231 N.C. App.—No. 2 Pages 174-317

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 4, 2016

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OF
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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

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Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims—no rules violation—The Industrial Commission erred in a workers' compensation case by concluding that the assigned nurse case managers were not operating within the Commission's Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims ("the RP Rules") and ordering defendants to assign different nurse case managers. Assuming *arguendo* that the Commission's findings were based on competent evidence, they did not support its conclusion that the nurse case managers violated the RP Rules. Further, there was no support for the Commission's conclusion that the relationship between Paradigm and defendants conflicted with those rules. **Espinosa v. Tradesource, Inc., 174.**

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.

ESPINOSA v. TRADESOURCE, INC.

[231 N.C. App. 174 (2013)]

JORGE A. ESPINOSA, EMPLOYEE, PLAINTIFF
v.
TRADESOURCE, INC., EMPLOYER, ARCH INSURANCE COMPANY, CARRIER, AND (GALLAGHER BASSETT SERVICES, INC.,THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA13-220, COA13-466

Filed 3 December 2013

1. Workers' Compensation—notice of appeal—timely filed—Rule 702

Plaintiff's argument that Paradigm's notice of appeal in a workers' compensation case was untimely filed was erroneous. Paradigm's motion for reconsideration and the Industrial Commission's denial of that motion did not arise under Rule 60(b) of the North Carolina Rules of Civil Procedure. Instead, Industrial Commission Rule 702 was applicable and Paradigm's motion for reconsideration tolled the filing period for its notice of appeal, which was filed well within thirty days of the Industrial Commission's order.

2. Workers' Compensation—adaptive housing—cost distributed pro rata

The Industrial Commission did not err in a workers' compensation case by distributing the cost of plaintiff's adaptive housing on a *pro rata* basis. The rent plaintiff had to pay before his injury constituted an ordinary expense of life and, thus, should have been paid by plaintiff. The change in such expense, which was necessitated by plaintiff's compensable injury, should have been compensated for by the employer.

3. Workers' Compensation—retroactive attendant care—reimbursement timely sought

The Industrial Commission did not err in a workers' compensation case by awarding retroactive attendant care to plaintiff where plaintiff timely sought reimbursement for the attendant care services provided by his father and sister.

4. Workers' Compensation—cost of life care plan—findings did not support conclusion

The Industrial Commission erred in a workers' compensation case by requiring defendants to pay the costs of plaintiff's life care plan. The evidence did not support the findings of fact or the conclusion that the life care plan was, in fact, a reasonably necessary rehabilitative service.

5. Workers' Compensation—attorney fees—stubborn and unfounded litigiousness

The Industrial Commission did not err in a workers' compensation case by failing to award plaintiff the entire cost of his attorneys' fees on grounds that defendants exhibited "a stubborn and unfounded litigiousness" throughout the case. Plaintiff offered no evidence of a stubborn or unfounded litigiousness.

6. Workers' Compensation—Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims—no rules violation

The Industrial Commission erred in a workers' compensation case by concluding that the assigned nurse case managers were not operating within the Commission's Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims ("the RP Rules") and ordering defendants to assign different nurse case managers. Assuming *arguendo* that the Commission's findings were based on competent evidence, they did not support its conclusion that the nurse case managers violated the RP Rules. Further, there was no support for the Commission's conclusion that the relationship between Paradigm and defendants conflicted with those rules.

7. Workers' Compensation—pretrial motions—no jurisdiction—no abuse of discretion

The Industrial Commission did not err in a workers' compensation case by denying Paradigm's motions for reconsideration, to present additional evidence, and to intervene. Paradigm filed these motions after plaintiff had already filed his notice of appeal so the Commission lacked jurisdiction to issue a ruling on those motions. Furthermore, the Commission did not err in denying Paradigm's motion for an advisory opinion as the decision to decline to give one was entirely reasonable.

8. Appeal and Error—record insufficient

The record was insufficient in a workers' compensation case to address Paradigm's remaining arguments on appeal.

Appeal by Plaintiff, Defendants, and Paradigm from opinion and award entered 6 November 2012 by the North Carolina Industrial Commission. Appeal by Paradigm from orders entered 28 November 2012 and 4 January 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 and 28 August 2013.

R. James Lore for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Martha W. Surles, M. Duane Jones, and Rochelle N. Bellamy, for Defendants.

Womble Carlyle Sandridge & Rice, by Philip J. Mohr and Jennifer B. Lyday, for Paradigm Management Services, LLC.

STEPHENS, Judge.

Introduction

COA 13-220 and COA 13-466[1] involve issues surrounding the workers' compensation benefits provided to Jorge Espinosa ("Plaintiff") after he was shot while employed as a construction crew supervisor for Tradesource, Inc. ("Tradesource"). As a result of Plaintiff's admittedly compensable injury, he is a high-level paraplegic. Additional facts necessary to the discussion of the issues raised by this appeal are provided below.

A. Procedural History

Plaintiff was injured on 13 August 2010. Tradesource and its insurer, Arch Insurance Company ("Arch"),[2] (collectively, "Defendants") admitted compensability for Plaintiff's injury on 18 January 2011 by way of an Industrial Commission Form 60. Defendants later contracted with Paradigm to manage Plaintiff's medical care.[3]

On 28 January 2011, Plaintiff filed a request for hearing and motion for emergency relief. In anticipation of that hearing, scheduled for 21 March 2011, Plaintiff listed the following issue in his pre-trial agreement with Defendants: "Should Paradigm . . . be removed from the case for conflict of interest and violation of the [North Carolina] Vocational

1. Because these two cases are factually and legally interconnected, we consolidate them for resolution in the same opinion. *See generally* N.C.R. App. P. 40.

2. Gallagher Bassett Services, Inc., is the third-party administrator.

3. Specifically, Paradigm was hired "to provide case management, rehabilitation[,] and vocational rehabilitation services." In return for more than two million dollars in consideration paid by Arch, Paradigm also accepted a significant share of the insurable risk. This required Paradigm "to undertake medical management responsibilities, including the payment of all medical costs." Pursuant to the contract, Paradigm would receive "the difference in the cost of rehabilitation, vocational[,] and case management services it [had] agreed to provide and the amount of the fixed sum payment it received . . . for assuming the risk of such services."

Rehabilitation Guidelines?" Counsel for Paradigm was not included in the pre-trial agreement.

A full evidentiary hearing was held on 21 March 2011.[4] Following the hearing, Plaintiff filed a written motion to remove Paradigm from the case. The motion was not served on either Paradigm or counsel for Paradigm, and the record does not reflect that Paradigm or counsel for Paradigm was otherwise notified of the motion. The deputy commissioner who heard the case filed an opinion and award one year later, on 12 March 2012, and, *inter alia*, denied Plaintiff's motion to remove Paradigm. From there, Plaintiff and Defendants appealed to the full North Carolina Industrial Commission ("the Commission"). Paradigm was not given notice of the parties' appeal and did not appear before the Commission.

The Commission filed its opinion on 6 November 2012, awarding permanent and total disability compensation to Plaintiff at a rate of $764.81 per week from the date of his injury to the end of his life, with a credit for compensation already paid. The Commission also awarded medical compensation for all injury-related conditions and retroactive payments to Plaintiff's father and sister at a rate of $14 per hour for eight hours per day, seven days per week, as compensation for the attendant care they provided from 4 February 2011 to 1 August 2011, subject to a credit for the attendant care provided by Defendants during that time. In addition, Defendants were ordered to pay for (1) ongoing attendant care services for eight hours per day, seven days per week; (2) the *pro rata* difference between Plaintiff's pre-injury rent and his post-injury rent; and (3) private transportation services at an average of two hours per day, seven days per week, for medical services and treatment, all "until further [o]rder of the . . . Commission." Further, Defendants were ordered to pay the costs for preparing Plaintiff's life care plan and to provide a medical case manager. Both parties' requests for attorneys' fees under N.C. Gen. Stat. § 97-88.1 were denied. Plaintiff's counsel was awarded 25% of the compensation due as attorneys' fees, and Defendants were ordered to pay costs. Both parties appealed.

Regarding Paradigm, the Commission denied Plaintiff's motion to remove it from the case and "ordered that this matter be referred to the North Carolina Department of Insurance [("the DOI")] to investigate whether Paradigm . . . [is] properly operating under North Carolina law . . . ." Paradigm alleges on appeal that it was not served with a copy of the Commission's 6 November 2012 opinion and award.

4. The record does not reflect that Paradigm received notice of this hearing.

Plaintiff filed his notice of appeal from the Commission's 6 November 2012 opinion and award on 14 November 2012, and Defendants filed their notice of appeal on 7 December 2012. On 15 November 2012, one day after Plaintiff's notice of appeal was received by the Commission, Paradigm filed a motion to intervene, to present additional evidence, and for reconsideration. Plaintiff filed a motion to dismiss Paradigm's motions the next day. The Commission dismissed Paradigm's motions on 28 November 2012, stating as grounds that Plaintiff had already filed his notice of appeal to this Court and the Commission lacked jurisdiction to review the motions. On 5 December 2012, Paradigm sent an e-mail to the Commission again requesting reconsideration and asking "what actions [the Commission] would have taken on [Plaintiff's motion to dismiss] if the notice of appeal had not been filed [by Plaintiff]." On 4 January 2013, the Commission denied Paradigm's second motion for reconsideration and its request for an advisory opinion. On 17 January 2013, Paradigm filed notice of appeal from the Commission's 6 November 2012 opinion and award, as well as its 28 November 2012 and 4 January 2013 orders.

Shortly thereafter, on 22 January 2013, Plaintiff filed a motion to dismiss Paradigm's appeal, and the Commission denied that motion. Just over three months later, on 2 May 2013, Plaintiff filed a separate motion to dismiss Paradigm's appeal in this Court. That same day Paradigm filed a motion to intervene in COA 13-220 and/or to consolidate COA 13-220 and 13-466. Plaintiff filed a response to that motion on 7 May 2013, and this Court denied Paradigm's motion by order entered 8 May 2013. On 16 May 2013, Paradigm filed a response to Plaintiff's motion to dismiss its appeal. In the alternative, Plaintiff submitted a conditional petition for writ of certiorari. Plaintiff filed a response to Paradigm's conditional petition on 17 May 2013.

B. Plaintiff's Motion to Dismiss

[1] In his motion to dismiss, Plaintiff argues that Paradigm's 17 January 2013 notice of appeal was "filed about 20 days too late." This argument is based on Plaintiff's assertion that Paradigm's motion for reconsideration "must necessarily be founded upon Rule 60(b)" of the North Carolina Rules of Civil Procedure. We disagree.

Plaintiff's argument is based on the following correctly stated rules: (1) An appeal from an opinion and award of the Commission must be given within thirty days of the date of such award or thirty days of receipt of notice of such award. N.C. Gen. Stat. § 97-86 (2011). (2) The procedure for such an appeal is as provided by the Rules of Appellate Procedure. *Id.* (3) When a party moves for reconsideration under Rule

60(b), the time for filing notice of appeal is not tolled. *See* N.C.R. App. P. 3(c); *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008). Because the Commission may consider a motion for reconsideration in the same manner as provided under Rule 60(b), *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985), Plaintiff assumes that Paradigm's motion was filed pursuant to Rule 60(b) and, therefore, insufficient to toll the thirty-day time period for filing notice of appeal. This is incorrect.

Noting that "[t]he Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act" ("the Act"), our Supreme Court has stated that, while the Commission's power to set aside judgments on a motion for reconsideration "is analogous" to the power granted trial courts under Rule 60(b)(6), it arises from a different source — "the judicial power conferred on the Commission by the legislature . . . ," not the North Carolina Rules of Civil Procedure. *Id.* at 137, 337 S.E.2d at 483 ("[W]e find no counterpart to Rule 60(b)(6) in the Act or the Rules of the Industrial Commission."). Accordingly, Paradigm's motion for reconsideration and the Commission's denial of that motion did not arise under the authority of Rule 60(b), and our cases interpreting Rule 60(b) are not directly applicable. Therefore, in order to determine whether Paradigm's notice of appeal was timely, we must look to the Commission's own rules and the cases interpreting those rules. *See id.*; *see also* N.C. Const. art. IV, § 3 ("The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created.").

Industrial Commission Rule 702 states:

> (a) Except as otherwise provided in N.C. Gen. Stat. § 97-86, in every case appealed to the North Carolina Court of Appeals, the Rules of Appellate Procedure shall apply. *The running of the time for filing and serving a notice of appeal is tolled as to all parties by a timely motion filed by any party* to amend, to make additional findings[,] or *to reconsider the decision*, and the full time for appeal commences to run and is to be computed from the entry of an [o]rder upon any of these motions, in accordance with Rule 3 of the Rules of Appellate Procedure.

4 N.C. Admin. Code 10A.0702 (2012) (amended effective 1 January 2011) (emphasis added). In an unpublished decision of this Court, we

recognized the deference given to the Commission in the application of its own rules of procedure, stating unequivocally that "the time for filing notice of appeal is tolled when a timely motion for reconsideration is filed." *Allender v. Starr Elec. Co., Inc.*, __ N.C. App. __, 734 S.E.2d 139 (Nov. 6, 2012) (unpublished disposition), *available at* 2012 WL 5395036. Though an unpublished opinion has no binding precedential value, the *Allender* Court correctly acknowledged the application of Rule 702 in that case, and we enforce it here. Accordingly, Paradigm's motion for reconsideration tolled the filing period for its notice of appeal, which was filed well within thirty days of the Commission's 4 January 2013 order. Therefore, Plaintiff's motion to dismiss is denied, and Paradigm's conditional petition for writ of *certiorari* is dismissed.

Discussion

Our review of an opinion and award of the 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." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations omitted). The Commission's conclusions of law are fully reviewable on appeal. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). "If the finding of fact is essentially a conclusion of law, however, it will be treated as a conclusion of law which is reviewable [*de novo*] on appeal." *Bowles Distrib. Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984).

Section I includes an analysis of most of the issues raised by Plaintiff and Defendants on appeal. It does not, however, address Plaintiff's argument that the Commission should have removed Paradigm from the case or Defendants' argument that the Commission erred in determining that the rehabilitation professionals were acting as insurance adjusters in violation of its rules. Those questions are considered in *Section II* of this opinion, which focuses on the issues relating to Paradigm.

I. Plaintiff's and Defendants' Appeals

On appeal, Plaintiff and Defendants both contest the Commission's award of *pro rata* adaptive housing to Plaintiff. Defendants also argue that the Commission erred by granting payment for retroactive attendant care and by requiring Defendants to pay the cost of Plaintiff's life care plan. In addition, Plaintiff asserts that the Commission erred by failing to award him "all of the cost of [his a]ttorneys' fees." We affirm the Commission's awards of *pro rata* adaptive housing, retroactive

attendant care, and attorneys' fees and reverse its award of the cost of Plaintiff's life care plan.

A. Adaptive Housing

[2] Both parties argue on appeal that the Commission erred by distributing the cost of adaptive housing on a *pro rata* basis. Plaintiff contends that the Commission erred in reducing his award by the amount he paid in rent before his injury, and Defendants argue that the Commission erred in requiring them to pay any cost beyond those necessary to make Plaintiff's apartment accessible. We affirm the Commission on this issue.

In its 6 November 2012 opinion and award, the Commission found the following pertinent facts:

> 42. . . . Prior to Plaintiff's injury, ... [h]e shared a rental house with three other individuals, one of whom was his father. His *pro rata* share of the rent was $237.50 per month. As a result of his injury, Plaintiff requires increased livable square footage to accommodate his wheelchair and other medical supplies. Plaintiff's pre-injury shared living arrangement is no longer available and would not be suitable for his current condition.
>
> 43. Neither before[] nor since his injury[] has Plaintiff owned any real property that could be adapted to accommodate his current condition. [T]he handicap[ped-] accessible apartment[] in which Plaintiff currently resides . . . at a monthly rental rate of $881.00[] reasonably fulfills Plaintiff's need for wheelchair[-]accessible, handicapped adaptive housing . . . .
>
> 44. [I]t is reasonable under the circumstances for Defendants to pay the difference between Plaintiff's pre-injury rent and his post-injury cost in renting wheelchair[-]accessible, handicapped adaptive housing from the time he first moved into his own rented housing . . . . on or about February 4, 2011.

(Italics added). The Commission also came to the following conclusions:

> 7. As a direct result of his compensable injury . . . , Plaintiff is a paraplegic and requires wheelchair[-] accessible, handicapped adaptive housing located in a reasonably safe community and in reasonable

> proximity to family, friends[,] and medical providers to provide relief and lessen his functional disability from his injury. Plaintiff is entitled to be furnished at Defendants' expense such wheelchair[-]accessible, handicapped adaptive housing. Since Plaintiff owns no real property capable of being adapted to suit his current needs, Defendants may fulfill their obligation to furnish Plaintiff with such wheelchair[-] accessible, handicapped adaptive housing through a suitable rented apartment. Plaintiff's current rental apartment is reasonable. N.C. Gen. Stat. § 97-25; *Derebery v. Pitt [Cnty. Fire Marshall]*, 318 N.C. 192, 347 S.E.2d 814 (1986).
>
> 8. It would be reasonable under the circumstances for Defendants to pay the difference between Plaintiff's pre-injury rent and post-injury rent dating back from the time he . . . first moved into private, adaptive housing following his August 13, 2010 work injury. N.C. Gen. Stat. § 97-25; *Derebery*[, 318 N.C. at 203, 347 S.E.2d at 821]; *Timmons[v. N.C. Dep't of Transp.*], 123 N.C. App. 456, 462, 473 S.E.2d 356, 359 (1996), *affirmed per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997).

Given those findings and conclusions, the Commission awarded Plaintiff "the difference between Plaintiff's pre-injury rent of $237.50 and his post-injury rent for handicap[ped] adaptive housing until further [o]rder of the Commission."

At the time of Plaintiff's injury, N.C. Gen. Stat. § 97-25 provided in pertinent part that

> [m]edical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the [Commission] may order such further treatments as may in the discretion of the Commission be necessary.

2005 N.C. Sess. Laws ch. 448, § 6.2. "Medical compensation" was defined at that time as

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably

> be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . .

1991 N.C. Sess. Laws Ch. 703, § 1.

The controlling Supreme Court opinion in this case is *Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986). In *Derebery*, the plaintiff lived with his parents before and after his injury. *Id.* at 194, 347 S.E.2d at 816. The plaintiff did not have any property of his own. *See id.* Because the owner of the parents' home refused to allow it to be adapted for the plaintiff's use, the Commission concluded that "[the d]efendant should furnish [the] plaintiff with a completely wheelchair-accessible place to live and provide all reasonable and necessary care for [the] plaintiff's well-being," including "an appropriate place for [the] plaintiff to live in view of his condition." *Id.*

On appeal to this Court, we held "that the provision of [section] 97-29[5] requiring payment for 'other treatment or care' cannot be reasonably interpreted to extend the [defendant's] liability to provide a residence for an injured employee." *Id.* at 193, 347 S.E.2d at 815 (citation, certain quotation marks, ellipsis, and brackets omitted). The Supreme Court reversed that holding on grounds that the statutory duty to provide "other treatment or care" can be reasonably construed to include the duty to "furnish alternate housing." *Id.* at 199, 347 S.E.2d at 818. Describing the Act as remedial legislation, which should be construed liberally, our Supreme Court ruled that "an employer must furnish alternate, wheelchair-accessible housing to an injured employee where the employee's existing quarters are not satisfactory and for some exceptional reason structural modification is not practicable." *Id.* at 203, 347 S.E.2d at 821.

Dissenting from the majority opinion in *Derebery*, Justice Billings offered the following additional analysis:

> The . . . Act provides disability compensation as a substitute for lost wages. That substitute for wages is the employer's contribution to those things which wages

5. We have determined that the *Derebery* Court's interpretation of section 97-29 is applicable to section 97-25. *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, 461, 473 S.E.2d 356, 359 (1996) ("In our view, the words 'and other treatment' contained in [section] 97-25 are susceptible of the same broad construction accorded the similar language of [section] 97-29 by the Supreme Court in *Derebe*ry . . . ."), *affirmed per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997).

> ordinarily are used to purchase — food, clothing, *shelter*, etc. There is no provision in the . . . Act for the employer, in addition to providing the statutory substitute for wages, to provide the ordinary necessities of life, although in addition to weekly compensation based upon the employee's wages the employer must provide compensation for "reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services [under section 97-29[6]]." To construe "other treatment or care" to include basic housing is not a "liberal construction" . . . of the statute; it is clearly a misconstruction. If housing is the kind of "treatment or care" intended by the statute, are not food, clothing and all of the other requirements for day-to-day living equally necessary for the employee's "treatment or care"? In the context of the [Act], the "treatment or care or rehabilitative services" clearly relate to those necessitated by the employee's work-related injury.

Id. at 205–06, 347 S.E.2d at 822 (Billings, J., dissenting) (citations and certain brackets omitted; emphasis in original).

We applied the *Derebery* opinion ten years later in *Timmons*, 123 N.C. App. at 456, 473 S.E.2d at 356. The plaintiff in that case, like the plaintiff in *Derebery*, was a paraplegic who lived with his parents. *Id.* at 458, 473 S.E.2d at 357. After the plaintiff's injury, the defendant paid to modify his parents' home to make it accessible for the plaintiff's use. *Id.* at 458, 473 S.E.2d at 357. The plaintiff later moved to a handicapped-accessible apartment where he lived for approximately eight and a half years. *Id.* When the rent increased, the plaintiff moved back to his parents' home. *Id.* Unlike *Derebery*, the plaintiff in *Timmons* eventually returned to full-time employment with the defendant, purchased land, and requested that the defendant finance the construction of a new, handicapped-accessible home. *Id.* at 458–59, 473 S.E.2d at 357–58. The Commission held that the plaintiff was entitled to financial assistance and ordered the defendant to pay, pursuant to section 97-25, the expense of rendering the plaintiff's new home handicapped accessible. *Id.* at 459, 473 S.E.2d at 358. The defendant appealed. *Id.*

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6. Section 97-29 no longer contains the quoted language. As noted in footnote 6, the controlling language for the purposes of this case can be found *supra* in the version of section 97-25 that was in effect at the time of Plaintiff's injury.

On appeal, this Court determined that "the Commission's finding [—] that the accommodations at [the] plaintiff's parents' home [were] no longer suitable [—] support[ed] its conclusion that [the] plaintiff [was] entitled to have [the] defendant pay for adding to [the] plaintiff's new home those accessories necessary to accommodate [the] plaintiff's disabilities." *Id.* at 461, 473 S.E.2d at 359 (internal quotation marks omitted). "We [did] not agree with [the] plaintiff, however, that *Derebery* require[d the] defendant to pay the *entire cost* of constructing [the plaintiff's] residence." *Id.* (emphasis added). Instead, we concluded that,

> [while] the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the [Act, t]he costs of modifying such housing . . . to accommodate one with extraordinary needs . . . is not an ordinary expense of life for which the statutory substitute [for] wage is intended as compensation.

Id. at 461–62, 473 S.E.2d at 359. The Supreme Court affirmed that decision *per curiam*. *Timmons v. N.C. Dep't of Transp.*, 346 N.C. 173, 484 S.E.2d 551 (1997).

On appeal in this case, Defendants assert that Plaintiff's adaptive housing is an "ordinary expense[] of life [which] Plaintiff is required to pay out of his weekly benefits." Relying on the language in *Timmon*s, "Defendants contend their only legal obligation under the [Act] regarding housing is to provide Plaintiff with modifications to his housing as required by his disability, which they have done." Plaintiff responds that this is a misreading of the law. At oral argument, Plaintiff asserted that the dissent authored by Justice Billings in *Derebery* and this Court's opinion in *Timmons* should be construed as the general rule in these matters, while the Supreme Court's opinion in *Derebery* should be construed as an exception to that rule. In his brief, Plaintiff articulated his interpretation of those opinions in the following way:

> . . . If an injured worker already owns a dwelling . . . that is capable of being . . . adapted for [handicapped] use, given the nature of the worker's particular injury, the employer . . . is only required to pay for the cost of the handicapped modifications . . . [.] But if the injured worker at the time of injury owns no dwelling . . . or does not own one capable of being . . . adapted [for handicapped use,] the employer . . . must "provide[,]" at its expense, . . . the worker with the entire handicapped-adapted dwelling . . . .

Plaintiff contends that this case falls firmly under the alleged *Derebery* exception and that Defendants must therefore pay the entire rent for his adapted apartment home. We find neither party's argument persuasive and affirm the Commission's *pro rata* determination in its entirety.

As a preliminary point, we note that the parties' arguments assume rules that are rigid and broadly applicable in the cases discussed above. A reading of section 97-25 makes it clear, however, that an award of "other treatment" is in the discretion of the Commission. 2005 N.C. Sess. Laws ch. 448, § 6.2 ("[T]he [Commission] may order such further treatments as may in the discretion of the Commission be necessary."). Section 97-2(19), as written at the time of Plaintiff's injury, further explained that the *type* of medical compensation the employer must pay is "*in the judgment of the Commission*" as long as it is "reasonably . . . required to effect a cure or give relief." 1991 N.C. Sess. Laws Ch. 703, § 1. The Supreme Court's decision in *Derebery* and our own decision in *Timmons* represent the outer limits of the Commission's authority under those statutes, not entirely new rules to be followed in place of or in addition to the statutes created by our legislature.

In this case, the Commission determined that Defendants should pay the *pro rata* difference between the rent required for Plaintiff's new, handicapped-accessible home and the rent Plaintiff had to pay as an ordinary expense of life before his injury. The Commission sensibly reasoned that living arrangements constitute an ordinary expense of life and, thus, should be paid by the employee. The Commission also recognized, however, that a change in such an expense, which is necessitated by a compensable injury, should be compensated for by the employer. Because Plaintiff did not own his own home in this case, he was required to find new rental accommodations that would meet his needs. In this factual circumstance, it was appropriate for the Commission to require the employer to pay the difference between the two.

While circumstances may occur in which an employer is required to pay the entire cost of the employee's adaptive housing, neither the Supreme Court's opinion in *Derebery* nor our holding in *Timmons* support Plaintiff's assertion that such a requirement is necessary *whenever* an injured worker does not own property or a home. Such a ruling would reach too far. For the above reasons, both parties' arguments are overruled, and the Commission's opinion and award as to this issue is affirmed.

B. Retroactive Attendant Care

[2] Relevant to the issue of retroactive attendant care, the Commission found that, as a result of his injury, Plaintiff was not fully independent and required assistance. Specifically, the Commission found that:

> 8. . . . [Plaintiff] is weak in the torso causing trunk balance problems, making him at risk for falls, especially during transfers to the bed, wheelchair, bathtub and toilet, and when engaging in his bowel program[,] which requires the administration of suppositories and leaning forward on the toilet. As a result of his injury, Plaintiff also has pain, leg spasticity, fatigue and shortness of breath due to his lung injury, and depression[,] which was significantly aggravated by his paraplegia.

Shortly after his injury, Plaintiff was cared for in a hospital. He was later moved to a rehabilitation center in Georgia. On 4 February 2011, Plaintiff was discharged from the rehabilitation center. When he inquired about whether he would begin to receive attendant care, he was informed that he would have to get a prescription for treatment from his Georgia-based treating physician, Dr. John Lin.

Plaintiff did not have a consultation with Dr. Lin and was discharged without a provision for attendant care services. Nonetheless, a report from the rehabilitation center "indicated that Plaintiff was not fully independent and that he continued to require assistance . . . with his mobility, specifically assistance with transferring from his wheelchair to his bed, tub, toilet[,] and car and that he continued to require supervision due to his spasticity level."

After Plaintiff was discharged from the rehabilitation center, he moved into a private home in Georgia. He was cared for by his father, who left his job to stay with Plaintiff, and his sister, who came from Mexico to assist her brother. During that time, Plaintiff's father and sister

> continued to provide [Plaintiff] with the same type of daily attendant care services that they had previously provided to him during his stay at the [rehabilitation center], including assisting him with his daily bowel program and internal catheterization program, transferring him to and from his wheelchair to his bed, the tub, toilet, and car, assisting with bathing and dressing, and performing other daily chores such as shopping for household needs and cooking.

These services were provided from approximately 9:00 a.m. to 11:00 p.m. each day.

Plaintiff's sister returned to Mexico on 5 March 2011. Plaintiff's father remained with Plaintiff as his sole caretaker. On 16 March 2011, Dr. Lin ordered professional attendant care for Plaintiff until Plaintiff could get an outpatient therapy evaluation. Defendants began providing attendant care on 17 March 2011 for two hours in the morning and two hours in the evening.

Plaintiff moved to North Carolina a few months later. On 11 July 2011, Dr. Lin issued discharge instructions, ordering that attendant care services be discontinued because "Plaintiff was functioning independently with his activities of daily living and mobility." Though Plaintiff's medical case manager asked Dr. Lin to reconsider that decision, he refused.

On 28 March 2011, Plaintiff presented himself for a medical evaluation concerning the transfer of his care from Georgia to North Carolina. His new, Charlotte-based doctor, Dr. William Bockenek, disagreed with Dr. Lin regarding attendant care and prescribed professional attendant care for eight hours per day, seven days per week.[7] Defendants began providing attendant care for Plaintiff at those requirements, beginning 1 August 2011. Dr. Bockenek also opined that Plaintiff needed eight hours of attendant care per day dating back to his 4 February 2011 discharge from the rehabilitation center.

In its 6 November 2012 opinion and award, the Commission stated that it gave "greater weight to the opinions of Dr. Bockenek over those of Dr. Lin on Plaintiff's attendant care needs." It also concluded that:

> 3. Plaintiff has been entitled to daily retroactive and ongoing attendant care services provided at Defendants' expense for eight hours per day since his discharge from the [rehabilitation center] . . . . Attendant care reimbursement for services previously provided by family members are [sic] recoverable. Although the Court of Appeals issued an opinion that prior approval of attendant care services must be obtained before family members can be reimbursed in *Mehaffey v. Burger King* . . . , __ N.C. App. __, 718 S.E.2d 720

7. Dr. Bockenek also prescribed an additional two hours of attendant care each day for community transport, which the Commission concluded was "in addition to the eight hours of [services] Plaintiff require[d.]"

> (2011), the Supreme Court of North Carolina issued a stay of the *Mehaffey* decision in January 2012.
>
> 4. Plaintiff's father and his sister provided eight hours of attendant care per day for Plaintiff during the periods when Defendants provided no care. During the periods when Defendants provided some care through a commercial agency, but less than eight hours per day, Plaintiff's father and sister provided the balance of the eight hours of care that Plaintiff required. The attendant care provided to Plaintiff by his father and sister was medically necessary and reasonably required to give relief and lessen his disability. *Plaintiff timely sought reimbursement for these attendant care services*. . . . Defendants are obligated to pay for the attendant care services provided to Plaintiff by his father and sister.

(Emphasis added). Therefore, the Commission ordered Defendants to reimburse Plaintiff's father and sister for the attendant care they had provided to Plaintiff and to continue providing attendant care services for eight hours per day until further notice.

Defendants argue on appeal that the Commission erred in awarding retroactive attendant care to Plaintiff, citing an opinion of this Court from 2011 in *Mehaffey v. Burger King*, __ N.C. App. __, 718 S.E.2d 720 (2011). In that case, the plaintiff's wife provided him with care for approximately nine months. *Id.* at __, 718 S.E.2d at 722. Afterward, a nurse consultant with the Commission recommended that the defendants compensate the plaintiff with eight hours of daily attendant care for five days each week. *Id.* The defendants did not authorize such care beforehand. *Id.* About ten months after the plaintiff's wife stopped attendant care, the plaintiff's family physician recommended sixteen hours of attendant care services per day, retroactive to the date of his original diagnosis. *Id*. In its opinion and award, the Commission gave the most weight to the family physician and awarded compensation for the plaintiff's wife's past and future attendant care. *Id.* at __, 718 S.E.2d at 722–23.

On appeal, we reversed the Commission's award because the attendant care provided by the wife had not been *pre-approved* in accordance with the Commission's medical fee schedule. *Id*. That opinion was reversed by our Supreme Court on 8 November 2013. *Mehaffey v. Burger King*, __ N.C. __, __, __ S.E.2d __, __ (2013), available at 2013

WL 5962846 [hereinafter *Mehaffey II*]. In reversing this Court's opinion, our Supreme Court stated:

> [O]ur [g]eneral [s]tatutes [do] not give the Commission the authority to mandate that certain attendant care service providers may not be compensated unless they first obtain approval from the Commission before rendering their assistance. As a result, we are unable to permit [the medical fee schedule] to prevent the award of retroactive compensation for the attendant care services [the wife] provided her husband.

