, liabilities and obligations that Borrower individually or collectively or interchangeably with others, owes or will owe Lender under the Note[.]

That indebtedness was established at trial, and Plaintiff does not argue on appeal that there was any error at trial concerning the jury's determination of the fair market value of the property, or concerning the trial court's determination of the remaining indebtedness in light of the jury's determination. Plaintiff argues that it should be allowed to recover from Borrower, through purchase and sale of the two parcels of real property, then recover again from Guarantors, based upon Guarantors' agreement to guarantee Borrower's indebtedness to Plaintiff. However, according to the guaranty agreements: "This Guaranty . . . will continue in full force until all the Indebtedness shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall

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1. The guaranty agreements all begin with the following language: "For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to [Plaintiff], and the performance and discharge of all Borrower's obligations under the Note and the related Documents."

have been performed in full." That indebtedness was partially satisfied through the Plaintiff's actions at the foreclosure sales. The trial was conducted to determine the remainder of the indebtedness.

Plaintiff argues that the defense and offset provided for in N.C.G.S. § 45-21.36 is personal to Borrower, and not available to Guarantors simply because Borrower had availed itself of the offset defense, and Borrower was re-joined in the action pursuant to N.C.G.S. § 26-12(b). We agree that the plain language of N.C.G.S. § 26-12(b) does not, upon re-joinder of Borrower, expand the defenses available to Guarantors beyond those that were available to Guarantors when Plaintiff originally brought action against both Borrower and Guarantors together. However, in the present case Guarantors were *not* allowed an offset defense, Borrower was. The fact that Guarantors "benefitted," because the amount of Borrower's indebtedness was determined at trial to be less than what Plaintiff claimed, does not alter this fact. Plaintiff directs us to no controlling nor persuasive law in support of its position in this matter.

The issue in the case before us is not whether a guarantor can *personally* assert an offset defense pursuant to N.C.G.S. § 45–21.36. We have not held that Guarantors had the right to avail *themselves* of the offset defense in N.C.G.S. § 45-21.36. We quite assiduously avoided making that determination. We hold that Guarantors were only responsible for Borrower's indebtedness. This holding is in accord with precedent and the language of the guaranty agreements drafted by Plaintiff. Once the jury and the trial court determined Borrower's indebtedness to Plaintiff, Guarantors' liability to Plaintiff was thereby established.

Plaintiff does raise legitimate questions concerning a guarantor's rights, if any, with respect to N.C.G.S. § 45–21.36. The earliest opinion addressing this issue appears to be *Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E.2d 645 (1937). Our Supreme Court in *Dunlop* held that the guarantor, though not a "mortgagee, or trustee, or holder of the notes secured by the mortgage," *id.* at 196, 198 S.E. at 646, had a right to "present the facts" concerning the statutory offset defense at trial. *Id.* Our Supreme Court further stated: "It is not, of course, for us to say whether the defendants can make good the allegations of their [offset] defense: We only say that at this stage of the case we do not deny their right to make it." *Id. Dunlop* seems to allow a guarantor to step into the borrower's shoes and assert the offset defense because

> [i]t would not be an unreasonable interpretation of the statute to hold that it proceeds upon the equitable assumption that the debtor has received payment in full when, by

> his own choice, he takes the land, and that the purpose of the law is, under such circumstances, to discharge the debt.

Id. Opinions of this Court have acknowledged this reading of *Dunlop*. *Chem. Bank v. Belk*, 41 N.C. App. 356, 368-69, 255 S.E.2d 421, 429 (1979) ("even a guarantor could likely assert [N.C.G.S. § 45-21.38 as a] defense. *See Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938)."); *Smith v. Childs*, 112 N.C. App. 672, 684, 437 S.E.2d 500, 508 (1993) ("While personal guaranties are not explicitly covered by G.S. 45-21.38, the statute does preclude 'a deficiency judgment on account of' a purchase money deed of trust. This Court has previously commented even a guarantor arguably could assert G.S. § 45-21.38 as a defense. *Chemical Bank v. Belk*, 41 N.C. App. 356, 368-69, 255 S.E.2d 421, 429, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 911 (1979). Moreover, our Supreme Court has ruled the guarantor of a purchase money deed of trust is entitled to plead the anti-deficiency statute as a defense in an action brought on his personal guaranty. *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198-99, 198 S.E. 645, 646 (1938). While the anti-deficiency statute at issue in [*Dunlop*] was not identical to present G.S. § 45-21.38, both statutes are similar in that guarantors are not expressly covered.").

To the extent *Dunlop* stands for the proposition that guarantors can claim the offset defense in N.C.G.S. § 45-21.38 under appropriate circumstances, opinions of this Court holding otherwise are not controlling. *Andrews ex rel. Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) ("this Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions 'until otherwise ordered by . . . [our] Supreme Court' ") (citation omitted). However, our holding in this matter does not require us to resolve this issue, and we do not presume to do so.

We hold that once Borrower successfully obtained an offset pursuant to N.C.G.S. § 45–21.36, reducing Borrower's indebtedness thereby, Guarantors could only be held responsible for Borrower's indebtedness. Plaintiff's arguments are without merit.

No error.

Judge McCULLOUGH concurs.

DILLON, Judge, concurring in part and concurring in the result only in part.

I concur with the majority's conclusion that the trial court did not abuse its discretion in joining Highmark Properties, LLC, ("Borrower") to this action. However, regarding the majority's holding that the trial court did not err by reducing the liability of the individual defendants ("Guarantors") based upon N.C. Gen. Stat. § 45-21.36 (2011), I concur in result only for the reasons set forth below.

I believe that holdings from our Court, discussed *infra*, would compel us to conclude that the trial court erred in reducing the liability of the Guarantors based on the jury's determination of the collateral's fair market value rendered in connection with the Borrower's assertion of the defense provided in G.S. § 45-21.36. However, I reach the same holding as the majority because I believe this case is controlled by our Supreme Court's holding in *Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1937), where the Court, essentially, held that a guarantor could assert the defense provided by G.S. § 45-21.36 in a case even where the mortgagor-borrower was not a party.

Normally, following a foreclosure sale, the amount of the underlying indebtedness securing a mortgage is deemed reduced by the amount of the net proceeds realized from the sale. N.C. Gen. Stat. § 45-21.31(a)(4) (2011). This general rule is abrogated in situations where the creditor, who commenced the foreclosure, is the high bidder at the foreclosure sale. I believe the key question here is whether the Legislature, by enacting G.S. § 45-21.36, intended for the actual value of the collateral at the time of the foreclosure – as opposed to the net proceeds realized from the sale – to serve as a measure by which the indebtedness is reduced or as a measure by which the *mortgagor-borrower's personal liability* to pay the indebtedness is reduced. If the former is true, then I believe a guarantor should be able to assert G.S. § 45-21.36, even if the borrower whose property served as the collateral for the debt is not a party to the action since the guarantor is only liable for the actual amount of the underlying indebtedness. However, if the latter is true — and the defense provided by G.S. § 45-21.36 is intended to provide a defense that is personal to the mortgagor-borrower — then I believe a guarantor cannot benefit from the defense.[1]

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1. Examples of defenses that are *personal* to the primary borrower, which we have stated cannot generally be asserted by a guarantor or surety, are found in *Exxon v. Kennedy*, 59 N.C. App. 90, 295 S.E.2d 770 (1982) (holding that a discharge of a debtor through bankruptcy does not discharge the obligation of a guarantor under a guaranty agreement); and in *Town v. Smith*, 10 N.C. App. 70, 74, 178 S.E.2d 18, 21 (1970), *cert. denied*, 277 N.C. 727, 178 S.E.2d 831 (1971), where we stated that "[a] surety for an idiot or an infant, or a surety for a corporation or governmental entity acting *ultra vires*, may be

Our Court has held that the guarantor of a mortgagor's debt may not avail himself of the defense provided by G.S. § 45-21.36. For instance, in *Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, which involved a deficiency suit by a creditor against a mortgagor-borrower and the guarantors, our Court affirmed the trial court's summary judgment order against the guarantors, stating that "[t]he fact that Bank also named Borrower, the mortgagor, as a defendant in the deficiency action does not expand the availability of the offset defense under N.C. Gen. Stat. § 45-21.36 to non-mortgagor [guarantors]." __ N.C. App. __, __, 742 S.E.2d 201, 204 (2013).

In *Borg-Warner v. Johnston*, which involved a deficiency suit against only the guarantors of a loan, our Court held that the guarantor-defendants could not invoke G.S. § 45-21.36 as a means to determine the amount of the indebtedness that they owed, but that the defense was only available to the mortgagor-borrower. 97 N.C. App. 575, 579, 389 S.E.2d 429, 433 (1990).

We have also held that, in a situation where a loan is extended to multiple co-borrowers but where only one of the co-borrowers actually owned the collateral securing the debt, only the borrower who had the ownership in the collateral could assert G.S. § 45-21.36. Specifically, in *Raleigh Federal v. Godwin*, the Court stated:

> The General Assembly's intention to limit the protection of the statute to those who hold a property interest in the mortgage property is clear; the protection of G.S. § 45-21.36 is not applicable to other parties who may be liable on the underlying debt. Defendants, as other parties liable on the underlying debt, but who hold no property interest in the mortgaged property, cannot assert the defense of G.S. § 45-21.36.

99 N.C. App. 761, 763, 394 S.E.2d 294, 295 (1990); *see also First Citizens v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979) (stating that the General Assembly intended that, in a case involving multiple borrowers, only the borrower with an interest in the collateral could avail itself of G.S. § 45-21.36), *disc. rev. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). Taken together, these holdings from our Court discussed above suggest that the defense provided by G.S. § 45-21.36 is *personal* to the mortgagor-borrower.

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liable, although the principal is liable neither to the obligee nor to the surety." *Id.* (citing *Davis v. Commissioners*, 72 N.C. 441 (1876); *Poindexter v. Davis*, 67 N.C. 112 (1872)).

Notwithstanding the holdings in these cases of our Court, I believe our Supreme Court's opinion in *Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1937) — a case which is not referenced in any of the decisions of this Court cited above — is controlling.

In *Dunlop*, a creditor made a loan to a borrower secured by borrower's real estate collateral and guaranteed by a guarantor.[2] *Id.* at 196, 198 S.E. at 645. The borrower defaulted. *Id.* at 197, 198 S.E. at 645. The creditor foreclosed on the collateral. *Id.* The successful bidder at foreclosure was not the creditor, but rather a subsidiary of the creditor. *Id.* The net proceeds, however, did not cover the amount owed on the underlying debt. *Id.* Accordingly, the creditor sued the executors of guarantor's estate for the deficiency under the guaranty; however, the borrower was not sued. *Id.*

In their answer, the executors of guarantor's estate pled, as a defense, the language in G.S. § 45-21.36, referred to in the opinion as "chapter 275 of the Public Laws of 1933[,]"[3] as a defense, alleging that the collateral "was reasonably and fairly worth the amount of the debt . . . and that its market value was in excess of such indebtedness; and that under [G.S. § 45-21.36] the debt of the plaintiff is fully satisfied and paid, and the estate of [the guarantor] was thereby fully released and discharged." *Id.* at 197, 198 S.E. at 645.

The creditor moved to strike the executors' defense, arguing that the pleading was irrelevant to the case because the defense under G.S. § 45-21.36 was only available to debtors " 'whose property has been so purchased (at foreclosure)' and that such special defense is unavailable to a guarantor of the debt." *Id.* at 198, 198 S.E. at 645.

The trial court denied the creditor's motion to strike the defense pled by the guarantor's executors. The creditor's immediately appealed.

Regarding motions to strike, our Supreme Court held that "an aggrieved party may have [an] irrelevant or redundant matter stricken from his opponent's pleading, especially when such matter is prejudicial to him[,]" stating that a motion to strike, timely made, was "a matter of

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2. The guaranty agreement appears to be a "guaranty of payment," stating that "[t]he undersigned [guarantor] hereby guarantees the prompt payment of the within obligation, both principal and interest, as and when same becomes due according to its terms. . . . The undersigned further agrees to remain bound notwithstanding any extension of time which may be granted to the maker of the within obligation." *Dunlop*, 214 N.C. at 196, 198 S.E. at 645.

3. The language in the statute has been amended since it was originally enacted in 1933. However, the portions of the statute that are relevant to *Dunlop* and to the present case are substantially similar to the current text of G.S. § 45-21.36.

right and not addressed to the discretion of the court." *Patterson v. R.R.*, 214 N.C. 38, 42-43, 198 S.E. 364, 367 (1937); *see also Development Co. v. Bearden*, 227 N.C. 124, 127, 41 S.E.2d 85, 87 (1946) (holding that "[i]f the matter sought to be deleted is found to be [irrelevant], the court has no alternative but to strike it out").

In addressing the issue of the relevancy of the pleadings, the *Dunlop* Court, citing Patterson, stated that "[o]n a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial." *Dunlop*, 214 N.C. at 198, 198 S.E. at 646. That is, only those allegations "which, if established, will constitute a cause of action or a defense[,]" are relevant and will be sustained. *Williams v. Thompson*, 227 N.C. 166, 167, 41 S.E.2d 359, 360 (1947). In *Dunlop*, the allegations sought by the creditor to be struck – for example, allegations that the purchaser at the foreclosure was essentially the alter ego of the mortgagee and that the actual value of the real estate exceeded the amount of the debt – were only relevant to the case if the guarantor's defense based on G.S. § 45-21.36 could validly be pled as a defense by a guarantor in a deficiency suit, even where the mortgagor-borrower had not been sued. By affirming the trial court's ruling not to strike the defense, our Supreme Court concluded that the allegations were, indeed, relevant, based "upon the merits." *Dunlop*, 214 N.C. at 199, 198 S.E. at 646. In other words, the only basis by which the Supreme Court could have affirmed the trial court's ruling in this case was that the defense provided by G.S. § 45-21.36 raised by the guarantor's estate was relevant, and therefore valid:

> It is not, of course, for us to say whether [the executors of guarantor's estate] can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it.

Id. at 199, 198 S.E. 646. If the defense was not available to a guarantor under the statute, the allegations would have been irrelevant to the resolution of the creditor's action against the guarantor; and I believe the Supreme Court would have been compelled to reverse the trial court's ruling, which would have prevented the parties from wasting time and resources at trial presenting evidence to prove irrelevant issues.

Our Supreme Court has not abrogated or overruled its 1937 holding in *Dunlop*. Accordingly, notwithstanding the prior holdings of our Court discussed above, I believe we are bound to follow that holding "until otherwise ordered by [our] Supreme Court[,]" *Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008).

CAROLYN G. HOLMES, Widow and Administrator of the Estate of WASHINGTON D. HOLMES, Deceased Employee, Plaintiff
v.
SOLON AUTOMATED SERVICES, Employer, SPECIALITY RISK SERVICES, INC., Carrier, Defendants

No. COA13-325

Filed 3 December 2013

1. Workers' Compensation—cost of annuity—condition precedent—failure to survive

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff wife was not entitled to receive from defendants $93,994.39 for the cost of an annuity. As plaintiff husband did not survive a single year, he failed to meet an explicit condition precedent in the mediated settlement contract.

2. Workers' Compensation—mediated settlement agreement—seed money

The Industrial Commission erred in a workers' compensation case by failing to require defendants to pay plaintiff wife $19,582.37 that would have been used as seed money for the mediated settlement agreement. It would have been inequitable for defendants to keep the $19,582.37, despite the purpose of the agreement being frustrated, since the agreement did not condition payment of this sum upon Mr. Holmes' continued survival.

Appeal by plaintiff from Opinion and Award entered 21 November 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 August 2013.

Lennon, Camak & Bertics, PLLC, by George W. Lennon and Michael W. Bertics, for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Winston L. Page, Jr., for defendant-appellee.

STROUD, Judge.

Plaintiff appeals an opinion and award of the North Carolina Industrial Commission denying "Plaintiff's request that the Commission enforce the provisions of the Mediated Settlement Agreement which

relate to the funding by Defendants of a Medicare Set-Aside Account[.]" For the following reasons, we affirm in part and reverse in part.

I. Background

On 21 November 2012, the North Carolina Industrial Commission issued an opinion and award in this matter. The basic facts of the situation are uncontested. Washington D. Holmes was an employee of defendant Solon Automated Services who sustained a compensable injury on 16 May 1990, for which he received workers' compensation benefits. On 26 August 2010, Mr. Holmes and defendants engaged in a voluntary mediation, and they "entered into an agreement to settle" Mr. Holmes' claim. This "agreement was memorialized in an Industrial Commission Form MSC8 Mediated Settlement Agreement ("Agreement") which was signed by all parties."

In the Agreement, in consideration of the payments to be made by defendants, Mr. Holmes "waived the right to any further benefits under the Act" arising from his 16 May 1990 injury. Defendants agreed to pay the following:

a. $250,000.00;

b. Mediator's fees;

c. "[A]ll authorized medical expenses to the date of the mediation[;]"

d. Funding of "a Medicare Set-Aside Allocation ('MSA') in the amount of $186,032.51, with '$19,582.37 seed money for the Medicare Set Aside for the benefit of Washington Holmes' and payments of '9,247.23 annually beginning on September 15, 2011, payable 18 years only if Washington Holmes is living.' "

The defendants were to purchase an annuity to make the annual payments. "The portion of the Mediated Settlement Agreement relating to the Medicare Set Aside further provides, 'Non-surgical medical bills will be paid to date of CMS approval.' " The Agreement also provided that " 'The Employee understands and agrees that the monies in the Medicare Set-Aside Account will be used for the sole purpose of paying future medical expenses related to his injury which would otherwise be paid for by Medicare.' " The seed money and annual payments "with which Defendants were to fund the Medicare Set-Aside Account [were] derived from a Medicare Set-Aside Summary prepared by Gould & Lamb" and "the factors used in the calculation of the Medicare Set-Aside include[d

Mr. Holmes'] life expectancy, which Gould & Lamb calculated to be 19 years, and his anticipated medical care, physical therapy and medication costs."

After the mediation, counsel for the parties "began drafting a settlement agreement[,]" but Mr. Holmes "died unexpectedly of pneumonia on October 24, 2010[,]" before the settlement agreement was completed.[1] Plaintiff, Mr. Holmes' widow, was substituted as plaintiff in this action. On 15 December 2010, defendants paid the $250,000.00 required by the Agreement to plaintiff "pursuant to an Administrative Order entered by Executive Secretary Tracey H. Weaver[.]" But defendants refused to pay any sums under the Agreement regarding the Medicare Set-Aside Account, stating:

> On December 30, 2010, Plaintiff filed an Industrial Commission Form 33 Request for hearing seeking payment of the Medicare Set-Aside funds set forth in the Mediated Settlement Agreement. Defendants contend they are not obligated to pay the seed money or the annual payments to a Medicare Set-Aside Account as set forth in the Mediated Settlement Agreement.

The Commission denied "Plaintiff's request that the Commission enforce the provisions of the Mediated Settlement Agreement which relate to the funding by Defendants of a Medicare Set-Aside Account[.]" The Commission based its determination upon the following rationale:

> 9. Pursuant to the Medicare Secondary Payer Act, the burden of future medical expenses arising from a workers' compensation case may not be shifted to Medicare. For this reason, the Act requires that Medicare's interest be considered in workers' compensation settlements which take into account future medical expenses.
>
> 10. As in the instant case, protecting Medicare's interest may be accomplished through the establishment of a Medicare Set-Aside Account. Medicare will not pay for any expenses related to the workers' compensation injury until the monies contained in the Medicare Set-Aside Account are exhausted. To this end, the Settlement

1. Plaintiff has not brought any claim for death benefits under North Carolina General Statute § 97-38. Plaintiff's claim is based solely upon the Agreement.

Agreement drafted by the parties in this case provides, "The Employee understands and agrees that the monies in the Medicare Set-Aside Account will be used for the sole purpose of paying future medical expenses related to his injury which would otherwise be paid for by Medicare."

. . . .

12. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the parties' purpose in agreeing to establish a Medicare Set-Aside Account was to comply with the mandate of the Medicare Secondary Payer Act to protect Medicare from bearing the burden of future medical expenses arising from this workers' compensation case. This purpose was to be accomplished through the funding by Defendants of the Medicare Set-Aside Account with monies which were to be used by Deceased-Employee for "the sole purpose of paying future medical expenses related to his injury which would otherwise be paid for by Medicare."

13. The Full Commission further finds that an implied condition in the agreement to establish a Medicare Set-Aside Account was that Deceased-Employee be living, and, in effect, capable of incurring future medical expenses, at the time the Medicare Set-Aside Account was established through the deposit of the seed money. As medical bills could be incurred during Decedent-Employee's lifetime, his death prior to the establishment of the Medicare Set-Aside Account frustrated the parties' purpose in agreeing to establish the Account, namely, to protect Medicare from bearing the burden of future medical expenses arising from this workers' compensation case.

14. Specifically with regard to the annual payments to be made by Defendants to the Medicare Set-Aside Account set forth in the Settlement Proposal, the Full Commission finds, that, not only was the purpose of these payments frustrated by Decedent-Employee's death as set forth above, but also, the contingency of Decedent-Employee being alive as of the due date of the annual payment has not been satisfied as Decedent-Employee died on October 24, 2010, before the first annual payment came due.

15. For the foregoing reasons, the Full Commission finds that Defendants are not required to pay the seed funds or the annual payments to a Medicare Set-Aside as detailed in the Mediated Settlement Agreement.

The Commission concluded,

1. Compromise settlement agreements, including mediated settlement agreements [in Workers' Compensation cases], are governed by general principles of contract law.[] *Roberts v. Century Contractors, Inc.*, 162 N.C. App. 688, 592 S.E.2d 215 (2004) (quoting *Lemly v. Colvald Oil Co.*, 157 N.C. App. 99, 577 S.E.2d 712 (2003)).

2. Addressing the doctrine of frustration of purpose in *Brenner v. Little Red School House, Ltd*, the North Carolina Supreme Court quoted 17 Am.Jur.2d Contracts § 401 (1964) as follows:

> Changed conditions supervening during the term of a contract sometimes operate as a defense excusing further performance on the ground that there was an implied condition in the contract that such a subsequent development should excuse performance or be a defense, and this kind of defense has prevailed in some instances even though the subsequent condition that developed was not one rendering performance impossible. . . . In such instances, . . . the defense doctrine applied has been variously designated as that of "frustration" of purpose or object of the contract or "commercial frustration."
>
> Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration of performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.

302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981). The doctrine of frustration of purpose is not applicable where the frustrating event is reasonably foreseeable. *Id.*

3. In the instant case, it was an implied condition of the portion of the Mediated Settlement Agreement concerning the Medicare Set-Aside that Decedent-Employee be living at the time the Medicare Set-Aside Account was established. *Id.* Decedent-Employee's supervening, unexpected death prior to the establishment of the Medicare Set-Aside Account through the depositing of the seed money, destroyed the expected value of the performance, namely, protecting Medicare from bearing the burden of future medical expenses incurred by Decedent-Employee arising from this workers' compensation case. *Id.*

4. Defendants could not have reasonably foreseen Plaintiff's unexpected death from pneumonia prior to the establishment of the Medicare Set-Aside Account. *Id.*

5. Based upon the foregoing, the Full Commission concludes that Decedent-Employee's death operates as a defense excusing Defendants from performance of that portion of the Mediated Settlement Agreement which concerns the Medicare Set-Aside Account. *Id.*

6. Neither party prosecuted or defended this claim without reasonable grounds. Therefore, neither party is not [sic] entitled to an award of attorney's fees under N.C. Gen. Stat. § 97-88.1.

Ultimately, the Commission ordered:

1. Plaintiff's request that the Commission enforce the provisions of the Mediated Settlement Agreement which relate to the funding by Defendants of a Medicare Set-Aside Account is hereby DENIED.

2. The parties shall bear their own costs.

Plaintiff appeals.

II. Standard of Review

The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an

> award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

Richardson v. Maxim Healthcare/Allegis Grp., 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations, quotation marks, and brackets omitted).

III. The Medicare Set-Aside Account

The essential facts of this case are not in contention. Furthermore, most of the terms of the Agreement have either been performed or are not contested before this Court: Defendants paid the $250,000.00, and none of the parties make any arguments regarding the "mediator's fees" or the "authorized medical expenses to the date of the mediation." Accordingly, all that is left for this Court to consider regarding the performance of the contract is the funding of "a Medicare Set-Aside Allocation ('MSA') in the amount of $186,032.51, with '$19,582.37 seed money for the Medicare Set Aside for the benefit of Washington Holmes' and payments of '9,247.23 annually beginning on September 15, 2011, payable 18 years only if Washington Holmes is living.' " As to the MSA, the Commission concluded that the doctrine of frustration of purpose applied to discharge defendant's performance of the Agreement. Neither plaintiff nor defendant assert that the Commission was incorrect in applying the doctrine of frustration of purposes; rather, plaintiff essentially contends that even when a defense of frustration of purpose applies, she is still entitled to restitution.

We can find no case law in North Carolina which directly supports an award of restitution following discharge of a contract based upon frustration of purpose. Yet there is case law supporting the proposition that restitution is an appropriate remedy in a case where performance of the contract is rendered impossible. *See Shelton v. Tuttle Motor Co.*, 223 N.C. 63, 68, 25 S.E.2d 451, 454 (1943) ("One who has paid for goods he never gets is entitled to recover the payment, even though the reason why performance was not made by the seller is excusable impossibility. The Act of God may properly lift from his shoulders the burden of performance, but has not yet extended so as to enable him to keep the other man's property for nothing." (citations and quotation marks omitted)). Furthermore, the Restatement (Second) of Contracts provides that restitution is an appropriate remedy following discharge of a

contract by either the defenses of frustration of purpose or impossibility. *See* Restatement (Second) of Contracts § 377 (1981) ("A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.") Lastly, defendants have not made any arguments that restitution is an inappropriate remedy where the purpose of a contract has been frustrated.

In the circumstances presented by this case, whether impossibility or frustration of purpose is the correct defense, it seems that the remedy is the same, so we believe that any attempt we might make to distinguish the two as to this case would simply be frustrating for the reader, and perhaps impossible to understand. We can find no legal distinction between considering restitution as a remedy for a contract that has been not fully performed either due to frustration of purpose or impossibility, so we conclude that restitution may be a proper remedy for plaintiff in light of the Commission's uncontested determination that the purpose of the parties' contract was frustrated. *See generally Shelton*, 223 N.C. at 68, 25 S.E.2d at 454; see also Restatement (Second) of Contracts § 377.

Plaintiff argues that she is entitled to restitution under the Agreement, in the amount of $113,576.76, which includes the $19,582.37 seed money as well as the sum of $93,994.39, which was the cost of the annuity which defendants were to purchase to pay for Mr. Holmes' ongoing medical expenses for 18 years, so long as he was living; plaintiff argues that allowing defendants to retain these funds would unjustly enrich them at her expense.

> Unjust enrichment has been defined as a legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. A claim of this type is described as a claim in quasi contract or a contract implied in law.

Rev O, Inc. v. Woo, ___ N.C. App. ___, ___, 725 S.E.2d 45, 49 (2012) (citation, quotation marks, and ellipses omitted).

> The restitution claim . . . is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's

> part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep even though plaintiff may have suffered no demonstrable losses.

WMS, Inc. v. Weaver, 166 N.C. App. 352, 360-61, 602 S.E.2d 706, 711-12 (citation, quotation marks, and ellipses omitted), *disc. review denied*, 359 N.C. 197, 608 S.E.2d 330 (2004).

A. Cost of the Annuity

[1] As to the cost of the annuity, plaintiff contends that defendants received a windfall as they have not paid the $93,994.39 for the purchase of the annuity to fund the MSA. However, the Agreement specifically provided that plaintiff should only benefit from the annuity for each year he remained alive. The Agreement stated, "$9,247.23 annually beginning on September 15, 2011, payable 18 years only if Washington Holmes is living[.]" The cost of the annuity to defendant was $93,994.39, but plaintiff received no guaranteed benefit from the annuity. Plaintiff could receive a maximum of $166,450.14, but only if he survived 18 years.

As plaintiff did not survive a single year, we conclude that plaintiff failed to meet an explicit condition precedent in the contract, survival. *See Handy Sanitary Dist. v. Badin Shores Resort*, ___ N.C. App. ___, ___, 737 S.E.2d 795, 800 (2013) ("A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability." (citation omitted)). As such, defendants did not receive a windfall, since the parties explicitly bargained that in order for Mr. Holmes to receive the benefit of the annual payments of the annuity Mr. Holmes must survive; he did not, and thus defendants have not breached the Agreement. We do not believe that the unfortunate timing of Mr. Holmes' death changes this analysis for purposes of restitution. Indeed, restitution is an inapplicable remedy as the explicit terms bargained for in the Agreement simply were not met, and thus neither Mr. Holmes nor plaintiff who stands in his stead "acquir[ed] a right[.]" *Id.* Accordingly, the Commission did not err in concluding that plaintiff was not entitled to the $93,994.39, the cost of the annuity.

B. Seed Money

[2] The analysis as to the seed money is a bit different. As to the seed money, defendants argue that they are not required to pay it due to the plain language of the Agreement. Essentially, defendants contend that

the purpose of the Agreement was frustrated. While this may be true, and indeed is for this case pursuant to the uncontested determination of the Commission, that does not mean that plaintiff is not entitled to restitution. Defendant makes no argument for why restitution would not be applicable. Unlike the annual payments, the seed money to fund the MSA does have a guaranteed benefit in a specific sum, $19,582.37. Furthermore, it does not have any specific language requiring Mr. Holmes to survive. While the seed money provision does note that it is for Mr. Holmes' benefit, and while according to the unchallenged determination of the Commission, this purpose was frustrated, plaintiff may still be able to recover restitution if defendant was unjustly enriched. *See generally Shelton*, 223 N.C. at 68, 25 S.E.2d at 454; *see also* Restatement (Second) of Contracts § 377. Plaintiff contends that "[i]f an injured worker dies and funds remain in the MSA account, the money passes to the injured workers' estate." Defendants do not contest this fact. As such, we conclude that defendants would be unjustly enriched if they were allowed to keep the seed money; like with the annual payments, defendants could have specifically bargained that the payment of the seed money was conditioned on Mr. Holmes survival, but they did not do so. We realize that this may have simply been inartful wording of the Agreement, but the parties agreed that the seed money would be for Mr. Holmes' benefit, and certainly a benefit to Mr. Holmes' estate is still a benefit to him.

