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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 26, 2016

MAILING ADDRESS: The Judicial Department
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OF
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WORKERS' COMPENSATION

Denial of motion—newly discovered evidence—reconsideration—no abuse of discretion—The Industrial Commission did not abuse its discretion in a workers' compensation case by denying defendants' motion to reconsider and admit newly discovered evidence. Evidence that plaintiff obtained a job after the hearing was not "newly discovered evidence" because it was not in existence at the time of the hearing. Furthermore, defendants' brief did not present any argument regarding the denial of the motion to the extent that it might have been considered as a motion for reconsideration. **Beard v. WakeMed, 187.**

Disability—burden of proof met—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff met her burden of proof to show disability pursuant to the second prong of *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762. The evidence and the findings of fact supported this conclusion. **Beard v. WakeMed, 187.**

Opinion and award—compensable injury—findings of fact—conclusions of law—evidence not reweighed—Defendants' argument in a worker's compensation case that the Industrial Commission's opinion and award awarding workers' compensation benefits to plaintiff contained fifteen findings of fact not supported by the evidence and three conclusions of law not supported by the findings of fact was overruled. Defendants were asking the Court of Appeals to reweigh the evidence before the Industrial Commission in favor of defendants. As the Court will not reweigh the evidence before the Commission, there was no valid legal argument for the Court to consider. **Beard v. WakeMed, 187.**

SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2016:

January 11 and 25

February 8 and 22

March 7 and 28

April 11 and 25

May 9 and 23

June 6

July None

August 8 and 22

September 5 and 19

October 3, 17, and 31

November 14 and 28

December 12

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

[232 N.C. App. 187 (2014)]

TRACY BEARD, Employee, Plaintiff
v.
WAKEMED, Employer, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, Administrator), Defendants

No. COA13-723

Filed 4 February 2014

1. Workers' Compensation—opinion and award—compensable injury—findings of fact—conclusions of law—evidence not reweighed

Defendants' argument in a worker's compensation case that the Industrial Commission's opinion and award awarding workers' compensation benefits to plaintiff contained fifteen findings of fact not supported by the evidence and three conclusions of law not supported by the findings of fact was overruled. Defendants were asking the Court of Appeals to reweigh the evidence before the Industrial Commission in favor of defendants. As the Court will not reweigh the evidence before the Commission, there was no valid legal argument for the Court to consider.

2. Workers' Compensation—disability—burden of proof met

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff met her burden of proof to show disability pursuant to the second prong of *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762. The evidence and the findings of fact supported this conclusion.

3. Workers' Compensation—denial of motion—newly discovered evidence—reconsideration—no abuse of discretion

The Industrial Commission did not abuse its discretion in a workers' compensation case by denying defendants' motion to reconsider and admit newly discovered evidence. Evidence that plaintiff obtained a job after the hearing was not "newly discovered evidence" because it was not in existence at the time of the hearing. Furthermore, defendants' brief did not present any argument regarding the denial of the motion to the extent that it might have been considered as a motion for reconsideration.

Appeal by defendants from Opinion and Award entered 1 February 2013 and order entered 8 April 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 2013.

O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, for defendants-appellants.

STROUD, Judge.

Defendants appeal opinion and award awarding workers' compensation benefits to plaintiff and order denying their motion for reconsideration. For the following reasons, we affirm.

I. Background

On or about 25 April 2011, defendant entered a Form 19, "EMPLOYER'S REPORT OF EMPLOYEE'S INJURY OR OCCUPATIONAL DISEASE TO THE INDUSTRIAL COMMISSION" ("report"). The report stated that plaintiff, a staff nurse, "was pulling a patient in their bed and felt lower back pain." On or about 2 May 2011, plaintiff's workers' compensation claim was denied for the following reasons:

- Your injury was not the result of an accident
- Your injury was not the result of a specific traumatic incident
- Your injury did not arise out of and in the course and scope of your employment
- Credibility based on inconsistent inaccurate and/or contradictory information
- and any other defenses that become known to the employer/carrier

On 12 May 2011, plaintiff requested that her claim be assigned for a hearing. On or about 27 May 2011, defendants responded to plaintiff's request for a hearing stating "that the plaintiff did not sustain an injury by accident arising out of and in the course of her employment and is therefore entitled to no workers' compensation benefits." On or about 13 December 2011, the parties entered into a "PRE-TRIAL AGREEMENT" wherein they all stipulated that plaintiff was an employee of defendant WakeMed and that she sustained an injury on 12 April 2011. On 23 May 2012, Deputy Commissioner Victoria M. Homick of the Industrial Commission entered an opinion and award ordering defendants to "pay temporary total disability compensation[,]" "all past and future medical

expenses incurred or to be incurred as a result of plaintiff's compensable injury[,]" "reasonable attorney's fee[,]" and "costs." On 29 May 2012, defendants appealed the Deputy Commissioner's opinion and award. On 1 February 2013, the Full Commission of the Industrial Commission entered an opinion and award again ordering defendant's to "pay temporary total disability compensation[,]" "all past and future medical expenses incurred or to be incurred as a result of Plaintiff's compensable injury[,]" "reasonable attorney's fee[,]" and "costs."

On 28 February 2013, defendants filed a "MOTION FOR RECONSIDERATION" On 7 March 2013, plaintiff objected to defendants' motion for reconsideration because, *inter alia*, it was not timely filed. On 7 March 2013, defendants contended that their motion should be heard because it was timely filed. On 8 April 2013, the Full Commission entered an order denying defendants' motion to reconsider. Defendants appealed both the opinion and award of the Full Commission and the order denying their motion to reconsider.

II. Findings of Fact and Conclusions of Law

Defendants challenge various findings of fact as unsupported by the competent evidence and several conclusions of law as unsupported by the findings of fact.

> The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

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

A. Compensable Injury

[1] Defendants contend that fifteen findings of fact "are not supported by the evidence of record" and three conclusions of law "are not supported by findings of fact or the applicable law" regarding "whether

plaintiff sustained a compensable injury by accident to her back in the form of a specific traumatic incident, arising out of and in the course of her employment with WakeMed that aggravated her pre-existing low back condition[.]" (Original in all caps.) (Quotation marks omitted.) While a cursory glance of defendant's brief makes it appear that defendants are appropriately challenging the evidence, findings of fact, and conclusions of law, a thorough reading reveals that defendants are actually asking this Court to reweigh the evidence before the Commission in favor of defendants. This we cannot do, as "this [C]ourt's duty goes no further than to determine whether the record contains *any evidence* tending to support the finding." *Id.* (emphasis added). The fact that the evidence may support a different finding of fact is irrelevant if there is "any evidence tending to support" the findings of fact actually made by the Commission. *Id.*

Defendants also argue that "the only evidence that plaintiff did sustain such an injury is plaintiff's own testimony" and "plaintiff was not honest[;]" however, the evidence contains statements by medical professionals regarding the fact that plaintiff sustained a compensable injury. Furthermore, plaintiff's own testimony *is* evidence which the Commission may weigh for credibility and if it determines the evidence is credible it may base findings of fact regarding plaintiff's compensable injury upon such evidence; defendant has failed to cite any legal authority stating otherwise.

Defendants further contend that "the Commission erroneously ignored all the evidence regarding plaintiff's failure to disclose her back history to WakeMed and her medical providers and made no findings of fact regarding this evidence or the evidence that plaintiff was reprimanded for failing to assist a co-worker on a problematic procedure[.]" Yet the fact that the Commission may not have made a finding of fact regarding every piece of evidence presented does not mean that the Commission "ignored" that evidence, but only that it did not determine that a finding of fact regarding such evidence was necessary to support its determination. Quoting and citing appropriate law regarding the Commission's duty to make all the material findings of fact necessary to support the conclusions of law is not actually an argument to this Court as to why specific findings of fact are necessary in this case. Defendants have failed to demonstrate that the Commission ignored any material evidence upon which a finding must be made.

Defendants also challenge the "medical evidence" before the Commission because "there is no medical evidence that plaintiff sustained an injury at the time she alleges" as the deposed doctors were

basing their opinions "on plaintiff's subjective history[.]" Defendants have pointed to no legal authority that doctors may not rely on "plaintiff's subjective history" both in diagnosing and treating her; indeed, defendants seem to imply that all "subjective history" should be disregarded. But a doctor's medical determination is not rendered incompetent because it is based upon a patient's subjective reports of her history and symptoms as a part of a medical evaluation. *See Yingling v. Bank of America*, ___ N.C. App. ___, ___, 741 S.E.2d 395, 406 (2013) ("Especially when treating pain patients, a physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law." (citation, quotation marks, and brackets omitted)). Defendants have made no legal arguments showing that the doctors' depositions should not be included as competent evidence before the Commission simply because the doctors relied in part upon plaintiff's subjective history in both diagnosing and treating plaintiff, and we can think of none. As such, the Commission was allowed to weigh the evidence, including the depositions, as it saw fit and make the appropriate and essential findings of fact based upon them. *See id.* Based on the foregoing reasons, the arguments regarding the findings of fact and conclusions of law are overruled. We will not reweigh the evidence before the Commission, so there is no valid legal argument for this Court to consider from defendants regarding any of the challenged findings of fact or conclusions of law as to plaintiff's compensable injury.

B. Disability

[2] Defendants also contend that five findings of fact "are not supported by the competent evidence of record" and three conclusions of law "are not supported by the findings of fact or applicable law. Defendants' challenge to the five findings of fact and three conclusions of law center around one issue: defendants argue that the Commission erred in concluding that "plaintiff met her burden of proof pursuant to the second prong of *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993)[.]"

Russell provides,

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways [including] . . . (2) the production of evidence that he is capable of some work, but that he has, after

> a reasonable effort on his part, been unsuccessful in his effort to obtain employment[.]

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citation omitted).

Defendants direct our attention to statements Dr. Daniel Albright made during his deposition which could be construed as evidence that plaintiff should not be under work restrictions. But Dr. Alright did place a 20 pound lifting restriction on plaintiff, at the very least to relieve her of the anxiety she had about returning to work because of the "exacerbation of her previous low back condition" caused by her "on-the-job injury[.]" Thus, the Commission had to weigh and consider Dr. Albright's statements along with the other evidence and based upon this could properly find that

> Dr. Albright diagnosed Plaintiff with a low back strain and recommended physical therapy and work conditioning. Dr. Albright released Plaintiff to return to work with restrictions of no lifting over twenty pounds. . . . Dr. Albright opined, to a reasonable degree of medical certainty, that the April 12, 2011 work incident exacerbated a pre-existing low back condition.

Furthermore, plaintiff's husband testified that it had been "very difficult for her" to find work due to her back pain, and plaintiff spent "four or five hours a day looking" for jobs and sending resumes to prospective employers. Plaintiff also testified that she had attempted to return to work taking a part-time position and eventually moving to a full-time position which she had held until a week or two before her hearing before the Industrial Commission but ultimately voluntarily left because she "had a lot of back pain" and "would come at the end of the day and it was hard for [her] to move." We believe that the evidence and the Commission's findings of fact regarding the evidence support the conclusion that "Plaintiff has proven disability under the second prong of *Russell*, through evidence that she made reasonable efforts to find work but has been unsuccessful in obtaining employment." Accordingly, this argument is overruled.

III. Motion for Reconsideration

[3] Defendants also contend the Commission erred in denying their motion to reconsider which they argue "contain[ed] a Motion to Consider and Admit . . . Newly Discovered Evidence[.]" Defendants' motion is entitled "DEFENDANTS' MOTION FOR RECONSIDERATION

OF FULL COMMISSION'S OPINION AND AWARD" and includes 30 numbered paragraphs. Defendants contend that two of these paragraphs contain their motion to consider and admit newly discovered evidence. The alleged "newly discovered evidence" is information that plaintiff obtained another job *after* the hearing before the Commission; this is not "newly discovered evidence" since this evidence did not exist at the time of the hearing. *See Parks v. Green*, 153 N.C. App. 405, 412, 571 S.E.2d 14, 19 (2002). "The newly discovered evidence must have been in existence at the time of the trial. This limitation on newly discovered evidence has been justified on the firm policy ground that, if the situation were otherwise, litigation would never come to an end." *Id.* (citation and quotation marks omitted).