Id. at __, __ S.E.2d at __ (citation omitted). Instead of affirming the Commission's original award, however, the Court pointed out that "an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider." *Id.* Accordingly, the Court stated that the plaintiff was only entitled to reimbursement for the attendant care services provided by his wife if he sought approval from the Commission within a reasonable period of time. *Id.* Because it was unclear from the record whether that had occurred, the Court remanded the matter for further findings of fact and conclusions of law by the Commission. *Id.*

Given the opinion of our Supreme Court, Defendants' argument is meritless. *See id.* Unlike *Mehaffey II*, the record in this case reflects the Commission's finding and conclusion that "Plaintiff timely sought reimbursement for [the] attendant care services [provided by his father and sister]." This determination is not disputed by the parties. Accordingly, we affirm the Commission's opinion and award on the issue of retroactive attendant care pursuant to our Supreme Court's opinion in *Mehaffey II*.

C. Cost of Life Care Plan

[4] As noted above, the employer in workers' compensation cases

> is required to provide the injured employee with medical compensation, which includes "medical, surgical, hospital, nursing, and *rehabilitative services* . . . as may reasonably be required to effect a cure or give relief." [1991 N.C. Sess. Laws Ch. 703, § 1] (emphasis [added]); [2005 N.C. Sess. Laws ch. 448, § 6.2]. The . . . Commission has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability.

Scarboro v. Emery Worldwide Freight Corp., 192 N.C. App. 488, 495, 665 S.E.2d 781, 786–87 (2008) (citation, internal quotation marks, and certain ellipses omitted). In addition, when reviewing an opinion and award of the Commission, we are "limited to a consideration of whether there [is] any competent evidence to support the . . . Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259 (2007) (citation, internal quotation marks, and emphasis omitted).

In this case, Defendants assert that the Commission erred in requiring them to pay the costs of Plaintiff's life care plan and contest findings of fact 32, 33, and 34 as insufficient to support its 11th conclusion of law. The Commission's findings state in pertinent part as follows:

> 32. . . . [T]he cost of preparation of the [life care plan] . . . was a reasonable rehabilitative service as it was medically necessary to comprehensively evaluate and identify the essential medical needs of Plaintiff as a result of his catastrophic injuries. The [life care plan] was essential to ensure appropriate treatment, care, transportation[,] and living accommodations [were] provided in order to give needed relief from symptoms associated with Plaintiff's injuries and to prevent further deterioration in his condition[,] which could otherwise become life threatening. Moreover, the majority of the recommendations and items identified . . . in the [life care plan] . . . have been put in place. The [life care plan] . . . is reasonably and medically necessary to provide relief and lessen Plaintiff's disability considering the circumstances of this case, including the Paradigm contract. Defendants are obligated to pay for the preparation of this [p]lan.
>
> 33. [An itemized, numbered table was prepared in the life care plan], listing the current and future needs of Plaintiff as a result of his injury. . . . Except for items 64–66 and 68, the . . . Commission finds that the items listed in the [life care plan] are medically necessary or have the potential to become medically necessary in the future[;] however, [certain items] are projected future needs and may be revised, items . . . related to the power wheelchair are not expected to be needed until 2035 and items . . . related to prescribed

> medications are subject to change periodically. If not already provided, Defendants are obligated to provide Plaintiff with the items listed as 1–63, unless Plaintiff specifically rejects the listed item, a medication or medical service is revised by a treating medical provider, or the item is a future need. . . .
>
> 34. Dr. Bockenek opined and the . . . Commission [finds] as fact that the recommendations he provided . . . to develop Plaintiff's [life care plan] were reasonably necessary.

Given those findings, the Commission concluded as a matter of law that:

> 11. The cost of preparation of the [life care plan] constitutes a reasonably necessary rehabilitative service and Plaintiff is entitled to have the costs associated with the preparation of this [plan] taxed against Defendants. Plaintiff is also entitled to be provided those items listed and found in the above findings of fact to be reasonably or medically necessary from [the life care plan]. . . .

In support of this conclusion, the Commission cited to 1991 N.C. Sess. Laws Ch. 703, then known as N.C. Gen. Stat. § 97-2(19); 2005 N.C. Sess. Laws ch. 448, § 6.2, then known as N.C. Gen. Stat. § 97-25; and *Scarboro*, 192 N.C. App. at 488, 665 S.E.2d at 781.

In *Scarboro*, we affirmed the Commission's tax of the costs of the plaintiff's life care plan as against the defendants because the plaintiff's doctor opined that the life care plan was reasonable and "medically necessary" for the plaintiff. *Id.* at 496, 665 S.E.2d at 787. In so holding, we determined that the doctor's opinion constituted competent evidence sufficient to support the Commission's conclusion that the life care plan was a "reasonable rehabilitative service." *Id.* For that we reason, we affirmed the Commission's opinion and award on that issue. *Id.*

Following the Commission's opinion and award in this case, Commissioner Tammy Nance offered the following dissenting opinion on the issue of the allocation of the costs of Plaintiff's life care plan:

> . . . Dr. Bockenek, the authorized treating physician who specializes in treating patients with spinal cord injuries, is perfectly capable of prescribing Plaintiff's medical needs as they arise, and as they change, which they will. As Dr. Bockenek explained in his deposition, patients with

> spinal cord injuries progress at different levels. There will be variability in what Plaintiff needs as his functional abilities improve with treatment and therapy, or decline with age. Dr. Bockenek testified that he could not say that Plaintiff was going to need everything that was on [the] life care plan. He said that everything that was in the life care plan was reasonable and necessary "for some patient with a spinal cord injury," but with respect to Plaintiff specifically, and what Plaintiff might need over his lifetime, it was "a guess, an estimate." According to Dr. Bockenek, he bases his treatment recommendations on his clinical assessment, not some "[c]onsortium for [s]pinal [c]ord [m]edicine" guidelines.
>
> A life care plan is a useful litigation tool when the parties are trying to settle a catastrophic claim and want a projection and cost analysis of future medical needs. I do not believe it is a component of medical compensation within the meaning of N.C. Gen. Stat. § 97-2(19) or N.C. Gen. Stat. § 97-25, and I do not believe that it was reasonable and necessary in this case to effect a cure, give relief, or lessen the period of Plaintiff's disability. I believe that Dr. Bockenek, with input from Plaintiff, the medical case manager, and the health care workers who attend to Plaintiff on a daily basis, can make recommendations for Plaintiff's care and prescribe for his needs as they arise and change, without resorting or referring to a life care plan.

On appeal, Defendants contest the Commission's findings of fact as not based on competent evidence and request that we adopt Commissioner Nance's dissenting opinion. In response, Plaintiff contends that "the preparation of a life care plan may be considered to be a necessary service in a workers' compensation action . . . when it is deemed 'necessary as a result of the injuries suffered by [the] plaintiff,' " citing an unpublished opinion of this Court.[8] Plaintiff goes on to assert, without citing any authority, that "[w]hether a life care plan is 'necessary as a result of the injuries suffered' is a question of fact for the . . . Commission to decide based on all the competent evidence of record and any reasonable inferences from this evidence." Beyond that, Plaintiff petitions this Court to affirm the Commission's award as

8. Unpublished opinions lack any precedential value and are not controlling on subsequent panels of this Court. N.C.R. App. P. 30(e).

a matter of policy, noting that the costs of preparing a life care plan are expensive and should not be imposed on injured workers who often lack the financial resources of their employers. We find Plaintiff's arguments unpersuasive, reverse the opinion and award of the Commission, and adopt the dissenting opinion of Commissioner Nance.

Plaintiff's argument that a life care plan is a "necessary service" is without merit. Plaintiff relies on no binding authority for that point, and we are unable to find any. If the Commission's conclusion of law is to be upheld on this issue, it must be because that conclusion is adequately supported by its own findings of fact, which must in turn be supported by competent evident. *See Ard*, 182 N.C. App. at 496, 642 S.E.2d at 259. In *Scarboro*, we affirmed the Commission's conclusion that the costs of the life care plan should be imposed on the defendants because its conclusion was supported by the finding that the plaintiff's doctor had deemed the life care plan to be "reasonable and medically necessary." *Scarboro*, 192 N.C. App. at 496, 665 S.E.2d at 787.[9]

In this case, the salient features of findings of fact 32 and 33 are more properly categorized as conclusions of law.

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.

See In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations, internal quotation marks, and certain commas omitted). By characterizing the life care plan and the items therein as reasonable and "medically necessary," findings 32 and 33 involve "the exercise of judgment [and] the application of legal principles," not a resolution of evidence. *See id.* For that reason, they constitute conclusions of law and, thus, are not competent support for the Commission's 11th identified conclusion. Nevertheless, finding of fact 34 constitutes a finding of fact because it resolves as an evidentiary matter the nature of Dr. Bockenek's opinion, *i.e.*, "that the recommendations he provided . . . to develop Plaintiff's [life care plan] were reasonably necessary." Therefore, we must determine whether finding of fact 34 supports conclusion of law 11. We hold that it does not.

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9. Because the defendants in *Scarboro* did not contest that finding, we presumed that it was based on competent evidence. *Id.*

While finding of fact 34 might appear to support the Commission's conclusion that the cost of the life care plan is a reasonably necessary rehabilitative service, this is not the case. In *Scarboro*, the doctor opined that the life care plan itself was "reasonable and medically necessary," and we held that this opinion was competent to support the Commission's conclusion that the cost of the plan should be taxed to the defendants as a result. Here, however, the Commission has only determined as a matter of fact that Dr. Bockenek believed *his own* recommendations were reasonable. As Commissioner Nance pointed out in her dissent, those recommendations did not support the Commission's conclusion that the life care plan was, in fact, a reasonably necessary rehabilitative service.[10] Accordingly, we reverse the opinion and award of the Commission, taxing the costs of Plaintiff's life care plan to Defendants.

D. Plaintiff's Attorneys' Fees

[5] Citing N.C. Gen. Stat. § 97-88.1, Plaintiff contends that the Commission erred in failing to award him the entire cost of his attorneys' fees on grounds that Defendants have exhibited "a stubborn and unfounded litigiousness" throughout the case. In support of that contention, Plaintiff briefly repeats his arguments regarding adaptive housing and Paradigm.[11] "If the [D]efendants' position is a correct statement of the applicable law, [Plaintiff contends,] the result in this case would be absurd." We disagree.

Section 88.1 of the Act provides as follows:

> If the . . . Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for [the] defendant's attorney or [the] plaintiff's attorney upon the party who has brought or defended them.

N.C. Gen. Stat. § 97-88.1 (2011).

> The purpose of this section is to prevent stubborn, unfounded litigiousness, which is inharmonious with the primary purpose of the [Act] to provide compensation to injured employees. . . . The reviewing court must

10. Commissioner Nance's dissenting opinion, quoted above, provides an in-depth discussion of why this finding does not support the Commission's conclusion, and we see no reason to quote it again.

11. Plaintiff's arguments regarding Paradigm are discussed *infra*.

> look to the evidence introduced at the hearing in order to determine whether a hearing has been defended without reasonable ground. The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness. If it is determined that a party lacked reasonable grounds to bring or defend a hearing before the Commission, then the decision of whether to make an award pursuant to [section] 97-88.1 and the amount of the award is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion.

Chaisson v. Simpson, 195 N.C. App. 463, 484, 673 S.E.2d 149, 164 (2009) (citations, internal quotation marks, brackets, and certain commas omitted).

Beyond the alleged "absurdity" of Defendants' argument, Plaintiff offers no evidence of a stubborn or unfounded litigiousness. Pursuant to our discussions of Defendants' arguments, *supra* and *infra*, we find no merit in this claim. Even to the extent that Defendants were legally incorrect, we see nothing in the record to suggest that they have provided anything less than a sound and sensible defense for their clients. Therefore, we hold that the Commission lacked the authority to tax Defendants with attorneys' fees under section 97-88.1 and affirm the portion of the Commission's opinion and award that concludes the same.

II. Paradigm's Appeal

In addition to the arguments discussed above, Defendants appeal on grounds that the Commission erred in determining that the assigned nurse case managers were acting as insurance adjusters, concluding that they were not operating within the Commission's Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims ("the RP Rules"), and ordering Defendants to assign different nurse case managers under the RP Rules. Further, Plaintiff contends that the Commission erred in failing to remove Paradigm from the case. Finally, Paradigm makes the following arguments in its appeal: (1) the Commission erred by denying Paradigm's motions and failing to advise how it would have ruled; (2) the Commission's opinion and award is void because Paradigm was a necessary party that was never made a party to the matter; (3) the Commission erred in concluding that Paradigm was not providing services under the RP rules; (4) the Commission erred in determining that Paradigm had a conflict of interest; and (5) the Commission erred in finding that Paradigm acted as a co-insurer. We reverse the Commission

on Defendants' appeal, affirm the Commission on Paradigm's first issue, and remand to the Commission for further review regarding Plaintiff's and Paradigm's remaining issues.

A. The Rehabilitation Professionals

[6] Defendants expressly challenge the Commission's findings of fact and conclusions of law regarding the RP Rules and the assigned rehabilitation professionals.[12] Relevant to our decision in this case, the Commission's findings and conclusions are as follows:

FINDINGS OF FACT

> 45. On or about December 13, 2010, [Defendants] contracted with [Paradigm] to provide case management, rehabilitation[,] and vocational rehabilitation services. In return for consideration paid . . . in the sum of $2,286,953.00, Paradigm agreed to provide not only these services but also accepted, with some exceptions, a significant share of the insurable risk in this matter. . . . Paradigm assumed financial responsibility for payment of compensable medical bills relating to Plaintiff's claim beginning August 13, 2010[,] and continuing until "all outcomes are achieved." Both Arch and Paradigm are presently acting as co-insurers.
>
> 46. The [o]utcome [p]lan [c]ontract between Arch and Paradigm outlined specific inclusions and exclusions of medical services to be provided by Paradigm . . . . The contract specifically provided [that:]
>
> "All medical costs related to the work injury deemed appropriate, necessary, and compensable in accordance with applicable jurisdictional statutes, from the contract start date until the targeted [o]outcome [l]evel is achieved, are included in the [o]outcome [p]lan [c]ontract price."
>
> . . .
>
> 47. Under its contract, Paradigm is compensated in part [for] the difference in the cost of rehabilitation, vocational[,] and case management services it has agreed

12. Specifically, Defendants challenge findings of fact 48–52 and conclusions of law 13–14.

to provide and the amount of the fixed sum payment it received from Arch as consideration for assuming the risk of such services. Ms. Angela Linn was assigned as network manager of the Paradigm contract.

48. . . . Defendants contend that Paradigm has contracted with a third party, Palmetto Rehabilitation, to provide its case management services to Plaintiff and that Paradigm did not directly provide case management services to Plaintiff. Ms. Linn testified that she performed services as an employee of Palmetto Rehabilitation; however, there is no documentation in the record to corroborate her testimony on this issue.

49. Ms. Linn has worked seven years as a contract nurse case manager/network manager for Paradigm. She testified that her primary duties as a nurse case manager/network manager for Paradigm are to coordinate and facilitate medical treatment for patients. In Plaintiff's case, Ms. Linn received a call to see if she would accept Plaintiff's case[. When she did,] she flew to [Plaintiff's location] and assessed his needs and coordinated his care transfer . . . to Atlanta, Georgia. Ms. Linn did not testify specifically [about] whether her assignment to Plaintiff's case came from Paradigm or Palmetto Rehabilitation. Once Plaintiff became a patient at the [rehabilitation center], Ms. Linn coordinated an outcome plan with other Paradigm team members and became the "eyes and ears" of the Paradigm team while Plaintiff was treated at the [rehabilitation center]. She visited Plaintiff once a week . . . , updated the Paradigm team on his progress, *authorized medical treatment and services that she felt were within the* [*o*]*utcome* [*p*]*lan* [*c*]*ontract [p]rice*[,] and coordinated and authorized housing needs and transportation for Plaintiff's family during his stay at the [rehabilitation center].

50. In terms of authorizing medical treatment and services, *Ms. Linn testified that while working on Plaintiff's claim she had full authority to provide services that she deemed medically necessary for Plaintiff and within the* [*o*]*utcome* [*p*]*lan* [*c*]*ontract price*. In a December 9, 2010 letter, Paradigm directed

Gallagher Bassett Services to forward any communication or requests for authorization of services related to Plaintiff's claim to Ms. Linn. A January 18, 2011 e-mail from [the] claims representative with Gallagher Bassett Services[] responded to a request from a vendor for authorization for medical supplies for Plaintiff, stating that "all medical treatment and authorization need to go through Paradigm. Please contact Angela Linn with Paradigm."

51. Once [Plaintiff's] care was transferred to North Carolina, Ms. Linda Sproat . . . provided case management services to Plaintiff, such as regularly performing home assessments to determine [Plaintiff's] daily needs, [and] coordinating his personal attendant care needs and medical appointments. She also authorized medical treatment, services[,] and cost[s] for Plaintiff, including an additional six weeks of physical and occupational therapy, transportation services to and from medical appointments[,] and wall[ ]mounted lifts and grab bars for Plaintiff's bathroom.

. . .

53. Based upon a preponderance of evidence, the . . . Commission finds that that [sic] the services provided by both Ms. Linn and Ms. Sproat as network managers with Paradigm do not fit within the parameters of medical case management allowed under the [RP Rules]. While they did provide some case management services to Plaintiff, Ms. Linn and Ms. Sproat had full authority to authorize medical treatment and services that they deemed to be medically necessary, which is closer to the authority of insurance claims adjusters. They only sought authorization from the carrier if the services were not within the listed "[o]utcome [p]lan [c]ontract [p]rice."

54. Palmetto Rehabilitation is not providing services to Plaintiff under the authority of the [RP Rules]. Plaintiff would benefit from the assignment of a medical case manager operating under [the RP Rules].

55. The . . . Commission finds that despite its contract with Paradigm, Defendants . . . remained liable for all of the

> compensable consequences of Plaintiff's injury. The . . . Commission further finds that it is within the jurisdiction of the [DOI] to determine whether Paradigm is properly operating in North Carolina on this claim and whether the services performed by Ms. Lin [sic] and Ms. Sproat constituted insurance claims adjusting.
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> . . .
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> CONCLUSIONS OF LAW
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> . . .
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> 13. No special contract can relieve an employer of his [sic] obligation under the [A]ct. Therefore, despite [Defendants'] contract with Paradigm[,] they remained ultimately liable on this claim. Paradigm then contracted with Palmetto Rehabilitation to provide rehabilitation and medical case management services. *However, since Ms. Lin* [sic] *and Ms. Sproat also have authority to approve or deny medical care, they are not operating under the* [*RP Rules*] *as they, in part, provided claims adjustment type services and their contractual relationship conflicts with the conduct allowed under* [*those*] *rules.*
>
> 14. Whether working for Paradigm or Palmetto Rehabilitation, Ms. Linn and Ms. Sproat are not providing services to Plaintiff under the [RP Rules].

(Emphasis added).

In their brief, Defendants assert that Ms. Linn and Ms. Sproat (collectively, "the nurse case managers") should not be removed as violating the RP Rules because, as employers, Defendants have the authority to direct medical treatment.[13] They go on to claim that the nurse case managers acted within the scope of the RP Rules and contend that the Commission lacked any authority for its conclusion to the contrary. In his brief, Plaintiff asserts that Paradigm is incentivized to minimize its payments to Plaintiff because of its agreement with Defendants. He also alleges that Paradigm and Arch were working together in violation of the RP Rules — citing an e-mail from Defendants to one of

13. This is correct. When an employer has accepted a claim as compensable, it has the right to direct the medical treatment for that injury. *Craven v. VF Corp.*, 167 N.C. App. 612, 616–17, 606 S.E.2d 160, 163 (2004).

the nurse case managers, which instructed her to contact Gallagher Bassett for items not covered in the contract.[14] After a review of the RP Rules and the record in this case, we find that the nurse case managers were not in violation of the rules and reverse the opinion and award of the Commission.

In pertinent part, the RP Rules provide as follows:

> *.0102 PURPOSE OF THE RULES*
>
> (a) The purpose of these Rules is to foster professionalism in the provision of rehabilitation services in Industrial Commission cases, such that in all cases the primary concern and commitment of the [Rehabilitation Professional ("RP")] is to the medical and vocational rehabilitation of the injured worker rather than to the personal or pecuniary interest of the parties.
>
> (b) To this end, these Rules are to be interpreted to promote frank and open cooperation among parties in the rehabilitation process, and to discourage the pursuit of plans or purposes which impede or conflict with the parties' progress toward that goal.

4 N.C. Admin. Code 10C.0102 (2012) (effective 1 January 1996).

> *.0103 APPLICATION OF THE RULES*
>
> . . .
>
> (d) "Medical rehabilitation" refers to the planning and coordination of health care services. The goal of medical rehabilitation is to assist in the restoration of injured workers as nearly as possible to the workers' pre-injury level of physical function. Medical case management may include but is not limited to case assessment, including a personal interview with the injured worker; development, implementation[,] and coordination of a care plan with health care providers and with the worker and family; evaluation of treatment results; planning

14. Plaintiff argues that the e-mail is revelatory of Paradigm's "carte blanch" [sic] authority to grant or deny services under its contract with Arch and through the nurse case managers.

for community re-entry; return to work with the employer of injury and/or referral for further vocational rehabilitation services.

. . .

4 N.C. Admin Code 10C.0103 (2012) (amended effective 1 June 2000).

.0106 PROFESSIONAL RESPONSIBILITY OF THE REHABILITATION PROFESSIONAL IN WORKERS' COMPENSATION CLAIMS

(a) The RP shall exercise independent professional judgment in making and documenting recommendations for medical and vocational rehabilitation for the injured worker, including any alternatives for medical treatment and cost-effective return-to-work options including retraining or retirement. The RP shall realize that the attending physician directs the medical care of an injured worker.

(b) The RP shall inform the parties of his or her assignment and proposed role in the case. At the outset of the case, the RP shall disclose to health care providers and the parties any possible conflict of interest, including[] any compensation carrier's or employer's ownership of or affiliation with the RP.

. . .

[(f)] Prohibited Conduct:

(1) RPs shall not conduct or assist any party in claims negotiation, investigative activities, or perform any other non-rehabilitation activity;

. . .

4 N.C. Admin. Code 10C.0106 (2012) (amended effective 1 June 2000).

.0107 COMMUNICATION

. . .

(f) The RP shall provide copies of all correspondence simultaneously to all parties to the extent possible, making every effort to effect prompt service.

. . .

4 N.C. Admin. Code 10C.0107 (2012) (amended effective 1 June 2000).

In its opinion and award, the Commission determined that the nurse case managers violated the RP Rules for two reasons: (1) they were given the authority to *approve or deny* payment for medical care within the auspices of the contract plan, which constituted unpermitted "claims adjustment type services," and (2) the contractual relationship between Paradigm and Defendants "conflict[ed] with the conduct allowed under [the] Rules." Assuming *arguendo* that the Commission's findings are based on competent evidence, they do not support its conclusion that the nurse case managers violated the RP Rules.[15]

First, to the extent that there is competent evidence to support the Commission's finding regarding the nurse case managers' medical care authority, the Commission has not offered any reason why the existence of this authority is a violation of the RP Rules. The RP Rules cited by Plaintiff only state that rehabilitation professionals must exercise "independent professional judgment" — they do not address medical care authority. Further, accepting for the purposes of argument that such authority constitutes "claims adjustment type services,"[16] as the Commission characterizes it, that type of activity is not specifically barred by the RP Rules.

Rule .0106(f) prohibits RPs from "claims negotiation, investigative activities, or . . . any other non-rehabilitation activity." However, neither the Commission's opinion nor the Plaintiff's brief offers any reason that the nurse case managers' approval of payment for certain medical treatment, which was *already approved under the outcome plan contract*, should constitute "claims negotiation" or "investigative activities," and we see no such reason. Further, the Commission made no finding regarding whether the nurse case managers' actions in approving payment for certain treatments constituted a "non-rehabilitation activity." In our view, approving medical treatment, when the provider requires approval before proceeding with treatment, constitutes "assist[ing] in the restoration of injured workers as nearly as possible to the workers' pre-injury level of physical function[,]" 4 N.C. Admin Code at 10C.0103(d), *particularly when*, as here, the RP is simply and solely communicating the authorization already in effect, and not making an independent judgment about whether the treatment should be approved.

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15. At no point in its opinion and award does the Commission establish what specific language or which specific rules were violated.

16. We do not offer an opinion as to whether it does.

Second, neither Plaintiff nor the Commission provide any support for the Commission's conclusion that the relationship between Paradigm and Defendants "conflict[ed]" with those rules. Indeed, we find none. Accordingly, we reverse the Commission's opinion and award as it relates to the nurse case managers.

B. Paradigm's Motions

[7] As discussed above, Paradigm moved to intervene, to receive additional evidence, and for reconsideration following the Commission's 6 November 2012 opinion and award. The Commission dismissed those motions on 28 November 2012 for lack of jurisdiction because Plaintiff had already filed notice of appeal. Afterward, Paradigm filed a second motion for reconsideration and for an advisory opinion, and the Commission denied those motions as well. On appeal, Paradigm argues that the Commission erred in dismissing those motions. We disagree.

i. Paradigm's Original Motions

It is well established that, as a general rule, "an appeal takes a case out of the jurisdiction of the trial court" and, thereafter, the court is *functus officio*. *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975) (citations omitted). Because Paradigm filed its motions after Plaintiff had already filed his notice of appeal, the Commission lacked jurisdiction to issue a ruling on those motions. As Plaintiff notes in his brief, Paradigm admitted to this fact in its response to Plaintiff's motion to dismiss. We hold that the Commission correctly denied Paradigm's original motions for reconsideration, to present additional evidence, and to intervene, and we affirm its 28 November 2012 order on those grounds.

ii. Paradigm's Second Set of Motions

Alternatively, Paradigm contends that the Commission abused its discretion in denying Paradigm's request for an advisory opinion and second motion for reconsideration. For support, Paradigm cites predominantly to *Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986), where we stated that, when a trial court is divested of jurisdiction because of a pending appeal, it "retains limited jurisdiction to hear and consider a . . . motion to indicate what action it would be inclined to take were an appeal not pending." *Id.* at 478–79, 343 S.E.2d at 7 (citations omitted). As a preliminary matter, we note that the cases cited by Paradigm only support its argument that the Commission had jurisdiction to provide an advisory opinion. None of the cited cases indicate that the Commission could grant Paradigm's second motion

to reconsider. Accordingly, Paradigm's argument regarding its second motion to reconsider is overruled, and we limit our review to its motion for an advisory opinion.

To the extent that the Commission has some limited authority to provide an advisory opinion when jurisdiction has been divested because of a pending appeal, that authority is not mandatory. *See id.* Our opinion in *Talbert* does not state that the Commission is obligated to provide an advisory opinion, and we see nothing to suggest that it is. *See id.* Accordingly, and as Paradigm appears to accept in its brief, consideration of the Commission's failure to exercise such authority must be reviewed for abuse of discretion. Under that standard, the Commission's order can be overturned only where its "ruling is manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *See State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

While the Commission appears to have some limited discretion to provide an advisory opinion in these circumstances under *Talbert*, we see nothing in the record — and Paradigm offers no argument or reason — to suggest that the Commission's decision to refrain from exercising that limited authority was arbitrary or manifestly unsupported by reason. Indeed, given our Supreme Court's repeated declaration that advisory opinions are not proper for the courts, we must hold that the Commission's decision to decline to give one was entirely reasonable. *See Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (1994) ("As this Court has previously pointed out, it is not a proper function of courts to give advisory opinions . . . .") (citations omitted). Accordingly, we affirm the Commission's denial of Paradigm's second motion for reconsideration and for an advisory opinion.

C. The Parties' Remaining Issues

[8] In addition to the arguments discussed above, Plaintiff contends on appeal in COA 13-220 that Paradigm should have been removed from this case for "engaging in illegal insurance activities, its conflict of interests[,] and . . . failing to unwind the contract between Paradigm and [Arch]." Paradigm alleges, however, that it was excluded from this case by chicanery on the part of Plaintiff. Specifically, Paradigm has contended that: (1) it was not served with notice of any of the proceedings leading up to the Commission's 6 November 2012 opinion and award in violation of the RP Rules;[17] (2) neither Plaintiff nor the Commission

17. The record on appeal does not contradict this allegation.

sought to join Paradigm in the proceedings below even though it was a necessary party;[18] and (3) "Plaintiff's counsel failed to disclose that the [DOI] has already rejected" the allegations he asserted on appeal regarding Paradigm's status as a co-insurer.[19] Plaintiff responds to these allegations, in part, by asserting that Paradigm intentionally excluded itself from the proceedings before the Commission as a matter of trial strategy because it preferred to make its arguments through Arch.

Given the allegations made by Paradigm and Plaintiff, we conclude that the record is insufficient to address their remaining arguments on appeal. Paradigm's allegations suggest that they were improperly excluded from this case and that the Commission lacked crucial information when making its contested decisions. Plaintiff's response suggests, in part at least, that this is not so. Because the record is not competent on these issues, we cannot resolve them on appeal. For that reason, we return jurisdiction to the Commission and remand for further proceedings on these Paradigm issues, including the taking of additional evidence, if necessary.

AFFIRMED in part; REVERSED in part; REMANDED in part.

Judges BRYANT and DILLON concur.

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18. Paradigm does not explicitly cite to a procedural rule for support. However, in connection with its assertion that Plaintiff did not seek to join Paradigm, Paradigm states in a footnote that "Plaintiff has never provided an explanation why he failed to comply with RP Rule [10C.0110]." Rule 10C.0110 states:

> An RP may be removed from a case upon motion by either party for good cause shown or by the . . . Commission in its own discretion. The motion shall be filed with the Executive Secretary's Office *and served upon all parties and the RP*. Any party or the RP may file a response to the motion within 10 days. The . . . Commission shall then determine whether to remove the RP from the case. . . .

4 N.C. Admin. Code 10C.0110 (2012) (amended effective 1 June 2000) (emphasis added). Pursuant to our discussion *infra*, we do not address the merits of this argument. Nonetheless, we note that the cases cited in Paradigm's brief rely on the application of Rule 19 of the North Carolina Rules of Civil Procedure — not RP Rule 10C.0110.

19. In support of this third point, Paradigm appends documents not included in the record on appeal. Paradigm explains the presence of these documents by alleging that Plaintiff launched an official investigation with the DOI regarding Paradigm's status as an insurer before the Commission's 6 November 2012 opinion and award and "never advised the . . . Commission about the [DOI]'s decision." As a result, Paradigm contends, the documents in the appendix "could not properly be included in the [record]."

GARY v. BRIGHT

[231 N.C. App. 207 (2013)]

ROBERT L. GARY, PLAINTIFF
v.
CRYSTAL D. BRIGHT, DEFENDANT

No. COA13-687

Filed 3 December 2013

Child Custody and Support—modification—temporary custody—no finding of substantial change in circumstances

The trial court erred by finding and concluding that the 15 July 2012 child custody order was temporary in nature and by entering the 13 February 2013 child custody order absent finding a substantial change in circumstances to warrant modification of the prior custody order.

Appeal by defendant from order entered 13 February 2013 by Judge David K. Fox in Rutherford County District Court. Heard in the Court of Appeals 6 November 2013.

No appellee brief filed.

King Law Offices, PLLC, by Brian W. King and Matthew D. Leach, for defendant.

McCULLOUGH, Judge.

Defendant appeals from the entry of a new custody order, finding the prior custody order as temporary in nature and applying a best-interests analysis to warrant modification. Based on the reasoning set forth below, we vacate the new custody order and remand for a new hearing.

I. Background

Plaintiff Robert Louis Gary and defendant Crystal Dawn Bright are not married. The parties are the parents of one minor child born on 13 February 2007.

On 26 May 2010, the trial court entered a child custody order giving defendant custody of the minor child, subject to the visitation of plaintiff. The 26 May 2010 order also gave plaintiff visitation with the minor child, subject to the condition that the visitations not violate a November 2009 Domestic Violence Protection Order ("DVPO") which

the parties consented to and subject to a visitation schedule consisting of four phases.

The 26 May 2010 order was modified by an order entered 28 March 2011 titled "Custody Modification Order and Order of Contempt and Attorney's Fees Against the Plaintiff." The trial court ordered *inter alia* plaintiff to pay defendant's attorney the sum of $5,558.75 to defray legal expenses, held plaintiff to be in willful civil contempt of the 26 May 2010 order, and modified portions of plaintiff's visitation schedule.

On 15 June 2012, the trial court entered a "Judgment & Order to Modify Child Custody Order & Contempt." The trial court found that since the filing of the 26 May 2010 and 28 March 2011 orders, there had been a "substantial change of circumstances that impacts the welfare of the child which justifies a modification in the Order." The trial court found, in pertinent part, that plaintiff had violated the DVPO, failed to enroll in parenting classes as previously ordered, and failed to pay child support and was in arrears in excess of $1,300.00, etc. The trial court also found that

> [t]his change of circumstances warrants a modification of the Order so that the care, custody and control of the minor children should be vested primarily in Defendant and the Plaintiff's visitations be curtailed until such time he complies with the spirit and letter of the previous orders in this case.