As to the remedy of restitution, the fact that the purpose was frustrated because the money will not be used for Mr. Holmes' future medical expenses does not mean defendant "may receive a windfall[.]" *WMS, Inc.*, 166 N.C. App. at 360, 602 S.E.2d at 712. As noted above, "[t]he principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep even though plaintiff may have suffered no demonstrable losses." *Id.* at 361, 602 S.E.2d at 712. Plaintiff gave up his legal rights to receive ongoing workers' compensation benefits in exchange for those benefits not contested before this Court and funding of an inheritable MSA with $19,582.37 non-contingent seed money and additional annual payments each year, totaling $166,450.14, contingent upon his survival of 18 more years. We thus conclude that it would be inequitable for defendants to keep the $19,582.37, despite the purpose of the Agreement being frustrated, as the Agreement did not condition payment of this sum upon Mr. Holmes' continued survival. Accordingly, defendants must pay plaintiff the $19,582.37 that would have been used as seed money for the MSA.

IV. Conclusion

For the foregoing reasons, we affirm the Commission's denial of plaintiff's request for the cost of the annuity, but we reverse as to the $19,582.37 in seed money.

AFFIRMED in part; REVERSED in part.

Judges CALABRIA and DAVIS concur.

IN RE A.D.N.

No. COA13-709

Filed 3 December 2013

1. Termination of Parental Rights—subject matter jurisdiction—standing

The trial court did not err by concluding that it had subject matter jurisdiction in a termination of parental rights (TPR) case. The evidence supported the trial court's ultimate finding that the minor child resided continuously with petitioner paternal grandmother for the two-year period immediately preceding the filing of the petition. Consequently, petitioner had standing to file the TPR petition under N.C.G.S. § 7B-1103(a)(5).

2. Appeal and Error—preservation of issues—failure to object—failure to appoint guardian ad litem for minor

Although respondent mother urged the Court of Appeals to reverse a termination of parental rights order based on the trial court's failure to appoint the minor child a guardian *ad litem*, respondent did not preserve this issue for appeal based on her failure to object at trial. Under the facts of this case, suspension of the appellate rules was not required to prevent manifest injustice to respondent or the minor child.

Appeal by respondent from order entered 1 April 2013 by Judge Peter Mack in Carteret County District Court. Heard in the Court of Appeals 28 October 2013.

Lauren Vaughan for petitioner-appellee.

Richard Croutharmel for respondent-appellant.

Geer, Judge.

Respondent mother appeals from the trial court's order terminating her parental rights to A.D.N. ("Andy").[1] On appeal, respondent mother argues that the trial court lacked subject matter jurisdiction over the termination of parental rights ("TPR") proceeding because petitioner, Andy's paternal grandmother, lacked standing to file the TPR petition. We hold that the trial court properly concluded that Andy resided with petitioner for a continuous period of two years prior to the filing of the petition, such that petitioner had standing under N.C. Gen. Stat. § 7B-1103(a)(5) (2011). Although respondent mother additionally urges this Court to reverse the TPR order based on the trial court's failure to appoint Andy a guardian ad litem, respondent mother has not preserved her argument on that issue for appeal. We, therefore, affirm the trial court's order.

Facts

Petitioner first met respondent mother in February 2010 when petitioner's son, respondent father, brought respondent mother to petitioner's home in Beaufort, North Carolina in order to introduce respondent mother to petitioner. Petitioner had a strained relationship with respondent father because of his drug use and legal troubles. Two weeks later, respondent mother and father returned to petitioner's home and told her that respondent mother was pregnant.

Respondent mother submitted to a pre-natal examination drug test on 1 September 2010, roughly two and a half months before Andy's birth, and she tested positive for "BZO, oxycodone, and THC." Respondent mother gave birth to Andy on 18 November 2010. At the time of his birth, Andy was diagnosed with neonatal withdrawal syndrome. Respondent mother admitted she used Xanax while pregnant with Andy, although she claimed she had been prescribed Xanax. In the days following Andy's birth, respondent mother requested and was prescribed pain medication for pain from her C-section surgery. She then returned to the emergency room to obtain additional pain medications, telling petitioner that respondent father was "eating her prescriptions like candy."

Andy was released from the hospital on 24 November 2010, and petitioner drove Andy and respondent mother and father to respondent mother's stepfather's house in Carteret County, North Carolina, where respondent mother and father were living. The next day, petitioner

1. The pseudonym "Andy" is used throughout this opinion to protect the child's privacy and for ease of reading.

brought Andy and respondent mother and father to petitioner's home for Thanksgiving dinner, and two days later, on 27 November 2010, Andy spent the night at petitioner's home at respondent mother and father's request. Petitioner returned Andy to respondent mother and father the next day.

Beginning at the time of Andy's birth, petitioner kept a daily calendar on which she noted information about Andy, including every time that Andy spent the night in her home. She did so because she worried about her son's drug use and believed it was important to document information about Andy.

Petitioner's calendar showed that from 1 December 2010 onward, Andy spent significantly more nights with petitioner than with respondent mother and father. In December 2010, Andy spent 21 nights in petitioner's home. During January 2011, Andy stayed overnight at petitioner's house for 25 nights. Andy spent 24 nights in petitioner's home in February 2011, and another 26 nights at her home in March 2011. In April 2011, Andy stayed overnight at petitioner's home for 26 nights.

In February 2011, respondent father was incarcerated for breaking and entering. Also in February, while respondent father was in prison, respondent mother moved into her own trailer home. Petitioner provided respondent mother with some furnishings for the trailer. When petitioner picked up Andy from respondent mother's trailer, Andy always smelled strongly of cigarettes. On one occasion, when petitioner picked up Andy from respondent mother, Andy "reeked of stench" and was wearing ill-fitting clothes, requiring petitioner to immediately bathe him and properly dress him.

During this time, a member of respondent mother's family called the Carteret County Department of Social Services ("DSS") and reported an incident in which respondent mother excessively shook Andy because he would not stop crying. DSS then became involved and ordered respondent mother and father to enroll in drug rehabilitation programs and submit to random drug testing. As of 19 May 2011, neither respondent had enrolled in a program, and both had failed numerous random drug tests.

On 19 May 2011, petitioner obtained an ex parte custody order for Andy, pursuant to Chapter 50 of the North Carolina General Statutes, that granted petitioner temporary sole custody of Andy and restricted respondent mother and father from visiting or contacting the child in any way. The order provided that it was in Andy's best interests to be in the sole care of petitioner and that there was probable cause to

believe that the ex parte order was necessary to protect Andy's health, welfare, and safety. A 24 May 2011 modification to the order allowed for supervised visitation by respondent mother and father.

In a 3 November 2011 order, the trial court again granted temporary custody to petitioner, although, this time, it was with the consent of respondent mother and father. Pursuant to the November 2011 order, respondent mother and father were each granted two hours supervised visitation twice a week. Respondent mother and father were both ordered to enroll in a drug treatment and counseling program, submit to random drug tests, and enroll in the Family Adjustment Services program offered by DSS.

Respondent mother visited occasionally, but missed many scheduled visitation periods and rarely stayed for the entire two hour period. Respondent mother was prescribed Suboxin and methadone during this period of supervised visitation to assist in her opiate withdrawal. Respondent mother enrolled in a drug treatment program along with respondent father, but respondent father was dismissed from the program after he and respondent mother attempted to sell respondent mother's Suboxin at a counseling session. Although DSS had required respondents to stop living together and to refrain from drug abuse, they continued to live together and each failed random drug tests during the period of supervised visitation.

On 26 May 2012, after just completing a drug treatment program, respondent mother took three Xanax that she got from a family member and drove to Harlowe, North Carolina to buy cocaine. The day after the Harlow incident, 27 May 2012, respondent mother returned to her trailer and got into a fight with respondent father because he refused to give her money to return to Harlowe and buy more cocaine. Respondent mother hit respondent father, causing respondent father to seek emergency treatment for a severe foot wound. Petitioner visited respondents' trailer the day after the fight and saw lots of blood and bloody rags on the floor, as well as a drug pipe and marijuana on the kitchen counter. In addition, the home was "nasty and dirty."

The trial court entered an order on 8 August 2012 terminating respondents' visitation with Andy. The court found that respondent mother "continues to use and abuse cocaine and other opiates." The August 2012 order further found that respondent mother was evicted from her trailer for failing to pay rent for three months; that the trailer was condemned for health and safety reasons, including the roof partially falling in; and that respondent mother had made "numerous"

threats to petitioner, including a 17 July 2012 threat that she would " 'see [petitioner] in hell for what [petitioner had] done.' "

At a 31 July 2012 hearing, respondent mother advised the trial court that she was going to Arizona to stay with a friend and enroll in a 12-month drug rehabilitation program. Prior to that time, respondent mother had called her friend in Arizona and told the friend that respondent mother was going to kill petitioner, Andy, and herself because "if she couldn't have [Andy], nobody else was going to have [Andy] either." In part because of this call, the friend agreed for respondent mother to stay with her in Arizona and to pay for respondent mother's ticket to Arizona.

Respondent mother left for Arizona on 19 August 2012 and, although she was accepted for an inpatient drug treatment program, she enrolled in an out-patient program. Respondent mother missed classes for the program and did not attend alcoholics anonymous/narcotics anonymous meetings or get a job as required by the program. After two months, respondent mother's friend told respondent mother that she either needed to enroll in an inpatient program in Arizona or return to Carteret County. Respondent mother returned to Carteret County the next day.

After returning to Carteret County, respondent mother did not contact petitioner about Andy, even on Andy's 18 November 2012 birthday. In early December, petitioner received a letter from respondent mother stating that respondent mother was in the process of getting a job and would start sending petitioner $200.00 a month to care for Andy. However, other than a $50.00 check from respondent mother's grandmother and a $30.00 money order from respondent mother, petitioner received no money from respondent mother.

During this time, respondent mother began a romantic relationship with a convicted felon whom she believed, in her own words, to be the "biggest heroin runner in Beaufort." Respondent mother used the man's address, went out of town with him, and kept her belongings at his residence until a 20 February 2013 incident in which the man pointed a gun at respondent mother. On 7 March 2013, respondent mother started living with respondent father at respondent mother's grandmother's home.

On 2 January 2013, petitioner filed a petition to terminate respondent mother's parental rights. At the TPR hearing, respondent mother admitted that she had issues with addiction and that, at the time of the hearing, she was incapable of caring for Andy.

On 1 April 2013, the trial court entered an order finding that it had jurisdiction over the TPR proceeding pursuant to N.C. Gen. Stat.

§ 7B-1103(a)(5) since Andy had resided continuously with petitioner for the two years preceding the filing of the petition. The court further found that grounds existed to terminate respondents' parental rights because (1) respondents left Andy in placement outside their home for more than 12 months without showing reasonable progress in correcting the conditions that led to his removal, (2) Andy was neglected, and (3) Andy was a dependent juvenile and there was no indication that either respondent would be able to care for him within a reasonable period of time. The court then found that termination of both respondents' parental rights was in Andy's best interests and would facilitate Andy's adoption by petitioner and, accordingly, ordered respondents' rights terminated. Respondent mother timely appealed to this Court.[2]

I

[1] Respondent mother first argues that the trial court lacked subject matter jurisdiction over the TPR proceeding because petitioner lacked standing to file the TPR petition. This Court has recognized that "standing is 'jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re E.T.S.*, 175 N.C. App. 32, 35, 623 S.E.2d 300, 302 (2005) (quoting *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004)). Whether petitioner had standing is a legal issue that this Court reviews de novo. *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 885 (2002).

Our General Assembly has prescribed by statute who has standing to file a TPR petition. N.C. Gen. Stat. § 7B-1103(a) provides:

> (a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> (1) Either parent seeking termination of the right of the other parent.
>
> (2) Any person who has been judicially appointed as the guardian of the person of the juvenile.
>
> (3) Any county department of social services, consolidated county human services agency,

2. Although the order also terminated the rights of respondent father, he is not a party to this appeal.

or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

(4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.

(5) *Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.*

(6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

(Emphasis added.)

The only applicable basis for petitioner to have standing in this case was the ground the trial court concluded existed: N.C. Gen. Stat. § 7B-1103(a)(5). The trial court found that "[t]he minor child has resided continuously with the Petitioner since November 27, 2010." Based on that finding, the court concluded that "[p]ursuant to G.S. 7B-1103(a)(5), the Petitioner has standing to bring the Petition for termination of parental rights, in that the minor child has resided continuously with Petitioner for a period exceeding two (2) years prior to filing the Petition." Respondent mother challenges both this finding and the conclusion based on it.

Since petitioner filed the TPR petition on 2 January 2013, the relevant period -- two years preceding the filing of the petition -- ran from 2 January 2011 until 1 January 2013. Although respondent mother does not dispute that Andy resided with petitioner continuously after the trial court entered the 19 May 2011 ex parte temporary custody order giving petitioner sole custody of Andy, respondent mother contends that the court erred in finding that Andy continuously resided with petitioner

prior to 19 May 2011. Consequently, we must determine whether the trial court properly determined that Andy continuously resided with petitioner from 2 January 2011 to 19 May 2011.

Initially, we note that while the trial court made the ultimate finding of fact necessary to establish that petitioner had standing, the trial court did not make detailed supporting findings because respondent mother did not raise the issue at trial. The record, however, contains competent evidence supporting the ultimate finding of fact that Andy resided continuously with petitioner for the two-year period prior to the filing of the TPR petition.

Respondent mother first argues that the trial court's conclusion was erroneous because, prior to 19 May 2011, respondent mother had legal custody of Andy and could, therefore, remove Andy from petitioner's home at any point. In applying N.C. Gen. Stat. § 7B-1103(a)(5), this Court has, however, previously held that "[t]he person or persons with whom legal custody lies during [the two-year] time period is irrelevant." *In re E.T.S.*, 175 N.C. App. at 38, 623 S.E.2d at 303. *See also id.* (explaining that "statute confers standing on petitioners based on their two year relationship with the child, which is in no manner related to the respondent or her relationship with the child during that two year period"); *In re B.O.*, 199 N.C. App. 600, 603, 681 S.E.2d 854, 857 (2009) (analyzing whether petitioners, who had temporary custody of child, had standing under N.C. Gen. Stat. § 7B-1103(a)(5) by reviewing time during which child "lived with" petitioners). We are bound by this Court's holding in *In re E.T.S.*

The plain language of N.C. Gen. Stat. § 7B-1103(a)(5) requires (1) that a child have "resided" with the petitioner and (2) that he did so "continuous[ly]" for two years. It is not entirely clear whether respondent mother challenges the trial court's conclusion that Andy "resided" with petitioner from 2 January 2011 to 19 May 2012. Respondent mother's principle brief appears to equate "residing" with overnight stays, thereby implicitly conceding that Andy resided with petitioner between 2 January 2011 and 19 May 2011 on the nights he spent at petitioner's house. Respondent mother then proceeds to argue that because Andy sometimes did not stay with petitioner, Andy did not reside continuously with petitioner. However, respondent mother's reply brief asserts that prior to 19 May 2011, Andy resided with respondent mother but "often spent the night with Petitioner."

Assuming without deciding that respondent mother has argued that Andy did not reside with petitioner, this Court, in analyzing the

requirement that a child reside with a petitioner for the statutory period, has looked to the period of time in which a child "lived with" the petitioner. *See In re B.O.*, 199 N.C. App. at 603, 681 S.E.2d at 857; *In re Ore*, 160 N.C. App. 586, 588, 586 S.E.2d 486, 487 (2003) ("Since the minor child lived with petitioner for the two years next preceding filing the motion, she was a proper person to file the petition."). To determine what the General Assembly intended when requiring that the child "reside" — or, as this Court has held, live with – the petitioner, we look to the analogous context of child support payments.

The General Assembly has directed the Conference of Chief District Judges to create the North Carolina Child Support Guidelines to be used in calculation of child support payments in North Carolina. *See* N.C. Gen. Stat. § 50-13.4(c1) (2011) ("Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent . . . ."). The Child Support Guidelines provide that "[a] parent's presumptive child support obligation . . . must be determined using one of the attached child support worksheets." Form AOC-A-162, Rev. 1/11. With respect to the worksheets, the guidelines provide:

> Use Worksheet A when one parent (or a third party) has primary physical custody of all of the children for whom support is being determined. A parent (or third party) has primary physical custody of a child if the child *lives with* that parent (or custodian) for *at least 243 nights* during the year. Primary physical custody is *determined without regard to whether a parent has primary, shared, or joint legal custody of a child*. . . .
>
> Use Worksheet B when (a) the parents share custody of all of the children for whom support is being determined, or (b) when one parent has primary physical custody of one or more of the children and the parents share custody of another child. Parents share custody of a child if the child *lives with* each parent for *at least 123 nights* during the year and each parent assumes financial responsibility for the child's expenses during the time the child *lives* with that parent. A parent does not have shared custody of a child when that parent has visitation rights that allow the child to spend *less than 123 nights* per year with the parent and the other parent has primary physical custody of the child. Shared custody is *determined without*

> *regard to whether a parent has primary, shared, or joint legal custody of a child. . . .*

Id. (emphasis added).

Thus, under the guidelines promulgated pursuant to N.C. Gen. Stat. § 50-13.4(c1), a child is determined to "live[] with" a parent or third party based upon the number of nights a child spends with that person per year (without regard to whether the parent or third party has primary, shared, or joint legal custody of a child). *Id.*

It is reasonable to conclude similarly for purposes of N.C. Gen. Stat. § 7B-1103(a)(5) that whether a child resides with or lives with a particular person depends on the number of nights that the child spends with that person. Accordingly, we hold that the person with whom a child "resided" as used in N.C. Gen. Stat. § 7B-1103(a)(5) refers to the person with whom a child spent his or her nights.

In this case, respondent mother does not challenge on appeal petitioner's evidence that in 2011, Andy stayed with petitioner overnight for 25 nights in January, 24 nights in February, 26 nights in March, 26 nights in April, and for 16 of the 18 nights from 1 May 2011 to 19 May 2011. In other words, Andy spent an average of 85% of his nights with petitioner. Respondent mother cannot, therefore, reasonably contend that Andy did not reside with petitioner during the period from January 2011 through May 2011. Although respondent mother argues on appeal that Andy was merely visiting petitioner on the nights he stayed with her, the trial court reasonably concluded that Andy was living or residing with petitioner and only visiting respondent mother.

The question remains whether Andy resided with petitioner "continuously" from 2 January 2011 to 19 May 2011. Respondent mother first contends that N.C. Gen. Stat. § 7B-1103(a)(5) requires that Andy must have had "uninterrupted" overnight stays with petitioner for the relevant period in order to have standing.

We believe that resolution of this issue is guided by this Court's analysis when deciding a child's home state for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). Under the UCCJEA, " '[h]ome state' " is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2011). "A period of temporary absence of any of the mentioned persons is part of the period." *Id.*

In *Chick v. Chick*, 164 N.C. App. 444, 451-52, 596 S.E.2d 303, 309 (2004), this Court adopted a totality of the circumstances test for the determination whether a period of absence was temporary under the UCCJEA home state statute and held that when the children had lived in Vermont for 11 months preceding the filing of the action, barring a six-week period during which they lived in North Carolina, Vermont was the children's home state. Similarly, in *Hammond v. Hammond*, 209 N.C. App. 616, 633-34, 708 S.E.2d 74, 85-86 (2011), this Court held that the children's home state was North Carolina, despite the fact that the children had lived in Japan for nearly the entire six months immediately preceding the action, since the children lived in North Carolina for nearly two years prior to leaving for Japan and since the father believed, in moving to Japan, that the family would return to North Carolina.

Similarly, here, we do not believe that the General Assembly's requirement under N.C. Gen. Stat. § 7B-1103(a)(5) that a child reside with a person "for a continuous period of two years" requires that the child spend every single night with the person for that period. Just as a child can live with a parent in a state for "six consecutive months" despite extended absences from the state under the UCCJEA, N.C. Gen. Stat. § 50A-102(7), a child can reside continuously with a person for the purposes of N.C. Gen. Stat. § 7B-1103(a)(5) despite spending a limited number of nights away from that person's home.

The evidence in this case showed that in 2011, Andy was away from petitioner for only six nights in January, four nights in February, five nights in March, four nights in April, and two of the 18 nights from 1 May 2011 to 19 May 2011. In other words, Andy spent the night elsewhere on a very limited number of occasions. Based on this evidence, the trial court could properly determine that Andy resided with petitioner "for a continuous period of two years or more next preceding the filing of the petition or motion." *Id.*

Respondent mother nonetheless argues that this Court should adopt a test that looks only to the intention of the parties -- specifically to respondent mother's intention -- in determining whether Andy resided with petitioner continuously during the relevant period. Respondent mother cites *Grindstaff v. Byer*s, 152 N.C. App. 288, 567 S.E.2d 429 (2002), and *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2000), in support of her argument. However, both of those cases refer to the intent of the parties when construing the terms of voluntarily-executed custody agreements, or contracts, between the parties. *See Grindstaff*, 152 N.C. App. at 296, 567 S.E.2d at 434; *Patterson*, 140 N.C. App. at 96-97, 535 S.E.2d at 378. Although it is true that " '[w]henever a court is

called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution[,]' " *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 18 (2003) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409–10, 200 S.E.2d 622, 624 (1973)), respondent mother has pointed to no equivalent principle in this non-contract context. In any event, given the evidence in this case, the trial court could properly conclude that the fact respondent mother allowed Andy to spend the overwhelming majority of his nights with petitioner indicated that respondent mother intended for Andy to reside with petitioner and visit respondent mother.

In sum, we hold that the evidence supported the trial court's ultimate finding that Andy resided continuously with petitioner for the two-year period immediately preceding the filing of the petition. Consequently, petitioner had standing to file the TPR petition under N.C. Gen. Stat. § 7B-1103(a)(5), and the trial court did not err in concluding that it had subject matter jurisdiction over the action.

II

[2] Respondent mother next argues that the trial court erred by failing to appoint Andy a guardian ad litem ("GAL") for the TPR proceeding. N.C. Gen. Stat. § 7B-1108(b) (2011) provides that when a parent files a response to a TPR petition or motion that "denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601 [providing for appointment of GALs for juveniles in abuse, neglect, and dependency proceedings]."

Here, respondent mother filed a response to the petition denying many of the material allegations of the petition and denying that grounds existed to terminate her parental rights. The petition was not filed by a GAL, and no GAL had previously been appointed for Andy in an abuse, neglect, and dependency proceeding. The trial court was, therefore, required to appoint Andy a GAL under N.C. Gen. Stat. § 7B-1108(b).

However, respondent mother failed to object at trial to the failure of the trial court to appoint the child a GAL. This Court has previously held that in order to preserve for appeal the argument that the trial court erred by failing to appoint the child a GAL, a respondent must object to the asserted error below. *See In re Fuller*, 144 N.C. App. 620, 623, 548 S.E.2d 569, 571 (2001) (discussing "respondent's noncompliance with our rules" by failing to object to lack of GAL at trial level); *In re Barnes*,

97 N.C. App. 325, 326, 388 S.E.2d 237, 238 (1990) (holding "respondent failed to comply with our Rules of Appellate Procedure" because "there was no objection or exception made at trial to the court's failure to appoint a guardian ad litem" for child). We are bound by these holdings, and respondent mother has, therefore, failed to preserve this issue for appeal. N.C.R. App. P. 10(a)(1).

We are aware that in both *Fuller* and *Barnes*, this Court invoked Rule 2 of the Rules of Appellate Procedure in order to reach the issue whether the trial court erred by failing to appoint a GAL for the child and, in both cases, found prejudicial error in the failure to appoint a GAL. *In re Fuller*, 144 N.C. App. at 623, 548 S.E.2d at 571; *In re Barnes*, 97 N.C. App. at 326-27, 388 S.E.2d at 238-39. However, there is no indication in those cases, as there is here, that the appealing respondent had repeatedly chosen substance abuse over the child's welfare throughout the child's life and had almost entirely abdicated responsibility for the child to the petitioner. *See In re Fuller*, 144 N.C. App. at 620, 548 S.E.2d at 569; *In re Barnes*, 97 N.C. App. at 326-27, 388 S.E.2d at 238-39.

Rule 2 of the Rules of Appellate Procedure provides that "[t]o prevent manifest injustice to a party . . . either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules . . . ." We do not believe, under the facts of this case, that suspension of rules is required to prevent manifest injustice to respondent mother or Andy. We, therefore, affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

IN RE FORECLOSURE OF WEBB

[231 N.C. App. 67 (2013)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY BURL WEBB, JR. AND LEIGH B. WEBB DATED JANUARY 6, 2006 AND RECORDED IN BOOK 19879 AT PAGE 177 IN THE MECKLENBURG COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA 13-324

Filed 3 December 2013

Parties—foreclosure action—trustee—holder of the note—appeal to superior court

The superior court erred in a foreclosure proceeding by an appeal from an assistant clerk's order on the basis that U.S. Bank was not a party to the proceeding. Where the trustee of a note institutes a foreclosure proceeding and the clerk enters an order in favor of the borrower, the holder of the note who did not appear at the hearing before the clerk has standing to pursue the appeal of the clerk's order in superior court. As U.S. Bank qualified as a real party in interest, U.S. Bank should have been allowed to prosecute the appeal of the assistant clerk's order in superior court.

Appeal by Petitioner from order entered 11 January 2013 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 2013.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and Taylor T. Haywood, for Petitioner.

The Law Office of James W. Surane, PLLC, by James W. Surane, for Respondents.

Shapiro and Ingle, LLP, by Jeffrey A. Bunda, for the Substitute Trustee.

DILLON, Judge.

Because the trial court erroneously found that U.S. Bank ("Petitioner") was not a party to the action and improperly ordered the case dismissed without prejudice, we reverse the order and remand the case to the trial court, holding that U.S. Bank is a real party in interest to this action.

I: Facts and Procedural History

On 6 January 2006, Burl Webb, Jr., ("Borrower") executed a promissory note ("the Note") in the amount of $400,000, payable originally to Wells Fargo Bank, N.A., in order to finance the purchase of a home ("the subject property"). The Note was secured by a Dead of Trust executed by Borrower and Leigh B. Webb (together, "Respondents"). Wells Fargo endorsed the Note "in blank" and then gave physical possession of the Note to U.S. Bank. Subsequently, Borrower defaulted on the Note, and the Note was accelerated.

On 28 June 2011, the Substitute Trustee under the Deed of Trust filed a Notice of Hearing of Foreclosure of Deed of Trust (the "Notice of Hearing") with the Mecklenburg County Clerk of Court, which listed U.S. Bank as the "present holder of the debt evidenced in the Deed of Trust."[1] On 15 March 2012, an Assistant Clerk of Superior Court of Mecklenburg County conducted a hearing on the matter, pursuant to N.C. Gen. Stat. § 45-21.16 (2011). Counsel for Respondents and the Substitute Trustee were present at the hearing; however, no counsel appeared on behalf of U.S. Bank. At the hearing, the Assistant Clerk dismissed the action with prejudice because the "[Substitute Trustee] failed to show valid debt by lack of showing holder of note." On 21 March 2012, U.S. Bank timely appealed to superior court pursuant to N.C. Gen. Stat. § 45-21.16(d1). On 29 November 2012, a hearing was conducted in Mecklenburg County Superior Court, at which counsel for U.S. Bank and Respondents were present, but counsel for the Substitute Trustee was not. At the close of U.S. Bank's evidence, Respondents moved for "a directed verdict of sorts[,]" arguing that "U.S. Bank is not a party to this action" and that the "trustee didn't even appear today to present evidence." The trial court, thereafter, granted a motion to dismiss without prejudice, finding that "the appeal was brought from the substitute trustee's action[,]" "that the substitute trustee is not here represented[,]" and that "the holder [of the Note] can't go forward because the holder hasn't intervened or become a party" to the proceeding.

The trial court entered an order of dismissal without prejudice on 11 January 2013. The order found that "[t]he notice of appeal was filed by the Substitute Trustee." Further, the order concluded that U.S. Bank was not the petitioner in the special proceeding and that the Substitute Trustee, being a party to the special proceeding, was required

1. Petitioner had maintained continuous possession of the Note from the time it received it from Wells Fargo in 2006 through 29 November 2012, when Petitioner presented the Note to the trial court.

to introduce evidence to prove its case. The trial court concluded that "[h]aving failed to appear at the November 29, 2012 appeal hearing, the Substitute Trustee did not establish its right to foreclose upon the Deed of Trust pursuant to N.C. Gen Stat. § 45-21.16" and, thereafter, dismissed the case without prejudice. From this order, Petitioner appeals.

U.S. Bank's primary issue on appeal is whether the trial court erred in dismissing the foreclosure proceeding on the basis that U.S. Bank was not a party to the proceeding. It is well established that "only the real party in interest can prosecute a claim." *Crowell v. Chapman*, 306 N.C. 540, 544, 293 S.E.2d 767, 770 (1982). Since "[s]tanding concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss[,]" "[o]ur review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*[.]" *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted).