Defendants' brief addresses only the denial of the motion to consider and admit newly discovered evidence and does not present any argument regarding the denial of the motion to the extent that it might be considered as a motion for reconsideration. In any event, both motions are reviewed for abuse of discretion. *See generally Cummins v. BCCI Const. Enters.*, 149 N.C. App. 180, 185, 560 S.E.2d 369, 373 ("the Commission did not manifestly abuse its discretion by denying defendants' Motion for Reconsideration"), *disc. review denied*, 356 N.C. 611, 574 S.E.2d 678 (2002); *Owens v. Mineral Co.*, 10 N.C. App. 84, 87, 177 S.E.2d 775, 777 (1970) ("Ordinarily, a motion for further hearing on the grounds of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission."); *cert. denied*, 277 N.C. 726, 178 S.E.2d 831 (1971).

> 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. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Burnham v. McGee Bros. Co., Inc., ___ N.C. App. ___, ___, 727 S.E.2d 724, 728 (2012) (citation, quotation marks, and ellipses omitted), *disc. review dismissed and cert. denied*, 366 N.C. 437, 737 S.E.2d 106 (2013).

As the "newly discovered evidence" which the defendants asked the Commission to consider is not actually "newly discovered evidence," *see Parks*, 153 N.C. App. at 412, 571 S.E.2d at 19, the Commission did not

abuse its discretion in denying the motion. Defendants further contend that the Commission erred in failing to address their motion to consider and admit newly discovered evidence; however, even according to defendants, this "motion" was two paragraphs as part of a larger motion to reconsider. It is obvious that the Commission denied defendants' entire motion. The Commission is not required to file a separate order or even add a separate sentence specifically denying this additional "motion" embedded within the motion to reconsider, since the order denying the motion to reconsider is clearly a denial of all arguments made within that motion. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges MCGEE and BRYANT concur.

COPYPRO, INC., Plaintiff
v.
JOSEPH EDWARD MUSGROVE, Defendant

No. COA13-297

Filed 4 February 2014

1. Appeal and Error—interlocutory orders and appeals—preliminary injunction—livelihood—substantial right

Where the entry of an order granting a request for the issuance of a preliminary injunction effectively destroyed defendant's livelihood by prohibiting him from working for his current employer for a period of three years, it affected a substantial right and was subject to immediate appellate review.

2. Employer and Employee—noncompetition agreement—unreasonably wide prohibition

The trial court erred by granting a preliminary injunction to plaintiff that prohibited defendant from working in any capacity for a competitor. The noncompetition agreement contained in the employment contract prohibited an unreasonably wide range of activities.

Appeal by defendant from order entered 19 December 2012 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 12 September 2013.

White & Allen, P.A., by David J. Fillippeli, Jr., for Plaintiff.

Cranfill Sumner & Hartzog LLP, by Benton L. Toups and Susie E. Sewell, for Defendant.

ERVIN, Judge.

Defendant Joseph Edward Musgrove appeals from an order granting a preliminary injunction sought by Plaintiff CopyPro, Inc., prohibiting Defendant from working in any capacity for a competitor. On appeal, Defendant contends that Plaintiff failed to demonstrate that it would likely succeed on the merits of its claim or that it would suffer harm in the absence of the issuance of the injunction. After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed, in part.[1]

I. Factual Background

A. Substantive Facts

Plaintiff has been engaged in the selling, maintaining and leasing of office equipment systems for the past forty-two years, with ninety percent of Plaintiff's business being derived from the leasing of office equipment. Almost all of Plaintiff's leases are for a term of either 36, 48, or 60 months. All of Plaintiff's customers are located in various counties in eastern North Carolina.

Sales personnel working for Plaintiff are provided with access to pricing and customer information in four principal ways. First, each sales representative has access to a company database that contains important information relating to the customers within the territory

1. As will be discussed in more detail below, the trial court's order enforced a contractual provision that prohibited Defendant from disclosing or making use of certain specified information and a separate contractual provision that prohibited Defendant from working for or having any connection with a competitor. On appeal, Defendant has challenged the validity of the noncompetition agreement, but has made no challenge to the trial court's decision to enforce the nondisclosure agreement. As a result, we have no basis for overturning the trial court's decision to enforce the nondisclosure agreement and leave that part of the trial court's order undisturbed.

assigned to that employee, with the information contained in that database consisting of material such as customer names, phone numbers, "decision-makers'" names, and lease expiration reports. Secondly, Plaintiff's sales representatives receive a weekly spreadsheet that shows order logs for the entire company organized on a territory by territory basis. The weekly spreadsheets list customer names, the date and amount of each sale, and the nature of the equipment sold. However, the weekly spreadsheet does not provide information concerning the length of specific leases. Thirdly, Plaintiff's sales persons have access to an electronic database known as Recollect, which contains copies of each contract that Plaintiff has entered into with any customer. Finally, pricing changes are communicated to sales representatives using a revised electronic price book that is sent out each time such a change takes place.

On 10 November 2009, Defendant entered into an employment contract with Plaintiff under which he agreed to work for Plaintiff as a salesperson. As a condition of his employment, Defendant was required to sign a nondisclosure agreement and a covenant not to compete. In the nondisclosure agreement, Defendant agreed to refrain from disclosing or making any use of any of Plaintiff's customer lists during or after his employment except to the extent that Defendant's activities benefitted Plaintiff. In the noncompetition agreement, Defendant agreed that he would not engage in certain activities for a period of three years after the end of his employment with Plaintiff.

During the time that he worked for Plaintiff, Defendant was assigned responsibility for accounts within Pender and Onslow Counties. In carrying out his job responsibilities, Defendant was responsible for servicing the accounts that were assigned to him and obtaining new accounts. Although Plaintiff did business in 33 eastern North Carolina counties, Defendant focused his efforts on his assigned area and only contacted potential customers outside that area on a few occasions, with such extra-territorial contacts including customers in Craven, Duplin, New Hanover, and Sampson Counties and an old hunting friend in Carteret County. As a result, 95% to 97% of Defendant's time was spent working with customers or potential customers in Onslow and Pender Counties.

Defendant remained employed by Plaintiff until his resignation on 28 August 2012. Defendant decided to leave Plaintiff's employment after learning that he was no longer Plaintiff's sole service representative in Onslow County, which made up the majority of his assigned territory. A few days after he resigned from his employment with Plaintiff, Defendant went to work for Coastal Document Systems, an entity which

competes with Plaintiff and operates solely in Brunswick, Columbus, and New Hanover Counties. After beginning to work for Coastal, Defendant refrained from calling on customers in Onslow or Pender Counties. In fact, Coastal officials informed Defendant that his employment would be terminated if he contacted any of Plaintiff's customers or conducted business within the territory that had been assigned to him during his employment with Plaintiff. However, Plaintiff learned in late August that Defendant was working for Coastal when one of its sales representatives visited a potential customer, learned that Coastal had provided the potential customer with a quote, and saw that one of Defendant's business cards was attached to Coastal's proposal.

B. Procedural Facts

On 29 October 2012, Plaintiff filed a complaint in which it alleged that Defendant had breached the nondisclosure and noncompetition agreements and sought the issuance of a temporary restraining order, a preliminary injunction, a permanent injunction and an award of attorneys' fees. After conducting a hearing with respect to Plaintiff's request for the issuance of a preliminary injunction on 15 November 2012, the trial court entered an order on 19 December 2012 granting Plaintiff's motion and enjoining Defendant for violating the nondisclosure and noncompetition provisions of his contract with Plaintiff. Defendant noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Appealability

[1] "A preliminary injunction is interlocutory in nature," which means that an order issuing a preliminary injunction "cannot be appealed prior to [a] final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment." *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (internal quotation marks omitted) (quoting *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913, *cert. denied*, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980)). However, when the entry of an order granting a request for the issuance of a preliminary injunction has the effect of destroying a party's livelihood, the order in question affects a substantial right and is, for that reason, subject to immediate appellate review. *See Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635, 568 S.E.2d 267, 271 (2002). As a result of the fact that the challenged order prohibits Defendant from working for Coastal

for a period of three years, we conclude that his appeal from the trial court's order is properly before us.

B. Standard of Review

"[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983). As a general proposition, however, "a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings." *Wrightsville Winds Townhouse Homeowners' Ass'n v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990) (citing *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984)), *disc. review denied*, 328 N.C. 275, 400 S.E.2d 463 (1991). In light of that fact, " 'there is a presumption that the judgment entered below is correct, and the burden is upon appellant to . . . show error.' " *Western Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (quoting *Lance v. Cogdill*, 238 N.C. 500, 504, 78 S.E.2d 319, 322 (1953)). As a result, we will uphold a trial court's decision to issue a preliminary injunction "(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). In view of the fact that the evidence received at the hearing held before the trial court was essentially undisputed and reflected in the trial court's findings of fact, the ultimate question for our consideration is whether the trial court correctly applied the applicable law to the undisputed record evidence, a determination that requires us to utilize a *de novo* standard of review. *Robins & Weill*, 70 N.C. App. at 540, 320 S.E.2d at 696.

C. Validity of Noncompetition Agreement

[2] In his brief, Defendant contends that the trial court erroneously granted the requested preliminary injunction on the grounds that Plaintiff failed to establish that it was likely to succeed on the merits of its underlying breach of contract claim. According to Defendant, the evidentiary materials contained in the record demonstrate that the noncompetition agreement contained in his employment contract prohibited an unreasonably wide range of activities and should, for that reason, have been deemed unenforceable. Defendant's argument has merit.

A noncompetition agreement contained in or associated with an employment agreement is subject to careful scrutiny. *Keith v. Day*, 81 N.C. App. 185, 193, 343 S.E.2d 562, 567 (1986), *disc. review improvidently granted*, 320 N.C. 629, 359 S.E.2d 466 (1987). A valid noncompetition agreement entered into in the employer-employee context must be "(1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business interest of the employer." *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 122-23, 392 S.E.2d 446, 448 (citing *A.E.P. Indus.*, 308 N.C. at 403-04, 302 S.E.2d at 760-61), *disc. review denied*, 327 N.C. 488, 397 S.E.2d 239 (1990). On the one hand, an employer has a right " 'to protect, by reasonable contract with [its] employee, the unique assets of [its] business, a knowledge of which is acquired during the employment and by reason of it,' " with these unique assets having "been defined as 'customer contacts' and 'confidential information.' " *Elec. S., Inc. v. Lewis*, 96 N.C. App. 160, 165-66, 385 S.E.2d 352, 355 (1989) (alterations in original) (quoting *Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944), and citing *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 653, 657, 370 S.E.2d 375, 381, 384 (1988)), *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990). On the other hand, an enforceable noncompetition agreement must "not impose unreasonable hardship on the [employee]," *Kadis*, 224 N.C. at 161, 29 S.E.2d at 547, and should not, for that reason, be "broader than necessary to protect its legitimate business interest." *Hartman v. W.H. Odell & Assocs.*, 117 N.C. App. 307, 316, 450 S.E.2d 912, 919 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). Although the record before us in this case clearly establishes that the noncompetition agreement at issue here was in writing, was made part of the employment contract between Plaintiff and Defendant, and was supported by valuable consideration, we conclude that the noncompetition agreement at issue prohibits Defendant from engaging in a much broader array of activities than is necessary to protect Plaintiff's legitimate business interests.[2]

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2. In addition to contending that the noncompetition agreement was broader than necessary to protect Plaintiff's legitimate business interests, Defendant challenges its temporal and territorial restraints as well. Although Plaintiff has raised serious questions about the validity of these temporal and territorial restraints, which prohibit Defendant from working in counties outside his assigned territory for a period of three years, we need not address Defendant's challenges to these provisions given our decision to reverse the trial court's order on the grounds that the noncompetition agreement between the parties prohibits a broader array of activities than is necessary to protect Plaintiff's legitimate business interests. For that same reason, we decline to address Defendant's specific objections concerning the extent to which Plaintiff demonstrated that it would suffer irreparable harm absent the issuance of a preliminary injunction.