Accordingly, the trial concluded that this order was in the best interest of the parties' minor child and ordered that the previous child custody orders remain in effect and modified as follows:

> a. The Plaintiff's every other weekend visitation is hereby modified to being from 8:00 a.m. until 8:00 p.m. every other Saturday and Sunday.
>
> b. The Plaintiff's weekend and holiday visitation is hereby suspended (save [sic] as every other weekend above). The [plaintiff] shall have from 2:00 p.m. to 4:00 p.m. on Father's Day, and from 12:00 p.m. to 4:00 p.m. on Thanksgiving and Christmas Day.
>
> c. That nighttime visitation will not resume without a motion and filing with the Court, included [sic] full performance of all requirements of the Plaintiff from the previous orders (including parenting classes and financial matters).

d. That the Plaintiff father is continued to be barred from the daycare or school of the minor child.

On 19 November 2012, plaintiff filed a "Motion to Change Custody, Motion to Set Aside Previous Order, Motion to Change Venue, Motion to Recuse" arguing that the trial court set aside the 15 June 2012 order and modify custody based on a substantial change in circumstances. Plaintiff argued the following in pertinent part: that defendant had continuously tried to thwart the relationship between plaintiff and the minor child; that the father has continuously asked for additional visitation but that defendant has denied his requests; and that plaintiff had completed the necessary parenting classes sponsored by Family Resources of Rutherford County, Inc.

Following a hearing held on 18 January 2013, the trial court entered an "Order in Custody & Visitation" on 13 February 2013 which included the following pertinent conclusions of law:

> 4. That the prior orders of the court regarding visitation and custody have become obsolete due to myriad occurrences and changed circumstances obtain[ed] since the entry of what the parties maintain is the operative 26 May, 2010 court order in this matter, as amended. That an order *de novo* would best serve not only [the minor child's] best interest but also the best interest of the parties[.]
>
> 5. That the most recent dispositive order in this matter, that filed 15 June, 2012, found there existed "a substantial change of circumstances requiring a modification of the previous order". That the court went on to enter what appears, as a matter of law and of fact, temporary restrictive provisions governing plaintiff's visitations with the parties' minor child . . . to wit: "That nighttime visitation will not resume without a motion and filing with the Court, including full performance of all requirements of the Plaintiff from the previous orders (including parenting classes and financial matters)."
>
> That [t]his language leads the Court to presume conclusively, as a matter of law, that this Court is invited to readdress the issues of custody and visitation, that the 15 June, 2012 order is a temporary one, at least relating to these issues, and that a requisite change of circumstances has already been found in said order.

> 6. That the plaintiff, as a matter of law and of fact, appears to the Court to have meaningfully addressed the primary impediments to resumption of a more liberal visitation with this minor child . . ., as established by the court orders in this matter filed prior to 15 June, 2012, including but not limited to the following, to wit: plaintiff attended and graduated from parenting classes, is properly abiding by the current support orders affecting [the minor child], and is appropriately medicating himself . . . . Further, plaintiff has expressed believably in open court under oath that he is at long last prepared to aggressively abide by the orders of this Court and to be a compliant and appropriate custodian of the parties' minor child, and, further, the [defendant] asserted in open court that she presently believes the best interest of the parties' minor child is served by establishment of a more liberal program of visitation of the child with the plaintiff, a conclusion in which this Court concurs.

The 13 February 2013 order awarded defendant primary legal and physical care, custody, and control of the minor child, subject to the secondary custody of and visitation with plaintiff. Plaintiff was awarded the secondary legal and physical custody of the minor child, with rights of visitation, subject to the primary legal and physical care, custody, and control of the minor child by defendant.

Defendant appeals.

II. Standard of Review

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . The trial court's conclusions of law must be supported by adequate findings of fact. Whether a district court has utilized the proper custody modification standard is a question of law we review *de novo*. Absent an abuse of discretion the trial court's decision in matters of child custody should not be upset on appeal.

Peters v. Pennington, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citations and quotation marks omitted).

III. Discussion

On appeal, defendant argues that the trial court erred by finding and concluding that the 15 July 2012 child custody order was temporary in nature and that consequently, the trial court erred by entering the 13 February 2013 child custody order absent finding a substantial change in circumstances. We agree.

"Custody orders may either be 'temporary' or 'permanent.' " *Woodring v. Woodring*, __ N.C. App. __, __, 745 S.E.2d 13, 17 (2013) (citations omitted). "[A] trial court's designation of an order as "temporary" or as "permanent" is not binding on this Court." *Lamond v. Mahoney*, 159 N.C. App. 400, 403, 583 S.E.2d 656, 658-59 (2003) (citation omitted). "[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009).

We note that

> [t]here is no absolute test for determining whether a custody order is temporary or final. A temporary order is not designed to remain in effect for extensive periods of time or indefinitely . . . . Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody.

Miller v. Miller, 201 N.C. App. 577, 579, 686 S.E.2d 909, 911 (2009) (citations omitted). "[A]n order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *File v. File*, 195 N.C. App. 562, 568, 673 S.E.2d 405, 410 (2009) (citation omitted).

In the case *sub judice*, the trial court made the following finding of fact in the 13 February 2013 order:

> 12. That by order filed in this matter 15 June, 2012 the now long suffering Judge Pool found plaintiff yet again in contempt of orders in this matter, punished him, yet again, and severely restricted his visitation with the parties' minor child. Plaintiff was not present for the hearing. This Court notes this is the eighth order affecting the custody and visitation of the parties with their minor child.

> That it appears to this court as a matter of fact that, to the degree this 15 June, 2012 order restricts plaintiff's "nighttime visitation" with his child, it is a temporary order. The balance of the order appears to be permanent in nature.

The trial court thereafter concluded that

> 5. [T]he most recent dispositive order in this matter, that filed 15 June, 2012, found there existed "a substantial change of circumstances requiring a modification of the previous order." That the court went on to enter what appears, as a matter of law and of fact, temporary restrictive provisions governing plaintiff's visitations with the parties' minor child . . . to wit: Paragraph 3(c) of the dispositive portion of the 15 June, 2012 order reads: "That nighttime visitation will not resume without a motion and filing with the Court, including full performance of all requirements of the Plaintiff from the previous orders (including parenting classes and financial matters)."
>
> That this language leads the Court to presume conclusively, as a matter of law, that this Court is invited to readdress the issues of custody and visitation, that the 15 June, 2012 order is a temporary one, at least relating to these issues, and that a requisite change of circumstances has already been found in said order.

Although the trial court in the present case made a finding and concluded that the 15 June 2012 order was temporary in part and permanent in part, "[o]ur appellate decisions have consistently considered whether a custody 'order' as a whole was temporary or final rather than breaking down the parts of that order." *Smith*, 195 N.C. App. at 250, 671 S.E.2d at 583 (citation omitted).

Our careful review indicates that the 15 June 2012 order was not entered without prejudice to either party, failed to state a clear and specific reconvening time, and determined all the issues pertaining to custody. *See File*, 195 N.C. App. at 568, 673 S.E.2d at 410. Accordingly, we hold that the 15 June 2012 order was a permanent order and thus, the trial court erred by finding and concluding that the 15 June 2012 order was temporary in nature.

Based on the erroneous finding that the 15 June 2012 order was temporary in nature, the trial court concluded in the 13 February 2013 order

that the "best interest of the parties' minor child . . . is the Polar Star guiding the Court in its dispositions in this matter" and that the trial court's disposition "best serve[d] the best interest of the minor child[.]"

We emphasize that

> [p]ermanent child custody or visitation orders may not be modified unless the trial court finds there has been a substantial change in circumstances affecting the welfare of the child. If there has been a substantial change in circumstances, the court may modify the order if the modification is in the best interests of the child. Conversely, temporary orders may be modified by proceeding directly to the best-interests analysis.

Woodring, __ N.C. App. at __, 745 S.E.2d at 18 (citations omitted). Trial courts should "when memorializing their findings of fact, to pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interests." *Shipman v. Shipman*, 357 N.C. 471, 481, 586 S.E.2d 250, 257 (2003). "[A] substantial change in circumstances is unequivocally a conclusion of law. This phrase is a term of art, meaning that a change has occurred among the parties, and that change has affected the welfare of the children involved." *Garrett v. Garrett*, 121 N.C. App. 192, 197, 464 S.E.2d 716, 720 (1995), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). "It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made." *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991).

Where we find that the trial court applied an improper modification standard, we hold that it erred by solely using a best-interests analysis instead of applying the substantial change in circumstances analysis to warrant modification of the prior custody order. Accordingly, we vacate the 13 February 2013 order and remand with instructions for the trial court to make further findings and conclusions with respect to this issue, consistent with this opinion.

Vacated and remanded.

Judges ELMORE and DAVIS concur.

GE BETZ, INC., PLAINTIFF
v.
R.C. CONRAD, ROBERT DODD, BENJAMIN LUKOWSKI, BARRY OWNINGS, AND ZEE COMPANY, INC., DEFENDANTS

No. COA13-239

Filed 3 December 2013

1. Unfair Trade Practices—other claims subsumed—same conduct

A claim of unfair or deceptive practices subsumed claims for breach of contract, tortious interference, and misappropriation of trade secrets in the damages phase of litigation involving non-compete employment agreements where the same conduct gave rise to all of the claims.

2. Evidence—parol—excluded—unambiguous non-compete agreement

In an action involving non-compete provisions in employment contracts, interpreted under Pennsylvania law, the trial court correctly excluded parol evidence regarding the meaning of "indirect solicitation" because the term was unambiguous.

3. Employer and Employee—non-compete agreements—indirect solicitation

In an action involving non-compete provisions in employment contracts, interpreted under Pennsylvania law, the trial court was permissibly guided by a federal district court decision in finding that defendants solicited former customers through each other as proxy, and thus breached the "indirect solicitation" clauses of their employment contracts.

4. Employer and Employee—non-compete agreement—indirect solicitation clause—no violation of public policy

The indirect solicitation clauses in the individual defendants' employment agreements did not exceed the scope necessary to protect plaintiff's business, and did not violate North Carolina public policy as being overbroad.

5. Employer and Employee—confidentiality agreement—breach—finding supported by evidence

The trial court correctly concluded that the individual defendants breached confidentiality clauses in their employment

contracts. There was competent evidence in the record to support the court's finding that individual defendants worked for plaintiff and were exposed to confidential information as part of their employment, and that they used plaintiff's information in soliciting customers for another company.

6. Employer and Employee—non-compete clauses—interpretation of supervisory responsibility—no consideration—change of title only

In an action involving non-compete clauses in employment contracts, the trial court did not err in its interpretation of the term "supervisory responsibility" in the contracts or in finding the provision effective despite the absence of new consideration when two defendants accepted area manager positions. The trial court correctly applied Pennsylvania law in determining that two defendants had exercised "supervisory responsibility" before taking positions as area managers. The terms of their employment agreements did not change with their titles.

7. Estoppel—employment agreement not found—no relief from duties—no estoppel

Plaintiff was not estopped from seeking to penalize one of the defendants for breaching his non-compete agreement where plaintiff told defendant that it could not locate a copy of the agreement. Plaintiff never told defendant that he had no agreement, only that plaintiff could not find its copy. Defendant was not relieved of the duties imposed by the agreement.

8. Evidence—non-compete agreement—damages from breach—causation

The trial court did not abuse its discretion in an action involving a non-compete agreement by excluding evidence of other potential sources of the loss of customers. Plaintiff needed only to show that the acts of the individual defendants caused some injury, not that the individual defendants' acts were the exclusive reason for the customer loss. Additionally, there was evidence that was independently sufficient to prove causation.

9. Trade Secrets—identification—formulas, pricing, proposals, costs, and sales

The trial court, in an action on a non-compete agreement, correctly identified plaintiff's information as trade secrets. Although the individual defendants contended that plaintiff failed to identify the

trade secrets with sufficient particularity, plaintiff identified chemical formulations, pricing information, customer proposals, historical costs, and sales data that individual defendants were exposed to while working for plaintiff.

10. Trade Secrets—sales reports and proposals—trade secrets

Descending sales reports and customer proposals were correctly identified as trade secrets in North Carolina.

11. Trade Secrets—transmission of information—not a failure to maintain secrecy

Plaintiff's transmission of information to one of the individual defendants after plaintiff determined that defendant was likely to leave the company did not mean that plaintiff had failed to maintain secrecy and that the information was not a trade secret. Defendant was still bound by the confidentiality terms of his employment agreement and plaintiff could not practically employ him without giving him access to trade secret information.

12. Trade Secrets—misappropriation—prima facie case—not rebutted

Plaintiff sufficiently proved misappropriation of trade secrets where the individual defendants did not rebut plaintiff's *prima facie* case by showing that they acquired the trade secrets through independent development, reverse engineering, or from someone who had the right to disclose them.

13. Unfair Trade Practices—misappropriation of trade secrets—violation of employment contracts

The trial court did not err in an action arising from non-compete agreements by holding the individual defendants liable for violating N.C.G.S. § 75-1.1. The misappropriation of trade secrets met the three prongs necessary to find a defendant liable for violating that statute. Additionally, the individual defendants willfully violated the terms of their employment contracts, thus committing egregious activities outside the scope of their assigned duties.

14. Damages and Remedies—joint and several liability—violation of non-compete agreements—single concerted plan

Joint and several liability was appropriate in an action arising from non-compete agreements where the trial court properly found that the individual defendants acted in concert to harm plaintiff, their former employer. There was ample evidence in the record

to support the trial court's finding that each individual furthered a single concerted plan with their new employer to solicit the former employer's customers.

15. Discovery—sanctions—corporate profit and revenue

The trial court did not abuse its discretion when applying discovery sanctions in an action arising from non-compete agreements. Defendant Zee Co., Inc. conceded that its behavior in evading requests for evidence warranted sanctions, and the sanction imposed by the trial court did not impermissibly transform the measure of damages from profit to revenue.

16. Damages and Remedies—punitive—limits—applied to each plaintiff

The trial court erred by entering punitive damages in an action arising from non-compete agreements. N.C.G.S. § 1-25(b) requires the application of the statutory limits to punitive damages to each plaintiff rather than each defendant, as the trial court did here.

17. Damages and Remedies—punitive—similar conduct with non-party considered—erroneous

An award of punitive damages in an action arising from a non-compete agreement was remanded where the trial court found that defendant Zee Co., Inc. had been engaging in similar conduct with a company that was not a party, but it was not clear how much weight the court gave to those findings in entering the maximum amount of punitive damages.

18. Attorney Fees—unreasonably persistent litigation

The trial court did not err in an action arising from non-compete agreements by awarding plaintiff attorney fees related to defendant Zee Co., Inc.'s counterclaims. Zee persisted in litigating the case after the point where it should reasonably have been aware that there was no justiciable issue.

19. Attorney Fees—out-of-state counsel—hourly rate

The trial court abused its discretion in an action arising from non-compete agreements by awarding the entire attorney fee billed by a New York firm without conducting any inquiry into which of the services truly could not have been performed by local counsel at reasonable rates within the community in which the litigation took place.

20. Contempt—indirect criminal—not a discovery sanction under court's inherent authority

The trial court erred when holding an attorney in indirect criminal contempt for violation of a protective order without following the procedures provided by N.C.G.S. § 5A-15. Although plaintiff argued on appeal that the attorney was held in contempt under the trial court's inherent authority to issue contempt as a discovery sanction, plaintiff's trial counsel stated in a hearing that it was seeking criminal contempt.

21. Attorney Fees—attorney not a party to suit

The trial court erred by awarding plaintiff attorney fees in sanction proceedings where the attorney was not a party to the suit under the language of N.C.G.S. § 1A-1, Rule 37(b)(2), which authorized attorney fees.

22. Attorneys—out-of-state—admission revoked—contempt erroneous

A trial court decision to revoke an attorney's admission to practice in North Carolina *pro hac vice* was remanded where a decision by that trial court holding the attorney in criminal contempt was set aside. Holding the attorney in contempt likely affected the trial court's decision to revoke his admission.

23. Attorneys—out-of-state admission revoked—failure to disclose discipline

The trial court did not err by revoking the *pro hac vice* admission of an attorney where the attorney had not disclosed a $1,000 fine levied against him in 1997 by a federal court in South Carolina. The plain language of N.C.G.S. § 84-4.1 requires attorneys to disclose discipline administered by both courts and lawyer regulatory organizations.

Appeals by individual defendants and Zee Company, Inc. from judgments entered 25 July 2011 and 23 May 2012 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Appeal by additional appellants from orders entered 18 and 22 June 2012 by Judge Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 11 September 2013.

Ellis & Winters LLP, by Matthew W. Sawchak, Stephen D. Feldman, and Zia C. Oatley, for individual defendants-appellants.

Robinson Bradshaw & Hinson, P.A., by John R. Wester, Jonathan C. Krisko, and Pearlynn G. Houck, for defendant-appellant Zee Company, Inc.

Graebe Hanna & Sullivan, PLLC, by Mark R. Sigmon, for additional appellants.

McGuireWoods, LLP, by Bradley R. Kutrow and Monica E. Webb, and Ward and Smith, P.A., by Jenna Fruechtenicht Butler and John M. Martin, for plaintiff-appellee GE Betz, Inc.

HUNTER, Robert C., Judge.

Three categories of appellants bring distinct issues before us in this case.

First, R.C. Conrad, Robert Dodd, Benjamin Lukowski, and Barry Owings (collectively "individual defendants") appeal from judgment entered 25 July 2011 by Judge Phyllis M. Gorham in New Hanover County Superior Court. On appeal, individual defendants argue that the trial court erred by: (1) misinterpreting various provisions of the employment agreement they had with GE Betz, Inc. ("GE") and concluding that individual defendants breached their contracts, (2) allowing GE to succeed on the merits of its claims without proving causation, and (3) concluding that individual defendants used GE's trade secrets and violated N.C. Gen. Stat. § 75-1.1. After careful review, we affirm the trial court's judgment as to these individual defendants.

Second, Zee Company, Inc. ("Zee") appeals the trial court's award of damages and attorneys' fees. Zee argues that the trial court erred by: (1) as a discovery sanction, allowing GE to use Zee's gross sales as a measure of compensatory damages, (2) entering punitive damages that violated defendants' due process rights and were impermissibly levied on a per-defendant rather than per-plaintiff basis, and (3) awarding unreasonable attorneys' fees and erroneously awarding GE fees incurred as a result of Zee's counterclaims. We affirm the trial court's judgment as to the measure of compensatory damages, but reverse and remand as to punitive damages and attorneys' fees.

Third, Mark A. Dombroff ("Dombroff") and Thomas B. Almy ("Almy") (collectively "additional appellants") appeal from the trial court's orders holding Almy in criminal contempt of court, ordering Almy to pay GE's attorneys' fees in addition to $500.00 as a contempt sanction,

and revoking the *pro hac vice* admissions of both Dombroff and Almy. On appeal, additional appellants claim: (1) the trial court failed to follow statutory and constitutional procedures in holding Almy in criminal contempt of court, (2) the court erred by ordering Almy to pay GE's attorneys' fees because Almy was not a "party" under the language of the statute authorizing the fee award, and (3) the court abused its discretion by revoking additional appellants' *pro hac vice* admissions. We reverse the trial court's orders as to Almy's criminal contempt and attorneys' fees, remand for reconsideration of Almy's *pro hac vice* revocation, and affirm the court's order revoking Dombroff's *pro hac vic*e admission.

I. BACKGROUND

A. Substantive Claims

Individual defendants were employees of Betz Entec or BetzDearborn, alternative names for the same company, which was acquired by GE and renamed GE Betz, Inc. ("GE"). They signed employment agreements before GE acquired the company. The employment agreements contained language restricting individual defendants from "directly or indirectly" soliciting GE's current or prospective customers with whom the individual had "any contact, communication or . . . supervisory responsibility" for eighteen months after employment with GE ended. The agreements also prohibited disclosure or misuse of GE's confidential information, including sales data, formulas, costs, treatment techniques, and customer information. The agreements state that they shall be construed under and governed by Pennsylvania law.

In 2006, GE's restructuring of its water treatment business resulted in the layoffs of defendants Conrad and Dodd. Conrad and Dodd began working for Zee shortly thereafter. During the restructuring, GE created a position of "area manager" and offered the area manager positions to defendants Owings and Lukowski. GE did not increase Owings's or Lukowski's compensation, and the position offers contained no compensation terms. On 18 July 2006, Zee offered Owings a job as a "team leader"; Owings never told GE he had an offer from Zee and was allowed to remain working at GE for two weeks after Zee's offer.

Following the "area manager" offers, GE began to email Owings and Lukowski "descending sales reports," which contained reports of actual sales and sales forecasts of about 175 GE customers. Owings and Lukowski ultimately resigned; Owings never received an offer letter for the area manager position and Lukowski stated via letter that he wanted to evaluate "other opportunities inside and outside" the water treatment industry. Lukowski continued receiving descending sales reports from

GE after he hinted at resignation and was considered to be an "immediate flight risk." Lukowski did not notify GE that he was leaving until two weeks after signing an employment agreement with Zee and did not notify GE he was joining a competitor. Shortly after resigning, Owings and Lukowski started working for Zee. The trial court found as fact that Owings and Lukowski affirmatively misled GE about their post-resignation plans.

Lukowski asked GE for a copy of his employment agreement, but did not receive it until weeks after beginning employment with Zee. In the interim between beginning employment with Zee and receiving his employment agreement, Lukowski contacted customers he previously helped while employed by GE. The trial court found as fact that all individual defendants began contacting former GE customers that they or another team member serviced or supervised while employed by GE and that Zee knew about and encouraged this conduct. GE learned of these tactics and sent cease-and-desist letters enclosed with copies of the employment agreements to Lukowski, Dodd, and Zee's President, Robert Bullard. GE informed Zee that individual defendants were "cross-selling" to each other's former GE customers and directly contacting GE customers. Zee responded that individual defendants were not competing with GE because they were selling products unrelated to the water treatment industry.

GE sued Zee and individual defendants in April 2007. GE sought a preliminary injunction to preclude all defendants from contacting around 175 companies that GE contended were covered by individual defendants' non-solicitation clauses. The trial court granted the injunction except as to ten "carve-out" companies ("carve-outs") with which Zee had already obtained contracts. GE retained its claim for monetary recovery for Zee's sales to the carve-outs, and GE ultimately sought damages for conduct regarding eight of the carve-outs.[1]

The employment agreements forbade individual defendants from "directly or indirectly . . . call[ing] upon, communicat[ing] or attempt[ing] to communicate with any customer . . . for the purpose of selling" competing products, services, or equipment. The trial court determined as a matter of Pennsylvania law that "indirect communication occurs when a member of a sales team contacts a prohibited customer of another team member." The court granted GE's motion *in limine*

1. These eight carve-outs were CMS Generation, DAK, Danaher Controls, Intercontinental Hardwoods, OMI, Shamrock Environmental, Shaw Environmental, and Wayne Memorial Hospital.

to prevent individual defendants from introducing parole evidence as to the meaning of the terms "switching" or "cross-selling" in their employment agreements. The trial court also excluded evidence that GE's customer departures stemmed from causes other than defendants' actions. However, the trial court admitted evidence of a lawsuit filed 12 September 2006 by another water treatment company, Chem-Aqua, in which Chem-Aqua alleged that Zee tortiously interfered with the contracts of Chem-Aqua employees, among other claims. The case settled with Zee admitting no wrongdoing and no money exchanging hands between the parties.

The trial court ultimately ruled that all individual defendants violated their employment agreements by indirectly or directly soliciting GE customers and breaching confidentiality terms and that Owings and Lukowski exercised supervisory responsibility while employed by GE. All defendants were held liable for misappropriating trade secrets, violating N.C. Gen. Stat. § 75-1.1, and Zee was individually held liable for tortiously interfering with individual defendants' employment contracts. The court awarded GE compensatory and punitive damages and attorneys' fees and costs. Zee and individual defendants filed timely notices of appeal.

B. Damages and Attorneys' Fees

Following the trial court's final ruling in its favor, GE had the option of seeking disgorgement of Zee's profits or its own lost profits as damages for its claim of unfair or deceptive practices pursuant to section 75-1.1[2] It sought to ascertain Zee's profits generated from sales to eight of the carve-outs identified in the preliminary injunction. However, over the course of more than two years, Zee failed to produce documentation of its net profits from the carve-outs, in contravention of multiple orders to compel. The trial court also reopened depositions upon motion from GE at which Zee had the opportunity to present evidence of its net profits generated from the carve-outs, but Zee's witnesses declined to do so. Months later, Zee designated defendant Owings to proffer that the industry-wide net profit margin "averages between 10 and 12 percent."

2. **[1]** The claim of unfair or deceptive practices subsumed the claims for breach of contract, tortious interference, and misappropriation of trade secrets in the damages phase of litigation because the same conduct gave rise to all claims. *See Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 666, 654 S.E.2d 495, 501 (2007) ("[W]here the same source of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both.") (citation and quotation marks omitted).

GE filed a motion on 12 February 2010 seeking discovery sanctions for Zee's refusal to provide net profit data for its sales to the carve-outs. The trial court granted GE's motion and sanctioned Zee by permitting GE to use Zee's gross sales to the carve-outs as the basis for its compensatory damages, as well as prohibiting Zee and Zee's witnesses from offering any evidence regarding GE's damages. GE subsequently elected to use the measure of gross sales to eight of the carve-outs, totaling $288,297.00, as compensatory damages. The trial court entered judgment awarding GE $288,297.00 in compensatory damages against all defendants jointly and severally based on these gross sales.

The trial court conducted a separate hearing to assess GE's requests for punitive damages and attorneys' fees. In its final judgment, the court found that each defendant individually had engaged in acts that warranted the maximum amount of punitive damages allowed by N.C. Gen. Stat. § 1D-25(b). As such, it awarded punitive damages in the amount of $864,891.00, three times the compensatory damages of $288,297.00, against each defendant individually, totaling $4,324,455.00 in punitive damages.

GE also sought reimbursement for attorneys' fees from all defendants, jointly and severally, based on N.C. Gen. Stat. §§ 75-16.1, 66-154(d), and 1D-45. It submitted billing summaries from both Ward and Smith P.A. ("Ward and Smith"), its North Carolina law firm, and Paul Hastings LLP ("Paul Hastings"), its New York law firm. Over $3 million of the $5,769,903.10 requested by GE was billed by Paul Hastings attorneys. Paul Hastings' lead attorney billed GE at rates between $633.25 and $675.75 per hour over the course of the litigation, reduced from her standard rates between $745.00 and $915.00 per hour[3]; its associate attorneys billed GE at rates varying between $289.00 and $552.50 per hour. Ward and Smith's lead attorneys billed GE at rates between $270.00 and $390.00 per hour. The trial court awarded GE the full amount of its fee request jointly and severally against defendants — $5,769,903.10 in attorneys' fees and $69,888.32 in costs. It also awarded GE $188,043.12 in costs against individual defendants, jointly and severally, pursuant to their employment agreements.

In sum, the trial court awarded GE $10,640,586.55.

C. Additional Appellants

Additional appellants are members of Dombroff, Gilmore, Jaques & French, P.A. ("the Dombroff firm"). At the outset of the underlying

3. Prices increased annually over the course of the litigation.

litigation, defendants were represented by the law firm of Williams Mullen Maupin Taylor P.A. ("Williams Mullen"). Defendants released Williams Mullen in April 2010 and retained the Dombroff firm to represent them against GE and in a malpractice case brought in Virginia federal court ("the Virginia action") against Williams Mullen arising out of Williams Mullen's representation of defendants in the underlying case. Additional appellants are licensed to practice law in the Commonwealth of Virginia and the District of Columbia; they were admitted *pro hac vice* to represent defendants in the underlying North Carolina action.

Shortly after GE initiated its case against defendants, two protective orders were entered which governed the treatment of confidential documents. Both orders prohibited the use of confidential information, including any customer list, for any purposes except "in furtherance of the prosecution or defense of this action"; the orders also stated that confidential information "shall not be used or disclosed by any person for any other purpose."

GE filed its first motion to enforce the protective orders on 12 October 2011, claiming that Dombroff had violated the orders on three separate occasions by introducing confidential documents during depositions taken in the Virginia action. Additional appellants claimed that GE had agreed to the use of the documents, marking them as confidential, and separating them from the other exhibits in the Virginia action. The trial court found that the protective order had been violated and warned that further unauthorized disclosure "should not occur again . . . unless the attorney for GE and [additional appellants] have some agreement or have a court order" and that "any further documents . . . will remain confidential documents." The trial court further stated that additional violations may result in the offending attorneys being held in contempt.

On Thursday, 15 March 2012, Almy electronically filed a brief in the Virginia action in opposition to Williams Mullen's motion for summary judgment; attached to the brief was GE's customer list, which had been designated as confidential and maintained under seal in the underlying litigation. The brief and attached customer list were filed via the court's CM/ECF[4] system and were therefore publicly available through PACER[5]. On the afternoon of Friday, 16 March 2012, GE's counsel learned of the public filing of GE's customer list and contacted the Dombroff firm,

4. "CM/ECF" stands for "Case Management/Electronic Case Files."

5. "PACER" stands for "Public Access to Court Electronic Records."

asking that it be taken down. Almy and other attorneys in the Dombroff firm reviewed the matter over that weekend, and on the afternoon of Tuesday, 20 March 2012, they filed a consent motion to remove the customer list from the docket. The court entered the consent order on 21 March 2012 and the customer list was removed. It was available to the public for six days.

On Monday, 19 March 2012, GE filed motions seeking sanctions against both Dombroff and Almy under Rule 37 of the North Carolina Rules of Civil Procedure and an order for them to show cause why they should not be held in contempt of court. These matters were heard on 19 April 2012. Almy argued that he was aware of the protective order on the client list, but he did not think that it was confidential at the time of filing because GE had attempted to offer the list into evidence twice before and had questioned a witness about the list in open court. However, Almy admitted at the hearing that he violated the protective order when he filed the customer list and took full responsibility for doing so.

The trial court ruled on GE's motion for sanctions on 31 May 2012 and entered a written order on 22 June 2012. The court held Almy in criminal contempt of court, ordered him to pay GE $500.00 as a sanction for his "willful violation" of the protective orders, and ordered him to pay the attorneys' fees incurred by GE in its pursuit of sanctions. Additionally, the court revoked the *pro hac vice* admissions of both Dombroff and Almy. Additional appellants filed timely notices of appeal.

II. DISCUSSION OF INDIVIDUAL DEFENDANTS' APPEAL

A. Employment Agreements

1. Indirect Solicitation

Individual defendants first argue that the trial court misinterpreted the term "indirect solicitation" in their employment agreements. They contend that the term was ambiguous, that the trial court overly relied on *Diversey Lever, Inc. v. Hammond*, 1997 WL 28711 (E.D. Pa. Jan. 24, 1997), and that the "indirect solicitation" restriction is against North Carolina public policy. After careful review, we affirm the trial court's judgment as to this issue.

Contract interpretation is a question of law to be reviewed *de novo*. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment" for that of the lower tribunal. *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). Issues involving contract interpretation are

analyzed under Pennsylvania law in this case due to the choice of law clause in the employment agreements.

[2] Individual defendants first argue that the term "indirect solicitation" is ambiguous. Under Pennsylvania law, "[w]hen the words of a contract are clear and unambiguous, the intent of the parties must be ascertained from the language employed in the contract, which shall be given its commonly accepted and plain meaning." *TruServ Corp. v. Morgan's Tool & Supply Co.*, 39 A.3d 253, 260 (Pa. 2012). Pennsylvania state courts define ambiguity as "duplicity, indistinctness or uncertainty of meaning of an expression used in a written instrument." *In re Miller's Estate*, 26 Pa. Super. 443, 449 (1904). Pennsylvania state courts have not yet interpreted the word "indirect," but authority from Pennsylvania federal courts shows that a restrictive covenant prohibiting a defendant from "directly or indirectly" engaging in certain conduct was unambiguous, because to rule otherwise would negate the words from the contract. *Plate Fabrication & Machining, Inc. v. Beiler*, 2006 WL 14515, at *5 (E.D. Pa. Jan. 3, 2006). We find this reasoning persuasive. Evidence of individual defendants' direct and indirect cross-selling to former GE customers was presented at trial, and the trial court made detailed factual findings based on that evidence. The trial court properly interpreted "indirect solicitation" to include one individual defendant soliciting a carve-out customer with whom another individual defendant previously had contact at GE. The trial court was therefore correct in excluding parol evidence regarding the meaning of "indirect solicitation," because the term, under Pennsylvania law, was unambiguous. *See Plate Fabrication*, 2006 WL 14515, at *5.