The specific question before this Court is - where the trustee of a note institutes a foreclosure proceeding and the Clerk enters an order in favor of the borrower — does a holder of the note who did not appear at the hearing before the Clerk have standing to pursue the appeal of the Clerk's order in Superior Court. We addressed this issue in *In Re Foreclosure of a Deed of Trust by Thomas*, 2009 N.C. App. LEXIS 20, 09 WL 26702, 2 (2009) (COA08-287). Because *Thomas* is an unpublished opinion, we are not bound by its holding; however, because we find the rationale persuasive, we adopt its rationale and holding in this case. In *Thomas*, the borrower argued that "only a trustee may appeal a clerk's adverse ruling to superior court," specifically contending that an appeal by the holder of the note should be dismissed for lack of "standing and subject matter jurisdiction." *Id.* Citing a number of cases from our Supreme Court, *e.g.*, *Energy Investors Fund, L.P. v. Metric Contractors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000), and *Parnell v. Nationwide*, 263 N.C. 445, 139 S.E.2d 723 (1965), this Court concluded in *Thomas* that the holder of the note was the real party in interest, and, therefore, could prosecute the appeal of the clerk's adverse ruling in superior court. *Id.* We noted in *Thomas* that "in one of this jurisdiction's leading foreclosure cases" from our Supreme Court, the "appeal was taken from the clerk of superior court to a superior court judge by the beneficiary of a deed of trust, not the trustee." *Id.* (citing *In re Foreclosure of Deed of Trust of Michael Weinman Assocs.*, 333 N.C. 221, 424 S.E.2d 385 (1993)).

In the case *sub judice*, U.S. Bank is the holder of the Note and the party to which repayment of the balance is owed. The disbursed funds

were secured by the Deed of Trust on the subject property; and, upon default, repayment of the funds was accelerated in accordance with the Note. U.S. Bank was injured by the judgment in this case since they were not able to proceed with the foreclosure as a remedy to recover the balance of the disbursed funds. Therefore, we find that the trial court erred in dismissing the proceeding because U.S. Bank qualifies as a real party in interest. U.S. Bank should be allowed to prosecute the appeal of the Assistant Clerk's order in superior court.

As to U.S. Bank's further arguments regarding the sufficiency of the evidence to allow the foreclosure to proceed, we remand to the trial court for that determination.

REVERSED and REMANDED.

Judge BRYANT and Judge STEPHENS concur.

DONALD R. PODREBARAC, Plaintiff
v.
HORACK, TALLEY, PHARR, & LOWNDES, P.A. and GENA G. MORRIS, Defendants

No. COA13-534

Filed 3 December 2013

Statutes of Limitation and Repose—legal malpractice—discovery of defect

The trial court erred by granting defendant's motion to dismiss plaintiff's complaint for legal malpractice under Rule 1A-1,Rule 12(b)(6) based on the statute of limitations. The alleged malpractice included failing to have the signatures on a mediation agreement notarized; liberally construing the complaint and applying the discovery rule to determine the earliest that plaintiff could reasonably have been expected to discover the defect, the complaint was filed within the time allowed.

Appeal by plaintiff from Order entered on or about 29 November 2012 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 23 September 2013.

Jackson Law Group, by Gary W. Jackson, for plaintiff-appellant.

Poyner Spruill LLP, by Cynthia L. Van Horne, for defendants-appellees.

STROUD, Judge.

Donald Podrebarac ("plaintiff") appeals from an order entered 29 November 2012 dismissing his malpractice complaint against Horack, Talley, Pharr, & Lowndes, P.A. and Gena Morris ("defendants") as barred by the statute of limitations. For the following reasons, we reverse.

I. Background

Plaintiff and Buntin Podrebarac were married in October 1987 and separated in December 2007. Plaintiff retained defendants and Perry, Bundy, Plyler, Long, & Cox, LLP ("Perry Bundy") to represent him in an action seeking equitable distribution of marital property. Plaintiff, Ms. Podrebarac, and their respective attorneys participated in a mediation session on 14 January 2009. The parties failed to reach an agreement at the first session, but agreed to a second mediation session on 29 April 2009. The second mediation session resulted in a three-page document entitled "Mediation Stipulations," which was signed by the parties and the attorneys but not notarized; the stipulations were contained in a document with the case caption, signed by the trial court, and filed with the Clerk of Court. As alleged by Plaintiff:

> 17. The Mediation Stipulation, at paragraph 12, provided that the property settlement and alimony provisions, as agreed upon at the mediated settlement conference, would be formalized in an Alimony and Property Settlement Agreement, which the parties agreed would be prepared by Ms. Podrebarac's counsel and submitted to Plaintiff and Defendants for review.
>
> 18. On May 1, 2009, the Honorable Christopher W. Bragg entered the Mediation Stipulations, which were to have resolved all issues between the parties.

As agreed in the stipulations, counsel for Ms. Podrebarac drafted an Alimony and Property Settlement Agreement ("Draft Settlement Agreement") based upon the stipulations, but then Ms. Podrebarac refused to sign it. Nevertheless, prior to January of 2010, the parties

began complying with the property division outlined in the "Mediation Stipulations" and continued to act in accordance with the stipulations until at least April 2012.[1]

In early 2012, defendants withdrew as counsel for plaintiff. Counsel for Ms. Podrebarac withdrew in early 2011. In May 2011, Ms. Podrebarac retained new counsel, who asserted that the mediation stipulations were not enforceable. Plaintiff also retained new counsel and moved to enforce the stipulations as a "mediated settlement agreement." Plaintiff's complaint alleges the following:

> 28. On September 26, 2011, Plaintiff's new counsel, Dorian Gunter, moved for enforcement of the Mediated Settlement Agreement.
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> 29. On April 13, 2012, Mr. Brooks and Ms. Woodruff filed a Motion to Dismiss Plaintiff's Motion to Enforce Mediated Settlement Agreement. The basis for the Motion was stated as follows:
>
> > The Motion to Enforce Mediated Settlement Agreement fails on its face and should be summarily dismissed because the Mediated Stipulations filed May 1, 2009, totally fail to meet the requirement of N.C.G.S. § 50-20(d) for a stipulation settling equitable distribution. To settle equitable distribution with a stipulation, the stipulation must absolutely be notarized. N.C.G.S. § 50-20(d).... The other option would have been to have had the parties sworn in open court under *McIntosh* (*McIntosh v. Mcintosh*, 74 N.C. App. 554, 328 S.E.2d 600). The procedure under *McIntosh* was not followed either.
>
> These motions were heard before District Court Judge Hunt Gwyn on April 29, 2012.
>
> 30. On April 29, 2012, Judge Hunt Gwynn granted Ms. Podrebarac's Motion to Dismiss on the basis that the parties' signatures on the Mediation Stipulations had

1. The stipulations also included provisions regarding alimony and child support, which are not at issue in this appeal, but the parties apparently acted in compliance with these provisions as well.

evidently not been notarized pursuant to N.C.G.S. §50-l0 or 50-20(d).[2]

Plaintiff then filed the present action against defendants, as well as Perry Bundy, and Richard Long, Jr. in Mecklenburg County on 14 June 2012, alleging professional negligence in the preparation of the mediation stipulations. Plaintiff alleged that defendants breached their duty to plaintiff by, *inter alia*, failing to have the signatures on the stipulations notarized, failing to advise him that the stipulations were not enforceable without such notarization, failing to take the necessary steps to have the stipulations notarized between the day that the stipulations were signed and the date they withdrew as counsel, and omitting the biggest asset in the marital estate, a business called Happy Times Discount Beverage, Inc., from the stipulations. Plaintiff attached a copy of the Mediation Stipulations, the Draft Settlement Agreement, and invoices for attorney services rendered to Ms. Podrebarac between December 2008 and June 2009 as exhibits to the complaint. Liberally construing the complaint, plaintiff has alleged that the "mediation stipulations" were intended to be a complete and final settlement agreement, but that defendants failed to ensure that the "Mediation Stipulations" were enforceable as a settlement agreement.

All defendants moved to dismiss the complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2011). The trial court granted defendants' motion by order entered 29 November 2012 on the basis that plaintiff's claims are barred by the applicable statute of limitations. Plaintiff filed notice of appeal on 27 December 2012, but also filed a voluntary dismissal of his claims against Richard Long, Jr. and Perry Bundy on 4 April 2013.

II. Motion to Dismiss

Plaintiff argues that the trial court erred in concluding that his complaint was barred by the applicable statute of limitations. We agree.

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2. The record in the case does not include Judge Gwynn's actual order, so for purposes of this opinion and because we are reviewing an order allowing a motion to dismiss, we must treat plaintiff's characterization of Judge Gwynn's ruling on the motion as alleged in the complaint as correct and true. We take judicial notice that plaintiff did appeal the trial court's ruling on his motion to enforce the "mediated settlement agreement," currently docketed in this Court as *Podrebarac v. Podrebarac* (COA13-779). That case, however, is separate from the one before us. We will consider the alleged ruling as the actual and complete ruling of the District Court for purposes of this opinion, but we caution that this opinion should not be construed as having any legal effect upon the pending appeal from the District Court's order.

A. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (citations and quotation marks omitted), *disc. rev. denied and app. dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

"A legal malpractice action is subject to a three-year statute of limitations. N.C.G.S. § 1-15(c) (2001). The action 'accrue[s] at the time of . . . the last act of the defendant giving rise to the cause of action.' N.C.G.S. § 1-15(c)." *Bolton v. Crone*, 162 N.C. App. 171, 173, 589 S.E.2d 915, 916 (2004) (citation omitted). "Continuing representation of a client by an attorney following the last act of negligence does not extend the statute of limitations." *Chase Development Group v. Fisher, Clinard & Cornwell, PLLC*, 211 N.C. App. 295, 304, 710 S.E.2d 218, 225 (2011) (citation omitted).

> However, if the claimant's loss is "not readily apparent to the claimant at the time of its origin, and . . . is discovered or should reasonably be discovered by the claimant two or more years after . . . the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made."

Bolton, 162 N.C. App. at 173, 589 S.E.2d at 916 (quoting N.C. Gen. Stat. §1-15(c)).

Plaintiff argues that even assuming his cause of action accrued on the date that the stipulations were signed, 29 April 2009, his loss was not apparent on that date. Liberally construing the complaint and taking all of the allegations in the complaint as true, we agree.

Plaintiff has alleged that he was unaware that the signatures on a mediated settlement agreement had to be notarized to be enforceable. Plaintiff claims that he did not discover that the agreement was unenforceable as a settlement agreement until 29 April 2012, when the District Court so held.[3]

Although defendants correctly point out that generally a person is expected to read and understand the documents he signs, *see Isley v. Brown*, 253 N.C. 791, 793, 117 S.E.2d 821, 823 (1961), that does not necessarily mean that it is reasonable to expect him to understand that the District Court would refuse to enforce the intended "mediated settlement agreement" unless the signatures were notarized or to second guess the alleged assurances of his attorneys, *see Thorpe v. DeMent*, 69 N.C. App. 355, 359, 317 S.E.2d 692, 695 (noting that the plaintiff was a "layman" who became aware of his loss when his attorneys informed him of their error, but affirming dismissal of the complaint because he was so informed within two years of the last act giving rise to his claim), *aff'd per curiam*, 312 N.C. 488, 322 S.E.2d 777 (1984).

The earliest that plaintiff could reasonably have been expected to discover that defect was on 13 April 2012, when Ms. Podrebarac's attorney filed a motion to "dismiss" his motion to enforce the "mediated settlement agreement." This date was more than two years after the last act giving rise to the claim—the agreement was signed on 29 April 2009 and filed with the trial court on 1 May 2009. Therefore, the discovery rule applies. The present complaint was filed on 14 June 2012, well within one year of 13 April 2012, as required by N.C. Gen. Stat. § 1-15(c). Therefore, the complaint was not barred by the statute of limitations.

Although it is certainly possible that discovery will reveal that plaintiff was or ought to have been aware of his injury before that date, or

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3. We reiterate that we are taking all of the allegations of the complaint as true, including his characterization of the "Mediation Stipulations" as an intended mediated settlement agreement. We cannot address the correctness of the trial court's determination in this case or whether the "Mediation Stipulations" may have been enforceable by some other avenue—that issue will be decided in the appeal from that order. The parties have only briefed the issue of the statute of limitations and the trial court explicitly based its order on that issue, not on the sufficiency of the complaint to state a claim.

that plaintiff's claim is defective for some other reason, we conclude that the time bar of the statute of limitations is not apparent from the face of the complaint or the attached exhibits. We cannot say that the complaint "discloses some fact that necessarily defeats the plaintiff's claim." *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 429 (citation and quotation marks omitted). Therefore, we must reverse the trial court's order dismissing plaintiff's action and remand for further proceedings.

III. Conclusion

We hold that plaintiff's complaint, liberally construed, does not disclose facts necessary to conclude that it is barred by the applicable statute of limitations. Therefore, we reverse the trial court's order dismissing the action and remand for further proceedings.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge GEER concur.

JOANN C. SIMON, PLAINTIFF
v.
BRIAN R. SIMON, DEFENDANT

No. COA13-249

Filed 3 December 2013

1. Divorce—equitable distribution—value and classification of stock

The trial court did not err in an equitable distribution case by failing to make a finding as to the value of the TSCG C stock on the date of distribution. There is no statutory requirement under N.C.G.S. § 50-21(b) that marital property be valued on the date of distribution.

2. Divorce—equitable distribution—classification of profit distributions

The trial court's classification in an equitable distribution case of the 2006 profit distributions received by defendant post separation as divisible property was remanded for further findings of fact. Unless defendant could sufficiently quantify the active post-date of separation component, the 2006 profit distribution should be classified as divisible property and distributed to plaintiff accordingly.

Plaintiff's argument as to the 2007 profit distribution was without merit because her interest in the TSCG C stock ended on the date of separation and the parties were separated for the entirety of 2007.

3. Divorce—equitable distribution—commission distribution

The trial court's findings of fact and conclusions of law in an equitable distribution case were insufficient to support its denial of plaintiff wife's request to find all of the commissions presented at trial to be divisible. The trial court's decision to deny the admission of business records was error. Thus, this issue was remanded to the trial court for further findings of fact and a possible recalculation and reclassification of property. With regard to the classification of commissions earned after the date of separation, the trial court was instructed to make further findings of fact, and it was to consider the payment journals plaintiff attempted to enter into evidence at trial.

4. Attorney Fees—failure to award—reasonable amount

The trial court erred in an equitable distribution case by failing to award plaintiff wife reasonable attorney fees. This issue was remanded for a determination of reasonable attorney fees to be awarded to plaintiff.

5. Costs—denial of expert witness fees—travel expenses —testimony

The trial court did not err in an equitable distribution case by denying plaintiff wife's request for $6,651.40 for the costs associated with the travel expenses and testimony of certain expert witnesses.

Appeal by plaintiff from orders entered 12 January 2012, 8 August 2012, and 20 September 2012 by Judge Edward L. Hedrick, IV in Iredell County District Court. Heard in the Court of Appeals 11 September 2013.

HAMILTON STEPHENS STEELE & MARTIN, PLLC, by Amy S. Fiorenza, for plaintiff.

No brief filed for defendant.

ELMORE, Judge.

Joanne C. Simon (plaintiff) asserts that the trial court erred in 1) failing to properly classify property, 2) valuing certain marital and divisible marital property, and 3) declining to award her attorney's fees and

additional costs. Portions of the trial court's order are vacated, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

I. Background

Plaintiff and Brian R. Simon (defendant) were married 30 March 1985 and divorced on 8 May 2008. Two children were born of the marriage. The parties separated on 16 September 2006. On 1 October 2007, plaintiff filed a complaint seeking, *inter alia*, temporary and permanent child custody, temporary and permanent child support, post-separation support, alimony, and equitable distribution of marital property.

On 12 January 2011, the trial court entered judgment on plaintiff's claims. It found that that an unequal distribution of marital property to plaintiff was equitable and awarded plaintiff $12,220 per month in alimony and $4,200 per month in child support.

Early in the parties' marriage, plaintiff earned a Bachelor's degree and worked in the field of commercial interior architecture earning $20,000 to $30,000 per year. In the 1990s defendant began working for the Shopping Center Group, Inc. as a salesman; he earned approximately $250,000 in 1993. In 1993, plaintiff stopped working to help defendant with administrative tasks related to his business. Shortly thereafter, plaintiff stayed home after the birth of the parties' first child. During the late 1990s to early 2000s, the Shopping Center Group of the Carolinas, a division of the Shopping Center Group, Inc., grew in the number of offices and employees. In 2002 the company restructured, and the Shopping Center Group, LLC (the Group) was formed. Defendant served as President of the Group from December 2004 to February 2008. As a shareholder of the Carolinas division, defendant received year-end profit distributions from the Group as part of his compensation. The trial court valued his shares of company stock (TSCG C stock) at $832,000 on the parties' date of separation.

In February 2008, defendant was terminated for malfeasance after having an inappropriate relationship with a company associate. As a result, defendant was required to sell the TSCG C stock at book value. On 7 March 2008 (the date of distribution), defendant sold the stock for $60,620.55; he was paid approximately $12,000 and was given a note for $48,496.44 plus interest at 8 percent annually. Defendant was terminated approximately three years short of his retirement. Should he have retired from the company, the buy-back value of his stock was estimated to be in the millions of dollars. After his termination, defendant

continued to work in the same field under the monikers of his companies HRS Retain and HRS Limited.

Plaintiff first appealed to this Court on 7 September 2012, while her claims for attorneys' fees and costs were pending. On 20 September 2012, the trial court denied her claim for attorneys' fees and granted her certain litigation costs. Plaintiff filed a second Notice of Appeal on 24 September 2012; she appealed: (1) the Equitable Distribution, Alimony and Permanent Child Support Order entered 12 January 2012, (2) the Order Re: the parties' Rule 59/60 motions entered 8 August 2012, (3) the Order on Plaintiff's Claim for Attorneys' Fees and Costs entered 20 September 2012, and (4) any intermediary orders affecting these Orders. Plaintiff's appeal is properly before us for our review. *See Duncan v. Duncan*, ___ N.C. ___, 742 S.E.2d 799 (2013).

II. Standard of Review

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute N.C.G.S. §50-20(c)[], will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted). This is a "generous standard of review," *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011); however, the trial court must still comply with the three step analysis set forth in N.C. Gen. Stat. § 50-20(c):

> First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

Smith v. Smith, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202-03 (1993) (citations omitted), r*ev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

> The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible

> property—collectively termed distributable property—in order that a reviewing court may reasonably determine whether the distribution ordered is equitable. In fact, to enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation.* In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.

Robinson, 210 N.C. App. at 323, 707 S.E.2d at 789 (citations and quotations omitted) (emphasis in original). Marital property is to be valued as of the date of separation and is defined to include "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties[.]" N.C. Gen. Stat. § 50-20(b)(1) (2011). Divisible property includes all "appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution," unless that appreciation or diminution in value is the direct result of the post-separation actions or activities of one spouse. N.C. Gen. Stat. § 50-20(b)(4) (2011). "[A]ll appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original).

III. Failure to Classify Property

In plaintiff's first three arguments, she contends that the trial court erred by not making findings of fact regarding divisible property, by not correctly valuing divisible property, and by incorrectly classifying property as defendant's separate property. We agree with plaintiff on several of her arguments, but disagree as to others.

A. Value and Classification of Stock

[1] Plaintiff's first argument is twofold. First, she avers that the trial court erred by failing to make a finding as to the value of the TSCG C stock on the date of distribution; according to plaintiff, that value is $960,000. Given this valuation, plaintiff next argues that the trial court

erred in failing to classify the $128,000 increase in value from the date of separation to the date of distribution as divisible property. We disagree.

> North Carolina has not enacted or adopted any definitive approaches for valuing stock rights. . . . *The award shall be based on the vested and non-vested accrued benefit, as provided by the plan or fund, calculated as of the date of separation*, and shall not include contributions, years of service, or compensation which may accrue after the date of separation.

Ubertaccio v. Ubertaccio, 161 N.C. App. 352, 356-57, 588 S.E.2d 905, 909 (2003) (citations and quotations omitted) (emphasis in original).

The trial court made the following finding of fact:

> 55. The Plaintiff hired an expert to value the stock. The expert was well-educated and experienced. He appropriately weighed different valuation approaches and researched the company and the industry. The expert factored into his opinion the discounts for risk, the size of the company, the lack of control and lack of marketability. The stock was acquired during the marriage and it existed on the date of separation and was marital property. The court finds that the value of the stock on the date of separation was $832,000.00.

The trial court is required to classify, value, and distribute marital and divisible property of the parties. Accordingly, it classified the shares of TSCG C stock as marital property and accepted the expert's valuation of $832,000 at the date of separation. In doing so, the trial court complied with N.C. Gen. Stat. § 50-21(b), which specifically provides that marital property is to be valued as of the date of separation. There is no statutory requirement that marital property be valued on the date of distribution. N.C. Gen. Stat. § 50-21(b) (2011).

Assuming *arguendo* that we remanded this issue, the trial court would be under no obligation to accept plaintiff's expert's valuation for the stock of $960,000 on the date of distribution merely because it used his valuation of $832,000 on the date of separation. Plaintiff's argument is purely speculative -- her alleged $128,000 increase in stock value between the date of separation and the date of distribution does not exist. Accordingly, we affirm the portion of the trial court's order dealing with the classification and valuation of the TSCG C stock.

B. Classification of Profit Distributions

[2] Plaintiff next contends that the trial court erred by not classifying the 2006 and 2007 profit distributions received by defendant post-separation as divisible property. We remand for further findings of fact.

Under N.C. Gen. Stat. § 50-20(4), divisible property includes passive income from marital property, such as interests and dividends. N.C. Gen. Stat. § 50-20(4) (2011). "Profits of a Subchapter S corporation are owned by the corporation, not by the shareholders, and are referred to as 'retained earnings.' . . . [I]ncome is allocated to shareholders based upon their proportionate ownership of stock. . . . [R]etained earnings of a corporation are not marital property until distributed to the shareholders." *Allen v. Allen*, 168 N.C. App. 368, 375, 607 S.E.2d 331, 336 (2005) (quotations and citations omitted). "[F]unds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation." *Id.* at 374, 607 S.E.2d at 335 (citation omitted). "Active appreciation" refers to the substantial "financial or managerial contributions" of one of the spouses. *O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998).

In *Allen*, *supra*, we held that the retained earnings of a Subchapter S corporation were properly classified as a non-marital asset when the profits represented a component of the book value of the corporation and there was no evidence that either party actually received a distribution. Conversely, here the parties filed a joint tax return for 2006, and defendant claimed he received $442,436 in non-passive income derived from his ownership interest in a Subchapter S corporation.

Here, the trial court found that "the income from the TSCGC stock received after the date of separation is not divisible property" because "[d]efendant was required to maintain his employment and the distribution of profits was directly related to [d]efendant's performance in the company." We note that the $442,436 profit distribution was tied to the amount of TSCG C stock defendant owned, and this stock was classified by the trial court as marital property. Shares of stock represent "title" to property, but title is not controlling in determining whether an asset is marital property. One aim of the Equitable Distribution Act was "to alleviate the unfairness of the common law [title theory] rule" and to base property distribution instead upon "the idea that marriage is a partnership enterprise to which both spouses make vital contributions[.]" *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 510, 507 S.E.2d 900, 902 (1998).

The trial court was first tasked with classifying the income earned from the stock after the date of separation as marital or separate in accordance with the definitions set forth in N.C. Gen. Stat. § 50-20(b). It did not do so. Additionally, before classifying the property, it would have been advantageous of the trial court to consider how the 2006 profit distribution was generated as a distributional factor under N.C. Gen. Stat. §§ 50-20(c)(1) and (12), specifically looking to whether it was compensation for both pre and post-separation labor.

From the record it appears that the trial court's intention was to classify the 2006 profit distribution as defendant's separate property because he was "required to maintain his employment" and the distribution of profits was directly related to his performance. Defendant bears the burden of showing the property should be classified as separate property. *See Joyce v. Joyce*, 180 N.C. App. 647, 650, 637 S.E.2d 908, 911 (2006) ("A party who claims a certain classification of property has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification."). Defendant testified that he played no role in the financial management of the Shopping Center Group of the Carolinas in regards to profit distributions, and the record is devoid of other evidence to support the finding that the 2006 profit distribution was derived solely from defendant's financial or managerial contributions.

The parties did not separate until September 2006, and defendant's interest in the 2006 distribution may have been acquired, in part, due to pre-separation labor. The fact that defendant received the 2006 distribution after the parties separated is irrelevant if the right to receive those funds was acquired during the marriage. *See Allen*, *supra*. We remand this issue to the trial court for further findings of fact. Unless defendant can sufficiently quantify the active post-date of separation component, the 2006 profit distribution should be classified as divisible property and distributed to plaintiff accordingly. Plaintiff's argument as to the 2007 profit distribution is without merit because (1) her interest in the TSCG C stock ended on the date of separation, and (2) the parties were separated for the entirety of 2007.

C. Commission Distribution

[3] Plaintiff argues that the trial court's findings of fact and conclusions of law were insufficient to support its denial of her request to find all of the commissions presented at trial to be divisible. We agree.

The conclusion that property is marital, separate, or non-marital must be supported by written findings of fact. "Appropriate findings of fact include, but are not limited to, (1) the date the property was

acquired, (2) who acquired the property, (3) the date of the marriage, (4) the date of separation, and (5) how the property was acquired (i.e., by gift, bequest, or purchase)." *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993). "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review "to determine from the record whether the judgment — and the legal conclusions that underlie it — represent a correct application of the law." *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (citation and quotation omitted).

The trial court made the following finding:

> 57. The Defendant received commissions after the date of separation which were in different stages of completion due to efforts prior to the date of separation. With the exception of the following commissions, the Plaintiff failed to prove that those commissions received after the date of separation were due to the efforts of the Defendant during the marriage and therefore divisible. The following commissions received after the date of separation were due to the efforts of the Defendant during the marriage and therefore divisible property: (1) Bed, Bath & Beyond-Mooresville, $20,000.00; Aiken $18,000.00; Greensboro, $20,000.00; Knightdale, $15,000.00; and Rocky Mount, $15,000.00. The total divisible property value is $88,000.00 and should be distributed to the Defendant.

The concerning issue before us is the somewhat arbitrary nature of the trial court's classification and distribution of certain commissions defendant earned post-separation. We instruct the trial court to consider the payment journals that plaintiff sought to introduce into evidence at trial because these documents were admissible under the business records exception to the hearsay rules.

A qualifying business record is admissible when "a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). There is "no requirement that the records be authenticated by the person who made them." *In re S.D.J.*, 192 N.C. App. 478, 482-83, 665 S.E.2d 818, 821 (2008) (quotation and citation omitted). The foundational requirements of Rule 803(6) may be satisfied through the submission of

> [a]n affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded[.]

Id. at 483, 665 S.E.2d at 822 (quotation omitted).

Here, Judge Hedrick denied the admission of certain documents into evidence because they were being tendered by affidavit, not live testimony. He stated, "I'm inclined to read the rule fairly strictly since it's exception to the hearsay rule where it says 'through a — the testimony.' " He thus concluded, "I'm inclined to consider testimony from this witness stand through that microphone."

The record reflects that the foundational requirements of Rule 803(6) were satisfied through the submission of the affidavit from Jamie Alexandar-Greene. The affidavit provided that financial records of the Shopping Center Group, LLC were made and kept in the regular course of business by persons having knowledge of the information set forth at or near the time of the acts, events, or conditions recorded. The trial court's decision to deny the admission of the business records was error. Accordingly, we remand this issue to the trial court for further findings of fact and a possible recalculation and reclassification of property.

IV. Attorney Fees

[4] Plaintiff argues that the trial court erred in failing to award her reasonable attorneys' fees. We agree.

Plaintiff sought attorneys' fees in connection with her claims for child custody, child support, and alimony. In a child custody or child support action, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6A (2011). Furthermore, any time that a dependent spouse is entitled to alimony pursuant to N.C. Gen. Stat. § 50–16.3A, "the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony." N.C. Gen. Stat. § 50–16.4 (2011). In order to establish that a spouse is entitled to attorneys' fees, he or she must be "(1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett v. Barrett*, 140 N.C. App. 369, 374,

536 S.E.2d 642, 646 (2000) (citation omitted). On appeal, the question posed is whether the trial court erred in concluding that plaintiff had sufficient means to defray the cost of litigation.

In its 20 September 2012 order, the trial court denied plaintiff's claims for attorneys' fees, finding she had "sufficient means" to defray the cost and expense of the suit as her separate estate was valued at $902,139.54. Plaintiff incurred legal expenses of approximately $288,091. Of that, not less than $89,436.89 was related to her claims involving child custody and child support, and not less than $40,953.03 was related to her claims for post-separation support and alimony. At the time of the hearing, plaintiff owed $180,000 in attorneys' fees — approximately $122,000 of which were recoverable by statute. *See* N.C. Gen. Stat. §§ 50-13.6A and 50–16.4.

A review of the records shows that, while plaintiff's estate appears ample, it consists entirely of assets received in equitable distribution, most of which are non-liquid. Additionally, plaintiff has no cash-on-hand and is carrying a balance of approximately $15,000 in credit card debt. Moreover, plaintiff has not worked outside the home for approximately 20 years, and the trial court found that it would take her not less than 3 years to update her college degree in Industrial Design and find employment. Plaintiff's sole source of income is derived almost entirely from pre-tax alimony payments of $12,220 per month; she also earns approximately $1,270 per month income from interests, dividends, and rental property.

Alternatively, the trial court valued defendant's separate estate at $1,095,630, approximately $190,000 more than plaintiff's. While defendant incurred legal expenses between $200,000 to $250,000, he owed less than $10,000 when the 20 September 2012 order was entered. His estate includes $39,500 cash-on-hand. Furthermore, defendant's pre-tax income is $40,937 per month. He has continued to represent commercial tenants in the same field "under the monikers of his companies HRS Retail and HRS Limited" and has maintained his relationships with Costco, Bed Bath & Beyond, and Ikea.

At $902,139.54 and $1,095,630 respectively, the parties' separate estates are nearly equal in value. Nonetheless a disparity of financial resources available to plaintiff to defray the expenses of litigation is apparent. Plaintiff would have to unreasonably deplete her relatively small resources to pay her recoverable attorneys' fees. *See Clark*, *supra*.