The noncompetition agreement between the parties provides that:

> [f]or a period of three (3) years from the date of the termination of his/her employment, the Employee will not, within the geographical limits of the Counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Halifax, Hertford, Hyde, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Pitt, Tyrrell, Washington, Wayne, Wilson or within a sixty (60) mile radius of Greenville and Wilmington, directly or indirectly, own, manage, operate, join, control, be employed or participate in the ownership, management, operation or control of, or be connected in any manner with any business of the type and character of the business engaged in by the Employer at the time of such termination.

As our decisions reflect, we have held on numerous occasions that covenants restricting an employee from working in a capacity unrelated to that in which he or she worked for the employer are generally overbroad and unenforceable. *E.g.*, *Henley Paper Co. v. McAllister*, 253 N.C. 529, 534-35 117 S.E.2d 431, 434 (1960) (holding that a noncompetition agreement was unenforceable on the grounds, in part, that it precluded the defendant from engaging in activities unrelated to those inherent in the sales position that he had occupied while employed by the plaintiff); *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 656-57, 670 S.E.2d 321, 327-28 (2009) (holding that a noncompetition agreement that prohibited an employee from working for a competing business even if the employment duties assigned to that employee by the competing business were not similar to the duties that the employee had performed while working for the plaintiff was unenforceable); *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508-09, 606 S.E.2d 359, 362-63 (2004) (alterations in original) (holding that a covenant that prohibited an employee from "own[ing], manag[ing], be[ing] employed by or otherwise participat[ing] in, directly or indirectly, any business similar to" the employer's business was overly broad and unenforceable); *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920 (holding that a noncompetition agreement was unenforceable on the grounds that the agreement in question prohibited the plaintiff from having any "association whatsoever with any business that provides actuarial services"). We have even held similar restrictions to be unenforceable outside the employment contract context. *E.g.*, *Outdoor Lighting Perspectives Franchising*

v. Harders, __ N.C. App. __, __, 747 S.E.2d 256, 267-68 (2013) (holding that a noncompetition agreement contained in a franchise agreement was unenforceable because it prevented the franchisee from associating with or owning a business in competition with any of the franchisor's affiliates regardless of the extent to which the franchisor's affiliates engaged in a business similar to that in which the franchisee was currently employed). As a result, in the absence of unusual factors tending to justify such a restriction, the appellate courts in this jurisdiction have typically refused to allow the enforcement of noncompetition agreements precluding an employee from engaging in activities that have no bearing on the employer's business interests.

A careful reading of the relevant contractual language at issue here establishes, as confirmed by the testimony of David Jones, Plaintiff's chief of operations, that the noncompetition agreement at issue here was intended to and actually did prohibit Defendant from working for Coastal in any capacity, including as a custodian. As the cases summarized above clearly establish, such overly broad restrictions are generally not enforceable in the employer-employee context on the grounds that the scope of the restrictions contained in such agreements far exceeds those necessary to protect an employer's legitimate business interests. *E.g.*, *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920 (holding that a noncompetition agreement that would prevent a non-custodial "plaintiff from working as a custodian for any 'entity' which provides 'actuarial services' " was unenforceable). As a result, we conclude that the noncompetition agreement at issue here is unenforceable.[3]

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3. The ordering paragraphs in the trial court's order do not contain the "in any manner" language found in the noncompetition agreement. Although Defendant contends that this omission represents an implicit attempt to "blue pencil" the noncompetition agreement in order to render it enforceable, we are inclined to agree with Plaintiff that the omission of this language from the trial court's order simply reflects the nature of Defendant's activities on behalf of Coastal rather than a "blue penciling" exercise. However, to the extent that this limitation on the scope of the trial court's order did represent an attempt to "blue pencil" the noncompetition agreement in order to make it enforceable, that effort must be deemed unavailing given that the exclusion of the omitted language for the reason suggested by Defendant would amount to an effort to rewrite the noncompetition agreement rather than a refusal to enforce a severable provision. *E.g.*, *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961) (stating that, "where, as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable"); *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) (stating that, "[t]he courts will not rewrite a contract if it is too broad but will simply not enforce it," and that, "[i]f the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision").

In seeking to persuade us to reach a different result, Plaintiff places principal reliance upon our decision in *Precision Walls*. In *Precision Walls*, the defendant worked as one of the plaintiff's project managers, having responsibility for customer contacts, calculating job costs, projecting bids, ordering materials, and engaging in other similar activities. *Precision Walls*, 152 N.C. App. at 632, 568 S.E.2d at 269. After signing a covenant that prevented him from being employed in any capacity with a competing business for a period of one year, the defendant went to work for a competitor. *Id.* at 632-33, 568 S.E.2d at 269-70. In holding that the noncompetition agreement at issue in that case was enforceable against a challenge predicated on the theory that it prohibited an unduly broad array of activities, we stated:

> that defendant would not be less likely to disclose the information and knowledge garnered from his employment with plaintiff if he worked for one of plaintiff's competitors in a position different from the one in which he worked for plaintiff. If defendant's new employer asked him about information he gained while working for plaintiff, defendant would likely feel the same pressure to disclose the information. Thus, plaintiff's legitimate business interest allows the covenant not to compete to prohibit employment of any kind by defendant with a direct competitor.

Id. at 639, 568 S.E.2d at 273. However, we do not believe that *Precision Walls* is controlling in this case.

Aside from the fact that the restriction at issue in *Precision Walls* was to remain in effect for only one year while the noncompetition agreement at issue here will remain in effect for three years, the present record contains no indication that Defendant ever had either the same level of responsibility or the same level of access to competitively sensitive information as the defendant whose conduct was at issue in *Precision Walls*. Simply put, the record developed in this case, unlike the record developed in *Precision Walls*, contains no evidence that Defendant had the responsibility for developing client-specific pricing proposals or adjusting prices for competitive reasons or that Defendant was involved in the development and operation of his employer's bidding or pricing strategies. Although Plaintiff contended in the court below that Defendant might share vital information even if he were hired by a competing business as a custodian, nothing in the present record indicates that Defendant actually possessed sufficiently important information to render him a competitive threat regardless of the

position he held with a subsequent employer. Although our opinion in *Precision Walls* indicates that the defendant possessed all of the information about which the employer was concerned, Defendant denied having taken any of Plaintiff's materials with him when he left its employment, claimed that he had never accessed the Recollect system during the entire time that he worked for Plaintiff, stated that his failure to access the Recollect system prevented him from knowing the identity of Plaintiff's customers, and testified that, in the event that he determined that a potential customer upon whom he called while working for Coastal was currently receiving service from Plaintiff, his standard reply was to describe Plaintiff as a "fine company" and depart without leaving a business card.

In order to affirm the trial court's order in this case, we would have to hold that an employer's decision to merely make information available to employees, without more, would support the enforcement of a noncompetition agreement like that at issue here. Such a result would be a substantial expansion of our decision in *Precision Walls*, and would be inconsistent with decisions such as *Henley Paper*, *Medical Staffing Network*, *VisionAIR*, and *Hartman*.[4] Although Plaintiff would have clearly had the right to seek "to prohibit defendant from working in an identical position with a competing business," *id.* at 638, 568 S.E.2d at 273, its decision to draft a much broader noncompetition agreement that prohibited Defendant from engaging in a wide array of activities which posed no competitive threat to Plaintiff and which involved an employee who had very different responsibilities than those at issue in *Precision Walls* causes us to conclude that *Precision Walls* does not control the outcome in this case.

Aside from *Precision Walls*, Plaintiff has cited no authority in support of its contention that a noncompetition agreement that precludes an employee from working for a competitor in a capacity unrelated to the employer's competitive position protects a legitimate business interest. In light of the absence of any controlling authority tending to suggest that restrictions such as those at issue here are appropriate in this case and in light of the fact that, contrary to many prior decisions of the

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4. Although Plaintiff asserts that Defendant possessed information that would allow him to approach Plaintiff's customers when their existing leases were about to expire, this argument is not valid unless one assumes that Defendant actually accessed the Recollect system or concludes that the fact that Defendant did, at one point, have access to the information contained in the Recollect system is sufficient to support a decision to uphold the enforceability of the noncompetition agreement at issue here, a step that we are unwilling to take.

Supreme Court and this Court, the noncompetition agreement at issue here precludes Defendant from working for a competitor in a manner which does not affect the employer's legitimate business interests, we hold that the noncompetition agreement at issue here is much broader than is necessary to protect Plaintiff's legitimate business interests and is, for that reason, unenforceable. As a result, the trial court erred by issuing a preliminary injunction enforcing the noncompetition provisions of the employment agreement between Plaintiff and Defendant.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, while the trial court's decision to enforce the nondisclosure agreement should be affirmed, the trial court erred by concluding that the noncompetition agreement at issue here was enforceable and by issuing a preliminary injunction enforcing that agreement. As a result, the trial court's order should be, and hereby is, affirmed in part and reversed in part.

AFFIRMED IN PART; REVERSED IN PART.

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

JAMES HINSON, Plaintiff
v.
CITY OF GREENSBORO, DAVID WRAY, former Police Chief of the City of Greensboro, in his official and Individual capacity, and RANDALL BRADY, former Deputy Police Chief of the City of Greensboro, in his official and individual capacity, Defendants

No. COA13-404

Filed 4 February 2014

1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—immunity—substantial right—non-immunity related arguments

Although appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review, defendants were not entitled to immediate appellate review of the trial court's denial of their motions to dismiss on the basis of any non-immunity related arguments. Further, defendant's petitions for writ of *certiorari* were denied.

2. Immunity—sovereign—liability insurance policy—official capacity—waiver—state claims of discrimination

The trial court erred by denying defendants' motion to dismiss with respect to plaintiff's state claims against defendant city and defendants Wray and Brady in their official capacities. Based on the terms of the city's liability insurance policy, it had not waived its immunity as to plaintiff's state claims of discrimination on the basis of race, conspiracy to discriminate on the basis of race, or conspiracy to injure plaintiff in his reputation and profession. Further, plaintiff's claim against defendants Wray and Brady in their official capacities was a suit against the State, and therefore, sovereign immunity applied.

Appeal by defendants from order entered 18 December 2012 by Judge Edwin G. Wilson, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 8 October 2013.

Ferguson Chambers & Sumpter, P.A., by James E. Ferguson, II, for plaintiff-appellee James Hinson.

Van Laningham Duncan PLLC, by Allison O. Van Laningham, Alan W. Duncan, and L. Cooper Harrell, for defendant-appellant City of Greensboro.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, and Carruthers & Roth, P.A., by Kenneth R. Keller, for defendant-appellants Randall Brady and David Wray.

McCULLOUGH, Judge.

Defendants City of Greensboro, David Wray, and Randall Brady appeal from a trial court's interlocutory order, denying their motions to dismiss plaintiff James Hinson's complaint, except as to plaintiff's claim for punitive damages against defendant City of Greensboro. Based on the following reasons, we reverse the trial court's denial of defendants' motion to dismiss with respect to plaintiff's State claims against defendant City of Greensboro and defendants David Wray and Randall Brady in their official capacities.

I. Background

On 30 May 2008, plaintiff James Hinson filed a complaint against defendant City of Greensboro ("defendant Greensboro"), David Wray,

former Police Chief of the City of Greensboro, in his official and individual capacity ("defendant Wray"), and Randall Brady, former Deputy Police Chief of the City of Greensboro, in his official and individual capacity ("defendant Brady") (collectively "defendants"). Plaintiff sought compensation and alleged that defendants had subjected plaintiff to discrimination on the basis of race, conspired to discriminate on the basis of race, and conspired to injure plaintiff in his reputation and profession. Plaintiff amended this complaint on 6 February 2009. On 4 September 2009, plaintiff filed a voluntary dismissal of his claims, without prejudice.