[3] Individual defendants next argue that the trial court relied too heavily on *Diversey*. In *Diversey*, the United States District Court for the Eastern District of Pennsylvania held that employees violated the "indirect solicitation" clause of their employment agreements by contacting each other's former customers, without direct evidence that the employees affirmatively aided each other with the solicitations. *Diversey* at *22. The court found that the defendants used concerted action through a shell company and its employees "to accomplish indirectly what they cannot do directly". *Id.*

Though *Diversey* is not controlling, the logic used by the *Diversey* court is persuasive. On a very similar set of facts, the *Diversey* court noted that allowing the defendants to continue using third-party employees of their new company to solicit former customers of their old company would go wholly against the "indirect solicitation" clause of their contract. *Id.* In the present case, allowing individual defendants to

solicit each other's former customers would nullify the word "indirectly" out of the contract. The trial court found as fact, and we find competent evidence to support the findings, that each individual, in concert, solicited former GE customers through the other individual defendants as proxy. The trial court was not bound by *Diversey*, but was permissibly guided by its reasoning in finding individual defendants liable for breaching the "indirect solicitation" clauses of their employment agreements. We find the trial court did not err by adopting the reasoning set forth by the *Diversey* opinion, given its factual similarity to this case.

[4] Individual defendants also contend that the "indirect solicitation" provision of the employment contracts is against North Carolina public policy for being overbroad. Under North Carolina law, a restrictive covenant can be "no wider in scope than is necessary to protect the business of the employer." *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979). Individual defendants argue that the "indirect solicitation" provisions exceed the scope necessary to protect GE's business. They also assert that upholding such a provision would effectively bar employers from hiring former GE employees, since none of the company's other employees would be permitted to solicit GE customers. We disagree with this broad characterization of the "indirect solicitation" provision and its speculative effect on the market.

First, the trial court found as fact, and there is competent evidence to support the finding, that Zee engaged in a concerted effort to exclusively hire former GE employees that would specifically target GE customers. This is distinguishable from a situation where a company hires employees who happened to have worked at GE. Second, GE's share of the North Carolina water treatment market was only 3%, leaving Zee 97% of the market of non-GE customers to solicit. Contrary to individual defendants' theory, protecting GE's own market share hardly threatened to drive Zee out of the North Carolina water treatment market and did not exceed the scope necessary for GE to protect its business. Third, the "indirect solicitation" provision of the employment contracts only lasted for eighteen months after the individuals left GE. Such time constraint was not unreasonable in scope because it allowed GE's other employees to build relationships with and retain its customers that were serviced by individual defendants before those individuals could begin soliciting the customers on behalf of their new company. *See Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 426, 571 S.E.2d 8, 13 (2002) ("[T]wo to five years has repeatedly been held a reasonable time restriction in a non-competition agreement.") (citation omitted). Because the "indirect

solicitation" clauses in the individual defendants' employment agreements did not exceed the scope necessary to protect GE's business, we find that the "indirect solicitation" clauses do not violate North Carolina public policy.

In sum, we affirm the trial court's conclusion that individual defendants breached the "indirect solicitation" terms of their employment agreements.

2. Confidentiality Provisions

[5] Individual defendants next claim that the trial court erred in analyzing the confidentiality clauses of the employment agreements by relying only on circumstantial evidence and the *Diversey* reasoning, which they argue is flawed. We affirm the trial court's conclusion that individual defendants breached the confidentiality terms of their agreements.

"Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

This is a question of evidentiary weight and not contract interpretation; as such, we apply North Carolina law rather than Pennsylvania law because the choice of law clause in the employment agreements does not apply. In this state, "[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence." *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984). Circumstantial evidence that a defendant acquired a plaintiff's customer contracts for a competing business was previously held "sufficient circumstantial evidence to sustain a finding that the defendant knew of the confidential information, had the opportunity to acquire it for his own use and did so[,]" and thus violated a confidentiality agreement in the employment contract between the plaintiff and the defendant. *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 377, 542 S.E.2d 689, 693 (2001).

There is competent evidence in the record to support the court's findings that individual defendants worked for GE and were exposed to confidential information as part of their employment, and that individual defendants utilized GE pricing formulas and proposals to create the same for Zee in soliciting carve-out customers. Therefore, it can reasonably be inferred through this circumstantial evidence that individual defendants, like the defendant in *Byrd's*, "knew of the confidential information, had the opportunity to acquire it for [their] own use and did so." *Byrd's*, 142 N.C. App. at 377, 542 S.E.2d at 693. Because GE introduced sufficient evidence for the trial court to reasonably find that

each individual defendant acquired confidential information during their employment with GE and that such information was utilized by Zee in its customer proposals, we affirm the trial court's conclusion that individual defendants breached the confidentiality clauses of the employment agreements.

3. Supervisory Responsibility

[6] Individual defendants next claim that the trial court misinterpreted the term "supervisory responsibility" by disregarding its plain meaning. They also argue that the trial court failed to find the provision ineffective for lack of consideration and salary terms when Owings and Lukowski took the area manager positions. We disagree.

As this is a contract interpretation issue, we assess the trial court's application of Pennsylvania law. However, the standard of review for this Court remains based on North Carolina law. *See Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004) (applying Arizona law to interpret a contract based on a choice of law provision, but reviewing the trial court's order based on a North Carolina standard of review). Contract interpretation is a question of law, which is reviewed *de novo* on appeal. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000); *Carolina Power & Light Co.*, 358 N.C. at 517, 597 S.E.2d at 721. Under Pennsylvania law, when a contract does not define a term, that term takes its ordinary meaning. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004).

The non-solicitation clauses in individual defendants' employment contracts forbade communication with any customer, representative, or prospective customer with whom the employee had "any contact, communication or for which [e]mployee had supervisory responsibility". Owings and Lukowski claim that when they began acting as area managers, the scope of the non-solicitation clauses expanded because they exercised greater supervisory responsibility. Though the trial court found as fact that Owings and Lukowski exercised "supervisory responsibility" prior to taking positions as area managers, individual defendants challenge the court's interpretation of "supervisory responsibility" giving rise to that finding.

Individual defendants first argue that the trial court misapplied the term "supervisory responsibility" and that the term implicitly requires overseeing and being accountable for a customer relationship. Lukowski and Owings managed teams of regional salespeople in North Carolina. Owings managed a team of sales representatives and oversaw customer sales, forecasting, and customer contacts prior to taking the position

as area manager. Lukowski managed a team of sales representatives, participated in personnel review, collected customer information, and developed sales reports prior to taking the position as area manager. In those positions they were responsible for a region of North Carolina sales and supervised a team of salespeople to solicit business for GE. We find that such conduct constitutes "supervisory responsibility" under the plain meaning of the words. *See Profit Wize Mktg. v. Wiest*, 812 A.2d 1270, 1274-75 (Pa. Super. Ct. 2002) ("As the parties have the right to make their own contract, we will not modify the plain meaning of the words under the guise of interpretation or give the language a construction in conflict with the accepted meaning of the language used."). As such, we affirm the trial court's application of Pennsylvania law in its conclusion that Owings and Lukowski exercised "supervisory responsibility" before taking positions as area managers.

Individual defendants also argue that the "supervisory responsibility" provision is invalid for lack of consideration. Individual defendants claim that no Pennsylvania law is on point and therefore cite to a Massachusetts case holding that when a restrictive covenant is greatly expanded, new consideration is necessary for that covenant to be enforceable. *F.A. Bartlett Tree Expert Co. v. Barrington*, 233 N.E.2d 756, 758 (Mass. 1968). Under the rule in *Barrington* proffered by individual defendants, "[t]he question to be decided is whether the change in the duties . . . resulted in a revocation of the previous employment agreement" which would require new consideration, "or in a modification of that agreement" which would not require new consideration. *See Mail-Well Envelope Co. v. Saley*, 497 P.2d 364, 368 (Ore. 1972) (applying the *Barrington* rule to hold that an employment agreement was modified, rather than revoked by implication, and therefore did not require new consideration when an employee obtained supervisory duties). Even applying individual defendants' proffered rule, we find that Owings's and Lukowski's restrictive covenants did not require new consideration when they became area managers. Owings and Lukowski managed sales teams, conducted personnel review, and oversaw customer sales, forecasting, and customer contacts prior to taking positions as area managers. As area managers, they began receiving descending sales reports containing information related to about 175 GE customer accounts but kept performing their key duties as before. We hold, due to the similar duties before and after acquiring area manager status, that Owings's and Lukowski's employment agreements were modified only in title, and therefore did not require new consideration.

Likewise, individual defendants' contention that their oral agreements to area manager positions were ineffective for lack of a salary term also fails. Because Owings and Lukowski exercised supervisory responsibility before their transitions to area managers, the terms of their employment agreements did not change with their titles. Additionally, because we find Owings's and Lukowski's contracts were modified rather than revoked, we conclude that their transition to area managers did not require a new salary term for their employment agreements to be enforceable. *See Saley*, 497 P.2d at 368.

4. Equitable Estoppel

[7] As an additional matter to the terms of the agreement, individual defendants claim that GE was estopped from penalizing Lukowski for breaching his employment agreement because GE told Lukowski that it could not locate a copy of his employment agreement. We disagree.

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Friedland v. Gales, 131 N.C. App. 802, 807, 509 S.E.2d 793, 796-97 (1998).

GE's failure to immediately present Lukowski with a copy of his employment agreement did not relieve Lukowski of the duties imposed on him by that agreement. GE never informed Lukowski that he had no employment agreement - only that GE could not locate a copy of it, and that he should refer to his personal records since he was provided a copy when he began employment with GE. GE's inability to locate a copy of Lukowski's employment agreement was not the "false representation or concealment of material facts" that equitable estoppel was designed to protect against. *See id.* We therefore affirm the trial court's conclusion that Lukowski was still subject to the obligations of the employment agreement even if GE temporarily could not locate a copy of it.

B. Causation

[8] Individual defendants next claim that the trial court's exclusion of evidence relevant to whether GE's customers left for reasons other than

individual defendants' behavior was in error because GE failed to prove but-for causation. GE claims that the exclusion of such evidence did not negate its burden to prove but-for causation and that causation was proven. We affirm the trial court's exclusion of the evidence.

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 458, 678 S.E.2d 671, 687 (2009). "The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (quotation marks and citation omitted). A plaintiff may recover on a claim of unfair or deceptive practices where the plaintiff demonstrates the act of deception proximately caused some adverse impact or injury. *Walker v. Sloan*, 137 N.C. App. 387, 399, 529 S.E.2d 236, 245 (2000) (citation omitted). A motion *in limine* is typically insufficient to preserve for appeal the admissibility of evidence; however, a party may preserve the exclusion of evidence for appellate review by making a specific offer of proof. *Ziong v. Marks*, 193 N.C. App. 644, 647-48, 668 S.E.2d 594, 597 (2008).

The record indicates that individual defendants preserved the issue of excluded evidence for appeal by making offers of proof regarding why GE customers moved their business away from GE. Accordingly, we will address this argument.

Though the trial court excluded evidence that may have shown other reasons GE customers moved their business away from GE, such exclusion does not equate to a ruling that GE did not have to prove causation. GE needed only to show that individual defendants' acts caused GE some injury, not that individual defendants' acts were the exclusive reason for GE's customer loss. *See Walker*, 137 N.C. App. at 399, 529 S.E.2d at 245. Zee conceded at oral argument that revenue that went to Zee would have gone to GE but for Zee's conduct. Additionally, there is sufficient evidence in the record to support the court's findings that the carve-outs were GE customers prior to individual defendants' solicitation and that the carve-outs moved their business to Zee as a result of individual defendants' solicitation. We find that such evidence is independently sufficient to prove causation between Zee's conduct and GE's injury. Even if GE might have lost customers for reasons other than individual defendants' conduct, such evidence would not negate the fact that individual defendants improperly solicited and unjustly profited from the carve-out customers, thus causing some amount of injury to GE and therefore meeting the element of causation in GE's claims.

Therefore, the exclusion of evidence pertaining to other reasons GE's customers may have moved their business was not arbitrary or "manifestly unsupported by reason." *Little v. Penn Ventilator Co.*, 317 N.C. at 218, 345 S.E.2d at 212. Because GE submitted sufficient evidence that individual defendants caused GE injury, we find the trial court did not abuse its discretion by excluding evidence of other potential sources of loss of customers for GE.

C. Trade Secrets and Unfair or Deceptive Practices

1. Trade Secrets

[9] Individual defendants argue that the information GE represented as a trade secret did not meet the statutory definition of a trade secret. GE contends that it established a *prima facie* case that individual defendants misappropriated trade secrets, and individual defendants failed to show the trade secrets were acquired properly. We affirm the trial court's conclusion that individual defendants misappropriated GE's trade secrets.

In North Carolina:

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (2011). This Court has held that cost history records; pricing policies, formulas, and information; and customer lists constitute trade secrets. *Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692; *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 59, 620 S.E.2d 222, 230 (2005); *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 173, 423 S.E.2d 324, 327 (1992). To make a *prima facie* case of trade secret misappropriation, a plaintiff must show that a defendant: "(1) [k]nows or should have known of the trade secret; and (2) [h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C. Gen. Stat.

§ 66–155 (2011). A claim for misappropriation of trade secrets may be proven through circumstantial evidence. *Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692. A trade secret must be alleged "with sufficient particularity . . . to enable a defendant to delineate that which he is accused of misappropriating" and to allow a court to decide whether misappropriation has occurred. *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003). Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to rebut a presumption that the trade secrets were misappropriated. *Sunbelt*, 174 N.C. App. at 58, 620 S.E.2d at 229.

[10] Individual defendants claim that GE failed to identify what information was a trade secret with sufficient particularity. GE specifically identified chemical formulations, pricing information, customer proposals, historical costs, and sales data that individual defendants were exposed to at GE. Such information has been held to derive independent commercial value from not being generally known. *Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692. The documents and contents of GE's evidence listed above were alleged with sufficient particularity for individual defendants to delineate that which they were accused of misappropriating and for the trial court to determine whether a misappropriation occurred. *See Analog Devices*, 157 N.C. App. at 468, 579 S.E.2d at 453. Because GE identified the contents of the misappropriated documents with sufficient particularity, we find the trial court correctly identified the information as trade secrets.

Individual defendants also claim that the GE descending sales reports, customer proposals, and other unidentified trade secrets do not satisfy the definition of a trade secret. We disagree. The descending sales reports, for example, contained history of actual sales and sales forecasts. GE's descending sales reports and customer proposals are analogous to the cost history records, customer lists, and financial projections previously found to be business information that derives independent commercial value. *See Byrd's*, 142 N.C. App. at 376, 542 S.E.2d at 692; *Sunbelt*, 174 N.C. App. at 58, 620 S.E.2d at 229; *Drouillard*, 108 N.C. App. at 173, 423 S.E.2d at 327. The trial court was therefore correct in holding that the information submitted by GE constituted trade secrets as defined in North Carolina.

[11] Additionally, individual defendants contend that GE's transmission of information to Lukowski after they determined he may be likely to leave for another company invalidates the argument that such information was a trade secret, because GE failed to maintain its secrecy. *See* N.C. Gen. Stat. § 66-152(3)(b) (2011) (a trade secret must be "the subject

of efforts that are reasonable under the circumstances to maintain its secrecy"). This contention is unpersuasive, as Lukowski was still bound by the confidentiality terms of his employment agreement and GE could not practically employ Lukowski without giving him access to trade secret information.

[12] We also find that GE sufficiently proved misappropriation of the trade secrets. " 'Misappropriation' means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. § 66-152(1) (2011). Individual defendants failed to show that they acquired GE trade secrets through independent development, reverse engineering, or from someone who had the right to disclose them, and therefore they did not rebut GE's *prima facie* case for trade secret misappropriation.

Because GE identified documents containing trade secret information pursuant to section 66-152 with sufficient particularity, and individual defendants failed to rebut GE's *prima facie* case that they misappropriated those trade secrets, we affirm the trial court as to this issue.

2. Unfair or Deceptive Practices

[13] Individual defendants argue that the trial court's error in identifying trade secrets affected the court's analysis of joint and several liability and section 75-1.1 liability. We affirm the trial court's conclusions as to both.

Joint and several liability is allowed when (1) defendants have acted in concert to commit a wrong that caused an injury; or (2) defendants, even without acting in concert, have committed separate wrongs that still produced an indivisible injury. *Bost v. Metcalfe*, 219 N.C. 607, 610, 14 S.E.2d 648, 651 (1941). Concerted action is when "two or more persons unite or intentionally act in concert in committing a wrongful act, or participate therein with common intent." *Garrett v. Garrett*, 228 N.C. 530, 531, 46 S.E.2d 302, 302 (1948). Section 75-1.1 makes unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce[.]" N.C. Gen. Stat. § 75–1.1 (2011).[6] Employees have been found liable for committing

6. Here, the trial court uses the phrase "unfair or deceptive *trade* practices." Although this language remains common in legal parlance today, the General Assembly omitted the word "trade" from section 75-1.1 in 1977. Ch. 747, sec. 1, 1977 N.C. Sess. Laws 1026.

unfair or deceptive acts when their actions involved egregious activities outside the scope of employment and would otherwise violate section 75-1.1. *See Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 56-57, 714 S.E.2d 162, 167-68 (2011).

This Court has held that violations of section 66-152 may also violate section 75-1.1. *See Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326.

> [A]ll defendants need to show to maintain a cause of action under [section 75-1.1] is (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) proximately causing actual injury to defendant or defendant business. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991). If the violation of [section 66-152] satisfies this three prong test, it would be a violation of N.C. Gen. Stat. § 75–1.1.

Id. Here, the trial court found as fact that:

> 25. GE's customer proposals, chemical formulations and products, customer pricing, and other customer-specific sales information are trade secrets under N.C. Gen. Stat. §§ 66-152, *et. seq*. [Individual defendants] misappropriated trade secrets in violation of N.C. Gen. Stat. § 66-152, *et. seq*. The misappropriation of GE's trade secrets by [individual defendants] and Zee was a cause of GE's loss of business from those customers.
>
> 26. GE has introduced substantial evidence that the individual [d]efendants and Zee knew of the trade secrets at issue, had specific opportunities to disclose and use the trade secrets, did use and disclose the trade secrets, which disclosure and use was without the express or implied consent or authority of GE, and that Zee and the individual [d]efendants have been unjustly enriched as a result of the misappropriation of the trade secrets at issue.
>
> 27. The acts of the individual defendants and Zee constitute unfair and deceptive trade [sic.] practices pursuant to [section 75-1.1].

Here, because individual defendants' misappropriation of GE's trade secrets met the three prongs necessary to find a defendant liable for violating section 75-1.1, we hold that the trial court did not err in finding individual defendants liable for violating section 75-1.1. *See id.*

Additionally, our Supreme Court has allowed individual liability for unfair or deceptive practices against employees when the employee's acts "(1) involved egregious activities outside the scope of [their] assigned employment duties, and (2) otherwise qualified as unfair or deceptive practices that were in or affecting commerce." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710–11 (2001). Here, individual defendants had ongoing "employment duties" to comply with the terms of their employment contracts, and by willfully violating the terms of those contracts, individual defendants committed "egregious activities outside the scope" of those duties. *See Dalton*, 353 N.C. at 656, 548 S.E.2d at 710-11. Such activity was sufficient to find individual defendants liable for violating section 75-1.1.

[14] Individual defendants also contend that GE failed to provide evidence that all individual defendants acted in concert to each carve-out to allow joint and several liability. Concerted action in a section 75-1.1 violation has previously been held to give rise to joint and several liability. *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 56-58, 338 S.E.2d 918, 921-22 (1986); *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 288, 616 S.E.2d 349, 354 (2005). Here, there is ample evidence in the record to support the court's finding that each individual furthered a single concerted plan with Zee to solicit GE customers for Zee's enrichment. Though individual defendants contend the Chem-Aqua allegations cannot support a finding of concerted action by individual defendants, there is ample evidence irrespective of Chem-Aqua to show sufficient concerted action to hold individual defendants jointly and severally liable. Because the trial court properly found that individual defendants acted in concert to harm GE, joint and several liability was appropriate. As such, we affirm the trial court's judgment with regard to joint and several liability and section 75-1.1 liability.

III. DISCUSSION OF ZEE COMPANY, INC.'S APPEAL

A. Rule 37 Sanctions and Compensatory Damages

[15] Zee first argues that the trial court erred by allowing GE to use Zee's gross sales to the carve-outs as its measure of compensatory damages rather than Zee's net profits, because the changed measure of damages as a discovery sanction is not authorized by Rule 37 of the North Carolina Rules of Civil Procedure. We disagree.

Rule 37 of the North Carolina Rules of Civil Procedure confers power on trial judges to impose sanctions that "prevent or eliminate dilatory tactics on the part of unscrupulous attorneys or litigants." *Essex Grp., Inc. v. Express Wire Servs., Inc.*, 157 N.C. App. 360, 363, 578 S.E.2d 705,

707 (2003). Sanctions for failing to obey a discovery order are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion. *In re Estate of Johnson*, 205 N.C. App. 641, 644, 697 S.E.2d 365, 367 (2010). "A trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is 'among those expressly authorized by statute' and there is no 'specific evidence of injustice.' " *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (citation omitted); *see also Martin v. Solon Automated Servs., Inc.*, 84 N.C. App. 197, 201, 352 S.E.2d 278, 281 (1987) ("Even though the [Rule 37] sanctions imposed were somewhat severe, they were among those expressly authorized by the statute; thus, we cannot hold that they constitute an abuse of discretion absent specific evidence of injustice caused thereby.").

The subsection of Rule 37 which authorized the trial court to sanction Zee reads:

> (b)(2) Sanctions by Court in Which Action Is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence[.]

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b) (2011).

Zee conceded at oral argument that its behavior during trial warranted sanctions of some kind. Indeed, the record is rife with Zee's efforts to evade GE's requests for evidence of net profits made on sales to the carve-outs, including contravention of three separate orders to compel over a span of two years. Zee's failure to obey these orders justified the trial court's decision to impose sanctions. *See McCraw v. Hamrick*, 88 N.C. App. 391, 394, 363 S.E.2d 201, 202 (1988) (noting that Rule 37 allows trial courts to enter orders to compel and sanction failure to comply with such orders).

GE was entitled to recover as damages either its lost profits or the profits garnered by Zee, and it elected to disgorge Zee of its profits. *See Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 659-61, 670 S.E.2d 321, 329-30 (2009) (setting damages for violation of section 75-1.1

premised on misappropriation of trade secrets as "the greater of the extent to which plaintiff has suffered economic loss or the extent to which the competitor has unjustly benefitted" and remanding for measure of profits where revenue alone was "too speculative to constitute a proper measure of damages"). However, contrary to Zee's characterization, the sanction imposed by the trial court did not impermissibly transform the measure of damages from profit to revenue. Rather, the court availed itself of Rule 37(b)(2)(b) by considering GE's evidence of the unfair benefit Zee generated from these transactions and keeping out any conflicting evidence that may have been offered by Zee. The trial court ordered that:

> 2. Plaintiff shall be permitted to offer evidence of Zee Company, Inc.'s gross sales as the basis of Plaintiff's damages in this action.
>
> 3. Samuel Harper and Barry Owings hereby are prohibited from offering testimonial or other evidence concerning Zee's damages in this action.
>
> 4. Zee hereby is prohibited from offering any evidence in support of its damages in this action . . . .

Although the court allowed GE to submit evidence of revenue as the "basis" of the measure of damages, it did not order that revenue displace profits in general as the target measurement. Profit is "[t]he excess of revenues over expenditures in a business transaction." Black's Law Dictionary 1329 (Ninth ed. 2009). Without evidence of expenditures, the court used what figures it had to determine the improper benefit Zee gained from the transactions with the carve-outs. This sanction was permissible because "the fact finder in [an] unfair and deceptive trade [sic.] practices claim[] has broad discretion in awarding damages to insure that the plaintiff is made whole and the wrongdoer does not profit from its conduct." *TradeWinds Airlines, Inc. v. C-S Aviation Servs.*, __ N.C. App. __, __, 733 S.E.2d 162, 174 (2012). Zee conceded at oral argument that GE incurred loss as a direct result of Zee's sales to the carve-outs. Based on Zee's admitted, obstinate refusal to provide evidence on its net profits, we find that any lesser sanction would not have been sufficient to insure that Zee did not profit from its misconduct.

This sanction was explicitly authorized under Rule 37(b)(2)(b), and because Zee concedes that it was enriched at GE's expense and its behavior during discovery was deviant enough to warrant punishment, we find that there is no evidence of injustice which may otherwise support a finding that the trial court abused its discretion by prohibiting

Zee from submitting evidence of the measure of damages. *See Martin*, 84 N.C. App. at 201, 352 S.E.2d at 281. We therefore affirm the court's sanction and judgment as to this matter.

B. Punitive Damages

[16] Zee next argues that the trial court erred by entering punitive damages that violate N.C. Gen. Stat. § 1D-25, are unconstitutionally excessive, and impermissibly punish Zee for out-of-state conduct. We find that the punitive damages were entered in contravention of North Carolina Supreme Court precedent, and therefore we must reverse and remand.

This Court reviews application of the punitive damages limits in N.C. Gen. Stat. § 1D-25 *de novo*. *Bodine v. Harris Vill. Prop. Owners Ass'n, Inc.*, 207 N.C. App. 52, 59, 699 S.E.2d 129, 134 (2010). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of the Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

The statute that imposes limitations on punitive damages awards provides that:

> (b) Punitive damages awarded *against a defendant* shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

N.C. Gen. Stat. § 1D-25(b) (2011) (emphasis added).

On appeal, Zee argues that the entry of punitive damages against each defendant individually was impermissible given our Supreme Court's interpretation of section 1D-25(b) in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004). We agree. The defendant in Rhyne argued, as GE does here, that the plain language of section 1D-25(b) ("[p]unitive damages against *a defendant* shall not exceed . . . ") requires the application of its limits to each defendant, not each plaintiff. *Rhyne*, 358 N.C. at 187-88, 594 S.E.2d at 19. However, by interpreting that provision in the context of the entire statute, our Supreme Court held that the legislature's intent was to "reduce each plaintiff's individual punitive damages award." *Id.* at 188, 594 S.E.2d at 20.

> This construction of section 1D–25(b) is further supported by the operation of other statutes within Chapter 1D. Most significantly, section 1D–15(a) directs the trier of fact to consider an exclusive list of aggravating factors when determining whether to award punitive damages. N.C.G.S. § 1D–15(a). *In the absence of some legislative directive, it is assumed that the trier of fact should, as it did at common law, consider these factors as to each plaintiff's cause of action and not as to each defendant.* It follows that, like section 1D–15(a), section 1D–25(b) applies to the individual jury verdict of each plaintiff.

Id. at 189, S.E.2d at 20 (emphasis added). It is undisputed that the trial court here made factual findings pursuant to the provisions within Chapter 1D as to each individual defendant in analyzing whether punitive damages should be awarded. The trial court then concluded that each defendant had engaged in conduct sufficient to warrant punitive damages and entered $864,891.00 (three times the compensatory damages amount of $288,297.00) against each defendant individually. Based on the Supreme Court's holding in *Rhyne*, this was an erroneous application of sections 1D-25(b), because the trial court as the finder of fact considered factors not as to "each plaintiff's cause of action" but as to each defendant. *Id.* We must therefore reverse the trial court's judgment and remand for reentry of punitive damages in light of that and now this decision. *See Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered by the Supreme Court.") (citation and quotation marks omitted).

[17] Zee also argues that the trial court violated its due process rights by awarding punitive damages against Zee for harm that it allegedly caused to Chem-Aqua, an out-of-state company which was not a party to this case. The United States Supreme Court has held "the Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts on nonparties." *Philip Morris USA v. Williams*, 549 U.S. 346, 353, 166 L. Ed. 2d 940, 948 (2007). Furthermore, the Supreme Court has noted "as a general rule, a [s]tate [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the [s]tate's jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421, 155 L. Ed. 2d 585, 600 (2003). In assessing punitive damages, the trial court found as fact that "[t]he acts of Zee pertaining to the Chem-Aqua incident

demonstrate that Zee was engaging in similar if not identical conduct that it engaged in against GE." It is unclear from the court's conclusions how much weight, if any, it gave to the Chem-Aqua allegations in entering the maximum amount of punitive damages. However, to ensure that Zee's constitutional rights were not violated, we remand to the trial court for new findings of fact and conclusions of law relating to punitive damages that give no consideration to Zee's out-of-state conduct toward Chem-Aqua, a nonparty to the suit.

Finally, Zee argues that the aggregate amount of punitive damages in this case was unconstitutionally excessive. Because the court initially awarded punitive damages on a per-defendant rather than per-plaintiff basis and improperly conducted its statutory inquiry into whether punitive damages were warranted, we decline to reach this issue, as it involves matters which may not recur following the court's actions on remand. *See Few v. Hammack Enterprises, Inc.*, 132 N.C. App. 291, 299, 511 S.E.2d 665, 671 (1999) (declining to consider the remaining contentions "as they may not recur on remand").

C. Attorneys' Fees

[18] Zee's final argument on appeal is that the $5.77 million award of attorneys' fees was unreasonable and the court abused its discretion by awarding GE fees related to Zee's counterclaims. We affirm the award of fees based on Zee's counterclaims, but remand for new findings as to the reasonableness of the award.

This Court reviews an award of attorneys' fees for abuse of discretion. *Blankenship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 771, 622 S.E.2d 638, 643 (2005). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001) (citation omitted). In order to determine whether the trial court has abused its discretion, we consider whether there is competent evidence to support the court's findings and whether those findings support the court's conclusions. *Dyer v. State*, 331 N.C. 374, 376, 416 S.E.2d 1, 2 (1992).

Generally, a successful litigant may not recover attorneys' fees unless such recovery is expressly authorized by statute. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973). Here, the court awarded attorneys' fees incurred on GE's claims pursuant to N.C. Gen. Stat. §§ 75-16.1(1), 66-154(d), and 1D-45; it also awarded attorneys' fees on Zee's counterclaims pursuant to N.C. Gen. Stat. §§ 75-16.1(2) and 6-21.5. Zee does not argue that the trial court erred by awarding fees to

GE based on GE's claims; rather, it argues that the court erred by awarding fees based on Zee's counterclaims and that the total attorneys' fees amount was unreasonable. We hold that the court did not err by awarding fees on Zee's counterclaims, but we remand to the trial court for a redetermination of the reasonableness of the total fee award.

Under section 75-16.1(2), a trial court may award attorneys' fees to a defending party where "the party instituting the action knew, or should have known, the action was frivolous and malicious." N.C. Gen. Stat. § 75-16.1(2) (2011). Section 6-21.5 requires a finding that there was "a complete absence of a justiciable issue of either law or fact raised by the losing party." N.C. Gen. Stat. § 6-21.5 (2011). Zee argues that its counterclaims were not "frivolous and malicious" and contained justiciable issues of law, and therefore the court could not meet the requirements of awarding fees under these statutes.

Zee cites *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 200, 696 S.E.2d 559, 565 (2010) for the proposition that "a claim that survives a motion for summary judgment, by definition, does not lack justiciability." However, Zee overlooks the actual holding of *Free Spirit*: "We need not address whether fees are always precluded after a denial of summary judgment because . . . the trial court did not err in denying defendants' motion for attorneys' fees under N.C. Gen. Stat. § 6–21.5." *Id.* at 201, 696 S.E.2d at 565. Here, the trial court granted summary judgment in favor of GE on all of Zee's counterclaims for tortious interference except as to one customer – Global Nuclear Fuels ("GNF") – as to which GE did not seek summary judgment.

Zee contended that GE tortiously interfered with contracts or prospective economic advantages it may have had with two carve-outs, GNF and Shamrock, and by doing so violated the unfair or deceptive practices act. However, the trial court correctly concluded that: (1) Zee had no right to conduct business with those companies in the first place, because doing so would breach individual defendants' employment contracts, but in the alternative, (2) Zee put forth no evidence which tended to show that any behavior on GE's part interfered with any relationship Zee may have had with GNF or Shamrock, and therefore (3) Zee presented no evidence which supported the conclusion that GE participated in unfair or deceptive practices. Because Zee "persisted in litigating the case after a point where [it] should reasonably have become aware that the pleading [Zee] filed no longer contained a justiciable issue," *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991), due to the lack of credible evidence implicating GE, we affirm the court's fee awards under section 6-21.5. Therefore,

we need not address the court's alternate conclusion that Zee's counterclaims were frivolous and malicious under section 75-16.1 or 1D-45.

[19] After concluding that it is statutorily authorized to award attorneys' fees, the trial court must make findings regarding the reasonableness of the award. *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993). Among the aspects of representation that the trial court may consider in assessing reasonableness are:

> the time and labor expended, the skill required, the customary fee for like work, [] the experience or ability of the attorney . . . the novelty and difficulty of the questions of law[,] the adequacy of the representation[,] the difficulty of the problems faced by the attorney[,] especially any unusual difficulties[,] and the kind of case for which fees are sought and the result obtained.