Furthermore, the record does not support the trial court's finding of fact #6, that there was insufficient evidence for it to determine what

portion of Allison Holstein's fees were recoverable. Upon review, we conclude that Holstein's testimony coupled with plaintiff's exhibits 5A and 5B constitute sufficient evidence to make the necessary calculation. Accordingly, we reverse the trial court's order and remand for a determination of reasonable attorneys' fees to be awarded to plaintiff.

V. Costs

[5] Plaintiff seeks an additional $6,651.40 for the costs associated with the travel expenses and testimony of certain expert witnesses. We disagree.

If a category of costs is set forth in section N.C. Gen. Stat. § 7A–305(d), "the trial court *is required to assess the item as costs.*" *Priest v. Safety–Kleen Sys., Inc.*, 191 N.C. App. 341, 343, 663 S.E.2d 351, 353 (2008) (emphasis in original). Subsection (d)(11) requires a trial court to assess as costs expert fees for time spent testifying at trial provided the witness was subpoenaed. *Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 741 (2011). Additionally, "a trial court has the authority to award costs for a subpoenaed witness' time attending, but not testifying, at trial under N.C. Gen. Stat. 7A–314(d), as well as transportation costs under N.C. Gen. Stat. 7A–314(b). A trial court may not, however, assess as costs expert witness fees for preparation time." *Id.*

Plaintiff argues that she is entitled to the following expenses: $825 for Matt McDonald's trial testimony; $1,500 for Dr. Rebecca Appleton's travel and trial testimony; $2,713 for Christopher Mitchell's travel and testimony; $913.40 for Larry Batton's appraisal, travel, and testimony; and $700 for Carol Armstrong's travel and testimony. The record shows that only Dr. Rebecca Appleton was subpoenaed; the record does not indicate whether the remaining witnesses testified under subpoena. As to Appleton, the trial court found, and we agree, that plaintiff failed to prove how much time was devoted to her testimony as opposed to travel and preparation. We affirm the portion of the trial court's 20 September 2012 order awarding plaintiff $4,962.52 in court costs.

VII. Conclusion

As discussed above, we vacate portions of the equitable distribution order, and remand. With regard to the classification and valuation of the TSCG C stock, we affirm. With regard to the 2006 profit distribution, the trial court is instructed to make further findings of fact. With regard to the classification of commissions earned after the date of separation, the trial court is instructed to make further findings of fact, and it is to consider the payment journals plaintiff attempted to enter into evidence

at trial. With regard to the award of attorney's fees and costs, the trial court is instructed to make a determination of reasonable attorneys' fees; we affirm the portion of the order awarding plaintiff certain costs. Based upon its revised findings and conclusions, the trial court shall then determine the total net value of the marital estate and allocate the property accordingly.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
SABUR RASHID ALLAH

No. COA13-667

Filed 3 December 2013

1. Burglary and Unlawful Breaking or Entering—intent—felonious restraint—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss a first-degree burglary charge where the indictment alleged the intent to commit felonious restraint inside an apartment, but the record provided no indication that defendant could have possibly intended to commit the offense of felonious restraint against the victim within the confines of the apartment structure. The facts in this case were indistinguishable from those at issue in *State v. Goldsmith*, 187 N.C. App. 162, in any meaningful way. Moreover, while the continuing offense doctrine might support a finding that defendant actually committed the offense of felonious restraint, it did not suffice to show that defendant intended to commit that offense inside the structure into which he broke and entered.

2. Appeal and Error—preservation of issues—no objection at trial—challenge to condition of probation

Defendant did not waive the right to seek appellate review of his challenge to a condition of his probation where he did not object at trial. According to well-established North Carolina law, N.C. R. App. P. 10(a)(1) does not apply to sentencing-related issues.

3. Probation and Parole—condition—supervised visits with daughter—no abuse of discretion

The trial court did not abuse its discretion by imposing as a condition of probation that defendant's visits with his daughter be supervised. The trial court could reasonably conclude under the circumstances that requiring supervised visits would limit the chance that defendant would have inappropriate contact or disputes with Ms. Pickett and help protect defendant's daughter from any untoward event.

Appeal by defendant from judgments entered 28 January 2013 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

ERVIN, Judge.

Defendant Sabur Rashid Allah appeals from judgments sentencing him to 51 to 71 months imprisonment based upon his conviction for first degree burglary and to a consecutive term of 13 to 16 months imprisonment, which the trial court suspended for 24 months on the condition that Defendant be placed on supervised probation and comply with certain terms and conditions, based upon his convictions for felonious restraint and communicating threats. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the first degree burglary charge, improperly instructing the jury with respect to the first degree burglary charge, and ordering, as a condition of probation, that Defendant's visitation with his child by the prosecuting witness be supervised. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the Defendant's first degree burglary conviction should be vacated, that the case should be remanded to the Forsyth County Superior Court for the entry of a new judgment sentencing Defendant based upon a conviction for misdemeanor breaking or entering, and that the trial court's probationary judgment should be affirmed.

I. Factual Background

A. Substantive Facts

In November 2011, Defendant was dating Charon Pickett, with whom he shared an apartment on Melrose Street in Winston-Salem. On the evening of 12 November 2011, Defendant celebrated his birthday at his sister's apartment in Winston-Salem. At approximately midnight, Ms. Pickett's cousin, Erica James, dropped Ms. Pickett off at the apartment at which the birthday party was occurring. Defendant was already intoxicated by the time that Ms. Pickett arrived at the party.

Ms. Pickett and Defendant left the party together at around 12:30 or 1:00 a.m. and returned to their apartment. Upon arriving at the apartment, Defendant became angry because Ms. Pickett refused to have sex with him. In his anger, Defendant flipped over the mattress upon which Ms. Pickett was lying, left the apartment, and drove off in Ms. Pickett's car. At that point, Ms. Pickett telephoned Ms. James and requested that Ms. James pick her up given her fear of being at the apartment when Defendant returned. As a result, Ms. James picked Ms. Pickett up and took her to Ms. James' apartment.

About fifteen to twenty minutes after Ms. Pickett and Ms. James arrived at Ms. James' apartment, a person who identified himself as "Chris" knocked on the door. Upon recognizing the voice as that of Defendant, Ms. Pickett hid in a bedroom closet out of concern about what Defendant might do in the event that he entered the apartment. After Ms. James refused to admit him, Defendant kicked the door in, searched the apartment, and found Ms. Pickett hidden in the closet. At that point, Defendant grabbed Ms. Pickett by her hair and dragged her out of the apartment and into the parking lot in which he had left Ms. Pickett's car with the motor still running. After shoving Ms. Pickett into the car, Defendant drove off toward his sister's apartment.

At the time that the car in which Defendant and Ms. Pickett were traveling arrived at the parking lot outside Defendant's sister's apartment, Defendant told Ms. Pickett he was going to kill her and choked Ms. Pickett until she briefly lost consciousness. After driving to a nearby Krispy Kreme establishment, Defendant reiterated his threat to kill Ms. Pickett, making reference to a man who had recently killed his girlfriend before killing himself. In response, Ms. Pickett pleaded with Defendant, reminding him that they had children and stating that, if he killed her, Defendant would be incarcerated. After responding to Ms. Pickett's plea by stating, "[y]ou're right, you're not worth it," Defendant drove back to the apartment that he and Ms. Pickett shared.

After Defendant and Ms. Pickett entered their apartment, Ms. James called Ms. Pickett for the purpose of telling her that a law enforcement officer wanted to speak with her. At that point, Defendant grabbed the phone from Ms. Pickett and disconnected the call. Over the course of the next 20 minutes, Defendant sent a series of text messages to Ms. James using Ms. Pickett's phone in an attempt to dissuade Ms. James from contacting the police in the hope that Ms. James would think that Ms. Pickett did not want such contact to be made. After Defendant returned the phone to Ms. Pickett, she received another call from Ms. James, who explained that the police officer wanted to see her for the purpose of making sure that she was safe and uninjured.

A few minutes after Ms. Pickett told Defendant that she was going to talk to the police, Defendant and Ms. Pickett left the apartment in Ms. Pickett's car. Shortly thereafter, Officer J.M. Payne of the Winston-Salem Police Department stopped the car. Although Defendant exited the car and attempted to flee, Officer Payne took him into custody by using a taser. At some point after Defendant was taken into custody, however, he and Ms. Pickett began living together again and had a child, who was three months old at the time of the trial.

B. Procedural History

On 13 November 2011, magistrate's orders charging Defendant with first degree kidnaping, first degree burglary, assault on a female, communicating threats, and resisting a public officer were issued. On 30 July 2012, the Forsyth County grand jury returned bills of indictment charging Defendant with felonious restraint, first degree burglary, assault on a female, communicating threats, and resisting a public officer. The charges against Defendant came on for trial before the trial court and a jury at the 21 January 2013 criminal session of the Forsyth County Superior Court. At the conclusion of the State's evidence, the trial court granted Defendant's motion to dismiss the resisting a police officer charge. On 25 January 2013, the jury returned verdicts convicting Defendant of felonious restraint, first degree burglary, and communicating threats and acquitting Defendant of assault on a female. On 28 January 2013, the trial court entered a judgment sentencing Defendant to 51 to 71 months based upon his conviction for first degree burglary; consolidated Defendants' convictions for felonious restraint and communicating threats for judgment; and entered a judgment sentencing Defendant to a consecutive term of 13 to 16 months imprisonment, with this sentence being suspended and with Defendant being placed on supervised probation for a period of 24 months subject to certain terms

and conditions. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Sufficiency of the Evidence of First Degree Burglary

[1] In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by denying his motion to dismiss the first degree burglary charge for insufficiency of the evidence. More specifically, Defendant contends that the trial court should have dismissed the first degree burglary charge on the grounds that the State failed to adduce sufficient evidence to establish that he broke and entered Ms. James' apartment with the intent to commit felonious restraint inside that structure. Defendant's contention has merit.

In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must determine whether the record contains substantial evidence tending to establish the existence of each essential element of the offense with which Defendant has been charged, with the evidence to be considered in the light most favorable to the State and with the State being given the benefit of any inference that may be reasonably drawn from the evidence. *State v. Davis*, 74 N.C. App. 208, 212, 328 S.E.2d 11, 14, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985). On the other hand, in the event that the evidence does nothing more than raise a suspicion of guilt, a motion to dismiss should be granted. *State v. Daniels*, 300 N.C. 105, 114, 265 S.E.2d 217, 222 (1980). This Court reviews a trial court's decision to deny a dismissal motion using a *de novo* standard of review. *See State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

The offense of first degree burglary consists of (1) a breaking (2) and entering, (3) in the nighttime, (4) into the dwelling house or sleeping apartment of another, (5) which is actually occupied at the time of the offense, (6) with the intent to commit a felony therein. *State v. Barnett*, 113 N.C. App. 69, 74, 437 S.E.2d 711, 714 (1993). "Intent to commit a felony is an essential element of burglary." *State v. Faircloth*, 297 N.C. 388, 395, 255 S.E.2d 366, 370 (1979), *superseded on other grounds by statute*, *State v. Silas*, 360 N.C. 377, 381, 627 S.E.2d 604, 607 (2006). "Felonious intent usually cannot be proven by direct evidence, but rather must be inferred from the defendant's 'acts, conduct, and inferences fairly deducible from all the circumstances.' " *State v. Goldsmith*, 187 N.C. App. 162, 165, 652 S.E.2d 336, 339-40 (2007) (quoting *State v. Wright*, 127 N.C. App. 592, 597, 492 S.E.2d 365, 368 (1997), *disc. rev. denied*, 347 N.C. 584, 502 S.E.2d 616 (1998)). For that reason, the intent to commit a felony within the structure which the defendant has entered necessary

for a first degree burglary conviction "may be inferred from the circumstances surrounding the occurrence," *State v. Thorpe*, 274 N.C. 457, 464, 164 S.E.2d 171, 176 (1968), with "evidence of what a defendant does after he breaks and enters a house [constituting] evidence of his intent at the time of the breaking and entering." *State v. Gray*, 322 N.C. 457, 461, 368 S.E.2d 627, 629 (1988). " '[W]hen the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged.' " *Faircloth*, 297 N.C. at 395, 255 S.E.2d at 371. *See also Silas*, 360 N.C. at 383, 627 S.E.2d at 608 (quoting *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996)).

The indictment charging Defendant with first degree burglary alleged that he broke and entered Ms. James' apartment "with the intent to commit a felony therein, felonious restraint." For that reason, the State was required, in order to obtain a first degree burglary conviction, to prove that Defendant intended to commit the offense of felonious restraint at the time that he came into Ms. James' apartment.

> A person commits the offense of felonious restraint if he unlawfully restrains another person without that person's consent, or the consent of the person's parent or legal custodian if the person is less than 16 years old, and moves the person from the place of the initial restraint by transporting him in a motor vehicle or other conveyance.

N.C. Gen. Stat. § 14-43.3. Although the offense of felonious restraint is a lesser included offense of kidnaping, *State v. Wilson*, 128 N.C. App. 688, 693, 497 S.E.2d 416, 420, *disc. review improvidently granted*, 349 N.C. 289, 507 S.E.2d 38 (1998), it "contains an element not contained in the crime of kidnaping – transportation by motor vehicle or other conveyance." *Id.* As a result of the fact that guilt of felonious restraint requires proof that the defendant transported the victim by motor vehicle or other conveyance and the fact that the record contains no evidence that Defendant intended to transport Ms. Pickett by vehicle when he entered Ms. James' apartment, Defendant contends that the record did not contain sufficient evidence to permit a rational jury to conclude that he intended to feloniously restrain Ms. Pickett at the time that he broke into and entered Ms. James' apartment.

The leading case addressing the extent to which the State is required to establish that the defendant intended to commit the offense inside the structure into which the defendant broke and entered is *State v. Goldsmith*, 187 N.C. App. 162, 652 S.E.2d 336 (2007), in which the defendant and a friend went to the victim's house at around 3:00 a.m.

with the intent to rob the victim, knocked on the door, pulled the victim out of the house after he answered the door, and demanded that the victim give him money or drugs as they struggled in the yard before fleeing when the victim's wife appeared with a shotgun. *Goldsmith*, 187 N.C. App. at 163, 652 S.E.2d at 338. On appeal, this Court held that the defendant's motion to dismiss the first degree burglary charge should have been allowed given the State's failure to prove that the defendant intended to commit a robbery inside the victim's house. After noting that, immediately after the victim opened the door, the defendant had pulled him out of the house, we stated that the undisputed "evidence [tended to show the existence of] an intent contrary to committing the robbery inside the dwelling, and instead support[ed] an inference that defendant intended to commit the robbery outside of the home." *Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340. As a result, this Court overturned the defendant's first degree burglary conviction and remanded the case in question to the trial court for the entry of a judgment sentencing him based upon a conviction for misdemeanor breaking or entering.

A thorough review of the record persuades us that the facts before us in this case are indistinguishable from those at issue in *Goldsmith* in any meaningful way. The undisputed evidence contained in the present record indicates that Defendant left the motor in the car which he was driving running during his entry into Ms. James' apartment, which was up two flights of stairs, and that, after locating Ms. Pickett in Ms. James' apartment, Defendant grabbed Ms. Pickett, pulled her from Ms. James' apartment into the waiting motor vehicle, and drove off. In view of the fact that the only vehicle in which Defendant could have intended to transport Ms. Pickett was outside in a parking lot, the record provides no indication Defendant could have possibly intended to commit the offense of felonious restraint against Ms. Pickett within the confines of Ms. James' apartment structure as required by *Goldsmith*. As a result, the trial court erred by denying Defendant's motion to dismiss the first degree burglary charge that had been lodged against him.[1]

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1. Although Defendant suggests that an individual could never be properly charged with committing first degree burglary based on the intent to commit felonious restraint on the theory that the offense of felonious restraint could never be committed inside a structure, we are unwilling to accept that argument given our ability to hypothesize situations in which such an intent could plausibly be inferred. As a result, we do not wish to be understood as holding that a first degree burglary conviction could never be upheld in a case in which the State alleged that the defendant intended to commit the offense of felonious restraint. Instead, we simply hold that the record before us in this case would not permit a reasonable juror to infer that Defendant intended to commit the offense of felonious restraint at the time that he broke into and entered Ms. James' apartment.

In seeking to persuade us to reach a different result, the State argues, in reliance on the fact that some crimes are continuing offenses, that the intent to commit a felony within Ms. James' apartment necessary for guilt of first degree burglary exists so long as the defendant committed any element of the offense in question within Ms. James' apartment. In support of this contention, the State cites *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 555, 346 S.E.2d 488, 495 (1986), in which the Supreme Court held that a series of acts constituting one continuous transaction established that the defendant had committed a single kidnaping. *Hall*, 305 N.C. at 82-83, 286 S.E.2d at 555-56. Based upon that decision, the State argues that the felonious restraint of Ms. Pickett was a continuing offense which began when he initially restrained Ms. Pickett inside Ms. James' apartment and that the commission of an act constituting an element of felonious restraint indicates that he broke into and entered Ms. James' apartment with the intent to feloniously restrain Ms. Pickett.

The fundamental problem with the State's argument is that it rests upon a misunderstanding of the relationship between a continuing offense and the intent necessary to support a first degree burglary conviction. According to well-established North Carolina law, a continuing offense is a "breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Johnson*, 212 N.C. 566, 570, 194 S.E. 319, 322 (1937). In other words, a continuing offense has been committed when the defendant, over some period of time and, possibly, in a number of different places, has committed all of the elements necessary to establish criminal liability. *See Hall*, 305 N.C. at 82-83, 286 S.E.2d at 556 (stating that "the fact that all essential elements of a crime have arisen does not mean the crime is no longer being committed" and that the fact that "the crime was 'complete' does not mean it was completed"). In order to establish the defendant's guilt of first degree burglary, however, the State is required to establish that the defendant intended to commit a felony within the structure into which he broke and entered. As a result, while the continuing offense doctrine might support a finding that Defendant actually committed the offense of felonious restraint, it does not suffice to show that Defendant intended to commit that offense inside the structure into which he broke and entered. Moreover, the State has cited nothing in support of its contention that the completion of a single element required for guilt of a particular offense inside the structure into which the defendant broke and entered is sufficient to establish that the defendant intended to commit the offense in question "within" the structure as required by our

decision in *Goldsmith*, and we know of nothing in our burglary-related jurisprudence which would support such an assertion. In fact, given that the victim in *Goldsmith* was forced from the door of his residence into the yard, one could argue that the assault inherent in the commission of a robbery with a dangerous weapon began in the victim's residence, making the facts at issue there virtually indistinguishable from those at issue here. Thus, given that the "continuing offense" doctrine has no bearing on the extent, if any, to which the State adduced sufficient evidence to permit the jury to find that Defendant broke into and entered Ms. James' apartment with the intent to feloniously restrain Ms. Pickett within that structure and given the absence of any authority indicating that the commission of a single element inside Ms. James' apartment sufficed to permit a jury determination that Defendant intended to commit felonious restraint within that structure, we conclude that the trial court erred by denying Defendant's motion to dismiss the first degree burglary charge that had been lodged against him.

Although the record does not contain sufficient evidence to support Defendant's first degree burglary conviction, it does contain sufficient evidence to support convicting Defendant of misdemeanor breaking or entering, which involves the unlawful breaking or entry into any building. N.C. Gen. Stat. § 14-54(b). "[B]y finding the defendant guilty of burglary, the jury 'necessarily found facts which would support a conviction of misdemeanor breaking and entering,' " so that, "where, as here, the evidence of intent to commit a felony is insufficient," *State v. Freeman*, 307 N.C. 445, 451, 298 S.E.2d 376, 380 (1983) (quoting *State v. Dawkins*, 305 N.C. 289, 291, 287 S.E.2d 885, 887 (1982)), the jury's verdict is tantamount to a decision that the defendant should be found guilty of misdemeanor breaking or entering. As a result, we hold that Defendant's conviction for first degree burglary should be vacated and that this case should be remanded to the Forsyth County Superior Court for the entry of a new judgment finding that Defendant had been convicted of misdemeanor breaking or entering and imposing sentence upon him for committing that lesser included offense.[2]

B. Visitation Restrictions

[2] Secondly, Defendant argues that the trial court erred by ordering, as a condition of probation, that Defendant's visits with his daughter be

2. As a result of our decision with respect to this sufficiency of the evidence issue, we need not address Defendant's related argument that the trial court committed plain error in connection with its instructions to the jury with respect to the issue of Defendant's guilt of first degree burglary.

supervised. In essence, Defendant contends that the trial court lacked the authority to impose the challenged condition of probation. We do not find Defendant's argument persuasive.

Although Defendant did not object to the challenged condition of probation at trial, we do not believe, contrary to the implication of the argument advanced in the State's brief, that Defendant has waived the right to seek and obtain appellate review of his challenge to the relevant condition of probation. Admittedly, N.C.R. App. P. 10(a)(1) provides that, as a general proposition, a party must have raised an issue before the trial court before presenting it to this Court for appellate review. However, according to well-established North Carolina law, N.C.R. App. P. 10(a)(1) does not apply to sentencing-related issues. *See State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005). The extent to which a trial judge erred by imposing a particular condition of probation is clearly a sentencing-related issue. As if the ordinary principles applicable to the lack of any necessity for objecting to sentencing-related issues at trial were not enough to establish that Defendant's challenge to the trial court's judgment is properly before this Court, N.C. Gen. Stat. § 15A-1342(g) provides that any failure on the part of the defendant "to object to a condition of probation [at the time it is] imposed does not constitute a waiver of the right to object at a later time to the condition." Thus, since a defendant "cannot relitigate the legality of a condition of probation unless he raises the issue no later than the hearing at which his probation is revoked," *State v. Cooper*, 304 N.C. 180, 183, 282 S.E.2d 436, 439 (1981), and since Defendant has challenged the validity of the condition of probation at issue here prior to any attempt to revoke his probation, Defendant is not, contrary to the State's suggestion, barred from challenging the validity of this condition of probation on appeal from the trial court's judgment despite his failure to challenge the validity of this condition before the trial court for this reason as well. We will now address Defendant's challenge to the condition of probation in question on the merits.

[3] The extent to which a trial judge is entitled to impose a particular condition of probation depends upon the proper application of the relevant statutory provisions. N.C. Gen. Stat. § 15A-1342(c). A number of conditions of probation are automatically included in each probationary judgment unless the trial court specifically elects to exempt the defendant from the necessity for compliance with one or more of those conditions. N.C. Gen. Stat. § 15A-1343(b). In addition, N.C. Gen. Stat. § 15A-1343(b1) provides that a trial judge is entitled to impose one or more of several specified special conditions of probation in the exercise

of its sound discretion. Finally, N.C. Gen. Stat. § 15A-1343(b1)(10) authorizes a trial judge to require the defendant to "[s]atisfy any other conditions determined by the court to be reasonably related to his rehabilitation." The extent to which a particular condition of probation is authorized by N.C. Gen. Stat. § 15A-1343(b1)(10) hinges upon whether the challenged condition bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant's exposure to crime, and whether the condition assists in the defendant's rehabilitation. *Cooper*, 304 N.C. at 183, 282 S.E.2d at 438. As a result, although the trial courts have the discretion to devise and impose special conditions of probation other than those specified in N.C. Gen. Stat. § 15A-1343(b1), N.C. Gen. Stat. § 15A-1343(b1)(10) "operates as a check on the discretion [available to] trial judges" during that process. *State v. Lambert*, 146 N.C. App. 360, 367, 553 S.E.2d 71, 77 (2001), *disc. review denied*, 355 N.C. 289, 561 S.E.2d 271 (2002). A challenge to a trial court's decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard of review, *See State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985), with such an abuse of discretion having occurred when the trial court's ruling is manifestly unsupported by reason or 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).

Although Defendant argues that the trial court abused its discretion by requiring that his visits with his daughter be supervised on the grounds that he has never injured or posed a threat to his daughter, thereby rendering the condition in question devoid of any reasonable relation to the rehabilitative process, we do not find this argument persuasive. Simply put, the evidence in the record clearly shows that, in a fit of anger, Defendant choked and threatened to kill the mother of his child. In light of that set of circumstances, the trial court could reasonably conclude that requiring that Defendant's visits with his daughter be supervised would limit the chance that Defendant would have inappropriate contact or disputes with Ms. Pickett and help protect Defendant's daughter from any untoward event which might occur should he become ferociously angry at Ms. Pickett again. As a result, we conclude that the trial court did not abuse its discretion by requiring that Defendant's visits with his daughter be supervised during the time in which he was subject to probationary supervision.

In addition, Defendant argues that the trial court erred by imposing the challenged condition on the grounds that (1) the district court has exclusive jurisdiction over child custody and visitation disputes

pursuant to N.C. Gen. Stat. § 7A-244; (2) issues relating to custody or visitation are only subject to resolution in civil litigation conducted pursuant to the relevant statutory provisions; (3) a parent must receive notice of a hearing concerning support or visitation-related issues before an order affecting custody and visitation rights can be entered, *Clayton v. Clayton*, 54 N.C. App. 612, 614, 284 S.E.2d 125, 127 (1981); and (4) a custody-related order must include findings of fact which support the trial court's "best interests" determination. N.C. Gen. Stat. § 50-13.2(a). The authorities upon which Defendant relies in support of this argument are, however, all civil in nature and have no bearing on a criminal trial court's authority to adopt otherwise lawful conditions of probation. As a result, none of Defendant's challenges to the limitation upon his ability to visit with his daughter imposed in the trial court's probationary judgment have merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, although the trial court erroneously denied Defendant's motion to dismiss the first degree burglary charge, it did not err by requiring that Defendant's visitation with his daughter be conducted on a supervised basis as a condition of probation. As a result, the trial court's judgment based upon Defendant's first degree burglary conviction should be, and hereby is, vacated, and the case in which Defendant was convicted of first degree burglary should be, and hereby is, remanded to the Forsyth County Superior Court for the entry of a new judgment sentencing Defendant for misdemeanor breaking or entering. On the other hand, the trial court's judgment based upon Defendant's convictions for felonious restraint and communicating threats should be, and hereby is, allowed to remain undisturbed.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
KEVIN JAMES DAHLQUIST

No. COA13-276

Filed 3 December 2013

Search and Seizure—driving while impaired—compelled blood sample—no warrant—exigent circumstances

The trial court did not err in a driving while impaired case by improperly denying defendant's motion to suppress evidence from a blood sample taken without a search warrant or defendant's consent. Under the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search.

Appeal by Defendant from judgment entered 29 February 2012 by Judge Jerry Cash Martin in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2013.

Attorney General Roy A. Cooper, by Assistant Attorney General Tamara Zmuda, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for Defendant.

DILLON, Judge.

Kevin James Dahlquist ("Defendant") appeals from a judgment convicting him of driving while impaired, arguing the trial court improperly denied his motion to suppress evidence from a compelled blood sample. We affirm.

I. Facts and Procedural History

In the early morning hours of Saturday, 26 September 2009, Officer Charles Jamieson of the Charlotte-Mecklenburg Police Department was working a checkpoint for impaired driving. The checkpoint was equipped with a Blood Alcohol Testing ("BAT") mobile, which housed an intoxilyzer for determining a suspect's blood alcohol level. The BAT mobile also had an area for a magistrate, though no magistrate was present that night.

At approximately 1:45 A.M., Defendant drove up to the checkpoint. Upon smelling a strong odor of alcohol emanating from Defendant,

Officer Jamieson administered several field sobriety tests, which Defendant failed. Defendant admitted to Officer Jamieson that he had consumed alcohol that night. Officer Jamieson arrested Defendant and escorted him to the BAT mobile to administer a breath test. Defendant refused to submit to the test. Officer Jamieson then transported Defendant to Mercy Hospital, where blood samples were drawn from Defendant without his consent. Afterwards, Defendant was taken to the Mecklenburg County Intake Center and appeared before a magistrate.

Defendant filed a pretrial motion to suppress evidence obtained without a search warrant. On 12 January 2012, Superior Court Judge Larry G. Ford denied Defendant's motion to suppress. On 29 February 2012, a jury found Defendant guilty of driving while impaired. From this judgment, Defendant appeals.

II. Anaylsis

In Defendant's sole argument on appeal, he contends the trial court erred in denying his motion to suppress the evidence from the compelled blood samples without first obtaining a search warrant, in violation of the U.S. Constitution, amendment IV and the N.C. Constitution, Article I, Section 20. Specifically, Defendant claims no exigent circumstances existed to allow the warrantless search. We find no error.

"Ordinarily, the scope of appellate review of an order [regarding a motion to suppress] is strictly limited to determining whether the trial [court]'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 [court]'s ultimate conclusions of law." *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (citation and quotation marks omitted) (alteration in original). When considering a motion to suppress, the trial judge "must set forth in the record his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2011). These findings and conclusions must be in the form of a written order *unless* "(1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *State v. Royster*, __ N.C. App. __, __, 737 S.E.2d 400, 403 (2012).

In the present case, we note that there were no material conflicts in the evidence. Accordingly, the trial court announced its findings of fact and explained the rationale for its decision, in open court. Defendant does not contend the trial court's findings are not supported by competent evidence. Rather, Defendant argues, citing *Missouri v. McNeely*,

__ U.S. __, 185 L. Ed. 2d 696 (2013), that the compelled taking of a blood sample in this case – without a search warrant or Defendant's consent, and allegedly without sufficient exigent circumstances – violated his constitutional right to be free from unreasonable searches and seizures.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. The United States Supreme Court has held that a warrantless search of the person is reasonable only if it falls within a recognized exception. *Missouri v. McNeely*, __ U.S. __, __, 185 L. Ed. 2d 696, 704 (2013). "One well-recognized exception . . . applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Id.* (citation and quotation marks omitted). For instance, "[i]n some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." *Id.* at __, 185 L. Ed. 2d at 705. (citations omitted). "[A] warrantless search is [in certain situations] potentially reasonable because there is compelling need for official action and no time to secure a warrant." *Id.* (citation and quotation marks omitted). "To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances." *Id.* (citations omitted).