Plaintiff filed a second complaint on 3 September 2010. The complaint alleged the following, in pertinent part: Plaintiff, an African-American, started working for the Police Department of the City of Greensboro in 1991 as a police officer in training. Plaintiff received numerous awards and received evaluations at the level of "exceeds expectations" and "superior performance" from the years 2000 through 2010. On 1 December 2001, plaintiff was promoted to Lieutenant. In 2003 and 2004, Chief of Police defendant Wray and Deputy Police Chief defendant Brady began "targeting plaintiff and creating problems for him in his workplace because of plaintiff's race."

The complaint further alleged that in 2003, defendants Wray and Brady directed two officers to gather pictures of various black officers employed by the Greensboro Police Department, including a photograph of plaintiff, to be used in line-up books or to be used in line-up photos while similarly situated white officers were not treated in this manner. From 2003 to 2004, defendants Wray and Brady caused some black officers of the City of Greensboro Police Department, including plaintiff, to be investigated by the Special Investigation Division ("SID") for alleged misconduct when SID was not created for this purpose. The Criminal Investigation Division ("CID") and Internal Affairs units were designed to investigate matters involving Greensboro Police Officers. Defendants required white officers suspected of wrongdoing to be investigated by the CID, Internal Affairs Division, or caused some white officers not to be investigated at all.

Plaintiff was transferred from the Operation Support Division to the Central Division under the direction of a Commanding Officer who required plaintiff to complete a detailed monthly schedule. Plaintiff alleges that similarly situated white officers were not treated in this manner. Plaintiff's department-issued computer was installed with a device that would monitor his activity while no other lieutenants in the Greensboro Police Department were monitored. Plaintiff filed a grievance

alleging retaliation and a hostile work environment but dropped the grievance after a meeting on 2 February 2005 where defendant Wray, defendant Brady, an Assistant Chief, a Commanding Officer, and Police Attorney were present. In March 2005, at the instruction of defendant Wray, a tracking device was placed on plaintiff's patrol car. Defendant Brady advised plaintiff that he was under surveillance because he was "possibly working off duty while on duty in violation of the Greensboro Police Department Departmental Directives and Procedures." Plaintiff alleged that his race was the motivation in initiating these investigations.

Defendant Wray falsely reported to the City Manager, Deputy City Manager, City Attorney, and media that plaintiff was suspected of being associated with illegal drug activity and other criminal activity. On 17 June 2005, plaintiff was suspended by defendant Wray for alleged on-going relationships with prostitutes and others who have a reputation in the community for involvement in criminal activity. Defendant Wray also delivered a public media statement falsely alleging that plaintiff was part of an "ongoing multi-jurisdictional criminal investigation" and that plaintiff's actions were under "internal review." Even though plaintiff was cleared by SID for any alleged wrongdoing, defendant Wray initiated an additional investigation of plaintiff by hiring retired and former officers of the Internal Affairs Division. Defendants Brady and Wray approved an additional investigation which did not adhere to the Greensboro Police Department's policies and Standard Operating Procedures. It was completed on 31 August 2005. On 5 June 2005, plaintiff was placed on leave. He was reinstated in January 2006. Since 2001, plaintiff has not been promoted and has not received any awards or commendations within the department.

Plaintiff's complaint alleged discrimination on the basis of his race, conspiracy to discriminate on the basis of race, and conspiracy to injure plaintiff and his reputation and profession in violation of federal law, 42 USC § 1981, § 1983, and § 1985 and in violation of North Carolina common law. Plaintiff argued that defendants had waived their governmental immunity by the purchase of liability insurance, as provided in N.C. Gen. Stat. § 160A-485[1], and that defendant Greensboro was liable as

1. N.C.G.S. § 160A-485(a) (2013) states that "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance. . . ."

respondeat superior as to each of the state common law claims against defendants Wray and Brady.

On 22 November 2010, defendant Wray and defendant Brady filed motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 24 November 2010, defendant Greensboro filed a motion to dismiss pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6).

Following a hearing held on 16 October 2012, the trial court entered an order on 18 December 2012. The order denied defendant Wray's motion to dismiss and defendant Brady's motion to dismiss. The order denied defendant Greensboro's motion to dismiss, except as to the claim for punitive damages against defendant Greensboro. As to that claim only, the motion to dismiss was allowed.

From this order, defendants appeal.

II. Standard of Review

"On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conducts a de novo review[.]" *Ventriglia v. Deese*, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819-820 (2008) (citation omitted). "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation omitted). "The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004) (citation and quotation marks omitted).

"Dismissal is proper, however, when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 204 (2005) (citation and quotation marks omitted).

III. Discussion

A. Scope of Review

[1] As a preliminary matter, we must first identify the issues that are properly before this Court.

"This Court has held that appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Williams v. Devere Const. Co., Inc.*, __ N.C. App. __, __, 716 S.E.2d 21, 25 (2011) (citation omitted). However, this only applies "for denial of a motion to dismiss under Rules 12(b)(2), 12(b)(6), and 12(c), or a motion for summary judgment under Rule 56. We cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1)." *Horne v. Town of Blowing Rock*, __ N.C. App. __, __, 732 S.E.2d 614, 621 (2012). Therefore, defendants' challenges to the trial court's denial of their motion to dismiss under Rule 12(b)(2) and 12(b)(6) based on governmental immunity grounds are properly before us.

Defendants have also sought immediate review of the trial court's denial of their motion to dismiss based on non-immunity related challenges by petitioning this Court.[2] However, defendants have not stated how a substantial right would be lost absent immediate appellate review of these non-immunity related challenges. Because it is well established that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order" and that "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits[,]" we decline to review the non-immunity related challenges to the trial court's denial of defendants' motions to dismiss. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted). *See Bynum v. Wilson County*, __ N.C. App. __, __, 746 S.E.2d 296, 299-300 (2013) (granting review of an interlocutory order raising issues of governmental or sovereign immunity but limiting the scope of review to only immunity-related challenges).

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2. The non-immunity related arguments advanced by defendants consist of claims that plaintiff's cause of action on the basis of race in violation of 42 U.S.C. § 1981 was time-barred; that defendant Greensboro could not be held liable on the basis of *respondeat superior*; that plaintiff's claim pursuant to 42 U.S.C. § 1983 is a new claim that cannot be included based on the "savings provision" of Rule 41(a) of the North Carolina Rules of Civil Procedure; that plaintiff's discrimination claim in violation of 42 U.S.C. § 1983 for violation of 42 U.S.C. § 1981 is time-barred; that defendants cannot be parties to a conspiracy; that plaintiff cannot show an agreement that would support a civil conspiracy due to the intracorporate immunity doctrine; that the parties' signed "Memorandum of Understanding" operated as an accord and satisfaction to bar plaintiff's claims; and that plaintiff's 2010 complaint did not properly allege claims against defendants Wray and Brady in their individual capacities, thereby violating Rule 41(a) and being barred by the statute of limitations.

Based on the foregoing, defendants are not entitled to immediate appellate review of the trial court's denial of their motions to dismiss on the basis of any non-immunity related arguments and we dismiss those portions of their appeal that rely on non-immunity related issues. Furthermore, we deny defendant's petitions for writ of certiorari, requesting that our Court review the entirety of the 18 December 2012 Order, including non-immunity related arguments.

B. Sovereign Immunity

[2] Defendants argue that plaintiff's state law claims of discrimination on the basis of race, conspiracy to discriminate on the basis of race, and conspiracy to injure plaintiff in his reputation and profession all fail under the doctrine of governmental immunity.

It is well established that "[s]overeign immunity shields the State, its agencies, and officials sued in their official capacities from suit on state law claims unless the State consents to suit or waives its right to sovereign immunity." *Toomer v. Garrett*, 155 N.C. App. 462, 480, 574 S.E.2d 76, 91 (2002) (citation omitted). "The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function." *Dalenko v. Wake Cty. Dep't of Human Servs.*, 157 N.C. App. 49, 55, 578 S.E.2d 599, 603 (2003) (citation omitted). "Law enforcement is well-established as a governmental function, and includes the training and supervision of officers by a police department." *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512, 524 (2008) (citations and quotation marks omitted).

"A [city] may, however, waive such immunity through the purchase of liability insurance. [I]mmunity is waived only to the extent that the [city] is indemnified by the insurance contract from liability for the acts alleged." *Satorre v. New Hanover County Bd. Of Comm'rs*, 165 N.C. App. 173, 176, 598 S.E.2d 142, 144 (2004) (citations and quotation marks omitted). A municipality may also waive its immunity by participating in a local government risk pool. N.C. Gen. Stat. § 160A-485(a) (2011). "In order to overcome a defense of [sovereign] immunity, the complaint must specifically allege a waiver of [sovereign] immunity. Absent such an allegation, the complaint fails to state a cause of action." *Green v. Kearney*, 203 N.C. App. 260, 268, 690 S.E.2d 755, 762 (2010) (citation omitted).

We find *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512 (M.D.N.C. 2008), to be instructive on the issue before us. In *Pettiford*, plaintiffs Nicole and Anthony Pettiford sought civil damages based on alleged misconduct arising from an investigation by the Greensboro

Police Department which is operated and owned by the defendant City of Greensboro. *Id.* at 515. The plaintiffs filed the action in the Superior Court of Guilford County, North Carolina, seeking recovery under the United States Constitution, pursuant to 42 U.S.C. § 1983, the North Carolina Constitution, and the common law of negligence. *Id.* at 516. The City of Greensboro removed the action on the grounds of federal question jurisdiction. *Id.* In lieu of answering, the City of Greensboro filed a motion to dismiss and a supplemental motion to dismiss pursuant to Rule 12(b)(1), (b)(2), (b)(6) and (b)(7)[3] of the Federal Rules of Civil Procedure. *Id.*

The *Pettiford* court noted that the City of Greensboro acknowledged its participation in a Local Government Excess Liability Fund ("Fund") and purchased an excess liability insurance policy, but that "neither constitute[d] a waiver of its immunity." *Id.* at 525. Uncontested evidence established that the City of Greensboro is self-insured up to $100,000.00 and that the Fund pays claims between $100,000.00 and $3,000,000.00, though the City of Greensboro is obligated to repay the Fund in the entirety. *Id.* The court in *Pettiford* concluded that the Fund did not waive the City of Greensboro's immunity as explained in *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 N.C. App. 1, 8-9, 530 S.E.2d 590, 596 (2000), because the Fund failed to meet the statutory requirements of a local government risk pool.

Furthermore, the *Pettiford* court concluded that the City of Greensboro's purchase of excess liability insurance did not waive its governmental immunity based on the explicit language of the policy. The City of Greensboro acknowledged that it purchased a $5 million excess liability policy to cover claims above $3 million. The *Pettiford* court examined the policy provisions of the excess liability insurance and found them to be substantially similar to those found in *Magana v. Charlotte-Mecklenburg Board of Education*, 183 N.C. App. 146, 645 S.E.2d 91 (2007), where our Court held that a local governmental entity had not waived its immunity through the purchase of excess liability insurance. *Id.* at 527. Both the policy found in *Magana* and the City of

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3. Rule 12(b) of North Carolina Rules of Civil Procedure provides the following, in pertinent part: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, . . . (6) Failure to state a claim upon which relief can be granted, (7) Failure to join a necessary party." N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), (6), and (7) (2013).

Greensboro's policy in *Pettiford* "disclaim[ed] any right of indemnification until (1) the damages exceed a self-insured retention amount ($1 million in *Magana* and $3 million in [*Pettiford*]); (2) the insured has a legal obligation to pay those damages; and (3) the insured actually pays those damages to the claimant." *Id.* at 529. The *Pettiford* court concluded the following:

> This excess liability insurance does not apply unless and until the City has a legal obligation to pay the $ 3 million self-insured amount. Because the City is immune from negligence claims up to $ 3 million, it will never have a legal obligation to pay this self-insured amount and, thus, has not waived its immunity through the purchase of this excess liability insurance policy.