Id. (citation and quotation marks omitted).

We find no relevant North Carolina statute that guides our assessment of "customary fees for like work," and our appellate courts have not had occasion to decide whether fees must be awarded in light of the rates typically charged in the geographic region where the litigation takes place. However, this Court has previously recognized the general principle that community rates in the geographic area of the litigation are relevant to the reasonableness determination. *See Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 594, 525 S.E.2d 481, 486 (2000) (allowing the Court to look at "the customary fee for similar work in the community" in a civil rights case) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)); *see also Whiteside Estates, Inc., v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 468, 553 S.E.2d 431, 444 (2001) (affirming rates as reasonable where the record showed they were "within the range of such fees and charges customarily charged in the community," among other things). The Fourth Circuit has also held that the community where the court sits is "the appropriate starting point for selecting the proper rate." *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988). The *Hanson* court held that although community rates may be the starting point, the trial court must conduct further inquiry when local counsel do not have the expertise to adequately represent a client. *Id.* In assessing reasonableness of fees incurred by more expensive out-of-state counsel, the court asks two questions as to reasonableness: (1) "are services of like quality truly available in the locality where the services are rendered"; and (2) "did the party choosing the attorney from elsewhere act reasonably in making that choice [to

hire non-local counsel]?" *Id.* (quoting *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 (7th Cir. 1982)).

We are not bound by the *Hanson* court's ruling, but we find its analysis addressing the reasonableness of awarding unusually high fees in the community where the litigation took place to be persuasive. *See Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) ("[W]ith the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State.") (citation and quotation marks omitted); *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 479, 617 S.E.2d 61, 64 (2005) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive.") However, we decline to adopt a test that forces courts to assess the reasonableness of a litigant's decision to hire counsel generally. Parties, including GE, are free to hire as counsel whomever they wish at whatever rates they are willing to pay. The issue is whether the fees awarded against an adverse party are reasonable, not whether it was reasonable for those fees to be incurred by the prevailing party. *See Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989) ("Once the court decides to award attorneys' fees, however, it must award reasonable attorneys' fees.").

Here, the trial court set out detailed findings of fact regarding the reasonableness of awarding the attorneys' fee, including the customary fees for like work. However, the court declined to consider whether Paul Hastings' fees should be adjusted in light of those typically charged in North Carolina.[7] The court made the following relevant findings of fact regarding the reasonableness of Paul Hastings' fees:

> 45. Here, the circumstances, complexity and nature of the case support GE's decision to utilize Paul Hastings as its legal counsel. Ward and Smith is a highly capable and qualified law firm. However, Ward and Smith had no prior working relationship with GE and no prior familiarity with the Employment Agreements at issue.
>
> 46. Paul Hastings has represented GE and its affiliates and subsidiaries for approximately 30 years and maintains a GE client service team, of which Victoria Cundiff is a member. When this dispute first arose, GE enlisted the

7. Specifically, the trial court stated: "Defendants contend the hourly rates charged by Paul Hastings must be reduced to the rates customarily charged by North Carolina attorneys in the community in which this case has been litigated and tried. The [c]ourt disagrees."

> assistance of its longstanding counsel, Paul Hastings, and Ms. Cundiff and other members of her team reviewed and analyzed the Employment Agreements and became familiar with the structure, business, and business challenges then facing GE. Ms. Cundiff also was personally involved in GE's efforts over the course of several months to avoid litigation prior to the institution of this lawsuit.
>
> 47. Members of Paul Hastings' team prepared drafts of the initial pleadings and initial discovery requests based on their prior knowledge and experience. Paul Hastings also utilized this knowledge and its longstanding relationship with GE to work with Ward and Smith[.]
>
> . . .
>
> 49. In the Fall of 2009, when the case was set for trial, Paul Hastings worked with Ward and Smith to prepare for the multitude of depositions scheduled during the month of October 2009. Thereafter, while the Ward and Smith attorneys prepared for, appeared and argued in Court, Paul Hastings worked with witnesses and engaged in other trial preparation activities. The Court finds that both firms' involvement was appropriate in order to prepare for the February 2010 trial.

We agree that GE's hiring of Paul Hastings to perform work related to this litigation was reasonable, but that does not complete our inquiry. In assessing the reasonableness of awarding Paul Hastings' fees against Zee, we will consider whether "services of like quality [were] truly available in the locality where the services are rendered." *Hanson*, 859 F.2d at 317. It appears that much of the work performed by Paul Hastings' attorneys could have just as effectively been performed by local counsel at local rates. The trial court did not attempt to make this distinction. The record reveals that Paul Hastings' attorneys billed at rates typical of New York firms, which were significantly higher than their North Carolina counterparts at Ward and Smith. For example, the rates billed by Paul Hastings' and Ward and Smith's lead attorneys at the outset of the litigation were $633.25 and $270.00 per hour, respectively. Because of that disparity, over $3 million of the $5,769,903.10 attorneys' fee award against Zee was billed by Paul Hastings, despite the fact that no counsel for Paul Hastings ever appeared before a court in North Carolina throughout the entirety of the litigation. Furthermore, in April 2007, associate attorneys at Paul Hastings charged $500.00 per hour

– double the $250.00 fee charged by attorneys at Ward and Smith – for "factual investigation and development; obtaining and analyzing [c]lient documents; [and] interview[ing] witnesses". These duties clearly did not require a prior relationship or intimate knowledge of GE's employment contracts, because GE paid the attorneys at Ward and Smith to perform almost identical work during the same time period.

We find it unreasonable to force Zee to pay a fee that includes rates double those billed in the community where the litigation took place for work that seemingly did not require such a premium. Ultimately, GE's willingness to pay significantly higher rates for work that they could have procured for much less does not necessitate a finding that those fees are reasonable when awarded against Zee. Rather, the court must make additional findings which demonstrate why awarding such unusually high fees in the community where the litigation took place is reasonable. *See Inst. Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 558, 421 S.E.2d 370, 374 (1992) ("[R]easonableness is the key factor under all attorney's fees statutes.").

Accordingly, we find that the trial court abused its discretion by awarding the entire fee billed by Paul Hastings against Zee without conducting any inquiry as to which of the services rendered by Paul Hastings' attorneys truly could not have been performed by local counsel at reasonable rates within the community in which the litigation took place. Therefore, we remand for further findings as to this distinction.

IV. DISCUSSION OF ADDITIONAL APPELLANTS' APPEAL

A. Criminal Contempt

[20] Additional appellants' first argument on appeal is that the trial court erred by failing to follow the proper safeguards in finding Almy in criminal contempt of court. We agree.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *see also State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855, (applying a similar standard of review for review of criminal contempt).

There are two kinds of contempt — civil and criminal. *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). "A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised." *Id.*

> Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.

Id. (citation and quotation marks omitted).

Criminal contempt is further categorized as either direct or indirect criminal contempt. Criminal contempt is direct when the act: (1) is committed within the sight or hearing of the presiding judge, (2) is committed in or near the room where proceedings are being held before the judge, or (3) is likely to interfere with matters before the court. *Id.* at 435-36, 329 S.E.2d at 373; N.C. Gen. Stat. § 5A-13(a) (2011). "Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by [N.C. Gen. Stat. §] 5A-15." N.C. Gen. Stat. § 5A-13(b) (2011). Because criminal contempt is a crime, constitutional safeguards are triggered and proper procedure must be followed. *Watson*, 187 N.C. App. at 61, 652 S.E.2d at 315. The procedural requirements of section 5A-15 include, *inter alia*, (1) the trial court giving notice to the accused in the form of "an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court"; and (2) establishing facts "beyond a reasonable doubt" that support a judgment of guilt. N.C. Gen. Stat. § 5A-15(a), (f) (2011).

GE tries to dispute that Almy was held in criminal contempt. It argues that the trial court did not avail itself of N.C. Gen. Stat. § 5A-1, which prescribes rules and procedures for criminal contempt, but rather utilized its "inherent authority" to issue contempt as a discovery sanction beyond the express language of Rule 37.

However, during the hearing on GE's motion to sanction additional appellants and hold them in contempt, GE's counsel stated "in this case, Your Honor, it would not be civil contempt, it would have to be criminal contempt . . . ." GE's counsel then stated that GE was seeking "statutory criminal contempt" under "North Carolina General Statute 5A-11." GE

was seeking to hold additional appellants in contempt based on their previous bad acts – the disclosures of confidential documents. Because "[a] major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised," and "[c]riminal contempt is generally applied where the judgment is in punishment of an act already accomplished," *O'Briant*, 313 N.C. at 434, 319 S.E.2d at 372, it follows that GE must have necessarily been seeking criminal contempt by punishing Almy and Dombroff for their violations of the protective order. Furthermore, the order itself stated that "publication of Exhibit 20 by Almy in violation of [the protective order] constitutes criminal contempt." In light of the above, it is clear that Almy was held in indirect criminal contempt based on his prior actions. *See* N.C. Gen. Stat. § 5A-13(b) (2011) ("Any criminal contempt other than direct criminal contempt is indirect criminal contempt . . . .").

Because Almy was held in indirect criminal contempt, the trial court was required to follow the procedures set out in section 5A-15, which it failed to do. The trial court did not provide Almy with "an order directing [him] to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court." N.C. Gen. Stat. § 5A-15(a) (2011). The only communication between the trial court and Almy after GE's motion and before the hearing was an email setting a date for the hearing.

Furthermore, the order did not set out facts established "beyond a reasonable doubt," nor did it indicate that a reasonable doubt standard was applied. N.C. Gen. Stat. § 5A-15(f) (2011). "Failure to make such an indication is fatally deficient, unless the proceeding is of a limited instance where there were no factual determinations for the court to make." *State v. Ford*, 164 N.C. App. 566, 571, 596 S.E.2d 846, 850 (2004); *see also In re Contempt Proceedings Against Cogdell*, 183 N.C. App. 286, 289, 644 S.E.2d 261, 263 (2007) (reversing a court order without remand where the trial court failed to indicate that the reasonable doubt standard was used in a criminal contempt proceeding). Here, because a hearing was held for the court to make factual determinations, the failure to indicate that the reasonable doubt standard was used renders the order fatally deficient.

Therefore, because Almy was held in indirect criminal contempt and the trial court failed to follow the procedures provided by section 5A-15, we reverse the trial court's judgment without remand. Accordingly, we need not address whether the $500.00 imposed on Almy as part of the criminal contempt sanction was permissible.

B. Attorneys' Fees

[21] Additional appellants' second argument on appeal is that the trial court erred in ordering that Almy pay GE's attorneys' fees incurred in the sanction proceedings under Rule 37(b)(2).[8] We agree.

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). Rule 37(b)(2) states that "[i]n lieu of any of the foregoing orders or in addition thereto, the court shall require *the party failing to obey the order* to pay the reasonable expenses, including attorney's fees, caused by the failure . . . ." N.C. Gen. Stat. § 1A-1 Rule 37(b)(2) (2011) (emphasis added).

At issue here is whether an attorney constitutes a "party" for the purposes of awarding attorneys' fees under Rule 37(b)(2). An often-applied rule of construction is that "where a statute is intelligible without any additional words, no additional words may be supplied." *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974). Although this Court has not analyzed whether the word "party" in Rule 37(b)(2) includes attorneys, we held in *First Mt. Vernon Indus. Loan Ass'n v. ProDev XXII, LLC*, 209 N.C. App. 126, 134, 703 S.E.2d 836, 841 (2011) that "Rule 37(a) demonstrates . . . that the General Assembly has purposefully distinguished between parties and non-parties." The *First Mt. Vernon* Court held that a non-party could not be subject to sanctions under Rule 37(d), and therefore, the trial court erred by taxing attorneys' fees and costs on the non-party where the statute explicitly applied to "the *party* failing to act." *Id.* at 134, 703 S.E.2d at 841. Rules 37(b)(2) and 37(d) contain almost identical provisions setting out the individuals who are bound by them. Both apply to "a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party." N.C. Gen. Stat. §§ 1A-1, Rule 37(b)(2), (d) (2011). Here, Almy was not a party to the underlying actions, nor was he an officer, director, managing agent, or designee to testify on behalf of a party.

Because the language of Rule 37(b)(2) is intelligible without adding anything further, and because the reasoning of the *First Mt. Vernon* Court applies to Rule 37(b)(2) given its similarity to Rule 37(d), we find that it was error for the court to award GE attorneys' fees against Almy because he was not a "party" to the suit under the language of the Rule authorizing fees. Accordingly, we reverse the award of attorneys' fees against Almy.

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8. The trial court did not award GE attorneys' fees against Dombroff.

C. Revocation of *Pro Hac Vice* Admissions

[22] Additional appellants' final argument on appeal is that the trial court erred by revoking their admissions *pro hac vice* to represent defendants in the action against GE. The court's order revoking additional appellants' admissions reads in its entirety, "The Court summarily revokes the pro hac vice admissions of Attorney Mark A. Dombroff and Attorney Thomas B Almy." The court made no independent findings of fact or conclusions of law supporting its order, but it did enter the order after conducting a hearing on GE's motion for sanctions.

Permission to practice in this state *pro hac vice* may be revoked by the trial court "on its own motion and in its discretion." N.C. Gen. Stat. § 84-4.2 (2011). "This status is . . . not a right but a discretionary privilege." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 178-79, 695 S.E.2d 429, 434 (2010) (citation and quotation marks omitted).

First, as to Almy, we find that our decision setting aside his being held in criminal contempt is significant enough to remand to the trial court for a new determination as to whether his admission *pro hac vice* should have been revoked. Conviction for a crime showing "professional unfitness" is a statutory ground for disbarment in North Carolina. N.C. Gen. Stat. § 84-28(b)(1), (c) (2011). As such, Almy's being held in criminal contempt likely affected the trial court's decision to revoke his admission. Because we reverse the order holding Almy in criminal contempt, we remand with instruction that the trial court afford no weight to that crime when reconsidering whether to revoke his *pro hac vice* admission.

[23] As to Dombroff, additional appellants argue that the trial court abused its discretion by revoking his admission because the $1,000 fine imposed by a federal court in 1997 was not the type of "discipline" that needed to be disclosed under N.C. Gen. Stat. § 84-4.1 (2011). Section 84-4.1(6) requires any attorney seeking admission to practice in this state *pro hac vice* to provide "[a] statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission." N.C. Gen. Stat. § 84-4.1 (2011). Additional appellants cite to a public announcement on the North Carolina State Bar website, wherein it defines the types of "disciplinary" proceeding that it prosecutes, and explains that it deals with disciplinary matters which implicate a lawyer's license to practice law. However, based on the plain language of section 84-4.1, attorneys are required to disclose discipline administered by both courts and lawyer

regulatory organizations such as the State Bar. We hold that the court did not abuse its discretion by revoking the *pro hac vice* admission of Dombroff because he violated section 84-4.1 by failing to disclose a $1,000 disciplinary fine levied against him by the United States District Court for the District of South Carolina, and the court's decision was therefore supported by reason. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.")

V. CONCLUSION

Because the trial court correctly interpreted "indirect solicitation" and "supervisory responsibility" in individual defendants' employment contracts, GE presented sufficient evidence to show individual defendants breached the confidentiality provisions in the employment contracts, and GE was not equitably estopped from penalizing Lukowski for breaching his contract, we affirm the trial court's judgment as to individual defendants' employment agreements. Additionally, because GE sufficiently established causation independent of evidence that GE lost customers for other reasons, we affirm the trial court's exclusion of that evidence. Finally, because GE sufficiently identified the misappropriated trade secrets, and individual defendants acted in concert, we affirm the trial court's ruling that joint and several liability and section 75-1.1 liability were appropriate. Thus, we affirm the trial court as to all issues on individual defendants' appeal.

As to Zee's appeal, we find that the trial court did not impermissibly change the measure of damages as a Rule 37 sanction. However, we do find that the entry of punitive damages against each defendant individually was in error given the Supreme Court's ruling in *Rhyne*, and that the trial court's assessment of attorneys' fees did not consider whether the fees billed by Paul Hastings attorneys were reasonable in the context of the community in which the action was litigated. Therefore, we affirm the trial court's measure of compensatory damages and remand as to the issues of punitive damages and attorneys' fees.

Finally, because the trial court did not follow the proper statutory procedures in holding Almy in criminal contempt of court, that order must be reversed and will not be remanded for further proceedings. *See Cogdell*, 183 N.C. App. at 290, 644 S.E.2d at 264 (reversing the court's judgment without remand where it failed to indicate that the reasonable doubt standard was used in a criminal contempt proceeding).

Accordingly, we remand for a redetermination as to Almy's *pro hac vice* revocation in light of this decision. We find that the court did not abuse its discretion in revoking the admission *pro hac vice* of Dombroff, because the discipline that he withheld from the trial court fell under the definition of the term as it is used in section 84-4.1.

AFFIRMED in part, REVERSED in part, and REMANDED in part.

Judges BRYANT and STEELMAN concur.

KENNETH HALSTEAD, PETITIONER
v.
JENNIFER PLYMALE, EXECUTRIX OF THE ESTATE OF
ANITA RAE HALSTEAD, RESPONDENT

No. COA13-375

Filed 3 December 2013

1. Jurisdiction—declaratory judgment—disposition of estate—standard of review

An appeal from the superior court's declaratory judgment concerning the proper disposition of an estate was an appeal of right to the Court of Appeals pursuant to N.C.G.S. § 7A-27(b). Moreover, review was *de novo* because the interpretation of the will turned solely on the language of the will and thus presented a question of law.

2. Wills—residuary estate—patent ambiguity—intent of testator

Where there was a patent ambiguity on the face of a will, the trial court correctly found that the entire residuary estate of testator (Ms. Halstead) passed under the terms of her will to her relative (Ms. Plymale) and not to petitioner, her estranged husband.

Appeal by petitioner from judgment entered 10 October 2012 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 10 October 2013.

Law Office of Shawna Collins, by Shawna D. Collins, for petitioner-appellant.

Helms Robison & Lee, P.A., by James Allen Lee and Emily B. Harp, for respondent-appellee.

HUNTER, JR., Robert N., Judge.

Petitioner Kenneth Halstead ("Petitioner") appeals from a judgment finding that decedent Anita Rae Halstead ("Ms. Halstead") bequeathed and devised all of her tangible personal property, as well as her entire residuary estate, to Jennifer Plymale ("Ms. Plymale"). Petitioner contends that Ms. Halstead's will is unambiguous and that the residuary clause fails to devise Ms. Halstead's intangible and real property. Accordingly, Petitioner contends that Ms. Halstead's intangible and real property should pass by intestacy. We disagree and affirm the trial court's judgment.

I. Factual & Procedural History

Petitioner filed a complaint on 6 January 2012 seeking a declaration that the residuary clause contained in Ms. Halstead's will failed to devise her intangible and real property and that such property is therefore to pass by intestacy. The facts as alleged in the complaint are as follows.

Petitioner is the widower of Ms. Halstead, who died testate on 17 October 2011. Ms. Halstead's will, which was attached and incorporated into the complaint by reference, indicated that Petitioner and Ms. Halstead were separated and estranged at the time of her death. Indeed, at the beginning of Ms. Halstead's will, she specifically states:

> I hereby declare that I am separated from my estranged spouse, KENNETH F. HALSTEAD, and that I have no children. I further hereby declare that I specifically wish to disinherit and disqualify my estranged spounst [sic], KENNETH F. HALSTEAD for his misconduct toward me, including but not limited to his willful abandonment of me and the marriage, and our separation, due to his cohabitation and adultery, which I have not and do not condone.

On 18 October 2011, Ms. Plymale, the executrix of Ms. Halstead's estate, presented Ms. Halstead's will to the Clerk of Superior Court of Union County, who admitted the will to probate. The will disposes of Ms. Halstead's property as follows:

> 1. Gift of Tangible Personal Property. All of my tangible personal property that was not held by me solely for investment purposes, including, but not limited to,

> my automobiles, household furniture and furnishings, clothing, jewelry, collectibles and personal effects, shall be disposed of as follows:
>
> 1. I give all such tangible personal property to my relative,[1] JENNIFER PLYMALE, . . . if she survives me.
>
> . . . .
>
> B. Gift of Residuary Estate. My residuary estate, being all my real and personal property, wherever located, not otherwise effectively disposed of, but excluding any property over which I may have a power of appointment, shall be disposed of as follows:
>
> 1. I give all such tangible personal property to my relative, JENNIFER PLYMALE, if she survives me.

Based on these provisions, Ms. Plymale indicated in the application for probate that she was the only person entitled to share in Ms. Halstead's estate. Petitioner then filed this action to obtain a declaration regarding the proper distribution of the residuary estate.

After a hearing on the matter, the trial court entered a judgment on 10 October 2012 finding a patent ambiguity on the face of the will and construing the will to devise the entire residuary estate in favor of Ms. Plymale. Specifically, because the trial court concluded that "[t]he bequest under 'A' effectively disposed of all of [Ms. Halstead's] tangible personal property so that none remained for disposition under 'B,' " the trial court considered the repeated reference to "tangible personal property" in the residuary clause to be patently ambiguous. Accordingly, because the trial court concluded that it was Ms. Halstead's express intention to disinherit and disqualify Petitioner, the reference to tangible personal property in the residuary clause was disregarded and the residue was deemed to have been devised in its entirety to Ms. Plymale. Petitioner filed timely notice of appeal.

II. Jurisdiction & Standard of Review

[1] "Courts of record within their respective jurisdictions shall have power to declare rights . . . and such declarations shall have the force

1. Notwithstanding this language, Ms. Plymale described her relationship with Ms. Halstead as a "close friend" in the application for probate.

and effect of a final judgment or decree." N.C. Gen. Stat. § 1-253 (2011). Accordingly, because Petitioner appeals the superior court's declaratory judgment concerning the proper disposition of Ms. Halstead's estate, Petitioner's appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

"The interpretation of a will's language is a matter of law. When the parties place nothing before the court to prove the intention of the testator, other than the will itself, they are simply disputing the interpretation of the language which is a question of law." *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988) (internal citations omitted). Here, both parties stipulated at the hearing that no extrinsic evidence would be considered. Accordingly, because the interpretation of Ms. Halstead's will turns solely on the language of the will, Petitioner's appeal presents a question of law. "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

III. Analysis

[2] The only question presented by Petitioner's appeal is the proper disposition of Ms. Halstead's residuary estate.[2] For the following reasons, we affirm the trial court's judgment finding that the entire residuary estate passed under the terms of the will to Ms. Plymale.

"The intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E.2d 777, 778 (1951); *see also Collier v. Bryant*, ___ N.C. App. ___, ___, 719 S.E.2d 70, 76 (2011) ("When reading a will, the testator's intent guides the trial court's interpretation of the will."). "This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy." *Coppedge*, 234 N.C. at 174, 66 S.E.2d at 778.

Naturally, "[w]here the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for, in such event, the words of the testator must be taken to mean exactly what

2. Petitioner's brief does not challenge the trial court's finding that all of Ms. Halstead's tangible personal property passed to Ms. Plymale under the section of the will entitled "A. Gift of Tangible Personal Property."

they say." *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965) (quotation marks and citation omitted). However, "where provisions are inconsistent, it is a general rule in the interpretation of wills, to recognize the general prevailing purpose of the testator and to subordinate the inconsistent provisions found in it." *Coppedge*, 234 N.C. at 176, 66 S.E.2d at 779. Indeed, "[e]ven words, phrases, or clauses will be supplied in the construction of a will when the sense of the phrase or clause in question as collected from the context manifestly requires it." *Entwistle v. Covington*, 250 N.C. 315, 319, 108 S.E.2d 603, 606 (1959); *see also Gordon v. Ehringhaus*, 190 N.C. 147, 150, 129 S.E. 187, 189 (1925) ("[I]n performing the office of construction, the Court may reject, supply or transpose words and phrases in order to ascertain the correct meaning and to prevent the real intention of the testator from being rendered abortive by his inapt use of language.").

Here, we agree with the trial court's conclusion that a patent ambiguity appears on the face of Ms. Halstead's will. *See Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 478, 91 S.E.2d 246, 253 (1956) (stating that "a patent ambiguity occurs when doubt arises from conflicting provisions or provisions alleged to be repugnant"). Specifically, a plain reading of Ms. Halstead's residuary clause reveals a clear inconsistency. Ms. Halstead's residuary clause reads as follows:

> B. Gift of Residuary Estate. My residuary estate, being all my real and personal property, wherever located, not otherwise effectively disposed of, but excluding any property over which I may have a power of appointment, shall be disposed of as follows:
>
> > 1. I give all such tangible personal property to my relative, JENNIFER PLYMALE, if she survives me.

Plainly, section B indicates an intention to dispose of "all . . . real and personal property, wherever located, not otherwise effectively disposed of" in preceding portions of the will. Yet, when alluding back to the contents of the residuary estate in subsection B(1), the will refers only to "tangible personal property." Tangible personal property would necessarily exclude all intangible personal property and all real property in Ms. Halstead's estate.

The inconsistency inherent in this provision is further revealed by the fact that Ms. Halstead had already disposed of her tangible personal property:

> A. Gift of Tangible Personal Property. All of my tangible personal property that was not held by me solely for investment purposes, including, but not limited to, my automobiles, household furniture and furnishings, clothing, jewelry, collectibles and personal effects, shall be disposed of as follows:
>
> > 1. I give all such tangible personal property to my relative, JENNIFER PLYMALE, . . . if she survives me.

Accordingly, given that Ms. Halstead had already devised her tangible personal property to Ms. Plymale in section A, and because section B purports to devise the entire residuary estate, the repeated reference to "tangible personal property" in subsection B(1) creates a patent ambiguity on the face of the will. Thus, our task is to construe this inconsistent provision to effectuate Ms. Halstead's intent as revealed by the four corners of the will.

"[T]he intent of the testator must be ascertained from a consideration of the will as a whole and not merely from consideration of specific items or phrases of the will taken in isolation." *Adcock v. Perry*, 305 N.C. 625, 629, 290 S.E.2d 608, 611 (1982). "[T]he use of particular words, clauses or sentences must yield to the purpose and intent of the testator as found in the whole will." *Kale v. Forrest*, 278 N.C. 1, 6, 178 S.E.2d 622, 625 (1971). Accordingly, "[i]n interpreting the different provisions of a will, the courts are not confined to the literal meaning of a single phrase." *Cannon v. Cannon*, 225 N.C. 611, 617, 36 S.E.2d 17, 20 (1945). Courts may even supply a gift by implication "[i]f a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express or formal words." *First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 587, 692 S.E.2d 457, 467 (2010) (quotation marks and citation omitted) (alteration in original).

Moreover, there is a general presumption that a testator did not intend to die intestate as to any part of his property, unless there is such an intent plainly and unequivocally expressed in the will. *McKinney v. Mosteller*, 321 N.C. 730, 732—33, 365 S.E.2d 612, 614 (1988). Furthermore, "the presumption against intestacy is strengthened by the presence of a residuary clause in a will." *Id.* at 732, 365 S.E.2d at 614; *see also Gordon*, 190 N.C. at 150, 129 S.E. at 189 ("In dealing with the residuary clause of a will which is ambiguous, it is required, by the general rule of construction, that a liberal, rather than a restricted, interpretation be placed upon its terms; for a partial intestacy may thereby be prevented, which, it is reasonable to suppose, the testator did not contemplate.").

Here, an application of the foregoing principles leads us to the conclusion that Ms. Halstead specifically intended to disinherit Petitioner and to devise her entire residuary estate in section B to Ms. Plymale.

First, Ms. Halstead states at the beginning of her will that "I specifically wish to disinherit and disqualify my estranged spounst [sic], KENNETH F. HALSTEAD for his misconduct toward me." Thus, the remainder of the will's provisions must be read in light of the fact that Ms. Halstead did not want Petitioner to share in her estate. Second, before the residuary clause appears in the will, Ms. Halstead effectively disposed of all her tangible personal property in section A of the will in favor of Ms. Plymale. Accordingly, her intent in subsection B(1) could not have been to re-gift the same property to the same person. Third, the introductory language of the residuary clause, section B, purports to dispose of all of Ms. Halstead's remaining real and personal property. Given this intent, the reference to "all such tangible personal property" in subsection B(1) is more aptly translated "all such property." *See Wing v. Wachovia Bank & Trust Co., N. A.*, 301 N.C. 456, 464, 272 S.E.2d 90, 96 (1980) ("When the language following an introductory phrase which purports to dispose of all of testator's property can be interpreted to result in complete disposition or partial intestacy, the introductory statement, pointing to a complete disposition, ought to be considered, and that sense adopted which will result in a disposition of the whole estate." (quotation marks and citation omitted)).

In summary, Ms. Halstead's intent as garnered from the four corners of the will was to specifically disinherit Petitioner, to avoid intestacy, and to pass her entire estate to Ms. Plymale. Furthermore, the reference to "tangible personal property" in subsection B(1) of the residuary clause was not intended to limit the contents of the residuary estate to tangible personal property. Accordingly, the proper interpretation of subsection B(1) is that Ms. Halstead intended to pass all of her residue, including all remaining real and personal property, to Ms. Plymale.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court finding that all of Ms. Halstead's tangible personal property, together with her entire residuary estate, were bequeathed and devised in their entirety to Ms. Plymale.

Affirmed.

Judges ERVIN and DAVIS concur.

HOMETRUST BANK, PLAINTIFF
v.
RICHARD H. GREEN AND JUDY L. GREEN, DEFENDANTS

No. COA13-511

Filed 3 December 2013

Process and Service—notice of foreclosure proceedings—actual notice

The superior court properly granted plaintiff's motion for summary judgment in a foreclosure proceeding as to defendant Richard Green, despite the fact that he was not individually served with notice of either foreclosure hearing. Richard Green had actual notice of the foreclosure hearings where the notices were mailed to Advantage Development, in care of Richard Green, and signed for by Richard Green. However, the superior court erred by granting plaintiff's motion for summary judgment as to defendant Judy Green where there was an issue of material fact as to whether Judy Green had actual notice of the foreclosure hearings.

Appeal by defendants from an order and a judgment entered 11 January 2013 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 4 November 2013.

The Dungan Law Firm, P.A., by James W. Kilbourne, Jr., for plaintiff-appellee.

Matney & Associates, P.A., by David E. Matney, III and Amy P. Mody, for defendants-appellants.

MARTIN, Chief Judge.

Defendants Richard H. Green and Judy L. Green appeal from the entry of summary judgment in favor of plaintiff HomeTrust Bank awarding plaintiff a judgment against them in the amount of $1,441,000 plus interest, costs, and attorney's fees.

The record established the following undisputed facts: in April 2007, Advantage Development Company, through its president, Richard H. Green, and its secretary, Judy L. Green, entered into a mortgage agreement with plaintiff. The mortgage was for $712,000 and was secured by Lot 27 in the King Heights subdivision located in Buncombe County,

North Carolina. Mr. and Mrs. Green also individually signed a Mortgage Loan Guaranty of Payment and Completion agreement.

In May 2007, Advantage Development entered into another mortgage agreement with plaintiff. The second mortgage was for $729,000 and was secured by Lot 15 in the King Heights subdivision located in Buncombe County, North Carolina. Mr. and Mrs. Green again individually signed a Mortgage Loan Guaranty of Payment and Completion agreement.

Advantage Development defaulted on both mortgages, and plaintiff commenced foreclosure proceedings on both Lots 27 and 15 on 30 December 2011. Notices of the foreclosure hearings were sent to Advantage Development in care of Richard Green, as registered agent, and were received by him on 3 January 2012, as evidenced by the registry receipt. Neither Mr. Green nor Mrs. Green were served with any other notices of the foreclosure hearings. On 19 January 2012, the clerk of superior court entered two orders allowing the foreclosure sales, and both properties were sold for less than the outstanding balance due.

On 30 December 2011, plaintiff also filed a verified complaint in the present action to recover the outstanding balance of both mortgages from Mr. and Mrs. Green pursuant to the guaranty agreements. Plaintiff and defendants moved for summary judgment. The superior court denied defendants' motion and granted plaintiff's motion for summary judgment, entering a judgment against both defendants for a total of $1,441,000, plus $139,778.94 in interest, with interest to accrue at a rate of 8% until both mortgages are paid in full. The superior court also awarded plaintiff $2,816 in attorney's fees and $330.84 in costs. Mr. and Mrs. Green appeal.

The issue before us on appeal is whether the superior court properly granted plaintiff's motion for summary judgment, which thereby granted plaintiff a deficiency judgment against both Mr. and Mrs. Green, despite the fact that they were not individually served with notice of either foreclosure hearing.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Mr. and Mrs. Green contend that because they were not individually given notice of either foreclosure hearing, they are not liable for any mortgage deficiency remaining after the sale of the two lots. *See* N.C. Gen. Stat. § 45-21.16(b)(2) (2011).