We have held that "[t]he withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution." *State v. Fletcher*, 202 N.C. App. 107, 111, 688 S.E.2d 94, 96 (2010) (citation and quotation marks omitted). "Therefore, a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *Id.* at 111, 688 S.E.2d at 97 (citation and quotation marks omitted). This rule is also codified at N.C. Gen. Stat. § 20-139.1(d1) (2011), which provides the following:

> If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

Id.

While it is "recognized that alcohol and other drugs are eliminated from the blood stream in a constant rate, creating an exigency with regard to obtaining samples," *Fletcher*, 202 N.C. App. at 111, 688 S.E.2d at 97 (citation and quotation marks omitted), the United States Supreme Court recently held, in *Missouri v. McNeely*, *supra*, that the natural dissipation of alcohol in the bloodstream cannot, *standing alone*, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant. *Id.* Specifically, the Supreme Court concluded that "the natural metabolization of alcohol in the bloodstream" does not create a "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases," holding that the "exigency in this context must be determined case by case based on the totality of the circumstances." *Id.* at __, 185 L. Ed. 2d at 702. Therefore, after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search.

In this case, the trial court found, *inter alia*, the following: Defendant pulled up to a checkpoint. A police officer noticed the odor of alcohol. Defendant admitted to drinking five beers. The officer administered field sobriety tests, and Defendant's performance in the tests signified impairment. Defendant was then taken to the BAT Mobile; however, Defendant refused the intoxilyzer test. The officer then took Defendant directly to Mercy Hospital to have a blood sample taken without first obtaining a warrant from a magistrate at the jail's Intake Center. The officer made this decision to go directly to the hospital because he knew that over time the amount of alcohol in blood dissipates; he knew from his years of experience that Mercy Hospital was ten to fifteen minutes away and that its patient load on Saturday mornings was typically fairly light; he surmised from his past experience that getting a blood draw at Mercy Hospital would take approximately forty-five minutes to one hour; he surmised from his past experience that, on a weekend night, it would take between four and five hours to obtain a blood sample if he first had to travel to the Intake Center at the jail to obtain a search warrant.[1]

Based on its findings, the trial court concluded that the police officer had exigent circumstances before him so as to allow Defendant's blood to be drawn without first obtaining a search warrant and that the officer had a reasonable belief that the delay to obtain the search warrant under

1. This recitation is not an exhaustive recount of the trial court's findings but is merely a summary.

the circumstances would result in dissipation of the percentage of alcohol in Defendant's blood.

After reviewing the trial court's findings of fact and the evidence presented at the hearing on Defendant's motion to suppress, we believe the evidence supports the trial court's findings and conclusions regarding the existence of exigent circumstances in this particular case. Considering the totality of the circumstances – including, but not limited to, the distance from and time needed to travel to the Intake Center and the hospital, and the officer's knowledge of the approximate probable wait time at each place – we conclude the facts of this case gave rise to an exigency sufficient to justify a warrantless search. Accordingly, we find no error.

We would, however, elaborate on one point regarding the procedure of obtaining warrants from magistrates in cases such as this, which was addressed by the United Supreme Court in McNeely – advances in technology. The Supreme Court noted that "[t]he Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone[:] . . . As amended, the law now allows a federal magistrate judge to consider 'information communicated by telephone or other reliable electronic means.' " *McNeely*, __ U.S. at __, 185 L. Ed. 2d at 708 (quoting Fed. Rule Crim. Proc. 4.1, which provides that "[a] magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons"). The *McNeely* Court also recognized that "[s]tates have also innovated[:] Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." *Id.*, __ U.S. at __, 185 L. Ed. 2d at 708. Indeed, in North Carolina, pursuant to N.C. Gen. Stat. § 15A-245(a)(3) (2011), a "sworn law enforcement officer" may employ "audio and video transmission in which both parties can see and hear each other" to obtain a search warrant. *Id.*

Though the North Carolina rules of criminal procedure have allowed a search warrant to be issued based on information communicated by a "video transmission" since 2005, the record in this case does not indicate that the arresting officer attempted to videoconference with the magistrate to obtain a search warrant or that he had the technology to do so.[2]

2. We further note that N.C. Gen. Stat. § 15A-245(a)(3) provides that "[p]rior to the use of audio and video transmission pursuant to this subdivision, the procedures and the type

N.C. Gen. Stat. § 15A-245(a)(3). Rather, it appears from the transcript that the arresting officer may have assumed he only had two options in this case: (1) to take Defendant to the hospital and compel a warrantless blood draw sample; or (2) to drive to the jail Intake Center, wait for a magistrate to issue a warrant, and then return to the hospital, at which time the alcohol in Defendant's blood may have dissipated. In our opinion, the "video transmission" option that has been allowed by N.C. Gen. Stat. § 15A-245(a)(3) for the past eight years is a method that should be considered by arresting officers in cases such as this where the technology is available. In the same vein, we believe the better practice in such cases might be for an arresting officer, where practical, to call the hospital and the Intake Center to obtain information regarding the wait times on that specific night, rather than relying on previous experiences. Having noted this, we also repeat the following statement of the United States Supreme Court:

> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record[.] . . . And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.

McNeely, __ U.S. at __, 185 L. Ed. 2d at 709.

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of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts." In the present case, Defendant does not assert that the arresting officer should have, but did not, employ the procedure allowed in N.C. Gen. Stat. § 15A-245(a). Neither the State, nor Defendant, develop any argument pertaining to this statute, nor do the parties point us to information in the record regarding whether Mecklenburg County, Judicial District 26, has even submitted the necessary information to AOC for approval.

III. Conclusion

In conclusion, we affirm the trial court's order denying Defendant's motion to suppress in this case, because, after considering a totality of the circumstances, we believe exigent circumstances existed to compel a warrantless blood draw sample from Defendant.

AFFIRMED.

Judge McGEE and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DANNY DALE GOSNELL

No. COA13-614

Filed 3 December 2013

1. Homicide—first-degree murder—not guilty verdict—jury instructions

The trial court did not commit plain error in a first-degree murder case by failing to instruct the jury of its duty to return a not guilty verdict for first-degree murder based on the theory of premeditation and deliberation if the State failed to establish any essential element beyond a reasonable doubt. The verdict sheet provided a space for a "not guilty" verdict, and the trial court's instructions on second-degree murder and the theory of lying in wait comported with the requirement in *State v. McHone*, 174 N.C. App. 289.

2. Homicide—first-degree murder—lying in wait—jury instructions—sufficient evidence

The trial court did not err in a first-degree murder case by instructing the jury that it could convict defendant of first-degree murder based on the theory of lying in wait where there was sufficient evidence to support the instruction. Furthermore, any error was not prejudicial.

Appeal by Defendant from judgment entered 3 October 2012 by Judge Marvin P. Pope in Superior Court, Buncombe County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for Defendant.

McGEE, Judge.

Danny Dale Gosnell ("Defendant") was indicted for first-degree murder of Brenda Kay Roberts Williams ("Ms. Williams") on 9 January 2012. The facts relevant to a determination of the issues on appeal are presented in the analysis portion of this opinion. A jury found Defendant guilty of first-degree murder on 2 October 2012. Defendant appeals.

I. "Premeditation and Deliberation" Instruction

[1] Defendant argues "the trial court committed plain error by failing to instruct the jury of its duty to return a not guilty verdict for first-degree murder based on the theory of premeditation and deliberation if the State failed to establish any essential element beyond a reasonable doubt."

A. Standard of Review

"Because defendant did not object at trial to the omission of the not guilty option from the trial court's final mandate to the jury, we review the trial court's actions for plain error." *State v. McHone*, 174 N.C. App. 289, 294, 620 S.E.2d 903, 907 (2005).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alterations in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental,

a defendant must establish prejudice——that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation and quotation marks omitted).

B. Analysis

"Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error." *McHone*, 174 N.C. App. at 295, 620 S.E.2d at 907. This Court held that "[t]elling the jury 'not [to] return a verdict of guilty' as to each theory of first degree murder does not comport with the necessity of instructing the jury that it must or would return a verdict of not guilty[,]" if it rejected the conclusion that the defendant committed first-degree murder. *Id.* at 297, 620 S.E.2d at 909.

As in *McHone*, we "first consider the jury instructions on murder in their entirety in determining whether the failure to provide a not guilty mandate constitutes plain error." *Id.* The instructions on premeditation and deliberation, which Defendant challenges on appeal, are quoted below:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting with malice, killed the victim with a deadly weapon, thereby proximately causing the victim's death, that the defendant intended to kill the victim and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of "guilty of first-degree murder["] on the basis of malice, premeditation and deliberation. If you do not so find or have a reasonable doubt as to one or more of these things you would not return a verdict of "guilty of first-degree murder" on the basis of malice, premeditation and deliberation. (emphasis added).

As to the theory of lying in wait, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant assaulted the victim while lying in wait for her and that the defendant's act proximately caused the victim's death, it would be your duty to return a verdict of "guilty of first-degree murder." If you do not so find or if you have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of "not guilty." (emphasis added).

As to second-degree murder, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and with malice wounded the victim with a deadly weapon and that this proximately caused the victim's death, it would be your duty to return a verdict of "guilty of second-degree murder." If you do not so find or have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of "not guilty." (emphasis added).

From our review of the entirety of the jury instructions on murder, it appears that, as to the theory of premeditation and deliberation, the trial court failed to comport precisely with the requirement to instruct that the jury would return a verdict of "not guilty" if it rejected the conclusion that Defendant committed first-degree murder on the basis of premeditation and deliberation, per *McHone*. However, it further appears that the trial court, in its instructions, comported with the requirement regarding both lying in wait and second-degree murder.

By contrast, the trial court in *McHone* "failed to instruct the jury on the option of finding defendant not guilty during its final mandate." *McHone*, 174 N.C. App. at 296, 620 S.E.2d at 908. "Indeed, it neither stated that the jury could find [the] defendant not guilty of first degree murder, nor that it was their duty to do so should they conclude the State failed in its burden of proof." *Id.* Rather, the trial court "essentially pitted one theory of first degree murder against the other, and impermissibly suggested that the jury should find that the killing was perpetrated by [the] defendant on the basis of at least one of the theories." *Id.* at 297, 620 S.E.2d at 909.

In *McHon*e, this Court also stated that "[s]econdly, we consider the content and form of the first degree murder verdict sheet in determining whether the failure to provide a not guilty mandate constitutes plain error." *Id.* The verdict sheet in the present case is structured as follows:

1. ____ GUILTY OF FIRST DEGREE MURDER by

(you may check one, both or neither of the following:)

____ MALICE, PREMEDITATION AND DELIBERATION and/or

____ LYING IN WAIT.

2. ____ GUILTY OF SECOND DEGREE MURDER.

3. ____ NOT GUILTY.

By contrast, the verdict sheet in *McHone* "did not provide a space or option of 'not guilty.' " *McHone*, 174 N.C. App. at 298, 620 S.E.2d at 909.

This Court in *McHone* considered the instructions and verdict sheet for the other offenses with which the defendant was charged.

> Rather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge, the presence of a not guilty final mandate as to the taking offenses likely reinforced the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.

McHone, 174 N.C. App. at 298, 620 S.E.2d at 909.[1] Additionally, this Court noted that the verdict sheet for the other offenses, "which did afford a space for a not guilty verdict, also likely reinforced the suggestion that [the] defendant must have been guilty of first degree murder on some basis[.]" *McHone*, 174 N.C. App. 298, 620 S.E.2d at 909.

In the present case, there are no other offenses to analyze in the course of our plain error review. The verdict sheet provided a space for a "not guilty" verdict, and the trial court's instructions on second-degree murder and the theory of lying in wait comported with the requirement in *McHone*. The trial court did not commit plain error in failing to instruct that the jury would or must return a "not guilty" verdict if it did not conclude that Defendant committed first-degree murder on the basis of premeditation and deliberation.

II. "Lying in Wait" Instruction

[2] Defendant also argues the trial court erred by instructing the jury that it could convict Defendant of first-degree murder based on the theory of lying in wait.

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1. The versions of *McHone* available online through Westlaw and LexisNexis contain the full sentence quoted above. The South Eastern Reporter, 2d Series also contains this full sentence. The slip opinion available online also contains this full sentence. *State v. McHone*, COA04-1605, slip op. at 13. However, the subject of the sentence is missing from the hard copy of the N.C. Court of Appeals Reports. The N.C. Court of Appeals Reports has only the following incomplete sentence: "Rather than help correct the failure to provide a similar not guilty mandate with respect to the taking offenses likely reinforced the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder." *McHone*, 174 N.C. App. at 298.

"Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citing *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E.2d 80, 88 (1975) (the trial court "should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence")).

"A murder which shall be perpetrated by means of . . . lying in wait . . . shall be deemed to be murder in the first degree[.]" N.C. Gen. Stat. § 14-17 (2011). "[W]hen G.S. 14-17 speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979).

> However, it is not necessary that he be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait.

Id. at 148, 257 S.E.2d at 425 (citing *State v. Wiseman*, 178 N.C. 785, 789-90, 101 S.E. 629, 631 (1919)). "Certainly one who has lain in wait would not lose his status because he was not concealed at the time he shot his victim. The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait." *Allison*, 298 N.C. at 148, 257 S.E.2d at 425.

In *State v. Wiseman*, *supra*, the evidence showed that the victim, "almost immediately on getting off the train, was fired upon by one or more persons, at short range[.]" *Wiseman*, 178 N.C. at 790, 101 S.E. at 631. Our Supreme Court concluded that "the killing, in any aspect of this case, was an assassination by lying in wait, and by taking the victim unawares without opportunity to defend himself." *Wiseman*, 178 N.C. at 790, 101 S.E. at 631.

In the present case, Defendant's vehicle was parked on "the other side of the barn" from Ms. Williams' house ("the house") at about 7:20 or 7:25 a.m. One of Ms. Williams' daughters, Amanda Williams ("Amanda"), testified that Ms. Williams received "three or four" phone calls from Defendant on the morning of the offense. Amanda was inside the house with her mother and her sister, Amber Williams ("Amber").

Amanda testified that, at 7:48 a.m., Ms. Williams told Amanda that she was running late and, shortly thereafter, left for work. Amber testified

that, after her mother left the house, her mother "screamed, 'No!' " That was the last time Amber heard her mother speak. Amber further testified that Ms. Williams and Defendant did not argue outside the house for a long period of time. Amber saw Defendant shoot Ms. Williams twice, the second shot occurring while Ms. Williams was on the ground.

A neighbor testified that he drove past Ms. Williams' house on the morning of the offense. At approximately 7:45 or 7:50 a.m., he drove past the house, turned around at a dead-end, and drove past the house again. He noticed an unfamiliar truck parked behind the barn and decided to check on the residents. As he approached the house, he saw Ms. Williams lying on the ground by the barn.

Defendant told the neighbor: "Go away; go away. Leave; leave." When Defendant said the second "leave," he shot Ms. Williams while she was lying on the ground. The neighbor saw Ms. Williams' body "bounce[] up off the ground[.]" The neighbor drove back to the road and called 911. A deputy sheriff responded to the 911 dispatch and arrived at the scene of the offense at approximately 8:05 or 8:10 a.m. The deputy sheriff testified that "[f]our and a-half or five minutes" passed "from the time of dispatch to arrival[.]"

Defendant relies on *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), in arguing that the trial court erred in instructing the jury on the theory of lying in wait. In *Lynch*, our Supreme Court noted that *Allison* established "that a lying in wait killing requires some sort of ambush and surprise of the victim." *Id.* at 217, 393 S.E.2d at 815. In *Lynch*, there was "no evidence that [the] defendant ambushed or surprised [the victim] when he fatally stabbed her." *Id.* at 218, 393 S.E.2d at 816.

> The evidence shows without contradiction that before the fatal stabbing [the] defendant walked with his arm around the victim through the parking lot. Later [the] defendant was observed chasing the victim across the lot, catching her and forcing her back to a car in the lot. The victim was heard to say, "No, please, don't do that," after which she was observed coming from between some cars, bleeding and calling for help. [The d]efendant was observed running across the parking lot.

Id. at 218-19, 393 S.E.2d at 816. Our Supreme Court concluded that there was "simply no evidence that [the] defendant lay in wait by ambushing or surprising his victim immediately before he inflicted the fatal stab wounds." *Id.* at 218-19, 393 S.E.2d at 816.

In the present case, Defendant contends only that there was no ambush or surprise "immediately before the shooting" because Defendant and Ms. Williams "interacted outside" for approximately ten to thirteen minutes. The evidence, however, does not support this conclusion. Defendant parked on the opposite side of the barn from the house and waited for Ms. Williams. Ms. Williams left the house shortly after 7:48 a.m. By 8:05 or 8:10 a.m., all the following events had transpired: (1) Defendant confronted Ms. Williams, and a short argument ensued; (2) Defendant shot Ms. Williams; (3) a neighbor arrived to check on the residents; (4) he saw Ms. Williams lying on the ground, and Defendant told the neighbor to leave; (5) Defendant shot Ms. Williams a second time while she was lying on the ground; (6) the neighbor drove back to the road and called 911; (7) the 911 call was dispatched to a deputy sheriff's radio; and (8) the deputy sheriff arrived on the scene. The deputy arrived approximately four and a half or five minutes after receiving the dispatch.

The evidence suggests that the shooting immediately, or almost immediately, followed Defendant's ambush of Ms. Williams outside the house. As stated above, our Supreme Court has held that "a lying in wait killing requires some sort of ambush and surprise of the victim." *Lynch*, 327 N.C. at 217, 393 S.E.2d at 815. The evidence does not show that Ms. Williams was aware of Defendant's presence outside the house or Defendant's purpose to kill her. Under *Allison* and *Lynch*, the evidence in this case supports an instruction on lying in wait. The trial court did not err in giving the instruction.

Even assuming Defendant can show error on this basis, Defendant cannot show prejudice resulting from the error because there is no possibility that, had the error in question not been committed, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a) (2011). The jury returned guilty verdicts on (1) lying in wait and (2) premeditation and deliberation. Defendant has not shown that prejudicial error occurred in this case.

No error.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
LADARRIUS TAVON HATCHER

No. COA13-632

Filed 3 December 2013

1. Homicide—handgun discharge—second-degree murder—evidence of malice—not sufficient—remanded for involuntary manslaughter sentencing

The trial court erred in denying defendant's motion to dismiss the charge of murder where the State failed to present sufficient evidence of malice. A group of young men were debating whether a 9mm pistol that one of them had would fire .380 ammunition; they loaded and attempted to fire the gun outside without success; they returned inside with the gun; there was a gunshot when defendant and the victim were alone in a room; and the victim was killed. The evidence was at best sufficient only to raise a suspicion of malice; however, there was sufficient evidence to support a finding that defendant was culpably negligent in handling the pistol and the case was remanded for sentencing on involuntary manslaughter.

2. Criminal Law—prosecutor's argument—murder conviction—errors concerning intent—remanded for involuntary manslaughter sentencing—no prejudice

There was no plain error in a murder prosecution where the trial court did not limit cross-examination and did not intervene *ex mero motu* in the prosecutor's closing argument where all of the alleged errors related to the State's attempt to show an intentional killing. Even assuming that the trial court erred as contended, defendant cannot show prejudice given that his murder conviction was reversed and the case was remanded for resentencing on involuntary manslaughter.

Appeal by defendant from Judgment entered on or about 16 November 2012 by Judge Walter H. Godwin, Jr. in Superior Court, Edgecombe County. Heard in the Court of Appeals 22 October 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brandon L. Truman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

STROUD, Judge.

Ladarrius Hatcher ("defendant") appeals from the judgment entered on or about 16 November 2012 after a jury found him guilty of murder in the second degree. For the following reasons, we vacate defendant's conviction for murder in the second degree and remand for entry of judgment and resentencing on involuntary manslaughter.

I. Background

On 10 January 2011, defendant was indicted by a grand jury in Edgecombe County for the murder of Murray Chamberlin by short form indictment. Defendant pled not guilty and proceeded to jury trial. At trial, the State's evidence tended to show the following:

On 30 November 2010, defendant, Mr. Chamberlin, Kalik Davis, and several other friends were at the home owned by Mr. Davis's mother. The group of friends had known each other for years and often spent time together. At the time, Mr. Chamberlin was seventeen years old, Mr. Davis was fifteen, and defendant was eighteen. Mr. Chamberlin had a 9mm pistol with him. Defendant asked if he could see the gun, so Mr. Chamberlin handed it to him. Defendant noticed it was unloaded when he pulled out the ammunition clip. Defendant asked Mr. Chamberlin if he had ammunition for the gun. Mr. Chamberlin responded that he had .380 caliber bullets and pulled out a plastic bag of bullets from his pocket. Defendant and Mr. Chamberlin began discussing whether a 9mm handgun would fire .380 caliber bullets. Defendant asserted that it would fire, while Mr. Chamberlin disagreed. Defendant loaded the gun with five or six .380 bullets and went outside, accompanied by Mr. Davis and Mr. Chamberlin.

Once outside, defendant attempted to fire the gun into the air several times, but the gun would not discharge. As he was trying to fire the gun, two of the bullets fell out. The three then gave up trying to fire the gun and went back inside to Mr. Davis's room. Once back in the room, Mr. Chamberlin sat near the rear of the bed, Mr. Davis sat near the front, and defendant sat on a nearby stool with the gun in his lap. Defendant began playing with the gun again, looking at it and pointing it around, though not aiming it at anyone. Mr. Davis asked defendant to watch where he was aiming the gun. Mr. Davis then left the bedroom to retrieve his cellphone. He overheard Mr. Chamberlin telling defendant to "Get that fucking gun out of my face" in a "low," or "medium" tone of voice.

Shortly thereafter, Mr. Davis heard one gunshot from his bedroom. He did not react immediately and kept trying to call his friends because

he did not think anything had happened. Mr. Davis went back to his room and saw Mr. Chamberlin laying on the bed. He asked defendant what he had done, then ran out of the house.

When Mr. Davis returned to his house, he saw defendant dragging Mr. Chamberlin's body outside. The police later found his body naked, hidden under a pile of leaves behind a nearby abandoned house. They found Mr. Chamberlin's clothes in a trashcan. Mr. Davis was the only witness called by the State who was present when Mr. Chamberlin was shot.

The forensic pathologist who examined Mr. Chamberlin found one fatal bullet hole in Mr. Chamberlin's head. He could not determine the distance from which the bullet had been fired. He also found abrasions and contusions on Mr. Chamberlin's body, but could only testify that the abrasions were consistent with being dragged and that the contusions were consistent with blunt force trauma. The pathologist found no evidence of defensive wounds.

After the State rested, defendant moved to dismiss the first degree murder charge. The trial court denied the motion. Defendant then presented the testimony of several witnesses, including Mr. Davis, and testified on his own behalf.

Defendant testified that he and Mr. Chamberlin were close friends who had known each other for over eight years. He testified that they had no problems with each other. Defendant's story largely matched that of Mr. Davis until the point Mr. Davis left the room. Defendant testified that after Mr. Davis left, he continued "messing with" the gun, trying to figure out why it would not fire. He then cocked the gun and it discharged, hitting Mr. Chamberlin. He testified that when he saw Mr. Chamberlin fall over, bleeding, he began sweating and crying. When Mr. Davis came back and saw Mr. Chamberlin laying on the bed, Mr. Davis asked defendant what he had done. Defendant said it was an accident, and that he made a mistake and shot Mr. Chamberlin.[1] Defendant admitted hiding Mr. Chamberlin's body behind the abandoned house. He explained that after the shooting he was scared of going to jail and panicked. Defendant turned himself in and was arrested the next day.

At the close of all evidence, defendant renewed his motion to dismiss the murder charge. The trial court again denied the motion. The trial court instructed the jury on first degree murder, second degree murder, and

1. Both defendant and Mr. Davis testified that he had said it was an accident.

involuntary manslaughter. The jury returned a verdict of guilty of second degree murder. Defendant was sentenced to 157 months to 198 months imprisonment. Defendant gave oral notice of appeal in open court.

II. Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of murder because there was insufficient evidence of malice. We agree.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Teague, ___ N.C. App. ___, ___, 715 S.E.2d 919, 923 (2011), *app. dismissed and disc. rev. denied*, 365 N.C. 547, 742 S.E.2d 177 (2012).

"The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citations and quotation marks omitted). "Although the evidence need not point unerringly toward the defendant's guilt so as to exclude all other reasonable hypotheses, it is well established that evidence which is sufficient only to raise a suspicion or conjecture of guilt is insufficient to withstand a motion to dismiss." *State v. Williams*, ___ N.C. App. ___, ___, 741 S.E.2d 9, 22 (2013) (citations, quotation marks, and brackets omitted).

"The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree." *State v. Bedford*, 208 N.C. App. 414, 417, 702 S.E.2d 522, 526-27 (2010) (citation and quotation marks omitted).

> What constitutes malice varies depending upon the facts of each case. Our courts have specifically recognized three kinds of malice:

> One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Grice, 131 N.C. App. 48, 53, 505 S.E.2d 166, 169 (1998) (citations and quotation marks omitted), *disc. rev. denied*, 350 N.C. 102, 533 S.E.2d 473 (1999). The State has not argued either at trial or on appeal that the evidence supports either of the first two kinds of malice.[2] The only theory of malice relied on by the State is an intentional killing. Therefore, we must consider whether there was sufficient evidence that defendant intentionally shot and killed Mr. Chamberlin.

Here, the State points us to two pieces of evidence which it claims supports the theory of an intentional shooting: (1) that Mr. Chamberlin said, "Get that fucking gun out of my face" before being shot, and (2) that defendant fled the scene and hid Mr. Chamberlin's body.

As to the first piece of evidence, although we must consider the evidence in the light most favorable to the State, that does not mean we must take pieces of evidence out of context. Before Mr. Chamberlin told defendant to "[g]et that fucking gun out of my face," defendant had been playing with the gun. Defendant and Mr. Chamberlin were debating whether a .380 bullet would fire out of a 9mm pistol. Defendant claimed that it would. Defendant, Mr. Davis, and Mr. Chamberlin went outside to see who was right. Defendant loaded the 9mm pistol with approximately five or six .380 cartridges and tried firing the gun into the air, but it would not fire. As defendant was trying to get it to fire, two of the bullets fell out—apparently ejected as defendant tried operating the slide—leaving approximately three or four bullets in the gun.

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2. "[O]rdinarily an unintentional homicide resulting from the reckless use of firearms in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). The State has not pointed us to evidence of a "heart devoid of a sense of social duty" here. *Id.*

Defendant and his friends went back to Mr. Davis' room and defendant continued playing with the loaded gun. He was manipulating the gun without paying attention to where the muzzle was pointing. Mr. Davis warned him, "Watch where you're aiming that gun." Mr. Davis then left the room, which is when he heard Mr. Chamberlin said "Get that fucking gun out of my face" in a "low" or "medium" tone. Shortly thereafter, one shot was fired. The projectile struck Mr. Chamberlin in the head and killed him. Mr. Davis did not testify that he heard a scuffle, an argument, or anything of the sort in the short amount of time between when he left the room and the gunshot. In this context, despite the State's arguments to the contrary, the phrase "[g]et that fucking gun out of my face" does not show that defendant intentionally pointed the gun at Mr. Chamberlin or that he intentionally fired it.

The only other evidence that the State argues shows that defendant intentionally killed Mr. Chamberlin is defendant's flight from the scene, including his decision to strip and hide Mr. Chamberlin's body. After Mr. Chamberlin was shot, defendant dragged his body outside, stripped him of his clothes, and hid the body under a pile of leaves. Defendant then left the scene and did not call an ambulance or the police. After speaking with his mother, however, defendant turned himself in the next morning.

"While the flight of an accused person may be admitted as a circumstance tending to show guilt, it does not create a presumption of guilt, nor is it sufficient standing alone, but it may be considered in connection with other facts in determining whether the combined circumstances amount to an admission." *State v. Gaines*, 260 N.C. 228, 231, 132 S.E.2d 485, 487 (1963) (citation, quotation marks, and parentheses omitted).

Considering defendant's flight in connection with the other facts in evidence and considering the evidence in the light most favorable to the State, we conclude that the State failed to provide sufficient evidence that defendant intentionally shot Mr. Chamberlin. The evidence is—at best—"sufficient only to raise a suspicion or conjecture" of malice. *Williams*, ___ N.C. App. at ___, 741 S.E.2d at 22. There was no evidence of any animosity or fighting between defendant and Mr. Chamberlin. There was no evidence of multiple shots being fired at Mr. Chamberlin. There was no evidence that defendant had any financial or social incentive to kill Mr. Chamberlin. Indeed, all of the State's evidence—and all of defendant's—indicated that defendant and Mr. Chamberlin were close friends and that there was no ill will between them. No one else was in the room when the lethal shot was fired. No one testified that defendant aimed the gun at Mr. Chamberlin and fired. Given the lack of evidence that defendant intentionally fired the shot that killed Mr.

Chamberlin, we hold that the State failed to present sufficient evidence of malice and therefore that the trial court erred in denying defendant's motion to dismiss the charge of murder.

"This error, however, does not require[] that we reverse the trial court's denial of [his] motion to dismiss, vacate the jury verdict[] on [this] charge[], and acquit [him], as . . . defendant contends." *State v. Suggs*, 117 N.C. App. 654, 662, 453 S.E.2d 211, 216 (1995). If the jury necessarily had to find facts establishing a lesser-included offense, and the evidence supports the jury's finding, we may remand for entry of judgment on the lesser offense. *See State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (vacating the judgment of first degree burglary and remanding for entry of judgment on a lesser included offense when there was insufficient evidence of an additional essential element of the greater offense). "As involuntary manslaughter does not contain an essential element not present in the crime[] of murder . . . and the essential element that the killing be unlawful is common to all four degrees of homicide, . . . involuntary manslaughter is a lesser included offense of murder[.]" *State v. Greene*, 314 N.C. 649, 652, 336 S.E.2d 87, 89 (1985). By finding defendant guilty of second degree murder, the jury necessarily found that defendant unlawfully killed Mr. Chamberlin with malice. *See Bedford*, 208 N.C. App. at 417, 702 S.E.2d at 526-27.