The City of Greensboro's motion to dismiss and supplemental motion to dismiss the negligence claims were granted. *Id.* at 529.

In the case before us, plaintiff argued in the 3 September 2010 complaint that defendant Greensboro had waived its governmental immunity by the purchase of liability insurance. In its motion to dismiss, defendant Greensboro acknowledges the purchase of liability insurance, but maintains that the liability insurance does not constitute a waiver of its sovereign immunity. In support of its defense, defendant Greensboro filed the affidavit of Everette Arnold, Executive Director of the Guilford City/County Insurance Advisory Committee and the insurance contracts themselves[4]. The evidence indicates that in 2004, defendant Greensboro purchased a $5 million excess liability policy with a $3 million self-insured retention from the Genesis Insurance Company. Arnold's affidavit stated that "the retained limit ($3,000,000.00) 'must be paid by the Insured. . . .' Thus, under the terms of the policy, the City [of Greensboro] is responsible for paying $3,000,000.00 before there is any potential coverage under the Genesis Insurance policy." The language of the insurance policy states that "[t]his policy is not intended by the Insured to waive its governmental immunity[.]" We find these policy provisions to be substantially similar to those found in *Magana* and *Pettiford*.

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4. The defense of sovereign immunity is both a North Carolina Rules of Civil Procedure Rule 12(b)(1) and Rule 12(b)(2) defense. *Battle Ridge Cos. v. N.C. DOT*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003). "Consideration of the affidavits and insurance contracts is proper, without converting the motion to dismiss to one for summary judgment, under motions filed pursuant to Rules 12(b)(1) and (b)(2) and with respect to state law claims." *Pettiford*, 556 F. Supp. 2d at 525 n.11.

Based on the terms of defendant Greensboro's liability insurance policy, we hold that defendant Greensboro has not waived its immunity as to plaintiff's State claims of discrimination on the basis of race, conspiracy to discriminate on the basis of race, and conspiracy to injure plaintiff in his reputation and profession. Furthermore, plaintiff's claims against defendants Wray and Brady in their official capacities "is a suit against the State" and therefore, sovereign immunity applies. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation omitted); *See Clayton v. Branson*, 153 N.C. App. 488, 493, 570 S.E.2d 253, 257 (2002) (stating that "[a]n officer acting in his official capacity shares the municipalities immunity or waiver" (citation omitted)). Accordingly, we reverse the trial court's denial of defendants' motion to dismiss with respect to plaintiff's state claims against defendant Greensboro and defendants Wray and Brady in their official capacities.

Reversed.

Judges MCGEE and DILLON concur.

IN THE MATTER OF C.W.F.

No. COA13-444

Filed 4 February 2014

Evidence—reports—non-testifying witness—right to confrontation—voluntary admission of a minor

The trial court erred in a hearing for review of a voluntary admission of a minor authorizing a continued admission for inpatient psychiatric treatment by admitting into evidence and relying upon three reports prepared by non-testifying witnesses. Admission of the reports violated the minor's right to confrontation.

Appeal by juvenile respondent from order entered 22 August 2012 by Judge Don W. Creed, Jr. in Moore County District Court. Heard in the Court of Appeals 25 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson and Special Deputy Attorney General Lisa Corbett, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for juvenile respondent-appellant.

Miranda R. McCoy, for petitioner-appellee Jackson Springs Treatment Center.

CALABRIA, Judge.

C.W.F. appeals an order concurring with the voluntary admission of a minor and authorizing a continued admission for inpatient psychiatric treatment for a period of 90 days. We vacate the order and remand to the trial court for findings.

On 7 August 2012, C.W.F's mother consented to C.W.F.'s evaluation for treatment, services and support provided by Jackson Springs Treatment Center ("Jackson Springs"). Freida Green ("Green"), a member of Jackson Springs' staff, completed C.W.F.'s Evaluation for Admission/Continued Stay ("Green's evaluation"). Green described her findings, included C.W.F.'s medications and recommended his admission for treatment or rehabilitation.

On 8 August 2012, Green filed a Request for Hearing to determine whether the court concurred with the voluntary admission/continued stay. Green attached her evaluation as well as a psychological evaluation prepared by licensed psychological associate Daniel Huang, M.A., dated 15 January 2012 ("Huang's evaluation").

Dr. Leah McCallum, Ph.D. ("Dr. McCallum"), performed a Comprehensive Clinical Assessment ("McCallum's assessment") dated 10 August 2012, which included, *inter alia*, C.W.F.'s general health and behavioral health history, described his removal from home for sexually abusing his younger sister, physical abuse by his father, and the precipitating events that caused his problems. McCallum's assessment also included recommendations for C.W.F.'s treatment within a structural 24-hour therapeutic environment. Dr. McCallum justified treatment at Jackson Springs because less intense levels of care where C.W.F. remained in the home and received community based treatment had been attempted but were unsuccessful. In the less structured treatment environments, C.W.F. continued to exhibit emotional and behavioral problems both in the home and community settings.

At the hearing in Moore County District Court on 22 August 2012 to determine whether C.W.F. should be treated at Jackson Springs or whether a less restrictive environment would be sufficient, the trial

court reviewed Green's and Huang's evaluations that had been attached to the Request for Hearing. C.W.F. was represented by appointed counsel. Jackson Springs presented the testimony of clinical director Teresa McGuire ("McGuire") as well as McCallum's assessment. McGuire, a social worker and clinical director at Jackson Springs, testified that she was providing C.W.F. with individual and group therapy. McGuire stated the reason C.W.F. was transferred to Jackson Springs from his prior treatment facility in South Carolina. Specifically, during C.W.F's prior placement, he displayed physical and verbal aggression and violated sexual boundaries with peers. McGuire believed that in C.W.F.'s prior treatment facility, he had possibly learned the skills he needed to reduce his physical and verbal aggression but had been unable to carry out those skills. C.W.F. objected to McGuire's testimony.

When McGuire was questioned regarding the purpose of reviewing a patient's medical records, she answered that it is part of the process of familiarizing the staff with a new patient's history, and that to prepare for the hearing she had reviewed Green's and Huang's evaluations as well as McCallum's assessment (collectively, "the reports"). C.W.F. objected to the introduction of the reports. The trial court overruled C.W.F.'s objections to McGuire's testimony and also admitted the reports.

The trial court found as fact all matters that had been set out in Green's evaluation, which included Green's opinion that C.W.F. was mentally ill, and incorporated it by reference as findings. Based on the findings, the trial court concluded that C.W.F. was mentally ill and in need of continued treatment at Jackson Springs because less restrictive measures would not be sufficient. In addition, the court concurred with C.W.F.'s voluntary admission and authorized C.W.F.'s continued admission at Jackson Springs for 90 days. C.W.F. appeals.

C.W.F. argues that the court erred by admitting and relying on three reports prepared by non-testifying witnesses because the reports violated his right to confrontation. We agree.

N.C. Gen. Stat. § 122C-224.3(f) (2011) provides the criteria for the trial court to determine whether a minor should remain in a voluntary admission:

> For an admission to be authorized beyond the hearing, the minor must be (1) mentally ill or a substance abuser and (2) in need of further treatment at the 24-hour facility to which he has been admitted. Further treatment at the admitting facility should be undertaken only when lesser measures will be insufficient. It is not necessary that the

> judge make a finding of dangerousness in order to support a concurrence in the admission.

On appeal from an order of involuntary commitment, the questions for determination are (1) whether the court's findings of fact "are indeed supported by the 'facts' which the court recorded in its order as supporting its findings, and (2) whether in any event there was competent evidence to support the court's findings." *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977). These same issues must be addressed in an appeal from the voluntary commitment of a minor.

C.W.F. disputes the trial court's findings of mental illness and that further treatment at Jackson Springs was based upon competent evidence. Specifically, C.W.F. argues that the admission of all three reports deprived him of his right to confrontation.

N.C. Gen. Stat. § 122C-224.3, which addresses hearings for review of voluntary admissions of minors, provides that "[c]ertified copies of reports and findings of physicians, psychologists and other responsible professionals as well as previous and current medical records are admissible in evidence, but the minor's right, through his attorney, to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-224.3(c) (2011). Thus, the plain language of this statute not only permits admission of relevant medical records into evidence, but also ensures the minor's right to confront and cross-examine witnesses. *Id.* The juxtaposition of these two points in a single sentence indicates the legislature sought to protect the minor's right to confront and cross-examine witnesses regarding those admissible records.

In the instant case, McGuire was Jackson Springs' sole witness at the hearing. C.W.F.'s counsel specifically objected to McGuire's reliance on the reports "on the grounds of hearsay, lack of confrontation, and foundation" and later objected to the admission of the reports themselves on the same grounds. The court overruled the objections and admitted Green's report as well as Huang's evaluation and McCallum's assessment. McGuire indicated that the purpose of all three reports was for the professionals at Jackson Springs to acquaint themselves with C.W.F.'s specific needs and individual conditions as a new patient.

The trial court found as fact all matters in Green's evaluation, and incorporated it by reference as findings. The court made no additional findings of fact. While Green's evaluation was certified as a true and exact copy of the Evaluation for Admission/Continued Stay, and therefore admissible under N.C. Gen. Stat. § 122C-224.3(c) as a certified copy of a report by a "psychologist [or] other responsible professional,"

Green was not available to testify at the hearing. In addition, Green was not subject to cross-examination regarding her evaluation and opinions regarding C.W.F.'s mental health. Therefore, the trial court erred in relying solely on Green's evaluation, since C.W.F. had no opportunity to cross-examine her.

The court's conclusions of law that C.W.F. was mentally ill, in need of continued treatment, and that less restrictive measures than a voluntary commitment would not be sufficient, are based solely upon Green's report. However, Green did not testify at the hearing, and C.W.F. was unable to confront or cross-examine Green regarding the findings and opinions she recorded in her evaluation. Since N.C. Gen. Stat. § 122C-224.3(c) protects a minor's right to cross-examine witnesses regarding relevant medical records, we vacate the trial court's order, remand for further findings, and need not address C.W.F.'s remaining arguments.

Vacated and remanded.

Judges ELMORE and STEPHENS concur.

IN THE MATTER OF D.H., D.H., K.H.

No. COA13-1055

Filed 4 February 2014

1. **Termination of Parental Rights—best interests of child—age of children**

   The trial court did not abuse its discretion by determining that termination of respondent mother's parental rights was in the best interests of the minor children even though the trial court failed to make written findings concerning the age of the children. Respondent failed to cite any evidence in the record indicating that age was raised as a relevant factor in this case.

2. **Termination of Parental Rights—findings—likelihood children would be adopted**

   Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to the likelihood that the children would be adopted pursuant to N.C.G.S. § 7B-1110(a)(2), the trial court made the requisite findings concerning this factor.

3. Termination of Parental Rights—findings—whether termination would aid in accomplishment of permanent plan

Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to N.C.G.S. § 7B-1110(3), concerning whether termination would aid in the accomplishment of the permanent plan for the juveniles, which in this case was adoption, the trial court made sufficient findings concerning this factor.

4. Termination of Parental Rights—findings—absence of adoptive placement

Although respondent mother in a termination of parental rights case contended that the trial court abused its discretion by making no findings with respect to the quality of the relationship between the juveniles and the proposed adoptive parent, guardian, custodian, or other permanent placement, pursuant to N.C.G.S. § 7B-1110(5), the absence of an adoptive placement for a juvenile at the time of the termination hearing was not a bar to terminating parental rights.

5. Termination of Parental Rights—findings—adoptability of children

The trial court did not abuse its discretion by terminating respondent mother's parental rights even though she contended that it was unlikely that two of the children would be adopted. The trial court found as fact that with continued therapeutic support, these children were likely to be adoptable.

Appeal by respondent from order entered 27 June 2013 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 7 January 2014.

Twyla Hollingsworth-Richardson for Mecklenburg County Department of Social Services, Youth & Family Services.