N.C.G.S. § 45-21.16(b)(2) requires notice of a foreclosure hearing to be served on "[a]ny person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale." N.C. Gen. Stat. § 45-21.16(b)(2) (2011). North Carolina's "previous foreclosure statute was declared unconstitutional because it did not provide adequate notice of foreclosure and did not provide a foreclosure hearing." *Fleet Nat'l Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 390, 451 S.E.2d 325, 327 (1994) (citing *Turner v. Blackburn*, 389 F. Supp. 1250, 1254 (W.D.N.C. 1975) (concluding that "North Carolina's foreclosure procedure is unconstitutional under the fourteenth amendment")). As a result, section 45-21.16 "was enacted to meet the minimum due process requirements of personal notice and a hearing." *Fed. Land Bank of Columbia v. Lackey*, 94 N.C. App. 553, 556, 380 S.E.2d 538, 539 (1989), *aff'd per curiam*, 326 N.C. 478, 390 S.E.2d 138 (1990).

This Court considered an issue similar to the issue in this case in *Fleet National Bank*, 117 N.C. App. 387, 451 S.E.2d 325. In *Fleet National Bank*, the trustee mailed notice of the foreclosure hearing to the defendant individually, which he never received, and also mailed notice to the joint venture in care of the defendant, which was accepted by an agent for the joint venture. *Fleet Nat'l Bank*, 117 N.C. App. at 388–89, 451 S.E.2d at 327. Based on these facts, this Court stated, "[defendant] may not assert the defense in G.S. § 45-21.16(b)(2) since he had actual knowledge of the foreclosure hearing" through notice on the joint venture. *Id.* at 389–90, 451 S.E.2d at 327 (emphasis added). Furthermore, this Court stated that the defendant cannot argue that "service on him was inadequate" because he had actual notice of the foreclosure hearing. *Id.* at 390, 451 S.E.2d at 328.

In this case, the notices of the foreclosure hearings were mailed to Advantage Development, in care of Richard Green, and signed for by Richard Green. As a result, Mr. Green had actual notice of the foreclosure hearings, and it is of no material consequence that notices of the hearings were not mailed to him individually. *See id.* at 389–90, 451 S.E.2d at 327. Thus, plaintiff has established that it is entitled to summary judgment against Mr. Green for any deficiency.

As to Mrs. Green, however, the analysis is different. *Fleet National Bank* established that "[d]eciding whether or not the trustee used reasonable and diligent efforts to personally serve [defendant] is unnecessary, because [defendant] . . . had actual knowledge of the foreclosure hearing." *Id.* In this case, there is evidence in the record that the notices for the foreclosure sales were published in the Black Mountain Newspaper; however, there is no evidence that there was an attempt to personally serve Mrs. Green. North Carolina Rule of Civil Procedure 4(j1) allows for service of process by publication only when a party "cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service." N.C. Gen. Stat. §1A-1, Rule 4(j1) (2011). Therefore, to find that Mrs. Green had notice of the foreclosure hearings, she must have actual knowledge of the foreclosure hearings because there was no attempt to personally serve her.

The plaintiff has failed to establish a presumption of actual notice because the foreclosure notices were addressed to and served on Advantage Development in care of Richard Green and were not addressed to Mrs. Green. *But see Fleet Nat'l Bank*, 117 N.C. App. at 389–90, 451 S.E.2d at 327 (holding that defendant had actual notice when plaintiff sent notice to the joint venture, in care of defendant). Therefore, plaintiff has failed to demonstrate that it is entitled, as a matter of law, to a judgment against Mrs. Green for any deficiency. There is a genuine issue of material fact as to whether Mrs. Green had actual notice of the foreclosure hearings because of her role as secretary of Advantage Development, or because the foreclosure notices, though not addressed to her, were mailed to the same address where she received the summons and complaint in this matter. Summary judgment as to Mrs. Green is, therefore, reversed and remanded for trial.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and DILLON concur.

JOHN WM. BROWN CO., INC., PLAINTIFF
v.
STATE EMPLOYEES' CREDIT UNION, DEFENDANT

No. COA13-388

Filed 3 December 2013

1. Laches—bar to enforcement of settlement agreement—separate lawsuit—not applicable

The doctrine of laches was not applicable and did not bar enforcement of the settlement agreement by defendant (SECU) where plaintiff (JWBC) asserted laches not as a bar to the lawsuit, which JWBC itself filed against SECU, but as a bar to the enforcement of the agreement settling the lawsuit entered into between SECU and Great American Insurance Company (GAIC), which had supplied labor and material bonds. Moreover, the delay that JWBC claims resulted in prejudice was not the result of any act by SECU, but the failure of GAIC to exercise its assignment rights under the indemnity agreement. Nevertheless, assuming the doctrine of laches was applicable, the result in this case would not be different under the language in the agreement.

2. Estoppel—equitable—enforcement of settlement agreement—act of third party

The doctrine of equitable estoppel did not bar the enforcement of a settlement agreement where the act complained of was not that of defendant (SECU), but the delay of Great American Insurance Company (GAIC), the bonding company, in asserting its right of assignment under an indemnity agreement. Moreover, the non-waiver provision in the Agreement of Indemnity explicitly reserved GAIC's right of assignment.

Appeal by plaintiff from order entered 11 January 2013 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 September 2013.

Safran Law Offices, by Lindsey E. Powell, for plaintiff.

Bailey & Dixon, L.L.P., by David S. Wisz, for defendant.

McCULLOUGH, Judge.

Plaintiff John Wm. Brown Co., Inc. ("JWBC") appeals from an order granting defendant State Employees' Credit Union's ("SECU") Motion to Approve and Enforce Settlement Agreement and Release. For the following reasons, we affirm.

I. Background

This case arises out of JWBC's service as the general contractor for the construction of the SECU branch office on Poole Road in Raleigh, an LEED project.

JWBC and SECU entered into a Standard Form of Agreement Between Owner and Contractor (the "Contract") for JWBC to serve as the general contractor for the project on 18 January 2008. In accordance with the terms of the Contract and in connection with a preexisting Agreement of Indemnity under which JWBC and individuals agreed to indemnify Great American Insurance Company ("GAIC"), JWBC obtained both a Labor and Material Payment Bond and a Performance Bond from GAIC on 18 March 2008. Each bond covered the contract amount of $2,374,000.

After significant delays, a notice to proceed was issued and the project commenced in December 2008. Pursuant to the terms of the Contract, JWBC was required to achieve substantial completion of the project within 270 days of commencement. The project, however, was not completed on time.[1]

In January 2010, GAIC began receiving bond claims from subcontractors on the project who alleged they had not been paid by JWBC. GAIC made payments on these bond claims in excess of $900,000.

When JWBC and the individual indemnitors failed to indemnify GAIC in accordance with the Agreement of Indemnity, GAIC filed suit against JWBC and individual indemnitors for breach of Agreement of Indemnity in the Middle District of North Carolina on 2 September 2010 (the "Federal Court Action"). In the Federal Court Action, GAIC sought reimbursement of over $600,000 paid to subcontractors on the bond claims.[2]

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1. JWBC and SECU dispute why the project was not timely completed.

2. The difference in the amount paid by GAIC on the bond claims and the amount sought in the Federal Court Action is the result of payments by SECU directly to GAIC.

On 28 April 2011, JWBC and SECU began communications regarding close-out of the project. In the course of these communications, JWBC submitted claims to SECU alleging SECU owed additional funds for change order work. By email on 21 July 2011, SECU acknowledged that it owed JWBC the remaining contract balance of $195,637 that it was holding as a retainage on the project; however, SECU denied that it owed any additional funds for change order work and advised JWBC that it felt it "already went above and beyond being fair" by not asserting over $60,000 in liquidated damages against JWBC for delays in completion of the project, paying over $200,000 in additional funds for change order work when JWBC substituted subcontractors, and by not seeking to back charge JWBC for extra work required for LEED certification. Thereafter, in accordance with the terms of a Non-Waiver and Preservation Agreement entered into by the parties in late August 2011, SECU paid the remaining contract balance of $197,637 directly to GAIC to reduce JWBC's liability under the Agreement of Indemnity. The parties' remaining claims and defenses were preserved.

Prior to the filing of the present action, SECU, JWBC, and GAIC met on several occasions to discuss resolution of all disputes amongst the parties. During the course of these meetings, SECU offered $100,000 to JWBC to settle all claims between them. JWBC, however, rejected the offer and filed this breach of contract action against SECU in Wake County Superior Court on 31 October 2011. In the complaint, JWBC sought compensation for "completed extra and/or change order work[,]" alleging that SECU had not remitted full payment for the project. SECU answered the complaint denying liability, asserting affirmative defenses, and counterclaiming for liquidated and compensatory damages in excess of $100,000.

After a year of discovery, continued settlement negotiations, and court-ordered mediation, SECU renewed its offer to settle the dispute for $100,000. At that time, GAIC exercised its assignment rights under the Agreement of Indemnity and unilaterally accepted the $100,000 settlement offer over JWBC's objection.

A written Settlement Agreement and Release (the "Agreement") was entered into by SECU and GAIC on 3 December 2012. On the same day, SECU filed a Motion to Approve and Enforce Settlement Agreement and Release in Wake County Superior Court. SECU's motion came on for hearing on 7 January 2013 before the Honorable Paul Ridgeway. On 11 January 2013, an order granting SECU's motion was entered. JWBC filed notice of appeal on 29 January 2012.

II. Discussion

On appeal, JWBC contends the trial court erred in granting SECU's motion to approve and enforce the Agreement because the doctrines of laches and equitable estoppel bar the enforcement of the Agreement over its objection. We disagree.

Standard of Review

A motion to approve and enforce a settlement agreement is treated as a motion for summary judgment when reviewed by this Court. *See Hardin v. KCS International, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009). Therefore, we review the trial court's order *de novo* to determine if there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *Litvak v. Smith*, 180 N.C. App. 202, 205-06, 636 S.E.2d 327, 329 (2006).

Laches

[1] "Laches" is defined as "[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought." *Black's Law Dictionary* 879 7th ed. 1999). As this Court has repeatedly stated,

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001).

In this case, JWBC argues the doctrine of laches applies to bar enforcement of the Agreement because GAIC, with SECU's express knowledge, sat on its right of assignment under the Agreement of Indemnity for over a year while litigation commenced. JWBC further

claims it was prejudiced as a result of GAIC's delay because it spent substantial amounts of time and money pursuing the litigation.

In support of its position, JWBC cites numerous cases to explain the doctrine of laches. Yet, we find the cases cited by JWBC distinguishable from the present case in two respects. First, in each of the cases cited by JWBC, the doctrine of laches was asserted as an affirmative defense to the filing of a lawsuit. *See e.g. Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). In the present case, however, JWBC asserts the doctrine of laches not as a bar to the lawsuit, which JWBC itself filed against SECU, but as a bar to the enforcement of the Agreement settling the lawsuit entered into between SECU and GAIC. Second, the delay that JWBC claims resulted in prejudice was not the result of any act by SECU, but the failure of GAIC to exercise its assignment rights under the Agreement of Indemnity for over a year.

We have been unable to find any case where the doctrine of laches has been applied in a scenario similar to the one now before this Court. Given the unique posture in which the doctrine of laches arises and the fact that SECU was not the cause of the delay, we hold the doctrine of laches has no applicability in the present case and does not bar enforcement of the Agreement by SECU.

Nevertheless, assuming arguendo the doctrine of laches may be applied to preclude the exercise of a right of assignment by a third party in order to bar the enforcement of a settlement, the result in the present case would not be different. The language in the Agreement of Indemnity is clear, "[n]o failure or delay by [GAIC] to exercise any right, power or remedy provided pursuant to this Agreement shall impair or be construed to be a waiver of [GAIC's] ability or entitlement to exercise any other right, power, or remedy."

Equitable Estoppel

[2] "Equitable estoppel" is defined as "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." *Black's Law Dictionary* 571 (7th ed. 1999). As this Court has recognized,

> [t]he essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the

> other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Parker v. Thompson-Arthur Paving Co., 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990).

Similar to its laches argument, JWBC argues the doctrine of equitable estoppel bars the enforcement of the Agreement between SECU and GAIC because GAIC was aware of SECU's settlement offer to JWBC but waited for over a year before it exercised its right of assignment and unilaterally accepted the offer. In the meantime, JWBC incurred the expenses of litigation. JWBC further argues SECU acquiesced and facilitated GAIC's shift in position to the detriment of JWBC and should not be able to benefit from GAIC's wrongful conduct.

For the same reasons the doctrine of laches is of no consequence in the present case, we hold the doctrine of equitable estoppel does not bar the enforcement of the Agreement by SECU. As noted above, the act complained of is not that of SECU, but the delay of GAIC in asserting its right of assignment under the Agreement of Indemnity. Moreover, the non-waiver provision in the Agreement of Indemnity explicitly reserves GAIC's right of assignment.

III. Conclusion

For the reasons discussed above, we affirm the trial court's order granting SECU's motion to approve and enforce the Agreement. As the trial court held "[t]he proper forum for JWBC's arguments [concerning the exercise of GAIC's right to assignment under the Agreement of Indemnity] is in the [Federal Court Action.]" *See e.g. Bell BCI Co. v. Old Dominion Demolition Corp.*, 294 F. Supp. 2d 807, 814-15 (E.D. Va. 2003) (providing claims of a surety's bad faith in settlement should be asserted as a defense in the surety's action for indemnification).[3]

Affirmed.

Judges McGEE and DILLON concur.

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3. We note the trial court explicitly reserved "the rights, claims, and and/or defenses of any party, including but not limited to JWBC, GAIC, and/or the individual [i]ndemnitors, in the Federal Court Action." Moreover, following entry of the trial court's order in this action, JWBC amended its pleadings in the Federal Court Action to assert claims against GAIC for breach of contract and breach of fiduciary duty.

NORTH CAROLINA STATE BOARD OF EDUCATION, PETITIONER, AND NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, ET AL., INTERVENORS
v.
NORTH CAROLINA LEARNS, INC., D/B/A NORTH CAROLINA VIRTUAL ACADEMY, RESPONDENT

No. COA13-179

Filed 3 December 2013

1. Schools and Education—State Board of Education—completion of virtual learning study—not ban on virtual charter school applications

The State Board of Education (SBOE) did not institute an illegal moratorium on virtual charter schools. The SBOE's actions did not constitute a shift in policy to ban virtual charter school applications permanently but rather reflected a general policy of the SBOE to not proceed with evaluating applications for virtual charter schools until the e-Learning Commission had concluded its study on the matter.

2. Schools and Education—State Board of Education—virtual charter school application—jurisdiction not waived

The State Board of Education (SBOE) was not required to act on respondent's virtual charter school application before its 15 March deadline. The applicable statutes were directory rather than mandatory, and therefore, the SBOE did not waive its jurisdiction by failing to respond to respondent's application by 15 March.

3. Parties—intervention—aggrieved parties

The trial court did not err in a case involving a virtual charter school application by allowing the intervention of persons who were not parties aggrieved where the ruling of the administrative law judge had a direct impact on the intervenors.

4. Schools and Education—State Board of Elections—no duty to act—no contested case—no authority for hearing in Office of Administrative Hearings

The Office of Administrative Hearings was not the appropriate forum for hearing respondent's claim involving a virtual charter school application. Where an agency, such as the State Board of Elections in this case, has not acted and is under no direction to act, there exists no contested case and no authority for a hearing in the Office of Administrative Hearings.

5. Pleadings—amendment to record—preservation of record—no prejudice

The trial court did not err in a case involving an application for a virtual charter school by allowing an amendment to the record to include respondent's virtual charter school application. The trial court noted that the application was admitted into evidence in order to preserve a complete record of all relevant evidence for purposes of appeal, pursuant to N.C.G.S. § 150B-47. Furthermore, the admission of this evidence was not prejudicial.

Appeal by respondent from order entered 29 June 2012 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorneys General Laura E. Crumpler and Tiffany Y. Lucas, for State Board of Education.

Tharrington Smith, L.L.P, by Deborah R. Stagner; and Poyner Spruill, LLP, by Edwin M. Speas, Jr., and Robert F. Orr, for intervenors-appellees.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Fletcher L. Hartsell, Jr., for respondent-appellant.

North Carolina Justice Center, North Carolina Rural Education Working Group, and Parents Supporting Parents, by Christine Bischoff and Carlene McNulty; Advocates for Children's Services of Legal Aid of North Carolina, by Lewis Pitts; Children's Law Clinic at Duke Law School, by Jane Wettach; North Carolina Association of Educators, by Ann McColl; Southern Coalition for Social Justice, by Anita S. Earls; UNC Center for Civil Rights, by Mark Dorosin; and UNC Center on Poverty, Work and Opportunity, by Mary Irvine, for amici curiae.

BRYANT, Judge.

The orders of the trial court finding: (I) that petitioner was not required to act on respondent's virtual charter school application before the March 15 deadline; (II) that the Office of Administrative Hearings was not the appropriate forum for hearing respondent's claim; and (III) that the State Board of Education, not the Office of Administrative

Hearings, has sole authority to grant or deny respondent's application to operate a virtual charter school, are affirmed. Because the trial court did not err in allowing the (IV) intervention of parties and (V) amendment of the record, we affirm.

In 1996, the North Carolina General Assembly adopted the Charter School Law, N.C. Gen. Stat. § 115C-238.29A (2011), governing the process for establishing and overseeing charter schools. Authority for the handling of charter schools was vested in the State Board of Education ("SBOE"). Pursuant to N.C. Gen. Stat. § 115C-238.29B, a local school board may give preliminary approval to an application for a charter school but final approval of said application must be given by the SBOE.

At the 6 October 2011 monthly meeting of the SBOE, Chairman Harrison announced that no applications for virtual charter schools would be considered for the 2012—2013 school year "because the e-Learning Commission [was] examining all aspects of virtual education in North Carolina (pre-K—16) . . . ."

On 1 November 2011, respondent North Carolina Learns, Inc., doing business as North Carolina Virtual Academy ("NCVA"), submitted a "fast track" application for preliminary approval of a virtual charter school to the Cabarrus County Board of Education. The Cabarrus County Board of Education reviewed the application and granted preliminary approval on 23 January 2012 to respondent for the creation of a virtual charter school. On 13 February 2012, NCVA forwarded the application to the SBOE; the SBOE received the application on 14 February 2012. Although the SBOE had a 15 March deadline to accept NCVA's application pursuant to N.C. Gen. Stat. § 115-238.29D(a), the SBOE took no action on NCVA's application because of its earlier decision not to review applications for virtual charter schools for the 2012—2013 school year.

On 21 March 2012, NCVA filed a petition for a contested case hearing with the Office of Administrative Hearings, citing the SBOE's failure to respond to NCVA's application by the 15 March deadline. Thereafter, NCVA amended its pleadings. The SBOE answered by filing a motion to dismiss, followed by a motion for summary judgment. NCVA then filed a cross-motion for summary judgment.

A hearing was conducted on 8 May 2012 in the Office of Administrative Hearings, and on 18 May 2012 the administrative law judge (or "ALJ") issued a decision granting summary judgment to NCVA. The administrative law judge found that the SBOE failed to act in a timely manner upon NCVA's application and had therefore lost jurisdiction over final approval or any other action related to the application.

The administrative law judge held that NCVA's application for a virtual charter school was deemed approved as a matter of law.

On 23 May 2012, the SBOE filed a petition for judicial review in Wake County Superior Court. On 15 June 2012, the North Carolina School Boards Association and 89 local boards of education ("intervenors") then sought to intervene in the matter as parties aggrieved.

On 25 June 2012, the matter was heard in Wake County Superior Court, the Honorable Abraham Penn Jones presiding. On 29 June 2012, the trial court granted the motion allowing the intervenors to join the lawsuit and reversed the decision of the administrative law judge.

NCVA appeals.

On appeal, NCVA argues that: (I) the SBOE instituted an illegal moratorium on virtual charter schools that did not relieve the SBOE of its legal duties; (II) the SBOE was required to act before the 15 March deadline and thus lost its ability to act by failing to meet the deadline; (III) the trial court erred in allowing the intervention of persons who were not parties aggrieved; (IV) the Office of Administrative Hearings was the appropriate forum for hearing NCVA's claim; and (V) the trial court allowed the amendment of the record in contravention of the law.

I.

[1] NCVA argues that the SBOE instituted an illegal moratorium on virtual charter schools that did not relieve it of its legal duties. We disagree.

A *de novo* standard of review is appropriate when reviewing decisions by a trial court based upon judicial review of an administrative agency decision. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004).

NCVA first argues that the SBOE, in declaring a moratorium on virtual charter schools during its 6 October 2011 meeting, violated Robert's Rules of Order. The minutes of the 6 October 2011 public meeting recorded SBOE Chairman Harrison's comments as follows:

> Chairman Harrison announced that the newly formed NC Public Charter School Advisory Council will convene for the first time on October 19. The purpose of this meeting is to begin reviewing the 'fast-track' charter applications in November. He explained that the 'fast-track' process is being targeted to charter schools that were considered

> last year and for conversion schools. Other schools that might be ready to open their doors are welcome to apply, but it is probably more appropriate for these to apply in February (for a FY 2013-14 opening). Further, he explained that *because the e-Learning Commission is examining all aspects of virtual education in North Carolina (pre-K-16), the [SBOE] will not be considering any virtual applications in the 'fast track' pool.*

NCVA contends that this announcement by Chairman Harrison is not authoritative because the SBOE has not demonstrated that it has adopted the latest edition of Robert's Rules of Order for conducting business. NCVA's argument on these grounds is without merit. North Carolina General Statutes, section 115C-12 states that "[t]he general supervision and administration of the free public school system shall be vested in the [SBOE]. The [SBOE] shall establish policy for the system of . . . public schools, subject to laws enacted by the General Assembly." N.C.G.S. § 115C-12 (2011); *see also* N.C. Const. art. IX, §§ 4, 5 ("The [SBOE] shall supervise and administer the . . . public school system and the educational funds provided for its support . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.").

Under section 115C-238.29B, the SBOE is vested with sole authority regarding charter schools in North Carolina, including all decisions regarding the formation and operation of such schools. *See* N.C.G.S. § 115C-238.29B(c)(3) (2011) ("Regardless of which chartering entity receives the application for preliminary approval, the [SBOE] shall have final approval of the charter school."); *see also* N.C.G.S. § 115C-238.29A, Editor's Note ("Session Laws 2011-164, s. 6, provides: 'The [SBOE] shall submit a preliminary report and a final report to the General Assembly on the implementation of this act, including (i) the creation, composition, and function of an advisory committee; (ii) the charter school application process; (iii) a profile of applicants and the basis for acceptance or rejection; and (iv) resources required at the State level for implementation of the charter school laws in Part 6A of Article 16 of Chapter 115C of the North Carolina General Statutes. The preliminary report shall be submitted by May 10, 2012, and the final report shall be submitted by June 11, 2012.' ").[1]

The rules regarding meetings and other actions by the SBOE are governed by Robert's Rules of Order: "Robert's Rules of Order (latest

1. Session law 2011-164 became effective on 1 July 2011.

edition) shall constitute the rules of parliamentary procedure applicable to all meetings of the Board and its committees." N.C. STATE BD. OF EDUC., POLICY MANUAL, POLICY OUTLINING STATE BD. OF EDUC. RULES OF PROCEDURE, TCS-C-006, Rule 1.1 (2005).

NCVA also claims that the SBOE's announcement on virtual charter schools was invalid due to a violation of Robert's Rules of Order requiring a motion and a vote. We disagree, as Chairman Harrison and the SBOE have the legal obligation to decide the application and approval process for charter schools. See N.C.G.S. §§ 115C-238.29A, 29B. The comments made by Chairman Harrison constituted a general announcement of already decided-upon policy, rather than a shift in policy as NCVA asserts.

Chairman Harrison clearly began his announcement by stating that the SBOE's decision not to review applications for virtual charter schools was based on deference to the e-Learning Commission which was then studying the issue of virtual charter schools and developing standards for the SBOE to use in their review and assessment of virtual charter school applications.[2] Accordingly, the comments made by Chairman Harrison reflected a general policy of the SBOE to not proceed with evaluating applications for virtual charter schools until the e-Learning Commission had concluded its study on the matter. Therefore, we reject NCVA's contention that the SBOE's actions constituted a shift in policy to ban virtual charter school applications permanently. NCVA's argument is overruled.

II.

[2] NCVA next argues that the SBOE was required to act before the 15 March deadline and thus, lost its ability to act by failing to meet the deadline. We disagree. Based on our analysis in Issue I, it is clear that the SBOE had no duty to review or otherwise further act on NCVA's virtual charter school application[3] Nevertheless, we address NCVA's argument.

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2. The e-Learning Commission was created by the SBOE and the Business Education Technology Alliance to assist the SBOE and other groups in developing standards and infrastructure for virtual learning opportunities, and to assist the SBOE in developing a virtual high school. *See State E-Learning Commission formed to Develop Virtual High School and Other Learning Opportunities*, N.C. DEP'T. OF PUB. INSTRUCTION (Apr. 12, 2005), http://www.ncpublicschools.org/newsroom/news/2004-05/20050412.

3. We note for the record that the e-Learning Commission was in the process of analyzing substantial concerns regarding virtual schools including, but not limited to, academic quality and effectiveness and quality of teaching and delivery of instruction, as well as sources of funding. These concerns had not been resolved at the time NCVA submitted its application in 2011—2012; the SBOE addressed these concerns with TCS-U-015, adopted

North Carolina General Statutes, section 115C-238.29D(a) provides that:

> The [SBOE] may grant final approval of an application if it finds that the application meets the requirements set out in this Part or adopted by the [SBOE] and that granting the application would achieve one or more of the purposes set out in G.S. 115C-238.29A. The [SBOE] shall act by March 15 of a calendar year on all applications and appeals it receives prior to February 15 of that calendar year.

N.C.G.S. § 115C-238.29D(a) (2011).

In addition, section 115C-238.29I(e) provides that:

> Notwithstanding the dates set forth in this Part, the [SBOE] may establish an alternative time line for the submission of applications, preliminary approvals, criminal record checks, appeals, and final approvals so long as the [SBOE] grants final approval by March 15 of each calendar year.

N.C.G.S. § 115C-238.29I(e) (2011).

In the order appealed, the trial court found that the administrative law judge erroneously relied on *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 398 S.E.2d 466 (1990), in reaching the conclusion that the SBOE waived jurisdiction by failing to respond to NCVA's application in a timely manner by its 15 March deadline, and thus, NCVA was entitled to a charter by operation of law.

In *HCA Crossroads*, the statute in question mandated a 90-day time limit for review of applications for certificates of need and allowed an additional 60-day extension which resulted in a mandatory maximum time limit of 150 days within which the applications were required to be reviewed. *See* N.C. Gen. Stat. §§ 131E-185(a)(1), (c). Another section of that statute required that a certificate of need be issued or rejected within the review period. *See id.* § 131E-185(b). In reviewing the statute, our Supreme Court found that a state agency waived its jurisdiction by not acting within the review period expressly stated in the applicable statute:

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10 January 2013. *See* TCS-U-015, Policy on the establishment of virtual charter schools in North Carolina, N.C. State Bd. of Educ., Policy Manual, Policy on the establishment of virtual charter schools in N.C., TCS-U-015 (Jan. 10, 2013), *available at* http://sbepolicy.dpi.state.nc.us/policies/TCS-U-015.asp?pri=04&cat=U&pol=015&acr=TCS.

> The limiting phrase 'within the review period' modifies only the phrase 'rejects the application,' and, therefore, the Department loses subject matter jurisdiction to reject an application when the review period ends. Once the review period expires without action by the Department, it retains jurisdiction only for the purpose of issuing certificates of need.

HCA Crossroads, 327 N.C. at 577, 398 S.E.2d at 469.

This Court has interpreted the holding of *HCA Crossroads* to apply to statutes which contain specific language requiring express action to be taken during a statutory review period. In contrast, where a statute lacks specific language requiring an agency to take express action during a statutory review period, our Court has held that such statutory language is merely directory, rather than mandatory. *See State v. Empire Power Co.*, 112 N.C. App. 265, 435 S.E.2d 553 (1993).

In *Empire Power*, the petitioner argued that the Utilities Commission's failure to hold a hearing within a statutory three month period of review constituted a waiver of jurisdiction. This Court disagreed, holding that

> [w]hether the time provisions [of section 62-82(a)] are jurisdictional in nature depends upon whether the legislature intended the language to be mandatory or directory. Many courts have observed that statutory time periods are generally considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period. If the provisions are mandatory, they are jurisdictional; if directory, they are not.
>
> [Section 62-82] clearly specifies that one provision is mandatory, and that is the one that *requires* that a certificate be issued if the Commission does not order a hearing at all and there is no complaint filed within ten days of the last date of publication. However, the statute is silent as to the consequences, if any, which would result from the Commission's failure to commence a hearing within the three-month time period. When the General Assembly, in the same statute, expressly provides for the automatic issuance of a certificate under different circumstances (the Commission does not order a hearing

> and no complaint is filed), the only logical conclusion is that the General Assembly only intended for an automatic issuance to occur in that specific situation.

Id. at 277, 435 S.E.2d at 559—60 (citations omitted). This Court, "find[ing] the language in [the statute] to be directory and, thus, not jurisdictional," concluded that:

> *HCA Crossroads* is inapplicable to the case at hand because the Court addressed a statute (N.C.G.S. § 131E-185) which contains specific language stating that the 'Department shall issue . . . a certificate of need with or without conditions *or reject the application within the review period.* The absence of any such explicit language in [section 62-82(a)] distinguishes this case from HCA Crossroads.

Id. at 278, 435 S.E.2d at 560 (citations omitted).

NCVA contends the trial court erred in reversing the decision of the administrative law judge because *HCA Crossroads* was controlling as to the interpretation of the SBOE's applicable statutes. However, neither §§ 115C-238.29D(a) nor 29I(e) expressly state that the SBOE will face consequences or waive its jurisdiction if an application is not approved by 15 March. Rather, these statutes in light of *Empire Power* provide for discretionary periods of review which only require that the SBOE issue its final approval of an application by 15 March. As in *Empire Power*, these statutes contain a provision that requires final approval by 15 March if the application indeed meets the requirements. However, unlike in *HCA Crossroads*, these statutes contain no specific language regarding the consequences of a failure to act. *See Comm'r of Labor v. House of Raeford Farms*, 124 N.C. App. 349, 477 S.E.2d 230 (1996) (distinguishing *HCA Crossroads* as applicable only to statutes which specify consequences for an agency's failure to act and thus are mandatory, from *Empire Power* as applicable to statutes which do not specify consequences for an agency's failure to act and thus are merely directory). Accordingly, we hold that the applicable statutes are directory rather than mandatory, and therefore, the SBOE did not waive its jurisdiction by failing to respond to NCVA's application by 15 March.[4]

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4. We note that a better practice would have been for the SBOE to acknowledge receipt of the application by NCVA for a virtual charter school and explain that such applications were not yet being reviewed by the SBOE. However, we further note that, under these facts, the SBOE was under no statutory obligation to do so.

III.

[3] NCVA's third argument on appeal is that the trial court erred in allowing the intervention of persons who were not parties aggrieved. We disagree.

> An appellate court reviewing a superior court order regarding an agency decision 'examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' When, as here, 'a petitioner contends the [agency's] decision was based on an error of law, de novo review is proper.'

Holly Ridge Assocs., LLC, v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007).

Intervening parties are governed by N.C. Gen. Stat. § 150B-46 (2011), which states that "[a]ny person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24." An aggrieved party is defined as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (2011). " 'Person' means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name." *Id.* § 150B-2(7). "[W]hether a party is a 'person aggrieved' must be determined based on the circumstances of each individual case." *Empire Power*, 337 N.C. at 588, 447 S.E.2d at 779.

NCVA argues that the intervenors are not aggrieved parties per N.C.G.S. § 150B-46 et al. NCVA further cites *Diggs v. N.C. Dep't of Health & Human Servs.*, 157 N.C. App. 344, 578 S.E.2d 666 (2003), as holding that the intervenors are not aggrieved because they have presented only speculative harms regarding potential losses in funding.

In *Diggs*, the petitioner sought a declaratory judgment based solely upon possible future payments made to adult caretakers. Our Court held that the petitioner could not be aggrieved where her claimed harm was not imminently threatened or likely to occur. *Id.* at 348, 578 S.E.2d at 668—69. *Diggs* can be distinguished from the instant case because here the intervenors share a common, immediate interest with the SBOE which has been affected substantially by the ruling of the administrative

law judge. NCVA's charter application projected receiving $6,753.00 per student from state and local school funds, with an estimated $1,854.00 per student coming from local funds. As such, the intervenors are faced with an imminent economic injury via loss of school funding based on the ruling of the administrative law judge.