Although we have concluded that there was insufficient evidence of malice, there is sufficient evidence of an unlawful killing. *See Wilkerson*, 295 N.C. at 579, 247 S.E.2d at 916. Specifically, there was sufficient evidence to support a finding that defendant was culpably negligent in handling the pistol. See generally, *State v. Hill*, 311 N.C. 465, 471, 319 S.E.2d 163, 167 (1984) ("[I]nvoluntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." (citation and quotation marks omitted)); *Greene*, 314 N.C. at 652, 336 S.E.2d at 89 ("That the killing be unlawful is the essential element that must be proved [for involuntary manslaughter]; showing that the killing was by an unlawful act not amounting to a felony or by culpable conduct is evidence to prove that the killing was unlawful."). Therefore, the jury found the necessary elements of the lesser included offense of involuntary manslaughter and we may remand for entry of judgment on that offense. *See Suggs*, 117 N.C. App. at 662, 453 S.E.2d at 216; *Greene*, 314 N.C. at 652, 336 S.E.2d at 89 ("[T]he essential element that the killing be unlawful is common to all four degrees of homicide[.] [Therefore,] we hold that involuntary manslaughter is a lesser included offense of murder."). Before deciding

whether to remand for entry of judgment on the lesser offense, however, we must determine whether defendant is entitled to a new trial based on his remaining arguments concerning the conduct of the trial.

III. Remaining Arguments

[2] Defendant next argues that the trial court committed plain error by failing to limit the State's cross-examination of defendant and Mr. Davis on their "gang" membership and use of guns, and cross-examining Mr. Davis in a way that insinuated Mr. Davis believed that the shooting could have been intentional. Defendant also argues that the trial court erred by failing to intervene *ex mero motu* in the prosecutor's closing argument when several points of the argument were not based on the evidence.

The standard of review for defendant's evidentiary challenges is plain error, as he failed to object at trial.

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

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

Because defendant did not object during the prosecutor's closing argument,

> our review is limited to whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Oakes, 209 N.C. App. 18, 22, 703 S.E.2d 476, 480 (citations and quotation marks omitted), *app. dismissed and disc. rev. denied*, 365 N.C. 197, 709 S.E.2d 918, 920 (2011).

Even assuming that the trial court did err as contended, defendant cannot show prejudice, given that we have reversed his conviction for murder. All of the alleged errors relate to the State's attempts to elicit evidence and argue that defendant intentionally shot Mr. Chamberlin. Despite the State's attempts to imply through its questions and arguments that this shooting was intentional, none of the challenged questions actually produced evidence relevant to intent and the prosecutor's arguments about intent in closing were based only upon those questions and not any facts in evidence. For example, the prosecutor attempted, but failed, to get Mr. Davis to say that the group of friends was a "gang:"

> Q. And you-all all hung around, to use your word, chilled out all the time.
>
> A. Yes.
>
> Q. Everyone of you was a member of something called the Grand Hustle Team, weren't you?
>
> A. Yes.
>
> Q. And the Grand Hustle Team is a gang, isn't it?
>
> A. Not really.
>
> Q. Well, what word do you want to use to describe it?
>
> A. Just friends that hung around each other in the same neighborhood.

The prosecutor continued with an extended line of questioning, still trying to characterize the group as a "gang," without success, and ultimately the trial court sustained a defense objection and ended the line of questioning. Despite the fact that neither this nor other similar lines of questioning of other witnesses elicited any evidence of a "gang" or that the shooting had anything to do with the "Grand Hustle Team," in his closing argument, the prosecutor implied that this act was somehow gang-related by noting the connection to the "Grand Hustle Team" and its fascination with guns. None of the alleged errors would affect a conviction for involuntary manslaughter. We hold that, even assuming the trial court erred, defendant cannot show plain error on the evidentiary issues, nor prejudicial error from the trial court's failure to

intervene *ex mero motu* during the State's closing argument. Therefore, he is not entitled to a new trial.

IV. Conclusion

We hold that the trial court erred in denying defendant's motion to dismiss the charge of second degree murder because the State failed to present sufficient evidence of malice. Therefore, we vacate defendant's conviction for second degree murder. We remand for entry of judgment and resentencing on involuntary manslaughter because there was sufficient evidence to sustain a conviction as to that lesser included offense. Given our decision to vacate the murder conviction, defendant cannot show prejudice from the alleged errors at trial, all of which relate to the State's attempt to show an intentional killing through cross-examination and argue in its closing that the shooting was intentional. As a result, defendant is not entitled to a new trial.

VACATED and REMANDED; NO PREJUDICIAL ERROR.

Judges MCGEE and BRYANT concur.

STATE OF NORTH CAROLINA
v.
JEFFREY BRIAN JONES

No. COA13-286

Filed 3 December 2013

1. Notice—satellite-based monitoring—copy of notice not included

Defendant's argument in a satellite-based monitoring (SBM) case that he was not afforded sufficient notice with respect to the SBM proceedings was dismissed where defendant failed to include in the appellate record a copy of the written notice sent to him concerning the SBM hearing.

2. Satellite-Based Monitoring—ex post fact laws—no violation

Defendant's argument that the retroactive application of satellite-based monitoring (SBM) in his case violated constitutional guarantees against ex post facto laws was rejected under *State v. Bowditch*, 364 N.C. 335.

3. Satellite-Based Monitoring—unreasonable search and seizure—no violation

Defendant's argument in a satellite-based monitoring (SBM) case that SBM violated his right to be free from unreasonable search and seizure under our federal and state constitutions was rejected under *State v. Martin*, 735 S.E.2d 238.

Appeal by Defendant from orders entered 12 December 2012 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Scott B. Goodson, for the State.

Amanda S. Zimmer, for Defendant.

DILLON, Judge.

Jeffrey Brian Jones (Defendant) appeals from orders requiring him to enroll in satellite based monitoring (SBM) for the remainder of his life. We affirm.

I. Factual & Procedural Background

On 5 August 2004, Defendant pled guilty to two counts of taking indecent liberties with a child and one count of failure to register as a sex offender.[1] Defendant served an active sentence for these offenses and was subsequently released from incarceration on 23 January 2009.

More than three years later, Defendant was notified that he was required to appear for an SBM hearing to determine whether he qualified for SBM monitoring.[2] The matter was heard in Buncombe County Superior Court on 12 December 2012, at which time defense counsel, citing a written motion to dismiss that she had filed six days prior to the hearing, moved to dismiss the proceeding, contending, *inter alia*, (1) that the SBM regulatory regime was enacted after Defendant had committed the offenses for which he was sentenced,[3] and, therefore,

1. We note that Defendant's middle name appears as "Bryan" rather than "Brian" on the plea transcript.

2. As discussed further *infra*, the record does not reveal precisely when Defendant was notified of the SBM hearing.

3. The provisions comprising North Carolina's SBM regime were enacted and became effective in 2006. *State v. Bare*, 197 N.C. App. 461, 463-64, 677 S.E.2d 518, 522 (2009) (citing N.C. Sess. Laws 2006–247, section 15(a)).

retroactive application of the SBM regime to Defendant would violate Defendant's right to be free from *ex post facto* laws; and (2) that, in light of the United States Supreme Court's recent decision in *United States v. Jones*, __ U.S. __, 132 S.Ct. 945 (2012), subjecting Defendant to SBM would violate Defendant's constitutional right to be free from unlawful search and seizure. After hearing arguments from both sides, the trial court denied Defendant's motion to dismiss. The Assistant District Attorney then produced an Administrative Office of the Courts (AOC) form and entered the following findings of fact on the court's behalf:

> 1. The defendant was convicted of a reportable conviction as defined by G.S. 14-208.6(4), but the sentencing court made no determination on whether the defendant should be required to enroll in [SBM] under Article 27A of Chapter 14 of the General Statutes.
>
> 2. The Department of Correction has made an initial determination that the offender falls into at least one of the categories requiring [SBM] under G.S. 14-208.40, and gave notice to the offender of the aplicable [sic] category(ies).
>
> 3. The District Attorney scheduled a hearing in the county named above, which is the county of the defendant's residence, the Department provided notice to the defendant as required by G.S. 14-208.40B, and the hearing was not held sooner than 15 days after the date the Department gave notice.
>
> 4. The defendant . . . falls into at least one of the categories requiring [SBM] monitoring under G.S. 14-208.40 in that . . . the defendant is a recidivist.

Relying on the foregoing findings, the trial court ordered that Defendant enroll in SBM for the remainder of his natural life. From these orders[4], Defendant appeals.

II. Analysis

A. Notice

[1] Defendant's first three arguments on appeal challenge the propriety of the notice he was afforded with respect to the SBM proceedings below. Specifically, Defendant contends (1) that the evidence of record

4. The court entered two identical orders, one for each of Defendant's indecent liberties convictions.

fails to support the trial court's finding that Defendant was afforded notice as required under N.C. Gen. Stat. § 14-208.40B; (2) that the State's failure to provide sufficient notice violated Defendant's right to procedural due process; and (3) that the insufficient notice deprived the trial court of its subject matter jurisdiction to conduct the SBM hearing. We find these arguments unpersuasive.

N.C. Gen. Stat. § 14-208.40B(a) (2011) provides that the Department of Correction (DOC) "shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a)." *Id.* This provision further provides that once this determination has been made

> the district attorney, representing the Department, shall schedule a hearing in superior court for the county in which the offender resides. The Department shall notify the offender of the Department's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14–208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed.

Id. "Thus, the statute requires notice of two facts: (1) the hearing date and (2) the Department's determination with respect to N.C. Gen. Stat. § 14-208.40(a)." *State v. Stines*, 200 N.C. App. 193, 199, 683 S.E.2d 411, 415 (2009).

Here, Defendant concedes that he had some notice of his SBM hearing, a point that is obvious in light of his appearance at the 12 December 2012 hearing. We note that Defendant was represented by counsel at the SBM hearing and, further, that defense counsel filed a substantive motion to dismiss the SBM proceedings six days prior to the hearing. We also note that Defendant did not challenge the sufficiency of the State's notice at the SBM hearing, nor does he now contend that he was in any way prejudiced by the State's allegedly defective notice. Regardless, we find it dispositive that Defendant has failed to include in the appellate record a copy of the written notice sent to him concerning the SBM hearing. This Court's review of Defendant's arguments is limited to what appears in the record. *See* N.C. R. App. P. 9(a) (2013) (providing that "[i]n appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9"). "It is well established in this jurisdiction that it is the duty of the appellant to see that the record on appeal is properly made up

and transmitted." *State v. Dellinger*, 308 N.C. 288, 294, 302 S.E.2d 194, 197 (1983) (citing *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965)). Without reviewing the written notice sent to Defendant, we are unable to consider the merits of Defendant's arguments that he was afforded insufficient notice of the SBM hearing; that the evidence does not support the trial court's finding that notice was given; or that the notice failed to comport with due process. These arguments are dismissed.[5]

B. SBM as an Ex Post Facto Law

[2] Defendant next contends that the retroactive application of SBM in his case would violate guarantees against ex post facto laws contained in both the federal and state constitutions. However, our Supreme Court has specifically held that "subjecting defendants to the SBM program does not violate constitutional prohibitions against ex post facto laws." *State v. Bowditch*, 364 N.C. 335, 336, 700 S.E.2d 1, 2 (2010). This argument is overruled.

C. SBM as an Unreasonable Search and Seizure

[3] Defendant further contends that subjecting him to SBM violates his right to be free from unreasonable search and seizure under our federal and state constitutions. This Court recently addressed and rejected this precise argument in *State v. Martin*, __ N.C. App. __, 735 S.E.2d 238 (2012). Accordingly, this argument is overruled.

We note Defendant's reliance on the United States Supreme Court's decision in *Jones*, __ U.S. __, 132 S.Ct. 945, where the Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' " within the meaning of the Fourth Amendment. *Id.* at __, 132 S.Ct. at 949 (footnote omitted). Defendant essentially argues that if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well. We disagree. The context presented in the instant case – which involves a civil SBM proceeding – is readily distinguishable from that presented in *Jones*, where the Court considered the propriety of a search in the context of a motion to suppress evidence. We conclude, therefore, that the specific holding in *Jones* does not control in the case *sub judice*.

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5. We note that even if Defendant had included the SBM hearing notice in the record on appeal, his due process argument would still fail, as he did not raise this constitutional issue below. *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.").

Furthermore, we recognize that in *State v. Martin*, __ N.C. App. __, 735 S.E.2d 238 (2012), a case decided subsequent to *Jones*, this Court addressed and rejected the defendant's argument that SBM violated his Fourth Amendment rights. We held the following:

> *Bowditch* considered the defendants' argument that SBM was punitive in effect, in part because SBM requires certain infringements upon the offender's privacy as required for DCC's maintenance of the SBM equipment, including visits to his home. Thus, our Supreme Court considered the fact that offenders subject to SBM are required to submit to visits by DCC personnel and determined that this type of visit is not a search prohibited by the Fourth Amendment, exactly the opposite of what defendant herein claims. As the Fourth Amendment was one of the factors which the Supreme Court considered to support its conclusion of the punitive effect of SBM, this language would not be dicta.
>
> But even if we were to assume arguendo that the quoted language from *Bowditch* is dicta, we find the Supreme Court's reasoning in that case highly persuasive and would apply it here. Accordingly, we affirm the order of the trial court ordering defendant to enroll in SBM.

Id. at __, 735 S.E.2d at 239. Although it does not appear that the *Martin* court addressed *Jones* in reaching its holding, *supra*, we do not believe that *Jones* is controlling under the circumstances presented here. Accordingly, we are bound by our decision in *Martin*, *see In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and Defendant's argument is overruled.

III. Conclusion

In light of the foregoing, we affirm the trial court's 12 December 2012 orders.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

STATE v. POWELL

[231 N.C. App. 129 (2013)]

STATE OF NORTH CAROLINA
v.
TROY LAMONT POWELL

No. COA13-593

Filed 3 December 2013

1. Appeal and Error—appealability—prior record level points—sentencing duration error

The State's motion to dismiss defendant's appeal on the ground that N.C.G.S. § 15A 1444(a2) does not authorize an appeal of right to correct a court's determination of a defendant's prior record level points was denied. N.C.G.S. § 15A 1444(a2)(3) allows defendant an appeal as a matter of right when the sentence contains a term of imprisonment that is for a duration not authorized by N.C.G.S. § 15A 1340.17 or N.C.G.S. § 15A 1340.23 for the defendant's class of offense and prior record or conviction level.

2. Sentencing—malicious conduct by prisoner—violation of statutory mandate

Defendant's sentence for malicious conduct by a prisoner was vacated and remanded for entry of a corrected sentence. The trial court's sentence of a maximum term of 30 months imprisonment for a 25 month minimum term was violative of the statutory mandate under the applicable sentencing guidelines of N.C.G.S. § 15A 1340.17(d) for a Class F felony committed on 9 June 2012, pursuant to N.C.G.S. § 15A 1447(f).

3. Sentencing—clerical error—prior record level points

A malicious conduct by a prisoner case was remanded to the trial court to amend the judgment form to reflect defendant's correct prior record level point total.

Appeal by defendant from judgment entered 8 January 2013 by Judge Milton F. Fitch, Jr. in Hertford County Superior Court. Heard in the Court of Appeals 18 November 2013.

Roy Cooper, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State.

Michelle FormyDuval Lynch, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Troy Lamont Powell appeals from a judgment entered pursuant to his guilty plea for one count of malicious conduct by a prisoner. For the reasons stated herein, we vacate defendant's sentence and remand for entry of a corrected sentence consistent with this opinion.

On 7 January 2013, defendant was indicted for malicious conduct by a prisoner, a Class F felony, which was alleged to have been committed on 9 June 2012. Defendant pled guilty to the charge and stipulated to being a Prior Record Level IV offender. The prior record level stipulation is consistent with the entries on the prior record level worksheet included in the record, which indicates that defendant had a total of twelve prior record level points; two points for one prior Class H or I felony conviction, nine points for nine prior Class A1 or 1 misdemeanor convictions, and one point because "all of the elements of the present offense [we]re included in any prior offense."

The trial court initially sentenced defendant to a term of 25 to 39 months imprisonment based on defendant's prior record level and his conviction for a Class F felony. However, when defendant returned to court to give his oral notice of appeal, the court purported to correct defendant's sentence as follows:

THE COURT:	Madam Clerk, the judgment is not correct, unless I'm looking at the wrong chart. I can't give him 39 months. I can give him 25, which is at the high end of the presumptive for an F. He's a Record Level IV. The maximum I can give him under the law that corresponds with 25—you actually have the printed chart. . . .
[ADA]:	Yes, sir, Judge.
THE COURT:	The date of offense is on or after December 1st, 2011; is that correct? The date of offense is 6/9/12?
[ADA]:	Yes, sir, Judge. . . .
THE COURT:	Just tell me if I'm accurate. Is the highest [maximum] 30?
[ADA]:	For an F on the 25, 25 takes you out to 30, Judge.
THE COURT:	Then the Court on its own motion will correct the judgment entered on 1/8/2013. . . .

> After examining the judgment and commitment the Court realizes that the Court gave 39 months. The 39 months would correspond to 32 months. If the Court gave, 39 months, the Court was in error. So the Court, on its own motion, corrects the judgment to comport with the statute. Give the defendant 25 months minimum, 30 months maximum in the North Carolina Department of Corrections.

The court then amended its written judgment to reflect a sentence of 25 to 30 months imprisonment. Defendant appealed.

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[1] As a preliminary matter, we note that the State filed a motion to dismiss defendant's appeal on the ground that the statute under which defendant purports to take his appeal—N.C.G.S. § 15A 1444(a2)—does not authorize an appeal of right to correct a court's determination of a defendant's prior record level *points*, when such a correction does not affect the court's finding of that defendant's prior record *level*, which comprises the entirety of defendant's sole issue on appeal. *See* N.C. Gen. Stat. § 15A 1444(a2)(1) (2011) ("A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed . . . [r]esults from an incorrect finding of the defendant's prior record *level* under G.S. 15A 1340.14 or the defendant's prior conviction *level* under G.S. 15A 1340.21. . . ." (emphases added)). While we agree that defendant's issue on appeal, standing alone, does not entitle defendant to an appeal as a matter of right within the express language of N.C.G.S. § 15A 1444(a2)(1), we have identified a sentencing error that appears on the face of the record that caused defendant to be sentenced to a term of imprisonment that is for a duration not authorized by the applicable version of N.C.G.S. § 15A 1340.17(d). Thus, because N.C.G.S. § 15A 1444(a2)(3) allows a defendant an appeal as a matter of right when his or her sentence "[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A 1340.17 or G.S. 15A 1340.23 for the defendant's class of offense and prior record or conviction level," N.C. Gen. Stat. § 15A 1444(a2)(3), we deny the State's motion to dismiss.

[2] "The criminal judgment entered against a person in either district or superior court shall be consistent with the provisions of Article 81B of [Chapter 15A of the North Carolina General Statutes] and contain a

sentence disposition consistent with that Article . . . ." N.C. Gen. Stat. § 15A 1331 (2011). Pursuant to N.C.G.S. § 15A 1340.17(d), after a trial court determines the minimum duration of a defendant's sentence, in order to calculate the maximum sentence for a Class F through Class I felony that is not otherwise provided by statute for a specific crime, the court should select, "for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table [in subsection (d)]," in which "[t]he first figure in each cell in the table is the minimum term and the second is the maximum term." N.C. Gen. Stat. § 15A 1340.17(d) (2011). Moreover, "[t]rial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense." *State v. Whitehead*, 365 N.C. 444, 447, 722 S.E.2d 492, 495 (2012).

In the present case, as evidenced by his guilty plea, defendant committed the offense of malicious conduct by a prisoner on 9 June 2012. Therefore, in order to determine defendant's maximum sentence for this Class F felony committed on 9 June 2012, the trial court should have used the version of the sentencing grid codified in N.C.G.S. § 15A 1340.17(d) that became effective on 1 December 2011 and "applie[d] to offenses committed on or after that date" as a result of the amendments promulgated under the Justice Reinvestment Act of 2011. 2011 N.C. Sess. Laws 758, 762, 765, ch. 192, § 2(e), (j).

Here, the trial court first sentenced defendant to a minimum term of 25 months imprisonment and a maximum term of 39 months imprisonment, which sentence was in compliance with the post Justice Reinvestment Act amendments to N.C.G.S. § 15A 1340.17(d) for offenses committed on or after 1 December 2011. *See id.* Then, at a subsequent hearing, on its own motion, the court sought to "correct" this sentence by directing defendant to serve a maximum term of 30 months imprisonment for the same minimum presumptive-range term of 25 months, because, as the colloquy excerpted above indicates, the trial court was convinced that it was "looking at the wrong chart." However, when the court "corrected" its sentence and changed defendant's maximum term to 30 months imprisonment, the court actually sentenced defendant to the term that was correct for offenses committed *before* the amendments of the Justice Reinvestment Act of 2011 took effect. *See* N.C. Gen. Stat. § 15A 1340.17(d) (2009). Because the trial court's sentence of a maximum term of 30 months imprisonment for a 25 month minimum term is violative of the statutory mandate under the applicable sentencing guidelines of N.C.G.S. § 15A 1340.17(d) for a Class F felony committed on 9 June

2012, pursuant to N.C.G.S. § 15A 1447(f), we vacate the trial court's sentence and remand this matter to the trial court with instructions to enter its original maximum sentence of 39 months imprisonment. *See* N.C. Gen. Stat. § 15A 1447(f) (2011) ("If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence."). Moreover, although we recognize that our order directing the trial court to impose a 39 month maximum sentence seems, itself, to instruct the court to violate the statutory mandate prohibiting a trial court from imposing a more severe sentence than the sentence originally imposed, *see* N.C. Gen. Stat. § 15A 1335 (2011) ("When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served."), our Court has recognized that, "where the trial court is required by statute to impose a particular sentence (on resentencing) G.S. § 15A 1335 does not apply to prevent the imposition of a more severe sentence." *State v. Kirkpatrick*, 89 N.C. App. 353, 355, 365 S.E.2d 640, 641 (1988).

[3] Finally, defendant contends the trial court erred by determining that he had twelve prior record level points. While defendant concedes that the trial court correctly gave him two points for one prior Class H or I felony conviction and nine points for nine prior Class A1 or 1 misdemeanor convictions, defendant asserts that the court should have determined that he had only eleven prior record level points because defendant had no prior convictions for malicious conduct by a prisoner and had no prior convictions that had all of the elements of this offense, which was the basis for the additional prior record level point in the court's calculation in accordance with N.C.G.S. § 15A 1340.14(b)(6).

One of the five essential elements of malicious conduct by a prisoner is that "the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim." *State v. Robertson*, 161 N.C. App. 288, 292, 587 S.E.2d 902, 905 (2003). Because the record does not reflect that any of defendant's prior convictions also included this element, the trial court erred by assessing an additional prior record level point to defendant's prior record level point total on this basis. However, since, as defendant concedes, subtracting this point from defendant's prior record level point total of twelve does not alter the court's determination that defendant is still a Prior Record Level IV offender, *see* N.C. Gen. Stat. § 15A 1340.14(c)(4) (2011) (providing that a Prior Record

Level IV offender has "[a]t least 10, but not more than 13 points"), we conclude that such error is harmless. *See*, *e.g.*, *State v. Lowe*, 154 N.C. App. 607, 610–11, 572 S.E.2d 850, 853–54 (2002). Nonetheless, we agree with defendant that the trial court also erroneously recorded his prior record level point total on the judgment form as "17" points, which *would* cause defendant to be a higher prior record level offender. As the State concedes, this error appears to be a clerical one, and "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696–97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). Accordingly, inasmuch as we remand this matter for entry of a corrected sentence, we further instruct the trial court to amend the judgment form to reflect defendant's correct prior record level point total.

Sentence vacated; remanded for entry of corrected sentence and for correction of clerical error on the judgment.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA
v.
ROBERT KENNETH STEWART

No. COA13-283

Filed 3 December 2013

1. Evidence—homicide—testimony—relevant—state of mind

The trial court did not commit plain error in a multiple homicide case by allowing certain testimony into evidence. the challenged testimony was relevant to show defendant's advanced planning and state of mind. Furthermore, assuming *arguendo* the admission of the testimony was erroneous, defendant failed to show that the admission of the testimony had a probable impact on the jury's finding him guilty.

2. Evidence—homicide—photographs—relevant—illustrative

The trial court did err in a multiple homicide case by allowing crime scene and autopsy photographs of the victim's bodies into evidence over his objection. The photographs were relevant as they

depicted the crime scene and the victims' injuries and all the photographs were introduced to illustrate witness testimony concerning either the crime scene as it existed immediately following the shootings, each victim's location in the nursing home, or the specific injuries sustained by the victims.

3. Assault—with deadly weapon with intent to kill police officer—sufficient evidence

The trial court did not err by denying defendant's motion dismiss the charge of assault with a deadly weapon with intent to kill a police officer. There was sufficient evidence of each element of the offense, including defendant's intent to kill the officer.

Appeal by defendant from judgments entered 3 September 2011 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Haral E. Carlin, for defendant appellant.

McCULLOUGH, Judge.

Robert Kenneth Stewart ("defendant") appeals from his convictions for second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, discharging a weapon into occupied property, assault with a deadly weapon with intent to kill, assault with a firearm on a law enforcement officer, and assault by pointing a gun. For the following reasons, we find no error.

I. Background

On the morning of 29 March 2009, approximately two weeks after defendant's wife left him, defendant went to Pine Lake Health and Rehabilitation in Carthage, North Carolina, armed with a 12-gauge shotgun and several other firearms. Defendant's estranged wife typically worked as a certified nurse's assistant on the 200 hallway of the nursing home; however, she was working in the locked Alzheimer's unit on 29 March 2009.

Shortly before 10:00 A.M., before entering the nursing home, defendant fired the long-barreled weapon at an occupied Ford truck in the parking lot three times, striking the occupant once in the left shoulder.

Thereafter, defendant entered the nursing home brandishing the shotgun. Defendant walked through the nursing home firing the shotgun at residents and staff. Seven residents and one nurse were killed.

Officer Justin Garner of the Carthage Police Department was the first officer on the scene. Officer Garner encountered defendant near the intersection of the 300 and 400 hallways while defendant was reloading the shotgun. Officer Garner instructed the defendant to drop the weapon three times, but defendant did not comply. Defendant then turned towards Officer Garner and lowered the shotgun in Officer Garner's direction. At approximately the same time, defendant and Officer Garner each fired one shot at each other. Officer Garner testified that he felt something strike his left leg and quickly stepped into a nearby room for cover. Officer Garner then reentered the hallway and saw defendant lying face down on the floor with the shotgun nearby. Officer Garner approached and secured defendant. Defendant had been shot in his shoulder.

Besides the shotgun, a loaded .38 caliber revolver and a loaded .22 caliber handgun were recovered from holsters on defendant's belt. A .22 caliber rifle was later recovered from the top of a Jeep in the nursing home parking lot. Ammunition for the firearms was recovered from defendant's pockets and a green military style satchel from around defendant's neck.

Defendant was indicted by a Moore County Grand Jury on 13 April 2009 of eight counts of first-degree murder, two counts of attempted first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of discharging a firearm into occupied property, one count of assault with a firearm on a law enforcement officer, and two counts of assault by pointing a gun. Shortly thereafter, the State filed notice that it would proceed capitally.

On 9 November 2010, the trial court ordered the venue of the proceedings be transferred to Stanly County for the limited purpose of jury selection. Defendant's case then came on for trial on 11 July 2011 in Stanly County Superior Court, the Honorable James M. Webb, Judge presiding. Following jury selection, the case was moved back to Moore County Superior Court where the jury began to hear evidence on 1 August 2011.

After weeks of evidence, closing arguments were heard on 1 September 2011. The case was then given to the jury on 2 September 2011. On 3 September 2011, the jury returned verdicts finding defendant guilty on eight counts of second-degree murder, one count of assault

with a deadly weapon with intent to kill inflicting serious injury, one count of discharging a weapon into occupied property, one count of assault with a deadly weapon with intent to kill, one count of assault with a firearm on a law enforcement officer, and two counts of assault by pointing a gun. The jury found defendant not guilty on the two counts of attempted first-degree murder. Separate judgments were entered for each of defendant's convictions and defendant was sentenced to fourteen consecutive terms totaling 1,699 months to 2,149 months imprisonment, plus 150 days. Defendant gave notice of appeal in open court.

II. Discussion

Testimony at Trial

[1] In defendant's first four issues on appeal, defendant contends that the trial court plainly erred in allowing certain testimony into evidence. Specifically, defendant challenges the relevancy of testimony from various officers concerning firearms and ammunition found in defendant's residence, ammunition found in defendant's truck, instructions for claymore mines found on defendant's kitchen table, and unfruitful searches of both defendant's and defendant's estranged wife's residences for claymore mines. Defendant did not object to the testimony at trial, but now asserts the admission of the testimony into evidence was plain error. We address defendant's arguments together.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C.R. App. P. 10(a)(1) (2013). However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

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

> finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

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

In asserting error, defendant argues the testimony from officers concerning their search for weapons and their recovery of firearms, ammunition, and instructions for claymore mines from defendant's property following the shooting was irrelevant because "[t]he evidence presented at trial was undisputed that all of the victims were killed with the shotgun[]" recovered at the scene. Moreover, defendant argues the only purpose in introducing the testimony was to portray him "as an extremely dangerous person who possessed dangerous weapons." As a result, defendant contends the testimony should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 402.[1] Defendant cites *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982), and *State v. Samuel*, 203 N.C. App. 610, 693 S.E.2d 662 (2010), in support of his argument.