Poyner Spruill LLP, by Shannon E. Hoff, for guardian ad litem.

Peter Wood for respondent-mother.

DILLON, Judge.

Respondent mother appeals from an order terminating her parental rights as to the juveniles D.H. ("Dora"), D.H. ("David"), and K.H ("Kim").[1] For the reasons stated herein, we affirm.

In February of 2009, the Mecklenburg County Department of Social Services ("DSS") obtained non-secure custody of eleven-year-old Kim, five-year-old David, and four-year-old Dora and filed a petition alleging that they were neglected and dependent juveniles. The petition's allegations described respondent's inadequate supervision of the juveniles and substance abuse, as well as her lack of appropriate alternative placement for the children.

The district court entered adjudications of neglect and dependency on 16 April 2009. On 8 February 2012, the court ceased reunification efforts and changed the juveniles' permanent plan to adoption.

DSS filed a petition for termination of respondent's parental rights on 16 October 2012. The district court heard the petition on 15 May 2013. In its order entered 27 June 2013, the district court found grounds to terminate respondent's parental rights based on (1) neglect, (2) failure to make reasonable progress, (3) failure to pay a reasonable portion of the cost of care, and (4) abandonment. N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (7) (2011). At disposition, the court found and concluded that terminating respondent's parental rights was in the best interests of each child. N.C. Gen. Stat. § 7B-1110(a) (2011). Respondent filed timely notice of appeal from the termination order.[2]

The termination of parental rights statutes provide for a two-stage termination proceeding: an adjudication stage and a disposition stage. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a). *Id.* If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B-1110(a). " 'We review the trial court's decision to terminate parental rights [(made at the disposition stage)] for abuse of discretion.' " *In re*

1. Pseudonyms are used throughout this opinion to protect the identity of the juveniles. *See* N.C.R. App. P. 3.1(b).

2. The order also terminated the parental rights of the juveniles' fathers, none of whom has pursued an appeal.

J.L.H., __ N.C. App. __, __, 741 S.E.2d 333, 337 (2012) (citation omitted). "The trial court 'is subject to reversal for abuse of discretion only upon a showing . . . that the challenged actions are manifestly unsupported by reason.' " *Id.* (citation omitted).

In this case, respondent does not challenge the adjudicatory portion of the trial court's order in which the court determined that grounds existed to support termination of respondent's parental rights. Rather, respondent argues that the trial court abused its discretion in the disposition portion of its order in which the court determined that termination of her parental rights was in the children's best interests. Specifically, respondent argues that the trial court failed to made adequate findings of fact on the dispositional factors set forth in N.C. Gen. Stat. § 7B-1110(a) (2011); and, further, that the court erred in determining that termination of her parental rights was in the juveniles' best interests, given that two of the children are unlikely to be adopted.

N.C. Gen. Stat. § 7B-1110(a) provides that in determining whether terminating parental rights is in a child's best interest, "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds relevant, reliable and necessary to determine the best interests of the juvenile." *Id.* This statute further provides the following:

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. We believe that the language of this stature requires the trial court to "consider" all six of the listed factors, and that any failure to do so would

constitute an abuse of discretion. The statute, as amended in 2011, also requires that the trial court make certain written findings. *In re J.L.H.*, __ N.C. App. at __, 741 S.E.2d at 338-39. We do not believe, however, that N.C. Gen. Stat. § 7B-1110(a) requires the trial court to make written findings with respect to *all* six factors; rather, as the plain language of the statute indicates, the court must enter written findings in its order concerning only those factors "that are relevant." *Id.* at __, 741 S.E.2d at 339 (holding that "[t]he amended statute now explicitly requires that the trial court to make written findings of fact on all relevant factors from N.C. Gen. Stat. § 7B-1110(a)").

[1] Respondent argues that the trial court erred by not making any written findings in connection with the factors set forth in subparts (1), (2), (3) and (5) of N.C. Gen. Stat. § 7B-1110(a). Regarding subpart (1), which concerns the age of the children, we agree with respondent that the trial court did not make any findings as to this factor. Respondent argues that the age of each child is a relevant factor because it bears on their adoptability. However, respondent fails to cite any evidence in the record indicating that age was raised as a relevant factor *in this case*. Respondent instead focuses on the following testimony of the DSS worker:

> . . . I'm aware that there are families – or there is at least one family that has expressed an interest in [Dora].
>
> [David], with the right supports in place, I believe that we could find an adoptive home for [David]. It will be a little bit more difficult just given the . . . behavioral issues that he's exhibiting in placement and in school.
>
> And I don't think that it would be a problem to find — [Kim] is a very engageable, very sweet young woman. I don't think there would be any problem in finding an adoptive home for her. *That does get a little bit more difficult with age*, but I think that she could certainly engage with a family if the right family was found for her.

(Emphasis added). We construe this testimony as indicative of the DSS worker's belief that a child's age *can be* a relevant factor in considering a child's adoptability, but not as indicative of any belief on her part that the children's age was a relevant or influential factor in the present case. Since respondent fails to point to any evidence in the record demonstrating that age was placed in issue as a relevant factor, such that it had an impact on the trial court's decision, we do not believe that the trial

court erred in not making specific findings concerning the children's ages in its order.[3]

[2] Next, respondent argues that the trial court erred by making no findings with respect to the likelihood that the children would be adopted, pursuant to N.C. Gen. Stat. § 7B-1110(a)(2). However, we believe that the trial court made the requisite findings concerning this factor. Specifically, the trial court made findings with respect to each child's current emotional state, that each child's emotional state would likely improve once the uncertainty about their status was lifted, and that "[w]ith continued therapeutic support[,] these children are likely to be adoptable." We believe that these findings are supported by the evidence, including the testimonies of the DSS worker and Dr. Kamillah McKissick. Accordingly, this argument is overruled.

[3] Respondent next argues that the trial court erred by failing to make findings pursuant to N.C. Gen. Stat. § 7B-1110(3), concerning whether termination would aid in the accomplishment of the permanent plan for the juveniles, which in this case is adoption. We believe, however, that the trial court made sufficient findings concerning this factor in its order. Specifically, the trial court found as fact that the children have "experienced significant emotional turmoil over the last four years as a result of their impermanent status in foster care"; that they would significantly improve once they are "free and able" to engage in a relationship with a permanent care provider; that "with therapeutic support[,] these children are likely to be adoptable"; and that any attempts to encourage contact with their mother would be "inconsistent with the children's health, safety, and need for a safe permanent home within a reasonable time." Accordingly, this argument is overruled.

[4] Respondent next argues that the trial court erred by making no findings concerning "[t]he quality of the relationship between the juvenile[s] and the proposed adoptive parent, guardian, custodian, or

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3. *In J.L.H.*, *supra*, the trial court did not to make findings regarding the factors listed in subparts (3) and (4) of N.C. Gen. Stat. § 7B-1110(a). *In re J.L.H.*, __ N.C. App. at __, 741 S.E.2d at 337. We determined that those factors were relevant and, accordingly, remanded to the trial court to make findings as to those factors. *Id.* at __, 741 S.E.2d at 338. In determining that those factors were relevant, we noted that they had been placed in issue by virtue of the evidence presented before the trial court; and we specifically recounted the conflicting evidence concerning one of the factors. *Id.* at __, 741 S.E.2d at 337-38. However, unlike in *J.L.H.*, in the case *sub judice*, though the ages of the children were properly "considered," respondent does not point to any evidence indicating that the age of any child was placed in issue such that this factor was "relevant."

other permanent placement[,]" pursuant to N.C. Gen. Stat. § 7B-1110(5). Respondent contends that there was no evidence concerning a potential adoptive parent for any of the children. Indeed, the trial court found that Youth and Family Services "is yet to find a single relative who has cooperated with efforts to assess their home for placement and maintained a willingness to provide a home for these children." However, we have held that the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights. *See In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983) ("It suffices to say that such a finding [of adoptability] is not required in order to terminate parental rights."). Therefore, where there is currently no proposed candidate to provide permanent placement, a trial court would not be able to make any findings with regard to subpart (5), since there would be no relationship bond to assess in its decision-making process. In any event, the trial court did identify the children's maternal grandmother as a possible permanent placement provider if she were able to qualify; and the trial court made a number of findings regarding the relationship between her and the children. Accordingly, this argument is overruled.

[5] Finally, respondent argues that the trial court abused its discretion in terminating her parental rights because, she contends, it was unlikely that two of the children would be adopted. However, trial court found as fact that "[w]ith continued therapeutic support[,] these children are likely to be adoptable." We believe that this finding is supported by the evidence, including Dr. McKissick's expert opinion and the testimony of the DSS worker, *supra*. We have carefully reviewed the trial court's order and do not believe that its decision to terminate respondent's parental rights was "manifestly unsupported by reason[,]" *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). Accordingly, this argument is overruled; and we affirm the order of the trial court.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

IN THE MATTER OF MARY ELLEN BRANNON THOMPSON

No. COA13-564

Filed 4 February 2014

1. Civil Procedure—law of case—judgment never entered

The trial court erred by concluding that an incompetency order was the law of the case. The incompetency order was invalid because judgment was never entered.

2. Guardian and Ward—appointment of guardian of estate—incompetency order never entered

The clerk's appointment of Mr. Thompson as guardian of respondent's estate was without legal authority. The incompetency order was never entered.

3. Collateral Estoppel and Res Judicata—res judicata—reliance on invalid orders

The trial court erred by concluding that the issues raised in appellant's appeal to the trial court were barred by the doctrine of *res judicata*. The other orders relied upon by the trial court in determining *res judicata* were invalid.

4. Pleadings—sanctions—improperly assessed

The trial court erred by imposing sanctions pursuant N.C.G.S. § 1A-1, Rule 11. The clerk's failed entry of the incompetency order prevented appellant from filing timely written notice of appeal of that order. Appellant also had a proper purpose, factual basis, and legal basis to the file motions.

Appeal by Calvin Brannon from order entered 20 November 2012 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 20 November 2013.

Attorney Reginald D. Alston for Calvin Brannon, appellant.

CRUMPLER, FREEDMAN, PARKER & WITT, by Dudley A. Witt, for Bryan C. Thompson, appellee.

ELMORE, Judge.

On 20 November 2012, Judge Anderson D. Cromer (Judge Cromer) entered an order that denied all four of Calvin Brannon's (appellant)

motions, dismissed them with prejudice, and issued sanctions against appellant. Each of appellant's motions hinged on the argument that an incompetency order dated 3 May 2007 declaring Mary Ellen Brannon Thompson (respondent) incompetent was never entered. After careful consideration, we reverse and remand the trial court's order.

I. Facts

On 4 April 2007, a Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian was filed by Leslie Poe Parker in Forsyth County Superior Court. The petition alleged that respondent lacked the capacity to manage her own affairs or to make important decisions concerning her "person, family [sic] or property[.]" The same day, a notice of "Hearing on Incompetence and Order Appointing Guardian Ad Litem" was filed. A hearing was conducted on 26 April 2007 by Theresa Hinshaw, assistant clerk of Forsyth County Superior Court (clerk Hinshaw). Numerous individuals were present at the hearing, including appellant, who is the brother of respondent. After the hearing, clerk Hinshaw announced in open court that she found respondent to be incompetent, and she orally appointed Bryan Thompson (Mr. Thompson) as guardian of the estate. On 3 May 2007, clerk Hinshaw signed and dated an order (incompetency order) finding "by clear, cogent, and convincing evidence that the respondent [was] incompetent." Additionally, clerk Hinshaw signed and dated an order authorizing issuance of letters appointing Mr. Thompson guardian of the estate.

Thereafter, appellant filed a "Petition for Removal of Guardianship of the Person" and a "Motion to Set Aside the Adjudication of Incompetence Order and Ask For a Rehearing[.]" Lawrence G. Gordon, Jr., Forsyth County Superior Court Clerk (clerk Gordon), signed and dated an order on 8 December 2009 denying the motions and concluded that the matters were time barred because appellant failed to timely appeal clerk Hinshaw's incompetency order. Appellant then appealed clerk Gordon's order to superior court. In an order entered 6 April 2010, Forsyth County Superior Court Judge James M. Webb (Judge Webb) dismissed both motions with prejudice.