The administrative law judge's decision could further have a significant impact on all school boards across the state, thus creating a present and substantial matter of concern for both the SBOE and the intervenors regarding issues of management, oversight, and regulation as well.[5] As the trial court considered these matters in its decision to

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5. On 10 January 2013, the SBOE approved TCS-U-015, *Policy on the establishment of virtual charter schools in North Carolina.* N.C. State Bd. of Educ., Policy Manual, Policy on the establishment of virtual charter schools in N.C., TCS-U-015 (Jan. 10, 2013), available at http://sbepolicy.dpi.state.nc.us/policies/TCS-U-015.asp?pri=04&cat=U&pol=015&acr=TCS. This policy addresses several of the reasons cited by intervenors as aggrieving factors in the present matter. As policy TCS-U-015 was not in effect at the time of this appeal, it is presented here only to show the SBOE's policy decisions reached in the wake of the e-Learning commission's findings on virtual charter schools.

> A virtual charter school is defined as a nonsectarian and nondiscriminatory public charter school open to all eligible North Carolina students who are enrolled full-time at the virtual charter school. Students enrolled at a virtual charter school receive their education predominantly through the utilization of online instructional methods. For purposes of initial operation in North Carolina, virtual charter schools may only serve grades 6 through 12.
>
> 1. Parties wishing to establish a virtual charter school shall establish a non-profit corporation and apply to one of the three chartering entities in North Carolina, but must receive final approval by the [SBOE]. A separate application created specifically for virtual applicants will include plans detailing how the virtual charter school proposes to provide technology hardware and internet connectivity to enrolled students.
>
> 2. The process of application review for final approval by the [SBOE] shall follow the same timelines and procedures established for all other charter applicants.
>
> 3. The virtual charter applicant shall submit a copy of the application to every Local Education Agency (LEA) in North Carolina from which the virtual charter school may attract students. Each LEA will have the ability to provide an Impact Statement related to the proposed virtual charter school.
>
> 4. Those designated to review virtual charter applications on behalf of the [SBOE] are under no obligation to recommend that the [SBOE] grant a preliminary charter to any applicant group. The focus of any recommendation must be solidly based upon the quality of the application and historical achievement attained by the intended provider.

permit the intervenors to join the instant proceeding, no error of law has been committed.

NCVA also cites *In re Complaint*, 146 N.C. App. 258, 552 S.E.2d 230 (2001), in support of its contention that the trial court committed error by allowing the intervenors to join the proceeding. However, *In re Complaint* is not applicable to the present matter.

In *In re Complaint*, the petitioner's claim was dismissed after our Court found that the petitioner was not personally aggrieved by the decision of the North Carolina Veterinary Medical Board to discipline one of its licensees who harmed the petitioner's pet. Our Court found

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5. Should a virtual charter school applicant receive preliminary approval, the board members that will have statutory responsibility for all operating procedures of the charter school shall complete the mandatory planning year established in [SBOE] policy.

6. Any virtual applicant group that receives a charter from the [SBOE] will receive a charter term no longer than three years for the initial charter, no virtual charter will receive a renewal charter term longer than five years.

7. The virtual charter school shall have an actual, physical location within the geographic boundaries of the state of North Carolina.

8. Should a virtual applicant receive final approval from the [SBOE], the charter agreement will be tailored to virtual charter schools with the inclusion of additional standards related to overall performance. Failure to meet any of these standards may result in the revocation and/or nonrenewal of the charter:

a) The virtual charter school must test at least 95% of its students during any academic year for purposes of the State's accountability system.

b) The virtual charter school's graduation rate must be no less than 10% below the overall state average for any two out of three consecutive years.

c) The virtual charter school cannot have a student withdrawal rate any higher than 15% for any two out of three consecutive years. This rate will be calculated by comparing the first and ninth month Principal's Monthly Report.

d) The virtual charter school's student-to-teacher ratio cannot exceed 50 to 1 per class. This calculation excludes academic coaches, learning partners, parents, or other non-teachers of record.

9. The virtual charter school will be funded as follows: the proposed virtual charter school shall receive the same rate as a full-year course in the NC Virtual Public School for eight courses per student. The virtual charter school will not receive local funds. Federal funding for which the virtual charter schools are eligible can be received provided the charter school completes the appropriate documentation.

that the petitioner was not aggrieved because the only actions taken were against the veterinarian and thus, the petitioner was not directly affected by the decision. Here, the ruling of the administrative law judge had a direct impact on the intervenors, as the granting of a license to a virtual charter school would have an immediate impact upon school boards across the state. Accordingly, the intervenors are aggrieved parties who were properly joined.

IV.

[4] The fourth argument by NCVA is that the Office of Administrative Hearings was the appropriate forum for hearing its claim. We disagree.

Assuming that a party is in fact aggrieved, a party aggrieved by a state agency can seek relief under N.C. Gen. Stat. § 150B-44 (2011).

> Unreasonable delay on the part of any agency or [ALJ] in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or [ALJ]. Failure of an [ALJ] subject to Article 3 of this Chapter or failure of an agency subject to Article 3A of this Chapter to make a final decision within 120 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or by the [ALJ].

NCVA argues that this statute does not require an aggrieved party to follow its procedure, and that had NCVA followed the statute, a waiting period of 120 days would have precluded it from enjoying the relief sought. However, N.C.G.S. § 150B-44 clearly states that an agency's delay for 120 days in making a decision allows a party who is adversely affected by the delay to bring an action to compel the agency to make a decision.

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10. The virtual charter school must offer "regular educational opportunities" to its students through meetings with teachers, educational field trips, virtual field trips attended synchronously, virtual conferencing sessions, or asynchronous offline work assigned by the teacher of record.

11. The virtual charter school shall comply with all statutory requirements and [SBOE] policies that apply to charter schools unless specifically excluded herein.

The requirements for a virtual charter school are embodied in the application (attached with this policy); and both become effective the date of this policy.

This is "a statutory provision for mandamus—*i.e.*, if an agency fails to act within the applicable period, the applicant may bring an action in *state* court to compel a decision on the application." *HCA Crossroads*, 327 N.C. at 583, 398 S.E.2d at 473 (citation omitted) (emphasis added). Where, however, an agency has not acted and is under no direction to act, there exists no contested case and no authority for a hearing in the Office of Administrative Hearings.

Here, NCVA filed a petition for a contested case hearing in the Office of Administrative Hearings on 21 March 2012, only six days after the 15 March deadline, citing the SBOE's lack of response to NCVA's application. NCVA contends it could not wait 120 days before filing for the relief available to it in N.C.G.S. § 150B-44. However, as discussed above, NCVA could only obtain relief from the SBOE's purported refusal to grant final approval to NCVA's application by the 15 March deadline by waiting 120 days before filing judicial relief. Accordingly, NCVA has failed to follow the appropriate path to seek judicial relief from an agency's purported failure to respond to an application.

NCVA further argues that it followed proper procedure pursuant to N.C. Gen. Stat. § 150B-23(a)(5). N.C.G.S. § 150B-23(a)(5) (2011) states that

> [a] contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the [OAH] and, except as provided in Article 3A of this Chapter, shall be conducted by [the OAH]. . . . A petition shall be signed by a party or a representative of the party and . . . shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that *the agency . . . [f]ailed to act as required by law or rule.*

Although NCVA is correct that N.C.G.S. § 150B-23(a)(5) sets forth the proper procedure for filing a petition for a contested case proceeding, it must be noted that the statute also clearly requires that in order for a petition for a contested case proceeding to be filed, an agency must "fail[] to act as required by law or rule." We see nothing in N.C.G.S. § 150B-23(a)(5) that permits a petition for a contested case proceeding to be filed where an agency has not acted when the agency is under no statutory direction to act.

As discussed previously under NCVA's first and second arguments on appeal, the SBOE's applicable statutes are directory rather than jurisdictional and thus, contain no specific language regarding the consequences of a failure to act. By not responding to NCVA's application, the SBOE has not "[f]ailed to act as required by law or rule," and thus, N.C.G.S. § 150B-23(a)(5) is not applicable because it requires that an agency "fail[] to act as required by law or rule" before a petition for a contested case proceeding can be filed. We acknowledge with approval the trial court's conclusion that

> [i]naction can constitute "action" sufficient to trigger jurisdiction in OAH pursuant to G.S. § 150B-23, provided there is an obligation to act. Failure to do so is actionable; however, in this case the [SBOE] was not obligated to act further having done so through the previously cited policy stated at the October 2011 meeting.

Therefore, where an agency such as the SBOE has declined to make a decision regarding a petitioner because the agency is not required by statute to do so, a petitioner's only available form of relief must come pursuant to N.C.G.S. § 150B-44 on grounds that the agency's decision is unreasonably delayed for more than 120 days.

V.

[5] NCVA's final argument is that the trial court allowed the amendment of the record in contravention of the law. We disagree.

> Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the Office of Administrative Hearings shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

N.C. Gen. Stat. § 150B-47 (2011).

> A party or person aggrieved who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence

> is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a final decision in the case, the court shall remand the case to the agency that conducted the administrative hearing under Article 3A of this Chapter. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a final decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and final decision. The additional evidence and any affirmation or modification of a final decision shall be made part of the official record.

N.C. Gen. Stat. § 150B-49 (2011).

NCVA argues that the trial court erred in amending the record and allowing evidence because it failed to abide by N.C.G.S. § 150B-49 when it accepted NCVA's application into evidence. NCVA further argues that even if N.C.G.S. § 150B-49 was not violated, § 150B-47 was violated because the trial court did not properly follow the requirements for the admission of new evidence.

The record before this Court indicates that the trial court admitted NCVA's application into evidence because it was relevant to the matter at hand, despite not being admitted into evidence during the administrative hearing. "The court may require or permit subsequent corrections or additions to the record when deemed desirable." *High Rock Lake Partners, LLC, v. N.C. Dep't of Transp.*, ___ N.C. App. ___, ___, 720 S.E.2d 706, 713 (2011), *rev'd on other grounds by High Rock Lake Partners, LLC, v. N.C. Dep't of Transp.*, 366 N.C. 315, 735 S.E.2d 300 (2012) (citing N.C.G.S. § 150B-47 (2009) (amended by Section 24 of Session Law 2011-398 and applying to contested cases commenced on or after 1 January 2012) (holding the superior court did not abuse its discretion under N.C.G.S. § 150B-47 in granting a motion to supplement the record)). The trial court also noted that the application was admitted into evidence in order to preserve a complete record of all relevant evidence for purposes of appeal. This permitting of subsequent additional evidence is within the language of N.C.G.S. § 150B-47, as "[t]he court may require or permit subsequent corrections or additions to the record when deemed desirable."

NCVA further argues that the admission of the application was prejudicial. We disagree, as nothing in the trial court's findings indicate that the admission of NCVA's application was erroneous or prejudicial to NCVA. The trial court, in its findings of fact and conclusions of law, does not discuss NCVA's application at any point, instead focusing on evidence which was presented during the administrative hearing. As such, the admission of NCVA's application was not prejudicial. Accordingly, the trial court did not err in permitting the amendment of the record.

Affirmed.

Judges STEPHENS and DILLON concur.

STAINLESS VALVE CO., PLAINTIFF
v.
SAFEFRESH TECHNOLOGIES, LLC, DEFENDANT

No. COA13-144

Filed 3 December 2013

Agency—contract to purchase equipment—limited liability company—actual authority

The trial court erred in granting summary judgment in favor of defendant Safefresh in an action to collect on an invoice for values manufactured by plaintiff and sold to Mr. Garwood, who held positions with both Safefresh and American Beef Processing LLC. There was sufficient evidence forecasted to create a genuine issue of material fact as to whether Mr. Garwood was acting with actual authority on behalf of Safefresh during 2008 negotiations, which resulted in the production of the valves.

Judge McCULLOUGH concurring.

Appeal by plaintiff from order entered 20 September 2012 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 14 August 2013.

Weaver, Bennett & Bland, P.A., by Trent M. Grissom, for plaintiff-appellant.

Caldwell, Helder, Helms, & Robison, P.A., by Aimee E. Bennington n/k/a Aimee E. Brockington and R. Kenneth Helms, for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff Stainless Valve Company ("plaintiff" or "Stainless Valve") appeals the order granting defendant Safefresh Technologies, LLC's ("defendant's" or "Safefresh's") motion for summary judgment. After careful review, we reverse the trial court's order and remand for proceedings consistent with this opinion.

Background

At some point in the early 2000's, Anthony Garwood ("Mr. Garwood"), the president of Safefresh, began communicating with Dirk Lindenbeck, the president of Stainless Valve, regarding a specific type of valve for a food processing application being developed by defendant. During these initial communications, Mr. Garwood identified himself as president of Safefresh. However, these discussions did not result in a contract because, according to Mr. Garwood, the quoted cost to manufacture the valves was "too expensive."

Between those initial discussions and 2008, there was no communication between Mr. Garwood and Dirk Lindenbeck. In 2008, Mr. Garwood contacted plaintiff regarding the production of two specific types of Stargate-O-Port-Valves (the "valves"). Dirk Lindenbeck had retired at this point, but his son, Axel Lindenbeck, was the president of Stainless Valve. Defendant contends that, although Mr. Garwood remained a manager of Safefresh, during these later communications, he contacted plaintiff only in his capacity as the president and chief executive officer of American Beef Processing, LLC ("ABP") and not on behalf of Safefresh. In an affidavit filed in support of defendant's motion for summary judgment, defendant stated that ABP and Safefresh are two different entities that are not affiliated with each other except that ABP has been granted an exclusive license for meat processing technologies invented and developed by Safefresh. However, he admits to being both a manager of Safefresh and of ABP. In support of its contention, defendant relies on the fact that, in all the communications included in the record from the 2008 negotiations, Mr. Garwood either identified himself individually or as the president and CEO of ABP.

In the midst of numerous discussions regarding the type of valves Mr. Garwood wanted manufactured, Stainless Valve provided price

quotations for each type of valve. All of Stainless Valve's price quotes were addressed to Safefresh. At no time during these communications did Mr. Garwood inform Stainless Valve that ABP, and not Safefresh, was the principal on whose behalf he was working. On 25 June 2008, Mr. Garwood, as an agent, and plaintiff entered into an agreement for the production of both types of valves via email. On the email accepting Stainless Valve's offer to manufacture the valves, Mr. Garwood does not identify himself as the agent of either Safefresh or ABP; instead, he simply signs it "Tony." At some point between 25 and 30 June 2008, Stainless Valve received purchase orders from Mr. Garwood to manufacture the valves. However, these purchase orders are not included in the record on appeal but are only referenced in a 30 June 2008 email from Stainless Valve to Mr. Garwood. Plaintiff required a total down payment of $48,400, which Mr. Garwood wired from ABP's account. On 18 November 2008, the valves were then shipped to Mr. Garwood; the packing slip indicates that they were shipped to Mr. Garwood at Safefresh in Washington state. After delivery, plaintiff issued a final invoice for payment and sent it to Mr. Garwood at Safefresh. On 19 November 2008, Mr. Garwood contacted Nora Lindenbeck, vice president and chief financial officer of Stainless Valve, via email and requested she reissue these invoices to ABP. He also informed her that the purchase order and deposits were both issued by ABP. These final invoices were reissued to Mr. Garwood at ABP. Dirk Lindenbeck testified during his deposition that it was customary for a customer to send an invoice to a third party or bank for payment. Plaintiff never received any payment on the final invoices.

Plaintiff filed a complaint against Safefresh based on claims of breach of contract and unjust enrichment. On 19 April 2010, defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted and lack of personal jurisdiction.[1] On 24 January 2011, defendant filed another motion to dismiss pursuant to Rule 12(b)(7). Specifically, defendant contended that plaintiff improperly brought a cause of action against defendant when the real party in interest was ABP. The matters came on for hearing on 7 February 2011. The trial court denied both motions to dismiss.

After discovery, defendant moved for summary judgment, arguing that no issues of material fact existed as to whether Safefresh

1. In this motion to dismiss, defendant also alleged that plaintiff's complaint should be dismissed for failing to name the real party in interest pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. However, defendant later withdrew the Rule 17 motion to dismiss.

and Stainless Valve entered into a contract and that it was entitled to judgment as a matter of law. The matter came on for hearing on 17 September 2012. The trial court concluded that plaintiff failed to forecast any evidence that Safefresh authorized any acts done by its agent Mr. Garwood or that, after the acts were completed, Safefresh ratified them. Accordingly, the trial court granted defendant's motion for summary judgment and dismissed the complaint with prejudice. Plaintiff appealed.

Arguments

Plaintiff's sole argument on appeal is that the trial court erred in granting summary judgment because there is a genuine issue of material fact as to whether Safefresh is liable to plaintiff for the balance due under the contract based on the acts by Mr. Garwood. Specifically, plaintiff contends that it has "presented testimony and evidence that demonstrate that it was more than reasonable for it to believe it was working with [Safefresh] in the production of the requested valves, and not [ABP][,]" citing the numerous correspondence it sent to Mr. Garwood in his capacity as the president of Safefresh including the quotes, order confirmations, and initial final invoices. Consequently, plaintiff alleges that this issue should have been decided by a jury.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (quoting N.C. Gen. Stat. § 1A–1, Rule 56(c) (2007)). The burden is on the moving party to show the lack of any "triable issue," and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008).

In order to hold an alleged principal liable to a third party for the acts of his agent,

> [t]he plaintiff has the burden of proving that a particular person was at the time acting as a servant or agent of the defendant. An agent's authority to bind his principal cannot

> be shown by the agent's acts or declarations. This can be shown only by proof that the principal authorized the acts to be done or that, after they were done, he ratified them. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract.

Simmons v. Morton, 1 N.C. App. 308, 310, 161 S.E.2d 222, 223 (1968). Accordingly, plaintiff has the burden of showing that Mr. Garwood was acting as an agent for Safefresh at the time the parties entered into negotiations in 2008. This Court has stated that:

> There are three situations in which a principal is liable upon a contract duly made by its agents: when the agent acts within the scope of his or her actual authority; when the agent acts within the scope of his or her apparent authority, and the third person is without notice that the agent is exceeding actual authority; and when a contract, although unauthorized, has been ratified.

Wachovia Bank of N.C., N.A. v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 170, 450 S.E.2d 527, 531 (1994). Thus, if Stainless Valve forecasted any evidence to create a genuine issue of material fact whether Mr. Garwood was acting within the scope of his actual authority, that he was acting within the scope of his apparent authority, or that Safefresh ratified the contract, the trial court would have been precluded from entering summary judgment in favor of Safefresh.

"Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal." *Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000). It "may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question." *Id.*

Plaintiff argues that Mr. Garwood had actual authority to bind defendant because it reasonably believed that Mr. Garwood was acting on behalf of Safefresh. In support of its contention, plaintiff relies on the fact that it directed almost all of its correspondence, including the purchase order and quotes, to Mr. Garwood at Safefresh. In contrast, defendant argues that Mr. Garwood did not have actual authority because he was acting on behalf of ABP when he re-established communications with Safefresh in 2008.

Based on the evidence in the record, we conclude that there exists a genuine issue of material fact as to whether Mr. Garwood, as the manager of Safefresh, an LLC, was acting within the scope of his actual authority when he contracted with Stainless Valve.

> The [LLC] Act contains numerous "default" provisions or rules that will govern an LLC only in the absence of an explicitly different arrangement in the LLC's articles of organization or written operating agreement. Because these default provisions can be changed in virtually any way the parties wish, an LLC is primarily a creature of contract.

Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 34.01 (7th ed. 2012). Pursuant to N.C. Gen. Stat. § 57C-3-23,

> [e]very manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company of which he is a manager, binds the limited liability company, unless the manager so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the manager has no authority.

Consequently, by default, as manager of Safefresh, Mr. Garwood had authority to bind Safefresh to Stainless Valve unless the articles of organization or operating manual provided otherwise.

Here, the record contains evidence that Mr. Garwood did have actual authority given that he had initially contacted Stainless Valve previously in his capacity as the president of Safefresh for the purpose of entering into a contract with it to manufacture certain valves. Moreover, while it appears that in every written communication included in the record on appeal in which Mr. Garwood identified himself as acting on behalf of any entity, he did so only as the president and CEO of ABP, that fact alone is not controlling. In the 25 June 2008 acceptance email in which Mr. Garwood accepted Stainless Valve's offer to manufacture the valves, he simply signed the email as "Tony" without indicating whether he was doing so on behalf of Safefresh or ABP. Viewing this evidence in a light most favorable to Stainless Valve, Mr. Garwood's silence on that email in conjunction with the fact that he had originally contacted Stainless

Valve in his capacity as the president of Safefresh creates a genuine issue of material fact whether he acted within the scope of his actual authority an as an agent of Safefresh in 2008. In addition, the fact that Mr. Garwood requested Stainless Valve reissue the final invoices to ABP is not conclusive. At no time prior to the goods being shipped did Mr. Garwood contact Stainless Valve to request they reissue any other correspondence to ABP. In fact, until the 19 November email, months after the parties began negotiating, Mr. Garwood never informed Stainless Valve that ABP was the client despite numerous quotes and other correspondence Stainless Valve sent to him addressed to Safefresh. In other words, it is undeniable that Mr. Garwood remained silent for months even though it was apparent that Stainless Valve believed that Safefresh was the client, not ABP.

In totality, although the record is not devoid of evidence suggesting that Mr. Garwood was acting in his capacity as the manager of ABP, there was sufficient evidence forecasted to create a genuine issue of material fact as to whether Mr. Garwood was acting with actual authority on behalf of Safefresh during the 2008 negotiations. Thus, the trial court erred in granting summary judgment in favor of Safefresh. Because there was a genuine issue of material fact whether Mr. Garwood had actual authority, it is not necessary to address the other situations in which a principal can be bound to a third party for the acts of its agent.

Conclusion

Because Stainless Valve produced sufficient evidence that Mr. Garwood had actual authority from Safefresh during the 2008 negotiations between the parties that resulted in a contract, we reverse the trial court's order granting summary judgment in favor of defendant.

REVERSED AND REMANDED.

McCULLOUGH, Judge, concurring.

I concur in the majority opinion but write separately as I believe some basic principles of contract law also dictate that this case is one that should not be decided on summary judgment. In their treatise on North Carolina Contract Law, Hutson & Miskimon state:

> Acceptance by conduct is a well-recognized rule in North Carolina, and the formation of implied-in-fact contracts has already been discussed. Although there are many decisions implying a promise to pay where one party

silently – but knowingly and voluntarily – accepts services rendered by another with the expectation of payment, and the recipient enjoys the benefit of those services, these decisions allow a recovery based on quantum merit or a contract implied in law. The more difficult involves the issue of when does one party's silence and inaction give rise to a valid contract that is considered by the product of actual agreement? As a general rule, mere silence by an offeree is not sufficient to manifest assent to an offer, and in fact at least one court has emphatically declared that "[s]ilence and inaction do not amount to an acceptance of an offer." However, that is an overstatement because, under some circumstances, a party may be required to speak when to remain silent would justifiably permit an offeror to infer that silence is a manifestation of assent. Whether an offeree's silence manifests assent to an offer is a question of fact that may depend upon industry custom to determine when an offer is normally accepted or rejected.

In *Anderson Chevrolet/Olds, Inc. v. Higgins* the court of appeals essentially – albeit without acknowledgment – approved of the *Restatement of Contracts* approach to acceptance occurring either by the offeree's silence or exercise of dominion over the offeror's property. Under this approach, silence and inaction in the face of an offer communicated to the intended recipient will operate as an acceptance:

> (1)(a) "Where the offeree with reasonable opportunity to reject offered goods or services takes the benefit of them under circumstance which would indicate to a reasonable man that they were offered with the expectation of compensation . . . .
>
> (c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction was intended by the offeree as a manifestation of assent, and the offeror does so understand.
>
> (2) Where the offeree [exercises dominion over things which are] offered to him, such [exercise of dominion] in the absence of other circumstances is an acceptance.

> The *Anderson* court's approval of this language appears consistent with North Carolina law and the majority of other jurisdictions.

John N Hutson, Jr. & Scott A. Miskimon, North Carolina Contract Law 82-84 (LexisNexis 2001).

The acceptance by silence or conduct principles are well-settled, although not encountered often. In the case of *The T.C. May Company v. The Menzies Shoe Company*, 184 N.C. 150; 113 S.E. 593 (1922), our Supreme Court stated:

> The definition of a contract as an agreement to which the law attaches obligation implies, among other essential elements, the mutual assent of the parties, which generally results from an offer on the one side and acceptance on the other. The offer, when communicated is a mere proposal to enter into the agreement, and must be accepted before it can become a binding promise; but when it is communicated, and shows an intent to assume liability, and is understood and accepted by the party to whom it is made, it becomes at once equally binding upon the promisor and the promise. 1 Page on Contracts (2 ed.), sed. 74 *et seq.*; 1 Elliott on Contracts, sec. 27 *et seq*. Such acceptance may be manifested by words or conduct showing that the offeree means to accept; for, while it is generally held that the intention to accept is a necessary element of acceptance, the question of intent may usually be resolved by what the offeree did or said. As a general rule, his mere silence will not amount to assent; but if he declines to speak when speech is admonished at the peril of an inference from silence, his silence may justify an inference that he admits the truth of the circumstance relied on or asserted.

Id. at 152, 113 S.E. at 593 (citations omitted).

In the case *sub judice* I believe that Garwood had this duty to speak and his failure to come forward when he sent the acceptance email where he signed as "Tony" makes this a classic case where a jury should decide for which of his LLC's did he act when that email was sent to Plaintiff.

Therefore, I believe the majority opinion has correctly decided that summary judgment is inappropriate. I concur separately because I believe the case law and the summary of contract law set forth above further our understanding of why this is so.

STATE OF NORTH CAROLINA
v.
GLENN EDWARD BENTERS, DEFENDANT

No. COA13-305

Filed 3 December 2013

Search and Seizure—motion to suppress drugs—affidavit supporting search warrant not supported by probable cause

The trial court did not err in a drug possession case by suppressing the evidence against defendant. The trial court's findings of fact, both challenged and unchallenged, were supported by competent evidence. Further, the trial court's conclusions of law that the affidavit supporting the search warrant was not supported by probable cause was based on competent findings of fact.

Judge HUNTER, Robert C., dissenting in separate opinion.

Appeal by the State from order entered 21 September 2012 by Judge Carl R. Fox in Vance County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellee.

BRYANT, Judge.

A motion to suppress evidence should be granted where the information presented in the search warrant has not been independently verified or corroborated by the requesting officer. Where a trial court makes competent findings of fact and conclusions of law in granting a motion to suppress evidence, we will not disturb those findings on appeal.

On 29 September 2011, Detective Justin Hastings, a narcotics detective with the Franklin County Sheriff's Office, contacted Lieutenant Joseph Ferguson of the Vance County Sheriff's Office regarding a drug investigation that began in Franklin County. A confidential informant had informed Det. Hastings that defendant Glenn Edward Benters ("defendant") was running an indoor marijuana growing operation on

defendant's property. The informant further stated that defendant "also maintained a residence in Myrtle Beach, South Carolina." When shown a driver's license photograph of defendant by Det. Hastings, the informant positively identified the person in the photograph as defendant.

Det. Hastings contacted Lt. Ferguson and Special Agent Lynn Gay of the State Bureau of Investigation and relayed the information learned from the informant. Det. Hastings also subpoenaed information on 29 September 2011 regarding power usage for defendant's property from Progress Energy. The report from Progress Energy provided the kilowatt usage and current subscriber information for the property. Det. Hastings testified that the Progress Energy report was "indicative of [a] marijuana grow operation[] base[d] on [the] extreme high kilowatt usage" at defendant's property because "the lows and the highs [were] not consistent of that with any type of weather patterns."

Based on the information from Progress Energy regarding defendant's property's energy use, Det. Hastings travelled to Vance County to meet with Lt. Ferguson regarding the investigation. The officers were acting in accordance with a mutual aid agreement between the Franklin and Vance County Sheriffs' Offices. It was determined that a surveillance of defendant's property should be conducted from an open field near the residence.

Upon arriving at defendant's property, Lt. Ferguson and the other accompanying officers observed a locked and posted gate across the drive leading to defendant's residence. Lt. Ferguson testified that he had been to defendant's residence for a prior incident and that the gate had been unlocked and open at that time.

Lt. Ferguson and the officers decided to use a "well-worn path for foot traffic" on the adjoining property to reach an open field from which defendant's property could be observed. The path led the officers to an open field on the adjoining lot where they could see the rear of defendant's residence, a building adjacent to the residence, a greenhouse, and other outbuildings. The officers observed a red pick-up truck parked near a shed on the residence; Lt. Ferguson testified that he had never observed defendant driving that particular vehicle. Music was also heard emanating from the property. Lt. Ferguson used binoculars to observe "old potting soil bags, cups, trays, fertilizer bags, pump sprayers, [and] a greenhouse, but no fields were in cultivation." Lt. Ferguson testified that the greenhouse appeared to be unused and was in a general state of disrepair. Lt. Ferguson noted that defendant's property did not contain any evidence of a garden plot, potted plants, or

fields in cultivation. Det. Hastings testified that, based on his experience with prior growing operations, the gardening supplies observed were used by marijuana growers.

The officers then returned to the entrance of defendant's property and entered the property through a farm gate at the driveway entrance. Lt. Ferguson decided to speak with defendant through a "knock and talk" approach. Lt. Ferguson knocked on the rear side door of defendant's premises, but received no answer. The officers then approached a white outbuilding from which music was emanating. While knocking on the door of the building, officers smelled a strong odor of growing marijuana. The building was padlocked and no one responded to the officers' knocks. Officers also observed "thick mil plastic," which is used to shield grow lighting from observation, around the door of the building.

Upon exiting the property, several officers were left at the entrance of the property to secure the premises while Lt. Ferguson and other officers went to the Sheriff's Office to obtain a search warrant for the property. In the Search Warrant Affidavit, Lt. Ferguson stated that:

> On September 29, 2011 Lt. Ferguson, hereby known as your affiant, received information from Detective J. Hastings of the Franklin County Sheriff's Office Narcotics Division about a residence in Vance County that is currently being used as an indoor marijuana growing operation. Detective Hastings has extensive training and experience with indoor marijuana growing investigations on the state and federal level. Within the past week Hastings met with a confidential and reliable source of information that told him an indoor marijuana growing operation was located at 527 Currin Road in Henderson, North Carolina. The informant said that the growing operation was housed in the main house and other buildings on the property. The informant also knew that the owner of the property was a white male by the name of Glenn Benters. Benters is not currently living at the residence, however [he] is using it to house an indoor marijuana growing operation. Benters and the Currin Road property is also known by your affiant from a criminal case involving a stolen flatbed trailer with a load of wood that was taken from Burlington, North Carolina. Detective Hastings obtained a subpoena for current subscriber information. [sic] Kilowatt usage, account notes, and billing information for the past twenty-four months in association with the

527 Currin Road Henderson NC property from [the] Progress Energy Legal Department. Information provided in said subpoena indicated that Glenn Benters is the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage.

Also on 9-29-2011 Detective Hastings and your affiant along with narcotics detectives from the Vance and Franklin County Sheriffs' Office as well as special agents with the North Carolina S.B.I. traveled to the residence at 527 Currin Road Henderson NC and observed from outside of the curtilage multiple items in plain view that were indicative of an indoor marijuana growing operation. The items mentioned above are as followed; [sic] potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Detectives did not observe any gardens or potted plants located around the residence. Detectives observed a red Dodge full size pickup truck parked by a building located on the curtilage of the residence and heard music coming from the area of the residence.

After observing the above listed circumstances, detectives attempted to conduct a knock and talk interview with anyone present at the residence. After knocking on the back door, which your affiant knows Benters commonly uses based on previous encounters, your affiant waited a few minutes for someone to come to the door. When no one came to the door, your affiant walked to a building behind the residence that music was coming from in an attempt to find someone. Upon reaching the rear door of the building, your affiant instantly noticed the strong odor of marijuana emanating from the building. Your affiant walked over to a set of double doors on the other side of the building and observed two locked double doors that had been covered from the inside of the building with thick mil black plastic commonly used in marijuana grows to hide light emanated by halogen light[s] typically used in indoor marijuana growing operations. Thick mil plastic was also present on windows inside the residence as well.

A search warrant was obtained and executed on 29 September 2011, resulting in the seizure of 91.25 pounds of marijuana, a variety of supplies used for growing marijuana, drug packaging items and paraphernalia, and multiple firearms from the property.

On 30 September 2011, defendant was charged with manufacturing marijuana, trafficking marijuana by manufacture, trafficking marijuana by possession, possession with intent to sell or deliver fifty-five marijuana plants, maintaining a residence for keeping and selling a controlled substance, maintaining a building for keeping and selling a controlled substance, and possession of drug paraphernalia. On 28 November 2011, defendant was indicted by the Vance County Grand Jury on all charges. Defendant filed a pretrial motion to suppress the evidence discovered during a search of his property pursuant to a search warrant. The matter was heard 11 June 2012. The trial court filed a written order on 24 September 2012 granting the motion.