In *Patterson* the State introduced evidence of a sawed-off shotgun found in the defendant's car in addition to a pistol identified by the victim as the weapon used in the armed robbery for which the defendant was on trial. 59 N.C. App. at 652, 297 S.E.2d at 630. On appeal of the defendant's conviction, this Court granted the defendant a new trial holding "[t]he shotgun was not connected to the robbery and it was clearly not relevant to any issues in the case[]" and "there [was] a reasonable possibility that the erroneous admission of the shotgun evidence contributed to the defendant's conviction, particularly in light of the conflicting evidence regarding the identity of the defendant as the man who robbed [the victim]." *Id.* at 653-54, 297 S.E.2d at 630. Similarly, in *Samuel* the State introduced evidence of two guns found in the defendant's home in order to link the defendant to the armed robbery for which he was on trial. 203 N.C. App. at 619-20, 693 S.E.2d at 668-69. On appeal, this Court held "the evidence about the guns was wholly irrelevant and, thus, inadmissible[]" because "there was not a scintilla of evidence

1. Defendant also briefly alludes to N.C. Gen. Stat. § 8C-1, Rule 403 in his argument. This Court, however, has opted not to review discretionary rulings under Rule 403 for plain error. *See State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) ("The North Carolina Supreme Court has specifically refused to apply the plain error standard of review 'to issues which fall within the realm of the trial court's discretion[.]'" (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000))).

linking either of the guns to the crimes charged." *Id.* at 621, 693 S.E.2d at 669. Additionally, "[g]iven the weakness in the State's evidence that [the d]efendant was the assailant and the substantial evidence tending to show that [the d]efendant was not the assailant," this Court concluded "that the admission of the evidence of the guns, and the prosecutor's reliance upon the revolver to link [the d]efendant to the crimes charged, had a probable impact on the jury's finding that the defendant was guilty[]" and therefore amounted to plain error. *Id.* at 624, 693 S.E.2d at 671 (citation and quotation marks omitted).

Although we acknowledge the holdings in *Patterson* and *Samuel*, we find the present case distinguishable.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Pursuant to N.C. Gen. Stat. § 8C-1, Rule 402, "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." "Although the trial court's rulings on relevancy technically are not discretionary . . . , such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

As the State points out, in the present case defendant was indicted on eight counts of first-degree murder and two counts of attempted first-degree murder. Although defendant was only convicted of second-degree murder, the State attempted to prove the first-degree offenses and therefore had to prove premeditation and deliberation. *See State v. Wilds*, 133 N.C. App. 195, 199, 515 S.E.2d 466, 471 (1999) (" 'First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation.' " (quoting *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981))). Additionally, instead of denying he was the shooter, defendant asserted insanity and automatism defenses. Accordingly, the State attempted to rebut those defenses with evidence of defendant's mental state.

The State now argues the challenged testimony was relevant to show defendant's advanced planning and state of mind. We agree. The facts that defendant had multiple firearms and various types of ammunition at his disposal were relevant to show that defendant made choices about which firearms to arm himself with and selected the correct ammunition for those firearms prior to the shootings. Additionally, the facts that officers searched for claymore mines and found instructions for claymore mines on defendant's kitchen table were relevant to show that defendant

had likely removed the instructions from the green satchel found around defendant's neck in order to fill it with ammunition to be used in the shootings. Based on the tendency of the evidence to show defendant's advanced planning and mental state prior to going to the nursing home, we hold the challenged testimony was relevant.

Moreover, assuming arguendo the admission of the testimony was error, defendant has not shown that the admission of the testimony amounted to plain error; namely, that "the error had a probable impact on the jury's finding that [he] was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Although defendant argues the testimony portrayed him "as an extremely dangerous person who possessed dangerous weapons[,]", defendant has not argued how the alleged prejudicial testimony impacted the jury's finding of guilt in light of the overwhelming evidence presented by the State.[2]

Photographs

[2] In defendant's next issue on appeal, defendant contends the trial court erred by allowing crime scene and autopsy photographs of the victim's bodies into evidence over his objection. Specifically, defendant argues the photographs should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rules 401, 402, and 403.

The photographs challenged on appeal were introduced at trial as follows: The State first sought to introduce forty-three crime scene photographs as the State's exhibits 123 through 165 to illustrate testimony of a crime scene investigator who processed the scene. Defendant objected to twelve of the photographs depicting the victims' bodies at the scene on the basis that the photographs were unduly inflammatory or prejudicial under N.C. Gen. Stat. § 8C-1, Rule 403. After reviewing the photographs, the trial court allowed all but one of the crime scene photographs into evidence; the trial court found the one excluded photograph duplicative. The State later sought to introduce the State's exhibits 320 and 322-327. Each of these exhibits consisted of an SBI prepared diagram illustrating the location where each victim was found within the nursing home with an enlarged copy of a previously admitted crime scene photograph. Defendant objected to each exhibit on the basis that the seven attached photographs were duplicative and unnecessary. After reviewing each exhibit and comparing the size of the enlarged photographs

2. We additionally note that the officer's testimony regarding the search of defendant's and defendant's estranged wife's residences for claymore mines was not prejudicial because the officer indicated that no such devices were found.

to the originals, the trial court allowed the exhibits into evidence for illustrative purposes. Lastly, the State introduced photographs from the victims' autopsies to illustrate testimony from medical examiners concerning the victims' injuries. Defendant specifically objected to the State's exhibit 383, a photograph of a victim's heart, pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. The trial court, however, allowed the autopsy photographs into evidence.

Now on appeal, defendant first contends the photographs of the victims' bodies had no probative value because there was no issue as to the identity of the victims, the cause of the victims' deaths, the manner of the shootings, or defendant's role as the shooter. Consequently, defendant asserts the photographs served only to inflame the passions of the jury.

Addressing the issue of relevance under N.C. Gen. Stat. § 8C-1, Rules 401 and 402, we note that "[b]ecause defendant objected to the admission of [the] photograph[s] solely on the basis of [N.C. Gen. Stat. § 8C-1, Rule 403], he has waived appellate review on the issue of the relevance of the photograph[s]." *State v. Lloyd*, 354 N.C. 76, 97, 552 S.E.2d 596, 613 (2001) (citing N.C. R. App. P. 10(b)(1)). Nevertheless, had defendant properly preserved the issue of relevance for appeal, both the crime scene and autopsy photographs of the victims' bodies were relevant and properly admitted for illustrative purposes. As stated by our Supreme Court, "[p]hotographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony." *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971).

> Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death[.] Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death.

State v. Hennis, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988) (citations omitted).

First, the photographs were relevant as they depicted the crime scene and the victims' injuries. Moreover, as discussed above, the State attempted to prove first-degree murder and attempted first-degree murder. Consequently, the photographs of the victims' bodies were not

precluded by the fact that defendant acknowledged that he shot and killed the victims; the photographs remained relevant "to illustrate testimony regarding the manner of [the shootings] so as to prove circumstantially the elements of murder [and attempted murder] in the first degree[.]" *Id.*

Having decided the photographs were relevant, the issue remains whether the photographs should have been excluded pursuant N.C. Gen. Stat. § 8C-1, Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." " 'Unfair prejudice' means an undue tendency to suggest a decision on an improper basis, usually an emotional one." *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526.

> Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each . . . lies within the discretion of the trial court. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

Id. at 285, 372 S.E.2d at 527 (citations omitted).

Defendant contends the trial court abused its discretion because the photographs of the victims' bodies had little probative value, were unnecessarily repetitive and cumulative, and served only to inflame the passions of the jury. Moreover, defendant asserts he was prejudiced by the manner in which the photographs were presented. Defendant cites our Supreme Court's decision in *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), in support of his arguments.

In *Hennis*, the defendant was convicted on three counts of first-degree murder and sentenced to death. On appeal, our Supreme Court addressed whether the trial court erred in admitting thirty-five photographs, nine photographs depicting the victims' bodies at the crime scene and twenty-six autopsy photographs, into evidence over the defendant's objection. *Id.* at 282-83, 372 S.E.2d at 525-26. The challenged photographs were first published to the jury by projecting them onto a large screen just above the defendant's head during witness testimony. *Id.* at 282, 372 S.E.2d at 525. Thereafter, just before the State rested its

case, the photographs were republished to the jury one at a time over the course of an hour, unaccompanied by additional testimony. *Id.* at 283, 572 S.E.2d at 526.

While reviewing whether the trial court abused its discretion by allowing the photographs into evidence, the Court explained "that when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury." *Id.* at 284, 372 S.E.2d at 526. Yet,

> [t]he test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies-these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

Id. at 285, 372 S.E.2d at 527.

Applying the above law, the Court in *Hennis* noted that many of the autopsy photographs were repetitive, "added nothing to the [S]tate's case as already delineated in the crime scene [photographs] and their accompanying testimony[,]" and "had potential only for inflaming the jurors." *Id.* at 286, 372 S.E.2d at 527-28. The Court further noted that "the prejudicial effect of the photographs . . . was compounded by the manner in which the photographs were presented." *Id.* at 286, 372 S.E.2d at 528. As a result, the Court held the trial court erred in admitting the photographs. Moreover, the Court found the error prejudicial and granted the defendant a new trial due to the fact "defendant was linked to the crime through circumstantial evidence and through direct evidence upon which the witnesses' own remarks cast considerable doubt." *Id.* at 287, 372 S.E.2d at 528. The Court specifically remarked, "[o]verwhelming evidence of [the defendant's] guilt was not presented." *Id.*

Defendant argues for the same result in the present case. As we have previously stated, " '[t]his Court has rarely held the use of photographic evidence to be unfairly prejudicial, and the case presently before us

is distinguishable from the few cases in which we have so held.' " *State v. Bare*, 194 N.C. App. 359, 364, 669 S.E.2d 882, 886 (2008) (quoting *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990)).

Applying the law as provided in *Hennis*, we hold the trial court did not abuse its discretion in admitting the photographs in the present case where all the photographs were introduced to illustrate witness testimony concerning either the crime scene as it existed immediately following the shootings, each victim's location in the nursing home, or the specific injuries sustained by the victims. Moreover, we do not find the number of photographs or manner of presentation extraordinary given the number of victims and the size of the enlarged photographs.[3] Lastly, we find it pertinent that the jury was properly instructed to consider the photographs solely for illustrative purposes. As a result, we cannot say that the trial court's decision to admit the photographs was so arbitrary that it could not have been the result of a reasoned decision.

Nevertheless, assuming arguendo the trial court abused its discretion in admitting the photographs, the error was harmless considering the overwhelming evidence of defendant's guilt.

Motion to Dismiss

[3] In defendant's final issue on appeal, defendant contends the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill Officer Garner.[4] As a result of the purported error, defendant contends the case must be remanded for a new trial.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence

3. The largest photograph attached to an SBI diagram was a fourteen and a half by nineteen inch photograph.

4. Defendant was originally indicted for assault of Officer Garner with a deadly weapon with intent to kill inflicting serious injury. However, considering the nature of Officer Garner's injury, the trial court only allowed the jury to consider the lesser offense of assault with a deadly weapon with intent to kill.

is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted).

"[T]he elements of assault with a deadly weapon with intent to kill are: '(1) an assault; (2) with a deadly weapon; (3) with the intent to kill[.]' " *State v. Garris*, 191 N.C. App. 276, 287, 663 S.E.2d 340, 349 (2008) (quoting *State v. Coria*, 131 N.C. App. 449, 456, 508 S.E.2d 1, 5 (1998)); *see also* N.C. Gen. Stat. § 14–32(c) (2011).

On appeal, defendant only challenges the sufficiency of the evidence with respect to the third element of the offense, intent to kill. Specifically, defendant contends the evidence shows he never intended to kill Officer Garner, but instead intended for Officer Garner to kill him. In support of his contention, defendant points to evidence tending to show he was depressed and felt his end was near, the deceased were all shot in their abdominal areas whereas Officer Garner was shot in the leg by three shotgun pellets on a ricochet, he made no attempt to use either of the two handguns on his person after he was shot by Officer Garner, and he told numerous officers to "shoot him" or "kill him." Moreover, defendant emphasizes he never expressed intent to kill Officer Garner.

Despite consideration of the evidence pointed to by defendant, we hold that, upon consideration of all the evidence in the light most favorable to the State, there is sufficient evidence of "intent to kill" to support

the charge of assault with a deadly weapon with intent to kill Officer Garner. As our Supreme Court stated long ago,

> [a]n intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

State v. Cauley, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956) (citation and quotation marks omitted).

In this case, the evidence tended to show that defendant had already fatally shot eight people with the shotgun at the time Officer Garner confronted defendant in the hallway. Defendant then ignored Officer Garner's repeated instructions to drop the shotgun and continued to reload it. Defendant then turned toward Officer Garner, lowered the shotgun, and fired one shot at Officer Garner at approximately the same time that Officer Garner fired at defendant and ducked into a doorway. Although Officer Garner was only struck in the leg by shotgun pellets on a ricochet, considering the relevant circumstances and viewing all the evidence in the light most favorable to the State, we find sufficient circumstantial evidence to support a reasonable inference of intent to kill. Therefore, the trial court did not err in denying defendant's motion to dismiss the assault with a deadly weapon with intent to kill charge.

III. Conclusion

Based on the forgoing reasons, we find neither plain nor prejudicial error in the trial court's admission of evidence below and hold defendant received a fair trial. Moreover, we find sufficient evidence to support the charge of assault with a deadly weapon with intent to kill and hold the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges HUNTER (Robert C.) and GEER concur.

JORGE TOVAR-MAURICIO, EDEMIAS DELEON MORALES, MARIO M. TOVAR, RANULFO DELEON VASQUEZ, BERNABE FRANCISCO CALIXTO, TOMAS MARTINEZ GUERRERO AND GABRIEL DOMINGUEZ-CONTRERA, EMPLOYEES, PLAINTIFFS-APPELLEES

v.

T.R. DRISCOLL, INC., EMPLOYER, GENERAL CASUALTY INSURANCE COMPANY, CAROLINAS ROOFING AND SHEET METAL CONTRACTORS SELF-INSURED FUND, CARRIER, DEFENDANTS-APPELLANTS

No. COA13-517

Filed 3 December 2013

1. Workers' Compensation—general casualty policy—no coverage in North Carolina

The Industrial Commission did not err in a workers' compensation case by concluding that the General Casualty policy afforded no coverage for plaintiffs' claims filed in North Carolina. The record indicated that plaintiffs received compensation under the workers' compensation laws of Virginia.

2. Workers' Compensation—fund agreement—coverage

The Industrial Commission did not err in a workers' compensation case by concluding that the Fund Agreement afforded coverage for plaintiffs' claims.

3. Appeal and Error—preservation of issues—failure to challenge findings of fact or conclusion of law—parol evidence—intent

Although defendant insurance carrier contended that the Industrial Commission erred in a workers' compensation case by considering parol evidence to determine the intent of the general casualty policy, it failed to challenge a finding of fact as unsupported by competent evidence or a conclusion of law as not justified by the findings of fact.

4. Workers' Compensation—general casualty policy—intent—reliance on agency relationship

The Industrial Commission did not err in a workers' compensation case by relying upon the alleged agency relationship between Davis-Garvin and the employer to determine the intent of the General Casualty policy. Even if defendant insurance carrier could demonstrate some error in a finding regarding agency, it could not demonstrate that the finding undermined a conclusion of law such that it justified reversal of the Commission's order.

5. Workers' Compensation—failure to reimburse benefits—claims transferred to North Carolina

The Industrial Commission did not err in a workers' compensation case by failing to award General Casualty reimbursement for benefits it paid to plaintiffs after they transferred their workers' compensation claims to North Carolina. N.C.G.S. § 97-86.1(d) does not permit repayment for compensation paid under the order of another state.

Judge DILLON concurring in part and dissenting in part in separate opinion.

Appeals by Defendants General Casualty Insurance Company and Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund from opinion and award entered by the North Carolina Industrial Commission on 21 December 2012. Heard in the Court of Appeals 24 September 2013.

Diener Law, by Cynthia E. Everson, for Plaintiffs-Appellees.

Orbock Ruark & Dillard, PC, by Roger L. Dillard, Jr. and Jessica E. Lyles, for Defendant-Appellee T.R. Driscoll, Inc.

Goodman McGuffey Lindsey & Johnson, LLP, by Adam E. Whitten, for Defendant-Appellant Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund.

Teague Campbell Dennis & Gorham, LLP, by Brian M. Love and George H. Pender, for Defendant-Appellant General Casualty Insurance Company.

McGEE, Judge.

T.R. Driscoll, Inc. ("Employer") is a company with a principal place of business in North Carolina. Employer intermittently sends its employees to work in other states, including Virginia. Employer joined the Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund ("the Fund") in the early 1980s. Employer entered into an agreement with the Fund for workers' compensation insurance "coverage for North Carolina and South Carolina operations[.]" The Davis-Garvin Agency, Inc. ("Davis-Garvin") served as Employer's agent in purchasing insurance for "exposure not covered by the Fund." Davis-Garvin obtained workers' compensation insurance for Employer from Capital

City Insurance Company in 2005. General Casualty Insurance Company ("General Casualty") acquired Capital City Insurance Company in 2009.

Employer sent Jorge Tovar-Mauricio, Edemias Deleon Morales, Mario M. Tovar, Ranulfo Deleon Vasquez, Bernabe Francisco Calixto, Tomas Martinez Guerrero, and Gabriel Dominguez-Contrera ("Plaintiffs") to Virginia to work on a roofing project. Plaintiffs were injured in the course and scope of their employment when a gas line exploded on 29 November 2009. Plaintiffs filed workers' compensation claims in Virginia. General Casualty "accepted the claims as compensable pursuant to the Virginia Workers' Compensation Act and began making payments[.]" The North Carolina Industrial Commission found that, as "of November 2011, General Casualty has paid compensation and medical benefits pursuant to the Virginia Workers' Compensation Act to [Plaintiffs] in an approximate amount of $1,960,000.00."

In September 2010, Plaintiffs filed Form 33 Requests for Hearing with the North Carolina Industrial Commission, indicating that the parties had been unable to agree, noting only "change of jurisdiction from VA to NC[.]" General Casualty responded that "it provided no coverage to [Employer] for claims filed in North Carolina and that such claims were properly covered by the Fund."

The Commission found that Employer "had a valid workers' compensation insurance policy with General Casualty covering Georgia, Tennessee, and Virginia." The Commission also found that Employer "was covered for workers' compensation claims filed in North Carolina by [the Fund] at the time of Plaintiffs' injuries."

The Commission concluded that the Fund "is the insurance carrier on the risk for [Employer] for workers' compensation claims filed under the North Carolina Workers' Compensation Act[.]" The Commission did "not address the issue of Plaintiffs' disability or average weekly wages" because the hearing "was limited to the establishment of jurisdiction and carrier liability[.]" The Fund and General Casualty appeal.

I. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Starr v. Gaston Cty. Bd. Of Educ.*, 191 N.C. App. 301, 304, 663 S.E.2d 322, 325 (2008). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Id.*

at 304-05, 663 S.E.2d at 325. "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 305, 663 S.E.2d at 325.

II. The Fund's Appeal

A. Conclusion "that the General Casualty Policy Affords No Coverage for Plaintiffs' Claims"

i. Conclusion of Law 4

[1] The Fund first argues that the "Commission erred in concluding that the General Casualty policy affords no coverage for Plaintiffs' claims[.]" The Fund fails to specify which conclusion of law it challenges on appeal. The only conclusion concerning General Casualty's coverage of Plaintiffs' claims is conclusion 4, quoted below:

> 4. . . . . Based upon a review of the plain language of the General Casualty policy, North Carolina was not a covered state at any time during the policy, either before or after the modification by endorsement.

We interpret the Commission's language that "North Carolina was not a covered state" as meaning that "the General Casualty policy affords no coverage for the claims before the Commission, i.e. Plaintiffs' claims that were filed in North Carolina." We interpret the language in this manner because of the plain language in the General Casualty insurance policy: "We will pay promptly when due the benefits required of you by the workers compensation law." According to the policy, "Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in Item 3.A. of the Information Page."

The "Information Page" lists Georgia, Tennessee, and Virginia:

> 3A. Workers compensation insurance: Part one of the policy applies to the workers compensation law of the states listed here: GA, TN, VA

Where "the language of an insurance policy is plain, unambiguous, and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms." *Walsh v. Insurance Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965); *see also Register v. White*, 358 N.C. 691, 599 S.E.2d 549 (2004).

The General Casualty policy is plain, unambiguous, and susceptible of only one reasonable construction. The General Casualty policy applies to benefits required by the workers' compensation laws of Virginia, in

this case. The Commission did not and indeed cannot award compensation except as required by the North Carolina Workers' Compensation Act. The Commission cannot award compensation under the laws of any state other than North Carolina.

The record indicates that Plaintiffs received compensation under the workers' compensation laws of Virginia. Thus, N.C. Gen. Stat. § 97-36 will apply in this case if future proceedings are instituted to determine the specific amount of compensation due Plaintiffs under our workers' compensation laws. *See* N.C. Gen. Stat. § 97-36 (2011) ("[I]f an employee . . . shall receive compensation or damages under the laws of any other state nothing herein shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article."). The Commission did not err in concluding that the General Casualty policy affords no coverage for Plaintiffs' claims filed in North Carolina.

ii. Liability under Virginia Workers' Compensation Law

The Fund requests this Court to "hold that General Casualty is liable to the Plaintiffs injured in Virginia, to the extent required by Virginia workers' compensation law, even after their claims are transferred to North Carolina for convenience." We note that the record indicates that the Commission ordered no such "transfer." Also, the Fund cites no provision in our General Statutes authorizing the Commission to "transfer" a claim from another state to North Carolina.

The conclusion that the General Casualty policy affords no coverage for these claims filed in North Carolina has no implications for General Casualty's liability under Virginia workers' compensation law. We therefore make no conclusions about General Casualty's past or continuing liability under Virginia law.

B. Finding of Fact 28 and Conclusion of Law 5

[2] The Fund next argues the Commission erred in concluding that the Fund agreement affords coverage for Plaintiffs' claims. We disagree.

The Fund challenges finding of fact 28 and conclusion of law 5. Finding of fact 28 is as follows:

> 28. . . . . The Full Commission further finds that [Employer] was covered for workers' compensation claims filed in North Carolina by [the Fund] at the time of Plaintiffs' injuries.

Conclusion 5 states:

> 5. Under the terms of the workers' compensation insurance policy with the Fund, [Employer] was properly covered for workers' compensation claims filed in North Carolina. N.C. Gen. Stat. § 97-36[.]

The Fund directs this Court to the following language in the Fund agreement:

> 1. To the extent that coverage is afforded the Member under Article II of this Agreement, the Fund shall neither be obligated to pay nor incur defense costs with respect to the following:
>
> a. Under Coverage A, for any liability, judgment or award rendered against the Member or the Fund by the governing authorities of a State not listed in the Preamble of this Agreement[.]
>
> b. Under Coverage A, for any liability, judgment or award rendered against the Member or the Fund, pursuant to a workers' compensation law other than that identified in Article II, section 3 of this Agreement[.]
>
> c. Under Coverages A and B, for operations conducted at or from any workplace if the Member has separate insurance for such operations[.] (emphasis added).

Coverage A refers to workers' compensation; Coverage B refers to "damages because of bodily injury or death[.]" The Fund agreement further states:

> Coverage A - Workers' Compensation. The Fund will pay promptly from the funds received from or on behalf of the Members when due all compensation and other benefits which the Member is ordered to pay by the governing authorities of the state(s) listed in the Preamble, pursuant to the Workers' Compensation law named in Article II, paragraph 3 of this Agreement. (emphasis added).

Article II, section 3 refers to the "Preamble." The "Preamble" lists North Carolina and South Carolina.

The Fund agreement plainly states that the exclusions in subparts "a" and "b" apply to awards rendered by States other than North and South Carolina. Thus, we consider whether the exclusion in subpart "c" applies. The Fund concedes it would "be liable for any excess liability *above* the liability owed under Virginia law." The Fund contends that

"any such coverage is nevertheless extinguished by the operation of" subpart "c." However, the record indicates that Employer has no separate insurance for the Virginia operations for the purpose of claims filed with the North Carolina Industrial Commission. For the claims in this case, which were claims filed with the North Carolina Industrial Commission, only the Fund agreement is applicable. The Commission did not err in the finding or the conclusion regarding the Fund's coverage in North Carolina.

C. Parol Evidence

[3] The Fund further argues the Commission erred in considering parol evidence to determine the intent of the General Casualty policy.

The Fund again fails to specify a finding of fact or conclusion of law to challenge on appeal. As stated above, our appellate review is limited to two issues: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Starr*, 191 N.C. App. at 304, 663 S.E.2d at 325; *see also Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005); *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986).

Because the Fund fails to challenge a finding of fact as unsupported by competent evidence or a conclusion of law as not justified by the findings of fact, this argument falls outside the well-established scope of our review on appeal.

D. Agency Relationship

[4] The Fund next argues the Commission erred in relying upon the alleged agency relationship between Davis-Garvin and Employer to determine the intent of the General Casualty policy.

The Fund again fails to specify a finding of fact or conclusion of law to challenge on appeal. Rather, the Fund contends that the issue "permeates the entire decision of the Full Commission." The Fund argues that evidence of "the knowledge or intent of Davis-Garvin . . . should not have formed the basis for the erroneous conclusions of law concerning the intent of the General Casualty policy and the efficacy of the attempted retroactive endorsement thereto."

However, the Commission held as follows:

> 8. As the Full Commission concludes that North Carolina was not a covered state either under the terms of the General Casualty policy, either before or after the modification by endorsement, the issues regarding the

> retroactive application of the amended endorsement and reformation of the contract are moot and not addressed by this Opinion and Award.

Because of our holding in Section II.A., affirming the Commission's conclusion as to General Casualty's lack of coverage over claims filed in North Carolina, we do not address this argument. Even if the Fund could demonstrate some error in a finding regarding agency, the Fund could not demonstrate that the finding undermined a conclusion of law such that it justified reversal of the Commission's order.

III. General Casualty's Appeal

[5] General Casualty's sole argument on appeal is that the Commission erred in failing to award General Casualty "reimbursement for benefits it paid to Plaintiffs after they transferred their workers' compensation claims to North Carolina."

General Casualty challenges only the following conclusion:

> There is no legal or contractual basis under the North Carolina Workers' Compensation Act that would entitle General Casualty to be reimbursed by the Fund for compensation already paid to Plaintiffs.

General Casualty cites N.C. Gen. Stat. § 97-86.1(d), quoted below:

> In any claim under the provisions of this Chapter wherein one employer or carrier has made payments to the employee or his dependents pending a final disposition of the claim and it is determined that different or additional employers or carriers are liable, the Commission may order any employers or carriers determined liable to make repayment in full or in part to any employer or carrier which has made payments to the employee or his dependents.

N.C. Gen. Stat. § 97-86.1(d) (2011).

General Casualty seems to imply that General Casualty has paid some compensation to Plaintiffs beyond that ordered by Virginia. However, the Commission made no such finding. The Commission found only that "General Casualty has paid compensation and medical benefits pursuant to the Virginia Workers' Compensation Act to [Plaintiffs] in an approximate amount of $1,960,000.00." (emphasis added). N.C.G.S. § 97-86.1(d) does not permit repayment for compensation paid under the order of another state. Rather, the statute refers only to where a carrier makes

payments pending a final disposition of "any claim under the provisions of this Chapter[.]" N.C.G.S. § 97-86.1(d).

The Commission did not err in making the challenged conclusion denying General Casualty reimbursement for compensation already paid to Plaintiffs.

IV. Conclusion

As to the Fund's appeal, the Commission did not err in its findings and conclusions relating to General Casualty's coverage in North Carolina or the Fund's coverage in North Carolina. As to General Casualty's appeal, the Commission did not err in failing to award General Casualty reimbursement for amounts paid to Plaintiffs.

Affirmed.

Judge McCULLOUGH concurs.

DILLON, Judge, concurring in part and dissenting in part.

I concur with Section III of the majority's opinion affirming the Commission's order with respect to the issues raised in the cross-appeal filed by General Casualty Insurance Company ("General Casualty"). However, I respectfully dissent from Section II with respect to the appeal filed by the Sheet Metal Contractors Self-Insurance Fund (the "Fund") to the extent the majority holds that General Casualty is not obligated under its policy to provide coverage to its insured, T.R. Driscoll, Inc. (the "Employer"), for benefits that Plaintiffs may be awarded that would otherwise have been required to be paid under Virginia workers' compensation law had Plaintiffs sought said benefits in Virginia.

I. Background

In this action, Plaintiffs are seeking workers' compensation benefits under North Carolina law arising from injuries that occurred while they were working on a job in Virginia. At the time of the accident, the Employer, which is based in North Carolina, was covered for workers' compensation claims under two separate insurance contracts, one provided by the Fund and the other by General Casualty.

In its order, the Commission determined that the Fund was solely liable to provide the Employer coverage for any benefits that the Commission may award Plaintiffs arising from the Virginia accident; and, therefore, dismissed General Casualty as a party to the proceeding.

The majority affirmed the Commission's order, holding that "[t]he Commission did not err in concluding that the General Casualty policy affords no coverage for Plaintiffs' claims filed in North Carolina." The issues encompassed in the Commission's order were, however, limited to "the establishment of jurisdiction and carrier liability[1][.]" In other words, the Commission has yet to determine the exact nature and amount of benefits that Plaintiffs will ultimately be awarded in the North Carolina proceeding.

I believe General Casualty's insurance contract provides coverage to the Employer for workers' compensation benefits that would be due under Virginia law for an accident occurring in Virginia, even if those benefits are ultimately sought and awarded under the laws of another state. Therefore, since it is unknown at this stage of the proceeding whether Plaintiffs will seek any benefits that would have been due under Virginia law had Plaintiffs sought those benefits in a Virginia proceeding, I believe the Commission was premature in concluding that the Fund is solely liable, to the exclusion of General Casualty, to provide coverage to the Employer for *all* the benefits that the Commission may award the Plaintiffs.