On 27 March 2012, appellant filed four motions giving rise to this appeal. These motions were:

> (a) for relief in the cause from a guardianship granted to Mr. Thompson dated May 1, 2007;
>
> (b) to declare that Leslie Parker did not have the capacity to represent respondent in the filings of motions and petitions on April 4, 2007;

(c) to declare that Mr. Thompson was not appointed the guardian of respondent after an adjudication of incompetence under G.S. 35A 1112(e) and G.S. 35A-1120.

(d) to declare Mr. Thompson's act of filing a voluntary bankruptcy petition under 11 U.S.C. 301 as a state court guardian of the estate of respondent invalid.

These motions were heard before Susan Frye (clerk Frye), Forsyth Superior Court Clerk, and she entered an order on 4 May 2012 denying appellant's motions. She also granted Mr. Thompson's motion for sanctions. In her order, clerk Frye denied motions (a), (b), and (c) because clerk Gordon and Judge Webb had previously "clearly ruled" on appellant's motions, "no appeals were ever entered[,]" "no new evidence was presented[,]" and "[t]he pleadings filed . . . [were] repetitious[.]" Clerk Frye declined to rule on motion (d) because she "[did] not have jurisdiction to hear this matter as the jurisdiction is presently under the Federal Bankruptcy Court." Appellant appealed clerk Frye's order to Forsyth County Superior Court. For the same reasons decreed by clerk Frye, Judge Cromer entered an order on 20 November 2012 denying and dismissing with prejudice appellant's motions (a), (b), and (c). Judge Cromer denied appellant's motion (d) with prejudice because it was "baseless." He also granted Mr. Thompson's motion for sanctions.

II. Analysis

a.) Law of the Case

[1] Appellant first argues that the incompetency order was invalid because judgment was never entered, and therefore the trial court erred in concluding that the incompetency order was the law of the case. We agree.

"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); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal."). "In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*,

364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals." N.C. Gen. Stat. § 35A-1115 (2013).

N.C. Gen. Stat. § 35A-1112 provides a superior court clerk with the authority to find that an individual is incompetent. N.C. Gen. Stat. § 35A-1112 (2013). After such a finding is made, "the clerk *shall enter* an order adjudicating the respondent incompetent." *Id.* (emphasis added). When such an order is entered, "a guardian or guardians shall be appointed[.]" N.C. Gen. Stat. § 35A-1120 (2013). A party seeking to appeal an incompetency order entered by a clerk must

> within 10 days of *entry* of the order or judgment, appeal to the appropriate court for a trial or hearing *de novo*. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. Notice of appeal shall be filed with the clerk in writing. Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law.

N.C. Gen. Stat. § 1-301.1 (2013) (emphasis added).

The North Carolina Rules of Civil Procedure "are applicable to special proceedings, except as otherwise provided." N.C. Gen. Stat. § 1-393 (2013). Rule 58 of the North Carolina Rules of Civil Procedure governs the entry of judgments and orders. N.C.R. Civ. P. § 1A-1, Rule 58 (2013). Under Rule 58, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." *Id.* We have also held that "Rule 58 applies to orders, as well as judgments, such that an *order* is likewise entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." *Watson v. Price*, 211 N.C. App. 369, 370, 712 S.E.2d 154, 155 *review denied*, 365 N.C. 356, 718 S.E.2d 398 (2011) (citation omitted). Thus, an oral ruling announced in open court is "not enforceable until it is entered[.]" *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998) (internal quotation mark omitted). Accordingly, a party cannot appeal an order until entry occurs. *Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 495 (1999). After entry, a clerk's order that is not timely appealed "will stand as a judgment of the court[.]" *In re Atkinson-Clark Canal Co.*, 234 N.C. 374, 377, 67

S.E.2d 276, 278 (1951). This legal proposition stems from the law of the case doctrine, which provides that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009) (internal quotation mark omitted).

Here, both parties agree that the hearing on the Petition for Adjudication of Incompetence was a special proceeding, and thus the Rules of Civil Procedure applied. Clerk Hinshaw orally rendered her decision finding respondent incompetent on 26 April 2007 in open court. Thereafter, she reduced the order to writing and dated it. However, nothing in the record indicates that the order was filed with the clerk of court. The order is devoid of any stamp-file or other marking necessary to indicate a filing date, and therefore it was not entered. *See Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 422, 667 S.E.2d 309, 310 (2008) (asserting that a filing date is to be determined by the date indicated on the file-stamp); *see also Watson*, 211 N.C. App. at 373, 712 S.E.2d at 157 (standing for the proposition that a signed and dated order is insufficient to be considered filed).

Because the order was not filed, it was not entered. Accordingly, the time period to file notice of appeal of clerk Hinshaw's order has not yet commenced. *See Darcy v. Osborne*, 101 N.C. App. 546, 549, 400 S.E.2d 95, 96 (1991) (holding that where judgment was not entered, the appeals period neither triggered nor expired). Furthermore, because clerk Hinshaw's incompetency order is effective only after its entry, the order cannot be the law of the case. *See Worsham v. Richbourg's Sales & Rentals, Inc.*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) ("[A] judgment is . . . not enforceable between the parties until it is entered.").

b.) Guardian of the Estate

[2] Next, appellant argues that since the incompetency order was never entered, clerk Hinshaw had no jurisdiction to appoint Mr. Thompson as guardian of the estate. We agree.

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

As mentioned above, N.C. Gen. Stat. § 35A-1112 requires the clerk to enter an order adjudicating incompetency. *See* N.C. Gen. Stat.

§ 35A-1112. Only once the order is entered shall "a guardian or guardians . . . be appointed[.]" N.C. Gen. Stat. § 35A-1120. Since the order was never entered, the clerk's appointment of Mr. Thompson as guardian of respondent's estate immediately thereafter was without legal authority.[1]

c.) Res Judicata

[3] Appellant also argues that the trial court erred in concluding that the issues raised in his appeal to the trial court were barred by the doctrine of *res judicata*. Specifically, appellant avers that the other orders relied upon by the trial court in determining *res judicata* were invalid. We agree.

N.C. Gen. Stat. § 7A-251 (2013) states that "[i]n all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk[.]" A court acting in an appellate capacity is "without authority to entertain an appeal where there has been no entry of judgment" because entry of judgment is jurisdictional. *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990) (citation omitted). Under the doctrine of *res judicata*, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

Here, appellant appealed clerk Frye's decision *de novo* to superior court. Judge Cromer declined to rule on the merits of appellant's motions and concluded that "[a]ll the previous [m]otions were denied by the [c]lerk and/or another [s]uperior [c]ourt [j]udge or the Bankruptcy Court and, other than the Bankruptcy Order, said Orders were never appealed to the North Carolina Court of Appeals. Based upon the previous [o]rders entered in this matter, the issues raised in the appeal are barred by the doctrine of res judicata[.]" The "previous orders" referred to superior court Judge Webb's order entered 6 April 2010, which was appealed from clerk Lawrence Gordon's order dated 8 December 2009. According to Judge Cromer, he "[could not] reverse Judge Webb" on "a case that [Judge Webb] already ruled on." However, Judge Cromer's conclusion assumed that Judge Webb had jurisdiction to rule on appellant's appeal of clerk Gordon's order to superior court. It is clear from the

1. We also note that the Order Authorizing Issuance of Letters purporting to appoint Mr. Thompson as guardian of the estate was never filed with the clerk's office as it was merely signed and dated by clerk Hinshaw.

record that clerk Gordon's order was never entered as it was merely signed and dated, but devoid of a filing date. *See Watson*, *supra*. The entry of clerk Gordon's order was necessary to vest Judge Webb with jurisdiction to hear appellant's appeal in superior court. *See Searles*, *supra*. Accordingly, no entry of final judgment on the merits of appellant's prior motions occurred such that the issues before Judge Cromer were barred by *res judicata*.

d.) Sanctions

[4] Appellant further argues that the trial court erred in imposing sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. We agree.

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). An analysis of sanctions under Rule 11 consists of a three-pronged analysis: "(1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Peters v. Pennington*, 210 N.C. App. 1, 27, 707 S.E.2d 724, 742 (2011) (citation and quotation omitted). A violation of any of these prongs requires the imposition of sanctions. *Id.* (citation omitted). In determining factual sufficiency, we must decide "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *Id.* (citation and quotation omitted). Whether a motion is legally sufficient requires this Court to look at "the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999) (citation and quotation omitted). "An objective standard is used to determine whether a paper has been interposed for an improper

purpose, with the burden on the movant to prove such improper purpose." *Coventry Woods Neighborhood Ass'n Inc. v. City of Charlotte*, 213 N.C. App. 236, 241, 713 S.E.2d 162, 166 (2011) (citation and quotation omitted). A signer's purpose is heavily influenced by "whether or not a pleading has a foundation in fact or is well grounded in law[.]" *Id.* at 242, 713 S.E.2d at 166 (citation and quotation omitted).

Here, appellant appealed the order from clerk Frye to Judge Cromer in superior court based on motions:

> (a) for relief in the cause from a guardianship granted to Mr. Thompson dated May 1, 2007;
>
> (b) to declare that Leslie Parker did not have the capacity to represent respondent in the filings of motions and petitions on April 4, 2007;
>
> (c) to declare that Mr. Thompson was not appointed the guardian of respondent after an adjudication of incompetence under G.S. 35A 1112(e) and G.S. 35A-1120.
>
> (d) to declare Mr. Thompson's act of filing a voluntary bankruptcy petition under 11 U.S.C. 301 as a state court guardian of the estate of respondent invalid.

Judge Cromer made findings of fact in support of his conclusion to allow Mr. Thompson's motion to sanction appellant pursuant to Rule 11. The pertinent findings stated:

> 1.) The matters presently before this Court have already been heard by the Clerk of the Forsyth County Superior Court and denied, thereafter they have been appealed to the Forsyth County Superior Court and the court has previously ruled on these matters. None of these rulings were appealed to the North Carolina Court of Appeals.
>
> 2.) [T]hese matters [had] been raised, heard and conclusively established by previous court orders. . . . [Clerk Gordon] [has] found that the underlying decisions related to these issues have not been appealed. Issues raised in the first three motions have been conclusively established in this matter contrary to [appellant] and he is bound by the previous adverse rulings.
>
> 3.) [Motion (d)] is false and any reasonable attorney would have known this to be the case if he reviewed the file prior to filing a pleading asserting this claim.

In sum, Judge Cromer sanctioned appellant after finding that his motions were: 1.) time barred from appellate review; 2.) repetitious; 3.) without any factual or legal basis; and 4.) previously ruled on. However, the genesis of appellant's motions was that "the [o]rder dated May 3, 2007 declaring [respondent] incompetent was not file stamped thereby negating its validity." Rooted in our analysis above, it is clear that motions (a), (b), and (c) were never properly ruled on by previous court orders because clerks Hinshaw and Gordon never entered their orders. Moreover, the failed entry of clerk Hinshaw's incompetency order prevented appellant from filing timely written notice of appeal of that order. Appellant also had a proper purpose, factual basis, and legal basis to file motion (d) requesting that Mr. Thompson's voluntary bankruptcy petition be declared invalid based on the incompetency order's invalidity. Thus, the trial court erred in sanctioning appellant under Rule 11.

III. Conclusion

The trial court erred in concluding that: 1.) the incompetency order was the law of the case; 2.) the issues raised in appellant's appeal to superior court were barred by the doctrine of *res judicata*; and 3.) sanctions were appropriate pursuant to Rule 11. Accordingly, we reverse the trial court on each of these issues and remand to the superior court for further proceedings.

Reversed and Remanded.

Judges McCULLOUGH and DAVIS concur.