The State appeals.

On appeal, the State argues that the trial court erred in suppressing the evidence against defendant. We disagree.

> In evaluating the denial of a motion to suppress, the reviewing court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh [the evidence,] and resolve any conflicts in the evidence . . . . Conclusions of law are reviewed de novo and are fully reviewable on appeal.

State v. Williams, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and internal quotations omitted).

The State concedes that the "knock and talk" entry onto defendant's property was an illegal search, but argues that the search warrant remained valid because it was supported by probable cause through the informant and the utility bill. As such, we must consider whether the warrant, based on the statements of the informant, the utility bill,

and the officers' " open fields" observations of defendant's property, was sufficient to establish probable cause.

"In determining . . . whether probable cause exists for the issuance of a search warrant, our Supreme Court has provided that the 'totality of the circumstances' test . . . is to be applied." *State v. Witherspoon*, 110 N.C. App. 413, 417, 429 S.E.2d 783, 785 (1993) (citations omitted). Under the "totality of the circumstances" test,

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257—58 (1984) (citation omitted). "Under our statutes a magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record [pursuant to] G.S. 15A-244; G.S. 15A-245(a)." *State v. Teasley*, 82 N.C. App. 150, 156—57, 346 S.E.2d 227, 231 (1986) (citation omitted).

Here, the State contests the trial court's Finding of Fact 2 and Conclusion of Law 1. In its Finding of Fact 2, the trial court found that "[p]rior to September 29, 2011, Detective Hastings received information from a confidential informant that the Defendant, Glenn Benters, was growing marijuana on his farm on Currin Road in Vance County. This confidential informant had not previously provided information to Detective Hastings that had later proven to be reliable." In its Conclusion of Law 1, the trial court stated that

> [i]nformation provided by a confidential informant who has not proven to be reliable by providing information which later proved to be truthful or resulted in arrests and convictions in the past, together with the power usage records for the Defendant's residence from Progress Energy, lacked sufficient "indicia of reliability" to establish probable cause for the issuance of a search warrant for the Defendant's property.

The State contends that the trial court's Finding of Fact 2 and Conclusion of Law 1 were erroneous because the trial court found that the informant "has not proven to be reliable by providing information which later proved to be truthful or resulted in arrests and convictions in the past . . . ." Det. Hastings testified at the suppression hearing that the informant was "used multiple times in the past, ha[d] always provided reliable information, who ha[d] [sic] conducted numerous controlled purchases, had been able to identify both marijuana, cocaine hydrochloride, cocaine base, on site and interact with those persons selling and using illegal substances." However, this Court has held that statements made after the issuance of a warrant regarding the reliability of the informant cannot be considered in determining whether the warrant was properly based on probable cause. *See State v. Newcomb*, 84 N.C. App. 92, 351 S.E.2d 565 (1987) (holding that in determining the validity of a warrant, only information presented at the time the warrant was issued can be considered, despite the requesting officer later testifying at a suppression hearing that he had "unintentionally and inadvertently" failed to provide information regarding the reliability of the informant in the warrant affidavit); *see also State v. Styles*, 116 N.C. App. 479, 483, 448 S.E.2d 385, 387 (1994) ("[P]ursuant to North Carolina General Statutes § 15A-245 . . . information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official."). As such, the testimony of Det. Hastings at the suppression hearing cannot be considered in evaluating whether the warrant was based on probable cause.

The trial court, in reviewing the sufficiency of the search warrant, was limited to the information presented to the magistrate at the time the warrant was requested. "The police officer making the affidavit [to accompany the search warrant] may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971) (citation omitted). However,

> [p]robable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely

> as a rubber stamp for the police. The issuing officer must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. . . .

State v. Edwards, 286 N.C. 162, 167, 209 S.E.2d 758, 761—62 (1974) (citations and internal quotations omitted).

Here, Lt. Ferguson stated in the affidavit that Det. Hastings had met with a confidential informant who said that defendant was growing marijuana on his property. Lt. Ferguson described the informant as a "confidential and reliable source of information," but did not state on what prior occasions the informant's information had proved reliable, whether informant had personally witnessed defendant's grow operation, or that informant had purchased marijuana from defendant. Although the threshold for establishing an informant's reliability is low, that threshold must be met. *See State v. McKoy*, 16 N.C. App. 349, 351—52, 191 S.E.2d 897, 899 (1972) (holding that an "affiant's statement that [a] confidential informant has proven reliable and credible *in the past*" is sufficient to sustain a warrant through probable cause); *see also State v. Beam*, 325 N.C. 217, 381 S.E.2d 327 (1989) (discussing how a defendant's prior history of involvement with drugs and evidence from a controlled purchase involving defendant allowed for probable cause); *Arrington*, 311 N.C. 633, 319 S.E.2d 254 (affidavit allowed for probable cause where the officer personally knew one informant, a second informant acknowledged buying drugs from defendant, and both informants had previously provided information which had led to arrests); *State v. McLeod*, 36 N.C. App. 469, 244 S.E.2d 716 (1978) (information in the affidavit regarding an informant's controlled purchase of drugs from defendant was sufficient for probable cause); *Edwards*, 286 N.C. 162, 209 S.E.2d 758 (discussing how proof of an informant's firsthand knowledge of defendant's drug dealing, such as purchasing drugs from defendant or seeing defendant producing and selling drugs, is needed to show the informant's reliability). As the affidavit failed to provide sufficient information showing that the confidential informant was reliable, the trial court's findings of fact support its conclusions of law that the evidence was insufficient to establish probable cause.

The State also contends that the presence of gardening supplies outside of defendant's buildings and the utility report from Progress Energy provided sufficient probable cause for execution of a warrant. Citing *State v. O'Kelly*, 98 N.C. App. 265, 390 S.E.2d 717 (1990), the State argues that an informant's tip, considered in conjunction with an officer's

observations of suspicious equipment outside of defendant's home, permits a finding of probable cause for issuance of a warrant.

In *O'Kelly*, officers received information from the defendant's neighbor and an informant that the defendant was engaged in the manufacture and sale of methamphetamine. *Id.* at 267, 390 S.E.2d at 718. Officers obtained the defendant's criminal records which reflected prior convictions for methamphetamine manufacture, sale, and distribution. *Id.* Outdoor "open fields" observations of the defendant's property were also conducted during which officers noticed a strong chemical odor emanating from the property and saw equipment suspiciously placed around the residence. *Id.* at 267—68, 390 S.E.2d at 718. Our Court held that the trial court properly denied the defendant's motion to suppress evidence gathered under the search warrant, finding that under a "totality of the circumstances" test, the search warrant affidavit presented sufficiently corroborated and reliable information to establish probable cause. *Id.* at 270—71, 390 S.E.2d at 720—21.

O'Kelly is relevant to our present matter, as the search warrant affidavit stated that the officers had observed gardening supplies and a greenhouse in disrepair on defendant's property during an "open fields" observation of defendant's property. However, under *O'Kelly*'s "totality of the circumstances" test such observations of gardening supplies are insufficient by themselves to permit the issuance of a search warrant. Lt. Ferguson stated in the search warrant affidavit that he saw gardening supplies which were indicative of an indoor marijuana grow operation during his open fields observation of defendant's property. However, as defendant lived in a farming community and had a greenhouse, even though in disrepair, on his property, there is insufficient evidence simply based upon viewing used gardening supplies such as pots and bags of soil to conclude that a marijuana growing operation existed there. Unlike in *O'Kelly*, where officers noticed a strong chemical odor emanating from the property and saw oddly placed equipment next to the house during their open fields observation, here officers noticed a marijuana smell and saw thick mil plastic covering the building doors from the inside only after they had entered the property. As previously acknowledged by the State, this entry was illegal and thus the marijuana smell and plastic coverings could not be properly considered in seeking a search warrant.

Lt. Ferguson also appears to have relied upon Det. Hastings' review of the utility report from Progress Energy for the search warrant as there is no evidence to indicate that the magistrate was presented with a copy of the utility report or that Lt. Ferguson himself reviewed the utility report. In the suppression hearing, Det. Hastings testified that

the allegation that the utility report indicated an indoor marijuana growing operation was based solely on his own belief. Det. Hastings also acknowledged that the utility report was not compared to other utility reports for neighboring residences to show a discrepancy in defendant's power usage and an expert opinion was not provided as to how likely it was that the utility report indicated the presence of an indoor marijuana growing operation on defendant's property. As already noted, to establish probable cause for a search warrant, the requesting officer must demonstrate that the information contained in the affidavit in support of the search warrant is sufficiently reliable and not conclusory. The trial court, in its Conclusion of Law 5, determined that

> [i]t was only after illegally entering onto the Defendant's property and making observations while illegally on the premises that "thick mil plastic" was [observed] around some of the doors of the white outbuilding and there was a "strong smell of growing marijuana" emanating from the same outbuilding that Lieutenant Ferguson decided to seek to obtain a search warrant. *Clearly, Lieutenant Ferguson did not feel he had sufficient evidence gathered through the officers' prior personal observations to provide the requisite "indicia of reliability" to corroborate the confidential informant and the power usage records from Progress Energy to establish probable cause for the issuance of a lawful search warrant for the Defendant's premises* because he included their observations after illegally entering onto the Defendant's property in his sworn "Search Warrant Affidavit" for the search warrant which was submitted to and later issued by the magistrate on September 29, 2011 for a search of the Defendant's property in this case.

Based on the record before us, the trial court's findings of fact, both challenged and unchallenged, are supported by competent evidence. Likewise, the trial court's conclusions of law that the affidavit supporting the search warrant was not supported by probable cause is based on competent findings of fact.

We affirm the trial court's order granting defendant's motion to suppress.

Affirmed.

Judge STEELMAN concurs.

HUNTER, Robert C., Judge, dissenting.

The majority concludes that the trial court was correct in granting defendant's motion to suppress evidence obtained from the search because the search warrant affidavit lacked sufficient "indicia of reliability" to establish probable cause. I agree that the affidavit did not contain a sufficient factual basis to establish probable cause under the confidential informant standard because the affiant did not detail why the source was reliable. However, I would find that under the anonymous tip standard, the affidavit contained detailed information provided by the source which was independently corroborated by experienced officers and therefore established probable cause for the search warrant's issuance. For the following reasons, I respectfully dissent.

This Court has traditionally used two standards to assess whether information provided by a third party may establish probable cause to support the issuance of a search warrant: the confidential informant standard and the anonymous tip standard. Under the confidential informant standard, a search warrant affidavit that states the affiant's belief that the confidential informant is reliable and contains some factual circumstance on which that belief is based is sufficient on its own to establish probable cause. *State v. Campbell*, 282 N.C. 125, 130-31, 191 S.E.2d 752, 756 (1972). However, "[p]robable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based." *Id.* (internal quotation marks omitted). Under the anonymous tip standard, sufficient "indicia of reliability" to establish probable cause can be found if the source provided detailed information and that information was independently verified by the police. *State v. Lemonds*, 160 N.C. App. 172, 179-80, 584 S.E.2d 841, 846 (2003); *see also State v. Trapp*, 110 N.C. App. 584, 589–90, 430 S.E.2d 484, 488 (1993) (anonymous source's tip may provide probable cause if the details can be independently verified). This Court has adopted a "totality of the circumstances" approach in determining whether probable cause exists in support of the issuance of a search warrant. *State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007).

I agree with the majority that the trial court correctly concluded that Lt. Ferguson's description of the source's reliability was merely conclusory, and therefore was insufficient to establish probable cause under the confidential informant standard. However, I believe the search warrant affidavit contained sufficient "indicia of reliability" for the

magistrate to find there was probable cause to issue the warrant under the anonymous tip standard.

In *Lemonds*, this Court applied the anonymous tip standard and held that there was probable cause where a source alleged that the defendant was growing marijuana, and evidence gathered by the police independently corroborated the tip. *Lemonds*, 160 N.C. App. at 179-80, 584 S.E.2d at 846. Prior to seeking a search warrant, the police discovered power bills for the defendant's residence that revealed electricity consumption patterns consistent with indoor marijuana-growing operations. *Id.* They also recovered equipment commonly used to grow marijuana from the defendant's garbage, saw the defendant put this equipment in the garbage, and found marijuana residue on the equipment. *Id.* The *Lemonds* Court concluded, "[b]ased on the totality of the circumstances . . . the information before the magistrate . . . provided a 'substantial basis' for finding probable cause that defendant was maintaining an indoor marijuana-growing operation." *Lemonds*, 160 N.C. App. at 180, 584 S.E.2d at 846.

I consider the facts as found by the trial court here analogous to those in *Lemonds*, and as such I believe there was sufficient evidence to establish probable cause for issuance of the search warrant under the anonymous tip standard. Here, the court made the following findings of fact. Det. Hastings and Lt. Ferguson began an investigation based on a source's tip that defendant was growing marijuana in an indoor operation on his farm. Det. Hastings had been employed by the Franklin County Sheriff's Department for approximately seven years at this time. Based on the source's information, Det. Hastings subpoenaed the power records for defendant's property. The records revealed excessive kilowatt usage, which Det. Hastings concluded was indicative of a marijuana-growing operation based on his extensive experience as a narcotics officer. The officers then went to a lot adjacent to defendant's property to conduct surveillance based on the source's tip and the power records. Before committing the illegal "knock and talk" entry onto defendant's property, the officers identified a plethora of physical evidence indicating a growing operation, including potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and pump sprayers. No fields were in cultivation at the time the officers identified these materials, and the greenhouse on the property appeared to be in disrepair based on tears in the exterior and knee-deep weeds surrounding it.

All of this information found as fact by the trial court was included in the affidavit before the magistrate. The affidavit also contained the statement by Lt. Ferguson that, based on his experience and training as

a narcotics officer, the physical evidence identified on defendant's property was indicative of an indoor marijuana-growing operation. I would find that the source's tip that defendant was growing marijuana in an indoor facility on his farm was independently verified by experienced officers through their analysis of defendant's power records and observation of physical evidence indicative of a marijuana-growing operation that necessarily must have been occurring indoors, as the source indicated. As such, based on the anonymous tip standard and the precedent set in *Lemonds*, I would find that there was a substantial basis to establish probable cause for the issuance of the warrant here.

I conclude that the combination of the officers' years of training, knowledge, and experience regarding narcotic and drug enforcement, as well as the independently verified utility records and personal observations of cultivation equipment at defendant's farm, sufficiently corroborated the source's tip and established probable cause to believe that there would be drugs and related paraphernalia at defendant's address under an anonymous tip standard. *See State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (holding that an officer may rely upon information received through a source "so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge") (citation omitted), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002); *see also Edwards*, 185 N.C. App. at 705, 649 S.E.2d at 650 (holding that the affiant officer's extensive experience weighed in favor of finding the magistrate had a substantial basis to conclude probable cause existed to issue a search warrant). Thus, under the totality of the circumstances, the search warrant affidavit provided to the magistrate set forth sufficient facts for a reasonably discreet and prudent person to rely upon in determining that probable cause existed in support of the issuance of the search warrant. *See Edwards*, 185 N.C. App. at 704, 649 S.E.2d at 649 ("To establish probable cause, an affidavit for a search warrant must set forth such facts that a reasonably discreet and prudent person would rely upon[.]") (citation and internal quotation marks omitted). Accordingly, I would find the trial court erred in granting defendant's motion to suppress evidence, and I would reverse the trial court's order.

STATE OF NORTH CAROLINA
v.
JOHN OMAR LALINDE, DEFENDANT

No. COA13-115

Filed 3 December 2013

1. Jurisdiction—special instruction denied—no factual dispute

The trial court properly declined to give the jury a special instruction regarding jurisdiction in a prosecution for child abduction where the evidence showed, and defendant did not dispute, that the child was either abducted or that defendant's final act of inducing her to leave her parents occurred in North Carolina. A special jury instruction on jurisdiction is only proper when a defendant challenges the factual basis for jurisdiction.

2. Felonious Restraint—restraint by fraud—evidence sufficient

The trial court properly denied defendant's motion to dismiss the charge of felonious restraint arising from the abduction of a child where the State's evidence was sufficient to show that defendant restrained the victim by defrauding her into entering his car and driving to Florida with him. While defendant argued that the child was not deceived because she knew he wanted to have sex with her, this argument viewed the evidence in the light most favorable to defendant, contrary to the well-established standard of review for motions to dismiss.

Appeal by defendant from judgments entered 1 October 2012 by Judge W. Douglas Parsons in Pender County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General V. Lori Fuller, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

GEER, Judge.

Defendant John Omar Lalinde appeals from his convictions of child abduction and felonious restraint. On appeal, defendant primarily argues that the trial court erred in denying his request for a special

instruction regarding whether North Carolina had jurisdiction over the child abduction charge. Because defendant does not dispute the facts relevant to the jurisdiction question and those facts establish that one element of the crime occurred in North Carolina, there was no issue for the jury to resolve, and the trial court properly declined to instruct the jury regarding jurisdiction.

With respect to the charge of felonious restraint, defendant argues that the State failed to prove that he restrained the alleged victim. We hold, however, that the State's evidence was sufficient to show that defendant restrained the victim by defrauding her into entering his car and driving to Florida with him. The trial court, therefore, properly denied defendant's motion to dismiss the charge of felonious restraint.

Facts

The State's evidence tends to show the following facts. When "Anna"[1] was nine years old, she lived across the street from defendant in Orlando, Florida. She and her neighbor Jessica got to know defendant when they played with his dog in the yard. Anna began regularly talking to defendant on the phone when she was 10 years old after her family had moved to a different house a few miles away and defendant gave her his phone number. She would also see defendant when she went to Jessica's house. When Anna was 11 or 12 years old, defendant persuaded Anna to sneak out of her house in the middle of the night so that he could give her a cell phone that she could use to call him. Her parents confiscated the phone a couple days later, but they did not know that the phone came from defendant, and Anna continued calling him. Anna's parents did not know about the phone calls or that Anna would see defendant when she went to Jessica's house.

In 2009, when Anna was 13 years old, she moved to North Carolina. She continued to telephone defendant, and in August 2010, defendant sent her a teddy bear, a two-piece bathing suit, and a cell phone on defendant's cell phone plan that had a camera feature. At defendant's request, Anna sent defendant photos of herself in the bathing suit and photos of herself naked. During their conversations, defendant and Anna told each other they loved one another. Defendant told Anna that if she left North Carolina, she could stay with him in Orlando and complete online classes. He also told her that he wanted to have sex with her.

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

Shortly after moving to North Carolina, Anna confided to defendant that while living in Orlando, her brother Anthony had raped and sexually molested her. Anthony initially did not move with the family to North Carolina, but instead decided to remain in Florida with his aunt.

In late September 2010, Anna's parents told her that Anthony, who was 19 years old at the time, was on a flight from Florida to North Carolina and was going to move back in with the family. At that point, Anna told her parents about the sexual abuse for the first time. Nevertheless, her parents still allowed Anthony to move back into the house.

At 3:00 in the morning on 2 October 2010, Anthony tried to enter Anna's locked bedroom. Anna escaped through her bedroom window and spent the night in the playhouse in the back yard. She called defendant to tell him what had happened, and he suggested that she come with him to Florida and stay at his house. Anna agreed to leave with defendant, and he drove from Florida to North Carolina to pick her up. Defendant arranged to meet Anna at the end of her street so that no one would see him. Anna snuck out of the house and her 19-year-old cousin Charles helped her carry a laundry basket full of her clothes to the end of the road. When defendant arrived, he greeted Anna with a kiss on the cheek. He asked Anna why Charles was there and said, "Nobody was supposed to see me." Anna got into the truck with defendant and drove with him back to his house in Florida. Anna's parents did not know she was leaving.

When Anna and defendant arrived at his house in Florida, she unpacked and took a shower. While she was in the shower, defendant hid her clothes, and when she got out of the shower, she found defendant sitting on his bed naked. Defendant laid Anna down on the bed, pinned her arms above her head, and, without her consent, had sexual intercourse with her.

The following day, defendant left for work, and defendant's mother took Anna to her house a few minutes away. When defendant returned to his mother's house for lunch, he removed the SIM card from Anna's phone and destroyed it. After defendant came home from work, police came by his mother's house looking for Anna. Defendant and his mother told Anna to go out the window and hide in the backyard. At that time, defendant was interviewed by phone by Detective John Leatherwood from the Pender County Sheriff's Office who suspected that he had Anna. Defendant denied knowing where Anna was or having talked to her in the previous two weeks. Police returned again later in the evening, and Detective Leatherwood informed defendant by phone that the police

had tracked defendant's and Anna's cell phones from North Carolina to Florida. Defendant continued to deny having seen or heard from Anna and claimed he had lost his phone.

At some point that evening, Anna was able to call her grandfather, and he and her aunt came to pick her up from defendant's mother's house. Afterwards, defendant called Detective Leatherwood and told him that Anna had tried to come to his house but was unable to get in, so she came to his mother's house, where she was picked up by her aunt.

Defendant was indicted for child abduction, felonious restraint, second-degree rape, statutory rape, and kidnapping. The rape charges were dismissed for lack of jurisdiction. After a jury trial, the jury acquitted defendant of first and second degree kidnapping, but found him guilty of child abduction and felonious restraint. The trial court imposed a presumptive-range term of 16 to 20 months imprisonment for abduction of a child, followed by a consecutive presumptive-range term of 16 to 20 months imprisonment for felonious restraint. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in denying his request for a jury instruction and special verdict as to North Carolina's jurisdiction over the child abduction charge. Generally, when a crime occurs in more than one state, "any state in which an essential element of a crime occurred may exercise jurisdiction to try the perpetrator." *State v. First Resort Properties*, 81 N.C. App. 499, 500, 344 S.E.2d 354, 356 (1986).

Jurisdiction over interstate criminal cases in North Carolina is governed by N.C. Gen. Stat. § 15A-134 (2011), which provides "[i]f a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State if he has not been placed in jeopardy for the identical offense in another state." This statute confers jurisdiction "where *any part of the crime occurred.*" *First Resort Properties*, 81 N.C. App. at 501, 344 S.E.2d at 356.

A special jury instruction on jurisdiction is only proper when a defendant challenges the factual basis for jurisdiction. *State v. Tucker*, ___ N.C. App. ___, ___, 743 S.E.2d 55, 61 (2013) ("Where the facts upon which the assertion of jurisdiction is based are contested, the trial court is required to instruct the jury that (1) the State has the burden of proving jurisdiction beyond a reasonable doubt; and (2) if the jury is not satisfied, it should return a special verdict indicating a lack of jurisdiction.").

See, *e.g.*, *State v. Holden*, 160 N.C. App. 503, 508, 586 S.E.2d 513, 517 (2003) (holding trial court erred by failing to instruct jury on jurisdiction when defendant disputed whether rapes occurred in Virginia or North Carolina), *aff'd per curiam* by *an equally divided court*, 359 N.C. 60, 602 S.E.2d 360 (2004).

When the defendant challenges whether any offense occurred or whether he was the perpetrator, but he does not dispute the facts upon which jurisdiction is based, then the trial court properly refuses to instruct the jury on the issue of jurisdiction. *See*, *e.g.*, *State v. White*, 134 N.C. App. 338, 341, 517 S.E.2d 664, 667 (1999) (holding that trial court properly refused to instruct on jurisdiction when there was no dispute that offense occurred in North Carolina and only issue was whether defendant committed that offense); *State v. Callahan*, 77 N.C. App. 164, 169, 334 S.E.2d 424, 428 (1985) ("[A]lthough the facts supporting defendant's commission of the offenses were in dispute, the fact upon which jurisdiction was based, i.e., the location where the offenses were committed, was not in issue. Therefore, the requested instruction was properly denied.").

Similarly, when "a defendant's challenge is not to the factual basis for jurisdiction but rather to 'the theory of jurisdiction relied upon by the State,' the trial court is not required to give these instructions since the issue regarding '[w]hether the theory supports jurisdiction is a legal question' for the court." *Tucker*, ___ N.C. App. at ___, 743 S.E.2d at 61-62 (quoting *State v. Darroch*, 305 N.C. 196, 212, 287 S.E.2d 856, 866 (1982)). In Tucker, the defendant was charged with embezzlement. *Id.* at ___, 743 S.E.2d at 56. He did not dispute the underlying facts but argued that "jurisdiction lies solely in the state where defendant either (1) lawfully obtained possession of his principal's property with fraudulent intent; or (2) misapplied or converted the funds for his own use." *Id.* at ___, 743 S.E.2d at 62. This Court concluded that the defendant's jurisdictional challenge addressed only the State's legal theory of jurisdiction. *Id.* at ___, 743 S.E.2d at 62. It was thus a legal question for the court and a jury instruction was not required. *Id.* at ___, 743 S.E.2d at 62.

Here, a person is guilty of child abduction if he or she "abducts or induces any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care . . . ." N.C. Gen. Stat. § 14-41(a) (2011). It is "not necessary for the State to show she was carried away by force, but evidence of fraud, persuasion, or other inducement exercising controlling influence upon the child's conduct would be sufficient to sustain a conviction" for this offense. *State v. Ashburn*, 230 N.C. 722,

723, 55 S.E.2d 333, 333-34 (1949) (holding evidence that 11-year-old girl consented to defendant's marriage proposal, defendant drove to girl's school during recess, "said to her, 'Come on, let's go,' and she got in the car with him and he drove away" and "[t]his was without the knowledge or consent of her mother" was sufficient to sustain conviction for child abduction).

In this case, the evidence shows, and defendant does not dispute, that Anna was either abducted or defendant's final act of inducing her to leave her parents occurred when defendant picked Anna up down the street from her parents' home in Rocky Point, North Carolina. Therefore, the child abduction occurred, at least in part, in North Carolina. Further, since defendant did not contend that he had "been placed in jeopardy for the identical offense" in Florida, jurisdiction in North Carolina was proper. *See* N.C. Gen. Stat. § 15A-134.

Defendant, however, focuses on the element of inducement and argues that any inducement occurred with his telephone calls to Anna made from Florida. Defendant further argues that a disputed issue of fact exists regarding whether any of the 10 phone calls from defendant to Anna on the day he drove to pick her up were placed while he was in North Carolina.

In support of his argument that this factual dispute draws into question North Carolina's jurisdiction, defendant cites *State v. Kirk*, ___ N.C. App. ___, 725 S.E.2d 923, 2012 WL 1995293, at *10, 2012 N.C. App. LEXIS 674, at *26 (unpublished), *disc. review denied*, 366 N.C. 233, 731 S.E.2d 413 (2012), another child abduction case. In *Kirk*, this Court held that emails sent by the defendant from a North Carolina computer to the victim saying " 'I think I love you' " and " 'I'm coming to get you' " were sufficient to show that the essential act of inducement took place in North Carolina. *Id.* While *Kirk*, as an unpublished opinion, is not controlling, its reasoning does not suggest a different result in this case. *Kirk* simply holds that jurisdiction in North Carolina may be based on acts of inducement prior to the victim's actually leaving the custody of her parents. *Kirk* does not -- as it could not -- hold that only the element of inducement and no other element may be the basis for jurisdiction in North Carolina with respect to a charge of child abduction.

In this case, therefore, any dispute over where the acts of inducement took place are immaterial to the question of North Carolina's jurisdiction because defendant does not dispute that he picked Anna up -- and Anna left her parents' custody -- in Rocky Point. Since there was no factual dispute regarding the basis for jurisdiction, the issue was a

question of law to be decided by the trial court. The trial court properly found that an essential act of the crime of child abduction took place in North Carolina and did not err in denying defendant's request for a jury instruction on jurisdiction.

II

[2] Defendant next argues that the trial court should have granted his motion to dismiss the charge of felonious restraint. "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).

It is well established that " '[u]pon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). When reviewing motions to dismiss, " 'we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' " *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455 (quoting *Barnes*, 334 N.C. at 75, 430 S.E.2d at 914).

A defendant may be found guilty 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 (2011). Defendant argues that there was insufficient evidence that he "restrained" Anna.

N.C. Gen. Stat. § 14-43.3 specifies that "[f]elonious restraint is considered a lesser included offense of kidnapping." Consequently, the requirement for "restraint" for a charge of kidnapping is the same as the requirement of "restraint" for a charge of felonious restraint.

Defendant argues that his motion to dismiss should have been allowed because he did not prevent Anna from leaving his truck, he did not physically restrain her, he did not force her out of her house, and he did not make any threats to her. Our courts have, however, explained that "[t]he term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction,

by force, threat or fraud, without a confinement." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978) (emphasis added). Specifically, "restraint" can also occur when "one person's freedom of movement is restricted due to another's fraud or trickery." *State v. Sturdivant*, 304 N.C. 293, 307, 283 S.E.2d 719, 729 (1981).

In *Sturdivant*, the Supreme Court held that the evidence was sufficient to show "an effective restraint of the victim in her automobile" when, after helping the victim who was experiencing car trouble on her way home to South Carolina, the defendant entered the victim's car "under the fraudulent pretext of seeking a ride to the home of a crippled friend." *Id.* at 306, 283 S.E.2d at 728. The Court explained that "[t]his constraint of the victim continued as defendant directed her to turn off the highway onto a dirt road, whereupon he cut off the car engine, made physical advances upon her, refused her repeated requests for him to leave the vehicle and later, while persisting in the pretense of going to the home of a crippled friend, made her drive still further along that deserted road." *Id.*, 283 S.E.2d at 728-29. In concluding that this restraint was sufficient to support the charge of kidnapping, the Court noted: "A kidnapping can be just as effectively accomplished by fraudulent means as by the use of force, threats or intimidation." *Id.* at 307, 283 S.E.2d at 729.

Applying these principles, this Court held in *State v. Williams*, 201 N.C. App. 161, 172, 689 S.E.2d 412, 417, 418 (2009), that there was sufficient evidence that the defendant "confined, restrained, or removed" the victim when he "induced [the victim] to enter his car on the pretext of paying her money in return for a sexual act" when in reality his intent was to assault and rob the victim. This Court concluded that "a reasonable mind could conclude from the evidence that had [the victim] known of such intent, she would not have consented to have been moved by defendant from the place where she first encountered him." *Id.*, 689 S.E.2d at 418.

In this case, as in *Sturdivant* and *Williams*, the evidence, when viewed in the light most favorable to the State, is sufficient to allow a reasonable jury to find that defendant restrained Anna in his truck through fraud. The evidence shows that defendant, a man in this thirties, had formed an inappropriate relationship with a nine-year-old girl and gained her trust and strengthened the secret relationship over the following five-year period. Anna confided in him that she had been sexually abused by her older brother and that she feared he would rape her again when he moved back to North Carolina. When her brother tried to break into her room, Anna called defendant, and he offered to come get her

and bring her to Florida to live with him -- in other words, he offered to rescue her from her brother. When Anna met him at the end of her street, he did not greet her in a sexual way, but rather gave her a deceptively innocent kiss on the cheek. Then, shortly after they arrived at his house in Florida, he took away Anna's clothes, pinned her to the bed, and had non-consensual sex with her.

A reasonable juror could conclude from this evidence that defendant duped Anna into getting into his car and traveling to Florida by assuring her that his intent was to rescue her from further sexual assaults by her brother when instead his intent was to isolate her so that he could sexually assault her himself. A reasonable juror could further conclude that defendant's failure to tell Anna that he intended to have sex with her and his kiss on her cheek were each intended to conceal from her his true intentions and that she would not have gone with him had he been honest with her.

Defendant, however, argues that there is no evidence of fraud because representations that he promised to help Anna escape from her brother were not false. It is well established, however, that fraud may be based upon an omission.

> Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated that fraud is better left undefined, lest, as *Lord Hardwicke* put it, the craft of men should find a way of committing fraud which might escape a rule or definition. However, in general terms fraud may be said to embrace all acts, *omissions*, and *concealments* involving a breach of legal or equitable duty and resulting in damage to another, or *the taking of undue or unconscientious advantage of another*.

Vail v. Vail, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951) (emphasis added) (internal citations and quotation marks omitted). Thus, fraud may be based upon defendant's failure to make clear to Anna his intentions to have sex with her when he knew she thought she was being rescued.

Defendant argues further that, in any event, Anna was not deceived because she knew he wanted to have sex with her, and there is no evidence that Anna would not have gone to Orlando with him had he told her of his actual intentions. He points to evidence that he had told Anna

on prior occasions that he wanted to have sex with her and that, when asked whether she would have gone with defendant if he had told her that they were going to have sex, she responded, "I'm not sure." This argument, however, views the evidence in the light most favorable to the defendant, contrary to the well-established standard of review for motions to dismiss. A reasonable juror could have concluded from all the evidence that Anna did not understand that she would be forced to have sex with defendant and that she would not have left with defendant if she had known that she would have no choice.

We, therefore, conclude that the State presented substantial evidence that defendant restrained Anna in his truck by inducing her through fraud to enter his truck and drive to Florida. Accordingly, the trial court properly denied defendant's motion to dismiss the charge of felonious restraint.

No error.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

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