II. Analysis

The Fund's contract provides coverage, *inter alia*, for benefits the Employer is "ordered to pay by the governing authorities of [North Carolina,]" but excludes from coverage, those "operations conducted at or from any workplace if [the Employer] has separate insurance for such operations." The Fund, here, argues that the Employer "has separate insurance" – provided by General Casualty – to provide benefits arising from the Plaintiffs' Virginia accident.

The provision at issue in the General Casualty policy provides that General Casualty will pay benefits as "required of [the Employer] by the workers compensation law [of Virginia]." General Casualty argues that this provision limits its exposure to pay benefits arising from claims actually *filed* in Virginia, and otherwise does not extend to any benefits

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1. The interpretation of insurance contract language is, generally, determined by a trial court. However, our Supreme Court has held that the Commission is authorized, pursuant to N.C. Gen. Stat. § 97-91, to hear "'all questions arising under' the Compensation Act [which include] . . . the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier." *Greene v. Spivey*, 236 N.C. 435, 445, 73 S.E.2d 488, 495-96 (1952); *see also Smith v. First Choice Servs.*, 158 N.C. App. 244, 248, 580 S.E.2d 743, 747, *disc. review denied*, 357 N.C. 461, 586 S.E.2d 99 (2003).

awarded in an action filed in another state, even where the accident occurs in Virginia and Virginia law *would* require benefits to be paid.

The Fund, on the other hand, argues that this provision is merely a "choice of law" provision; and, accordingly, General Casualty's obligation to provide the Employer coverage as required under Virginia workers' compensation law is not obviated simply because Plaintiffs chose to file for benefits for the Virginia accident in a state other than Virginia.

Neither party has cited a North Carolina case that is on point regarding the proper interpretation of the language in General Casualty's coverage provision. Rather, the parties cite cases from other jurisdictions in their briefs which illustrate the difference in judicial opinion throughout the United States regarding this issue. An Illinois appellate court has explained this difference as follows:

> [This coverage question has] produced two divergent lines of decisions. One line of cases agrees with [the employer] that alleged territorial limitation provisions are in fact choice of law provisions, not limiting coverage based on where the employee chooses to file his claim, but only to restrict benefit eligibility and to set indemnification limits based on the state law specified in the policy. This line of cases includes *Smith & Chambers Salvage v. Insurance Management Corp.*, 808 F. Supp. 1492 (E.D. Wash. 1992); *Sieman v. Postorino Sandblasting & Painting Co.*, 111 Mich. App. 710, 314 N.W.2d 736 (1981); *American Mutual Insurance Co. v. Duvall*, 117 N.H. 221, 372 A.2d 263 (1977); *Toebe v. Employers Mutual of Wausau*, 114 N.J. Super. 39, 274 A.2d 820 (App. Div. 1971); *Kacur v. Employers Mutual Casualty Co.*, 253 Md. 500, 254 A.2d 156 (1969); and *Weinberg v. State Workmen's Insurance Fund*, 368 Pa. 76, 81 A.2d 906 (1951). The other line of cases agrees with [the insurer] that, for there to be coverage, the claim must actually be filed in the state whose law is made to apply in defining the term "worker's compensation law." This line of cases includes *Travelers Insurance Co. v. Industrial Accident Comm'n*, 240 Cal. App. 2d 804, 809-10, 50 Cal.Rptr. 114, 118-119 (1966); *Lumber Transport, Inc. v. International Indemnity Co.*, 203 Ga. App. 588, 590, 417 S.E.2d 365, 366-67 (1992); *Foster Wheeler Corp. v. Bennett*, 1960 OK 186, 354 P.2d 764, 768 (Okla. 1960); *Consolidated Underwriters v. King*, 160 Tex. 18, 20, 325 S.W.2d 127, 129, 2 Tex. Sup. Ct. J. 338 (1959); *Rood*

> *v. Nelson*, 14 Misc. 2d 859, 860-861, 178 N.Y.S.2d 969, 971 (1958); *Jones v. Henessy*, 232 La. 786, 793, 95 So.2d 312, 314 (1957); *Mandle v. Kelly*, 229 Miss. 327, 345, 90 So.2d 645; 649-50 (1956); and *Miller Brothers Construction Co. v. Maryland Casualty Co.*, 113 Conn. 504, 519-20, 155 A. 709, 714,-15 (1931).

Szarek, Inc. v. Maryland Cas. Co., 357 Ill. App. 3d 584, 588, 829 N.E.2d 871, 875 (2005) (construing the policy language at issue as a "choice of law" provision).

Our Supreme Court has held "[a] difference of judicial opinion regarding proper construction of policy language is some evidence" that the policy language is ambiguous. *Brown v. Lumbermens Mut. Cas. Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (citations omitted). I believe the language in General Casualty's policy is ambiguous on the issue; and, accordingly, I would hold that the General Casualty policy does provide coverage for the claims sought in North Carolina by Plaintiffs to the extent that the benefits would be required under Virginia workers' compensation law. *See W&J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 316, 374 S.E.2d 430, 433 (1988), *disc. review denied*, 324 N.C. 342, 378 S.E.2d 809 (1989) (holding that "an insurance contract should be construed as a reasonable person in the position of the insured would have understood it [and that if] the language used in the policy is reasonably susceptible to different constructions, it must be given the construction most favorable to the insured"). I believe that the word "require" in the coverage provision could reasonably be construed to allow for either interpretation asserted by the two lines of cases described in *Szarek*, *supra*. I believe it is reasonable for the Employer to have assumed that the language in the General Casualty policy would provide coverage for accidents occurring in Virginia, to the extent that the listed state would require the insured to pay benefits, and that General Casualty could not avoid providing this coverage simply because Plaintiffs chose to file for benefits in another state that may also have jurisdiction.

If the interpretation propounded by General Casualty is adopted, then it is conceivable that a North Carolina employer who had policy with this provision – but providing coverage for benefits required under North Carolina law – would be afforded no coverage under its policy for an accident occurring in North Carolina where the employee chose to file for benefits in another state that might also have jurisdiction. For instance, another state may assert jurisdiction because the injured employee originally accepted the employer's offer of employment while in the that state. *See Murray v. Ahlstrom Indus. Holdings, Inc.*,

131 N.C. App. 294, 506 S.E.2d 724 (1998) (holding that North Carolina has jurisdiction over a claim arising from an accident in Mississippi because the original offer of employment was accepted over the telephone while the employee was in North Carolina).

General Casualty, which drafted the policy language, could have included language to clearly state that it was providing coverage only for claims "filed" in Virginia or, alternatively, for benefits that the Employer would be ordered to pay "by the regulating body" in Virginia. Indeed, the Fund's policy contains very specific language indicating that it would provide coverage to the Employer only as ordered "by the governing authorities of [North Carolina]." However, General Casualty chose not to include such language in its policy. Therefore, because I believe that the coverage language is ambiguous, I would construe this ambiguity against the insurer, General Casualty, and hold that the policy provides coverage for the claims filed in North Carolina to the extent that Virginia workers' compensation law would require General Casualty to provide benefits.

PAULETTE SMITH WISE, EXECUTOR OF THE ESTATE OF HARVEY SMITH, DECEASED EMPLOYEE, PLAINTIFF
v.
ALCOA, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA13-29

Filed 3 December 2013

1. Workers' Compensation—evidence—expert testimony—witnesses sufficiently qualified

The Industrial Commission did not err in a workers' compensation case by admitting testimony of medical experts. There was evidence in the record to support the Commission's determination that defendant's witnesses were sufficiently qualified in their respective fields.

2. Workers' Compensation—findings of fact—supported by the evidence

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's decedent suffered from Barrett's esophagus. The report of a pathologist, whose credentials were not challenged by plaintiff, supported a finding of Barrett's esophagus and was sufficient evidence to support the Commission's finding.

3. Workers' Compensation—findings of fact—supported by the evidence

The Industrial Commission did not err in a workers' compensation case by giving weight to the known risk factors for esophageal disease. There was evidence in the record to support the Commission's finding that these risk factors were present.

4. Workers' Compensation—admission of additional evidence—denial of motion—not prejudicial

The Industrial Commission did not abuse its discretion in a workers' compensation case by denying plaintiff's motion to admit a deposition from another case as additional evidence. Even assuming *arguendo* that the denial was erroneous, plaintiff failed to show that the error was prejudicial.

5. Workers' Compensation—quashed subpoena—no error

The Industrial Commission did not err in a workers' compensation case by quashing plaintiff's subpoena of defendant's company representative regarding defendant's knowledge of asbestos-related health risks. Defendant had already stipulated that plaintiff was exposed to asbestos during his employment with defendant and defendant's knowledge or lack thereof of the risks of asbestos exposure was not relevant to the issue of whether defendant's exposure to asbestos was the cause of his esophageal cancer.

6. Workers' Compensation—finding of fact—supported by the evidence

The Industrial Commission's challenged finding of fact in a workers' compensation case did not lack evidentiary support. An expert witness cited the report which formed the basis of the finding as an authoritative source and the report was properly introduced into evidence. Furthermore, even assuming *arguendo* that this finding was erroneous, it was not essential to the Commission's decision.

7. Workers' Compensation—opinion not contrary to law—federal provision not dispositive

The Industrial Commission did not err as a matter of law in a workers' compensation case by issuing an opinion contrary to the law of North Carolina. Where a non-mandatory provision of federal law recognized the existence of an "association" between asbestos exposure and esophageal cancer, that provision was not dispositive of the issue of whether decedent's esophageal cancer was caused by asbestos exposure.

Appeal by plaintiff from order entered 17 September 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 June 2013.

Wallace and Graham, P.A., by Michael B. Pross, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Jeri L. Whitfield and Lisa K. Shortt, for defendant-appellee.

STEELMAN, Judge.

Where medical experts testified concerning subjects within their areas of expertise, the Industrial Commission did not err in admitting their testimony. The Commission did not err in finding that plaintiff's decedent suffered from Barrett's esophagus. There was evidence in the record to support the Commission's findings concerning risk factors applicable to decedent. The Commission did not abuse its discretion in denying plaintiff's motion to admit a deposition from another case as additional evidence. Where plaintiff moved to subpoena evidence that was not relevant to the issue before the Commission, the Commission's failure to address plaintiff's motion was harmless. Where a non-mandatory provision of federal law recognized the existence of an "association" between asbestos exposure and esophageal cancer, that provision was not dispositive of the issue of whether decedent's esophageal cancer was caused by asbestos exposure.

I. Factual and Procedural History

Harvey Smith (Smith) worked for Alcoa, Inc. (defendant) from 1935 until 1978. The parties stipulated that he was exposed to asbestos during his employment with defendant. On 12 February 2008, Smith was diagnosed with esophageal cancer, specifically esophageal adenocarcinoma, from which he died on 9 March 2008 at an advanced age. Subsequently, the executor of his estate, Paulette Smith Wise, (plaintiff) filed this worker's compensation claim, contending that Smith's cancer and death were caused or contributed to by asbestos exposure that occurred during his employment with defendant.

Plaintiff offered three expert witnesses: Dr. Nicholas Shaheen, head of the Center for Esophageal Disease and Swallowing at the University of North Carolina; Dr. Ravi Reddy, Smith's treating physician; and Dr. Arthur Frank, a board certified expert of occupational medicine. Defendant also offered three expert witnesses: Dr. Ernest McConnell,

a veterinary pathologist and toxicologist, and expert in animal medical studies; Dr. Kenneth Karb, a general oncologist; and Dr. Michael Morse, an expert in oncology.

On 17 September 2012, the Industrial Commission entered its Opinion and Award. The Commission concluded that plaintiff had failed to prove that Smith's esophageal cancer was characteristic of individuals engaged in his particular trade or occupation with defendant; that Smith's employment had put him at increased risk of developing esophageal cancer as compared to members of the general public; and that Smith had contracted a compensable occupational disease while working for defendant. The Industrial Commission denied plaintiff's claim.

Plaintiff appeals.

II. Standard of Review

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations and quotations omitted).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

III. Arguments

A. Admission of Expert Testimony

[1] In her first argument, plaintiff contends that the Commission erred in admitting the testimony of defendant's experts. We disagree.

Rule 702 of the North Carolina Rules of Evidence states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. R. Evid. 702(a), N.C. Gen. Stat. § 8C-1 (2009).[1] Our Supreme

1. We note that this language has since been amended by statute for cases commenced on or after 1 October 2011. The current language of Rule 702 implements the

Court, in *Howerton v. Arai Helmet, Ltd.*, detailed a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant? *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing *State v. Goode*, 341 N.C. 513, 527-529, 461 S.E.2d 631, 639-641 (1995)).

Plaintiff contends that defendant's witnesses, Drs. Karb, Morse and McConnell, were not experts in a medical field relevant to the issue in this case, which plaintiff contends is esophageal cancer resulting from asbestos exposure. However, our Supreme Court held in *Howerton* that:

> "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' "

Id. at 461, 597 S.E.2d at 688 (quoting *Goode* at 529, 461 S.E.2d at 640).

Dr. Karb was tendered as an expert in oncology. Plaintiff does not challenge this fact. Plaintiff argues, however, that Dr. Karb was not offered as an expert regarding the harms of asbestos, or with regard to gastrointestinal disease such as Barrett's esophagus. As was stated in *Howerton*, while this level of detail may have been relevant to Dr. Karb's credibility before the Commission, it did not mandate the exclusion of his testimony. It was sufficient that Dr. Karb was an expert in oncology, the study, diagnosis and treatment of cancer in general.

Dr. Morse was also tendered as an expert in "oncology and gastrointestinal oncology." Again, plaintiff does not challenge his credentials as an oncologist. Rather, plaintiff contends that Dr. Morse, like Dr. Karb, was not qualified to address the specific issue of causation of esophageal cancer. As with plaintiff's argument concerning Dr. Karb, we are unconvinced by this argument.

Dr. McConnell, a veterinarian, was tendered as an expert in "toxicology, pathology, and asbestos-associated diseases." Plaintiff notes that Dr. McConnell is not qualified to treat or evaluate humans for

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standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993). However, the quoted version of Rule 702 was in effect at the time that the instant case was filed.

asbestos-related disease, and that he had never been tendered as an expert in human disease resulting from asbestos exposure. However, Dr. McConnell's testimony was offered to present animal studies which had shown no link between asbestos exposure and esophageal cancer. Dr. McConnell was not called to testify about the treatment or diagnosis of asbestos exposure in humans, but instead to interpret a medical study. We hold that this was within his area of expertise.

It is the role of the Commission to consider the reliability and credibility of witnesses. It is not the role of this Court to make *de novo* determinations concerning the credibility to be given to testimony, or the weight to be given to testimony. We hold that there was evidence in the record to support the Commission's determination that defendant's witnesses were sufficiently qualified in their respective fields to testify as experts, and that the Commission was within its discretion to determine the credibility of their testimony and the weight to be given to that testimony.

This argument is without merit.

B. Finding of Fact 11

[2] In her second argument, plaintiff contends that the Commission erred in finding that Smith suffered from a condition called Barrett's esophagus. We disagree.

Defendant's position before the Commission was that Smith's esophageal cancer was caused by a condition called Barrett's esophagus. In finding of fact 11, the Commission found:

> Decedent suffered from GERD [gastrointestinal reflux disease] for more than twenty years. Based upon the results of pathological examination of the tissue of his esophagus and a preponderance of the credible expert evidence of record, the Full Commission also finds that decedent had Barrett's esophagus and erosive esophagitis. All three conditions – GERD, Barrett's esophagus, and erosive esophagitis – are known risk factors for EAC [esophageal adenocarcinoma]. Other risk factors for esophageal cancer that were present in decedent's medical history were race (white), sex (male), age (elderly), mild obesity, and hiatal hernia (diagnosed in 1983).

Plaintiff contends that, because none of defendant's experts have backgrounds in gastroenterology or Barrett's esophagus, their testimony was not sufficient to support this finding. Similarly, plaintiff

contends that plaintiff's experts, specifically Drs. Reddy and Shaheen, who were qualified in gastroenterology, asserted that Smith did not have Barrett's esophagus.

According to the pathology report, a biopsy of Smith's esophagus revealed "intestinal metaplasia[,]" "poorly differentiated adenocarcinoma[,]" and "histologic findings consistent with Barrett's esophagus." This diagnosis was made by the pathologist, whose credentials are unchallenged by plaintiff. Because the Commission had before it the pathologist's report, which supports a finding of Barrett's esophagus, and because the pathologist's credentials were not challenged by plaintiff, we hold that there was evidence in the record sufficient to support the Commission's finding that Smith suffered from Barrett's esophagus.

This argument is without merit.

C. Weight Given to Risk Factors

[3] In her third argument, plaintiff contends that the Commission erred in giving weight to the known risk factors for esophageal disease. We disagree.

Plaintiff's argument is cursory, noting simply that while there are references in the record to these risk factors, no witness stated that they were the cause of Smith's esophageal cancer. However, the Commission did not conclude that any of these risk factors caused Smith's cancer; the Commission merely found their existence. Plaintiff herself concedes that references exist in the record to these risk factors. We hold that there was evidence in the record to support the Commission's finding that these risk factors were present.

This argument is without merit.

D. Motion for Additional Evidence

[4] In her fourth argument, plaintiff contends that the Commission erred in failing to address plaintiff's motion for additional evidence. We disagree.

In the Pre-Trial Agreement and Stipulations of the Parties, plaintiff listed Dr. Mark Cullen, a resident of California, as a potential witness. On appeal to the Full Commission, plaintiff moved to admit a deposition of Dr. Cullen from a prior civil action against defendant. Defendant opposed this motion, arguing that the deposition was inadmissible hearsay. Defendant contended that plaintiff had failed to show Dr. Cullen's unavailability; that the subject of the deposition was mesothelioma instead of esophageal cancer; that defendant had no reason

to cross-examine Dr. Cullen on the relationship between asbestos and esophageal cancer at the deposition; that because Dr. Cullen was an outside consultant, and not an employee of defendant, plaintiff was free to depose him at plaintiff's discretion; that plaintiff's failure to do so was deliberate; and that no good grounds existed for the admission of this evidence. The Full Commission denied plaintiff's motion.

According to Rule 701(f) of the Industrial Commission Rules, "[n]o new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits." 4 N.C. Admin. Code 10A.0701 (2011). The General Statutes provide that "the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" N.C. Gen. Stat. § 97-85 (2011). In resolving an apparent conflict between the statute and the Industrial Commission Rules, we have held that:

> A plaintiff does not have a substantial right to require the Commission to hear additional evidence, and the duty to do so only applies if good ground is shown. *See Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E.2d 17 (1968). Furthermore, plaintiff concedes that, "[t]he question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion." *Pickrell v. Motor Convoy, Inc.*, 82 N.C. App. 238, 243-44, 346 S.E.2d 164, 168 (1986), *rev'd on other grounds*, 322 N.C. 363, 368 S.E.2d 582 (1988).

Allen v. Roberts Elec. Contr., 143 N.C. App. 55, 65-66, 546 S.E.2d 133, 141 (2001). We discern no abuse of discretion in the Commission's denial of plaintiff's motion to introduce the deposition of Dr. Cullen.

Even assuming *arguendo* that the Commission's denial of plaintiff's motion was in error, we have held that "[a]n error in the admission of evidence is not grounds for granting a new trial or setting aside a verdict unless the admission amounts to the denial of a substantial right." *Gray v. Allen*, 197 N.C. App. 349, 353, 677 S.E.2d 862, 865 (2009). "The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Id.* In the instant case, plaintiff failed to demonstrate that this error prejudiced plaintiff.

This argument is without merit.

E. Objection to Quashed Subpoena

[5] In her fifth argument, plaintiff contends that the Commission erred in quashing plaintiff's subpoena of defendant's company representative. We disagree.

Plaintiff sought to subpoena defendant's company representative regarding defendant's knowledge of asbestos-related health risks. This subpoena was quashed by the Deputy Commissioner. Plaintiff contends that this prejudiced plaintiff, in that plaintiff could not cross-examine defendant about defendant's knowledge of the risks of asbestos exposure. Plaintiff raised this issue on review before the Full Commission. However, the Full Commission did not address this issue in its opinion.

We acknowledge that the Full Commission erred in failing to rule on plaintiff's objection concerning the quashed subpoena. However, defendant had already stipulated that Smith was exposed to asbestos during his employment with defendant. Defendant's knowledge or lack thereof of the risks of asbestos exposure was not relevant to the issue of whether Smith's exposure to asbestos was the cause of his esophageal cancer. Defendant's representative could not have addressed that issue. As such, even had the ruling to quash the subpoena been reversed, the testimony would not have been relevant. We hold any error to be harmless.

This argument is without merit.

F. Finding of Fact 14

[6] In her sixth argument, plaintiff contends that the Commission lacked evidentiary support for its finding of fact 14. We disagree.

In finding of fact 14, the Commission found:

> The National Academy of Sciences was ordered by Congress to study the issue and advise Congress whether asbestos causes gastrointestinal cancers. The National Academy of Sciences' panels are typically used for politically sensitive issues in areas of science upon which an objective opinion, not influenced by bias, is needed. The panel's initial report is forwarded to a diverse set of reviewers to achieve a greater consensus and to insure that all sides of the issue are heard and fully considered before a final consensus opinion is reached. In 2006, the Institute of Medicine of the National Academy of Sciences published its findings in a book entitled *Asbestos: Selected*

> *Cancers*. The conclusion reached by the Institute of Medicine ("IOM") with regard to esophageal cancer specifically was as follows:
>
> Some studies have found an association between asbestos exposure and esophageal cancer, but the overall results of epidemiology studies are mixed. In addition, what little evidence there is from animal experiments about asbestos' carcinogenic potentials specifically on esophageal tissues do not support biological activity at this site. On the basis of these observations, the committee concluded that the evidence is *inadequate* to infer the presence or absence of a causal relationship between asbestos exposures and esophageal cancer.

Plaintiff does not contend that the facts cited above are incorrect, but rather contends that there was no evidence in the record to support this finding. Plaintiff overlooks the fact that Dr. McConnell testified concerning this report, citing it as an authoritative source. His testimony properly introduced this report into evidence.

Even assuming *arguendo* that this finding was in error, however, it was not essential to the Commission's decision. As we have discussed, the Commission heard the testimony of experts regarding whether asbestos exposure or Barrett's esophagus caused Smith's esophageal cancer. Even if we were to assume that this particular finding was in error, that would not detract from the Commission's ultimate conclusion that plaintiff had failed to prove causation.

This argument is without merit.

G. OSHANC

[7] In her seventh argument, plaintiff contends that the Commission erred as a matter of law in issuing an opinion contrary to the law of North Carolina. We disagree.

Plaintiff contends that the Occupational Safety and Health Act of North Carolina ("OSHANC") "recognizes that there is a well-established association between asbestos exposure and esophageal cancer." Plaintiff cites to the Code of Federal Regulations in support of this position.[2]

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2. Plaintiff incorrectly cites to OSHANC (calling it NCOSHA). North Carolina has adopted, in OSHANC, the provisions of the federal OSHA. N.C. Gen. Stat. § 95-131 (2011). However, the C.F.R. provisions cited by plaintiff are elements of OSHA, not OSHANC, and should properly be attributed to the federal source.

The C.F.R. provision in question is entitled "Medical Surveillance Guidelines for Asbestos Non-Mandatory," and concerns the toxicology, symptoms, and preventative considerations of asbestos exposure and asbestos-related diseases. 29 C.F.R. § 1910.1001, App. H (2012). The C.F.R. notes that clinical studies have "shown a definite association between exposure to asbestos and an increased incidence of lung cancer, pleural and peritoneal mesothelioma, gastrointestinal cancer, and asbestosis." *Id.* Studies have also shown that "[e]xposure to asbestos has also been associated with an increased incidence of esophageal, kidney, laryngeal, pharyngeal, and buccal cavity cancers." *Id.*

We note first that this Appendix is labeled "non mandatory." Such Appendices generally are designed to provide guidance, rather than imposing specific rules. *See e.g.* 29 C.F.R. § 1910.1450, App. B ("The materials listed below are offered as non-mandatory guidance."); 29 C.F.R. § 1910.1200, App. F ("This non-mandatory Appendix provides additional guidance on hazard classification for carcinogenicity."); 29 C.F.R. § 1910.217, App. D ("Although this appendix as such is not mandatory, it references sections and requirements which are made mandatory by other parts of the PSDI standard and appendices."). We hold that this federal guideline does not constitute North Carolina law, and was not binding upon the Commission.

Even assuming *arguendo* that this guideline was binding, it would not be dispositive of this case. At most, this provision recognizes the existence of an "association" between asbestos exposure and esophageal cancer, and this association is at best a general one. This general association does not address the pivotal issue before the Commission, which was whether asbestos exposure caused Smith's esophageal cancer in the instant case. While this guideline may constitute some evidence of causation, it was not dispositive of that issue.

This argument is without merit.

IV. Conclusion

The Commission weighed the evidence before it and concluded that plaintiff failed to meet her burden of proving causation. We hold that there was evidence in the record to support the Commission's findings of fact, and that these findings in turn support the Commission's conclusion that plaintiff failed to prove causation.

AFFIRMED.

Judges McGEE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 DECEMBER 2013)

CHURCH v. DECKER No. 13-455	Caldwell (01CVD1391)	Reversed and Remanded
FRYE REG'L MED. CTR., INC. v. HOSTETTER & KEACH, INC. No. 13-313	Mecklenburg (11CVS22084)	Affirmed
GREER STATE BANK v. EVANS No. 13-560	Jackson (11CVS763)	Reversed in part, affirmed in part.
HEDGEPETH v. WINSTON-SALEM STATE UNIV., No. 13-577	Forsyth (12CVS7048)	Affirmed
IN RE D.P.W. No. 13-806	Dare (08JT28)	Affirmed
IN RE HENDRICK No. 13-284	Cleveland (11E568)	Affirmed
IN RE J.A.R. No. 13-636	New Hanover (10JT336)	Affirmed
IN RE L.G. No. 13-875	Burke (11J157-158)	Affirmed
MACMILLAN v. THOMPSON No. 13-611	Forsyth (85CVD351)	Vacated
PACE v. STATE No. 13-252	Henderson (12CVD1400)	Affirmed
RAYNOR v. DEP'T OF CRIME CONTROL & PUB. SAFETY No. 13-197	N.C. Industrial Commission (TA-21549)	Affirmed
RETTIG v. RETTIG No. 13-287	Cumberland (12CVD2163)	Affirmed
SKIPPER v. WAYNE OIL CO., INC. No. 13-657	Wayne (12CVS312)	Affirmed

STATE v. ADDISON No. 13-145	Cleveland (10CRS2476-78) (10CRS51931-33)	No Error
STATE v. ALBRIGHT No. 13-763	Alamance (08CRS53045)	No Error
STATE v. BOWDEN No. 13-290	Montgomery (08CRS1694) (11CRS321-22)	Convictions Affirmed; Sentence Vacated and Remanded for Resentencing.
STATE v. BRENNICK No. 13-627	Brunswick (10CRS52854)	Affirmed
STATE v. BRICE No. 13-363	Mecklenburg (10CRS241907)	Affirmed
STATE v. BRINCEFIELD No. 13-434	Alamance (11CRS55533) (12CRS173)	Affirmed
STATE v. BULLOCK No. 13-514	Durham (10CRS56171) (11CRS3849)	No error in part; reversed and remanded in part
STATE v. CALDWELL No. 13-272	Wilkes (12CRS686-89)	Reversed and Remanded
STATE v. CHEEK No. 13-783	Guilford (12CRS81774-75)	No Error
STATE v. COMPEL No. 13-730	Granville (11CRS52679)	No Error
STATE v. EGGLESTON No. 13-185	Mecklenburg (02CRS238864) (02CRS238869)	Affirmed
STATE v. GATEWOOD No. 13-669	Anson (10CRS1780) (11CRS1262)	Affirmed
STATE v. GLASPIE No. 13-123	Wayne (10CRS50827)	No Error
STATE v. GRUBB No. 13-625	Lee (10CRS53428)	No Error

STATE v. HILL No. 13-106	Catawba (11CRS4537) (11CRS51882)	No Error
STATE v. LEWIS N o. 13-418	Pitt (08CRS50587) (08CRS56245)	Remand for resentencing.
STATE v. MASKE No. 13-120	Mecklenburg (04CRS235596-97)	Affirmed
STATE v. MERRELL No. 13-244	Forsyth (11CRS62170) (11CRS729998-30000)	Affirmed
STATE v. MILLS No. 13-867	Mecklenburg (10CRS238763-64) (10CRS238766-67) (10CRS238769-70) (10CRS238772-73)	No Error
STATE v. MOODY No. 13-122	Brunswick (11CRS3477) (11CRS53615-16)	No Error
STATE v. MORTON No. 13-146	Cabarrus (09CRS52656) (09CRS52747) (11CRS1116)	No Error
STATE v. RANKIN No. 13-234	Iredell (11CRS2689) (11CRS52119) (12CRS54793)	No Error
STATE v. ROBINSON No. 13-415	Wake (11CRS214299)	Affirmed
STATE v. ROUNDTREE No. 13-633	Halifax (12CRS52276)	No error as to the conviction; vacated and remanded as to the restitution
STATE v. RUMLEY No. 13-408	Rockingham (10CRS52148)	No Error
STATE v. SKEENS No. 13-595	Burke (11CRS53194) (11CRS53262-63)	No Error

STATE v. SMITH No. 13-15	Wake (07CRS101795)	No Error
STATE v. YELVERTON No. 13-211	Wayne (00CRS55293) (00CRS6696)	No Error
STATE v. WILLIAMS No. 12-1097	Pasquotank (09CRS50937)	Affirmed in part; reversed and remanded in part.
STRICKLAND v. GOETZ No. 13-605	Pitt (02CVD2130)	Dismissed
STATE BAR v. BURFORD No. 13-647	Disciplinary Hearing Commission (11DHC3)	Dismissed
VOGEL v. HEALTH SCI. FOUND., INC. No. 13-303	New Hanover (12CVS3416)	Affirmed
WAHL v. PORTER No. 13-333	Avery (11CVS307)	Affirmed