TOMMY KNOX, VELMA KNOX, AND KERRY GORDON, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS
v.
FIRST SOUTHERN CASH ADVANCE; COMPUCREDIT CORPORATION; VALUED SERVICES ACQUISITIONS COMPANY, LLC; VALUED SERVICES, LLC; VALUED SERVICES OF NORTH CAROLINA, LLC; VALUED SERVICES FINANCIAL HOLDINGS, LLC; VALUED SERVICES HOLDINGS, LLC; FORESIGHT MANAGEMENT COMPANY, LLC; FIRST AMERICAN HOLDING, LLC; FIRST AMERICAN MANAGEMENT, INC.; JAMES E. SCOGGINS AND ROBERT P. MANNING, DEFENDANTS

No. COA12-604

Filed 4 February 2014

Arbitration and Mediation—motion to compel—refusal to grant—error

The trial court erred by refusing to grant defendants' motion to compel arbitration. As held in companion case *Torrence v. Nationwide Budget Finance* also filed by the Court of Appeals on 4 February 2014, the trial court erred by determining that the arbitration agreement was substantively unconscionable.

Appeal by defendants from orders entered 23 January 2012 by Judge D. Jack Hooks, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2012.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, and North Carolina Justice & Community Development Center, by Carlene McNulty, for plaintiff-appellees.

Moore & Van Allen PLLC, by Thomas D. Myrick, Mark A. Nebrig and Jonathan M. Watkins, and Paul Hastings LLP, by J. Allen Maines and S. Tameka Phillips, for defendant-appellants.

STEELMAN, Judge.

Based upon the decisions of the United States Supreme Court in *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), the trial court erred in holding that the arbitration agreement was unconscionable and refusing to compel arbitration.

I. Factual and Procedural History

Between 1 May 2003 and 28 January 2005, Tommy Knox, Velma Knox, Kerry Gordon and Willie Patrick (collectively, "plaintiffs") obtained loans from Community State Bank ("bank"). These loans were short-term, single-disbursement, single-repayment loans in amounts up to $750. At maturity, plaintiffs were required to pay the principal plus a finance charge ranging from eighteen to twenty-seven percent of the principal.

Upon approval for a loan, plaintiffs were presented with an agreement, which conspicuously contained provisions that plaintiffs agreed to binding arbitration of all claims, and that plaintiffs agreed not to participate in a class action lawsuit.

Of particular relevance to the instant case is the following language from the Arbitration Agreement:

> **Arbitration:** You acknowledge that you have read, understand, and agree to the terms contained in the Arbitration Agreement you are signing in connection with this Note. By entering into the Arbitration Agreement, you waive certain rights, including the right to go to court (except as specifically provided in the Arbitration Agreement), to have the dispute heard by a jury, and to participate as a part of a class of claimants relating to any dispute with Lender, First American or their affiliates.
>
> . . .
>
> **ARBITRATION AGREEMENT AND WAIVER OF JURY TRIAL.** Arbitration is a process in which persons with a dispute: (a) waive their rights to file a lawsuit and proceed in court and to have a jury trial to resolve their disputes; and (b) agree, instead, to submit their disputes to a neutral third person (an "arbitrator") for a decision. Each party to the dispute has an opportunity to present some evidence to the arbitrator. Pre-arbitration discovery may be limited. Arbitration proceedings are private and less formal than court trials. The arbitrator will issue a final and binding decision resolving the dispute, which may be enforced as a court judgment. A court rarely overturns an arbitrator's decision. **THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS:**

. . .

2. By entering into this Arbitration Agreement:

(a) YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;

(b) YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and

(c) YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.

3. Except as provided in <u>Paragraph 6</u> below, all disputes including any Representative Claims against us and/or related third parties <u>shall</u> be resolved by binding arbitration <u>only</u> on an individual basis with you. **THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.**

4. Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, you shall have the right to select any of the following organizations to administer the arbitration: the American Arbitration Association[], J.A.M.S./Endispute[], or the National Arbitration Forum[]. However, the parties may agree to select a local arbitrator who is an attorney, retired judge, or arbitrator registered in good standing with an arbitration association and arbitrate pursuant to such arbitrator's rules. . .

5. If you demand arbitration, then at your request we will advance your portion of the expenses associated with the arbitration, including the filing, administrative, hearing and arbitrator's fees ("Arbitration Fees"). If related third parties or we demand arbitration, then at your written request we will advance your portion of the Arbitration Fees. Throughout the arbitration, each party shall bear his or her own attorneys' fees and expenses, such as witness and expert witness fees. The arbitrator shall apply applicable substantive law consistent with the FAA and applicable statutes of limitation, and shall honor claims of privilege recognized at law. The arbitration hearing will be conducted in the county of your residence, or within 30 miles from such county, or in the county in which the transaction under this Loan Agreement occurred, or in such other place as shall be ordered by the arbitrator. The arbitrator may decide with or without any hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. In conducting the arbitration, the arbitrator shall not apply any federal or state rules of civil procedure or evidence. At the timely request of any party, the arbitrator shall provide a written explanation for the award. The arbitrator's award may be filed with any court having jurisdiction. If allowed by statute or applicable law, the arbitrator may award you statutory damages and/or your reasonable attorneys' fees and expenses. Regardless of whether the arbitrator renders a decision or an award in your favor resolving the dispute, you will not be responsible for reimbursing us for your portion of the Arbitration Fees.

6. All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction. Any dispute that cannot be adjudicated within the jurisdiction of a small claims tribunal shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

7. This Arbitration Agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA. If a final non-appealable judgment

> of a court having jurisdiction over this transaction finds, for any reason, that the FAA does not apply to this transaction, then our agreement to arbitrate shall be governed by the arbitration law of the State of South Dakota.
>
> 8. This Arbitration Agreement is binding upon and benefits you, your respective heirs, successors and assigns. The Arbitration Agreement is binding upon and benefits us, our successors and assigns, and related third parties.

On 8 February 2005, plaintiffs filed a class-action complaint, alleging that defendants Compucredit Corporation ("Compucredit"), Valued Services Acquisitions Company, LLC ("VS-AC"), Valued Services of North Carolina, LLC ("VS-NC"), Valued Services Financial Holdings, LLC ("VS-FH"), Valued Services Holdings, LLC ("VS-H"), Foresight Management Company, LLC ("Foresight"), First American Holding, LLC ("FA-H"), First American Management, Inc. ("FA-M"), James E. Scoggins ("Scoggins"), and Robert P. Manning ("Manning"), under the name First Southern Cash Advance (collectively, "defendants") violated the North Carolina Consumer Finance Act, the North Carolina unfair trade practices statute, and North Carolina usury laws.

On 28 February 2006, plaintiffs moved that the case be certified as a class action. On 10 November 2009, Patrick voluntarily dismissed his claims against defendants without prejudice. On 25 January 2011, Scoggins and Manning moved to dismiss for insufficiency of service of process. On 19 May 2011, VS-AC, VS-FH, VS-H, FA-H, FA-M, Scoggins, and Manning moved to dismiss for lack of personal jurisdiction, asserting that they had insufficient contacts with the State of North Carolina for the trial court to exercise personal jurisdiction under the long-arm statute (N.C. Gen. Stat. § 1-75.4). On 25 May 2011, defendants moved to compel arbitration.

On 23 January 2012, the trial court denied defendants' 25 January 2011 motion to dismiss for insufficiency of service of process, denied defendants' 19 May 2011 motion to dismiss for lack of personal jurisdiction, denied defendants' 25 May 2011 motion to compel arbitration, and granted plaintiffs' 28 February 2006 motion for class certification.

Defendants appeal.

II. Failure to Compel Arbitration

Defendants first contend that the trial court erred by refusing to compel arbitration. We agree.

A. Standard of Review

> The standard governing our review of this case is that "findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if ... there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). "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).

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008).

B. Unconscionability

In the instant case, the trial court's order denying defendants' motion to compel arbitration was filed on 23 January 2012. On 25 January 2012, the trial court's order denying defendants' motion to compel arbitration in the companion case of *Torrence et al. v. Nationwide Budget Finance et al.* (New Hanover County case 05 CVS 447) was filed. The findings of fact, conclusions of law, and rulings of the trial court were virtually identical.[1]

We are simultaneously filing an opinion in the *Torrence* case (COA 12-453). For the reasons set forth in *Torrence*, we hold that the trial court erred in determining that the arbitration agreement was substantively unconscionable. The orders of the trial court denying defendants' motion to dismiss for insufficiency of service of process, denying defendants' motion to dismiss for lack of personal jurisdiction, denying defendants' motion to compel arbitration, and granting plaintiffs' motion for class certification are vacated, and the matter is remanded to the trial court for entry of an order compelling arbitration in this case. Because the trial court erred in holding that the arbitration agreement was substantively unconscionable, we need not reach the question of procedural unconscionability. *See Torrence*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2014) (COA 12-453, § VI).

1. In *Torrence*, there was additional analysis dealing with the designation of the National Arbitration Forum (NAF) as the arbitrator. In the instant case, the arbitration agreement provided for three arbitration groups, one of which was the NAF. The agreement also provided that, by agreement, the parties could select a local arbitrator. Neither party in the instant case has raised a question concerning the arbitrator or arbitrator selection clause in the arbitration agreement.

III. Other Arguments

Because the trial court erred in denying defendants' motion to compel arbitration, defendants' arguments with regard to class action are moot, and further excluded due to the express language of the arbitration agreement waiving class actions. Because this case was not properly before the trial court, we need not address defendants' further contentions regarding class certification, personal jurisdiction and service of process. *See*, *e.g.*, *Miller v. Two State Const. Co.*, *Inc.*, 118 N.C. App. 412, 418, 455 S.E.2d 678, 682 (1995) (holding that where the arbitration agreement was valid, we "need not address the other issues raised by defendants"). These issues are properly to be determined by an arbitrator.

IV. Conclusion

The trial court erred in refusing to grant defendants' motion to compel arbitration. The orders of the trial court enumerated in Section II of this opinion are all vacated, and this matter is remanded to the trial court for entry of an order compelling the parties to arbitrate their claims.

VACATED AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

JANET MAY and CURTIS HILL, Co-Administrators of the Estate of Mark Curtis Hill, Plaintiffs
v.
MELROSE SOUTH PYROTECHNICS, INC., and OCRACOKE CIVIC & BUSINESS ASSOCIATION d/b/a OCRACOKE ISLAND CIVIC AND BUSINESS ASSOCIATION, Defendants

JUDY B. GRAY, Administrator of the Estate of Melissa Annette Simmons, Plaintiff
v.
EAST COAST PYROTECHNICS, INC., formerly known as MELROSE SOUTH PYROTECHNICS, INC., Defendant

KEVIN F. MACQUEEN, Administrator of the Estate of Charles Nathaniel Kirkland, Jr., Plaintiff
v.
EAST COAST PYROTECHNICS, INC., formerly known as MELROSE SOUTH PYROTECHNICS, INC., Defendant

MARTEZ HOLLAND, Plaintiff
v.
EAST COAST PYROTECHNICS, INC., formerly known as MELROSE SOUTH PYROTECHNICS, INC., Defendant

No. COA13-620

Filed 4 February 2014

1. Negligence—plaintiffs—employees or independent contractors—issues of material fact

The trial court did not err in a negligence case arising out of a fireworks accident by denying defendants' motion for summary judgment. There remained several genuine issues of material fact as to whether plaintiffs were employees of defendants or independent contractors.

2. Negligence—gross negligence—plaintiffs—employees or independent contractors—issues of material fact

The trial court did not err by denying defendants' motion for summary judgment as to plaintiffs' claims for negligence, gross negligence, strict liability, and negligent hiring because there remained several genuine issues of material fact as to whether plaintiffs were employees of defendants or independent contractors.

3. Negligence—Woodson claim—plaintiffs—employees or independent contractors—issues of material fact

The trial court did not err in a negligence case by denying defendants' motion for summary judgment as to plaintiffs' *Woodson*

claims because there remained several genuine issues of material fact as to whether plaintiffs were employees of defendants or independent contractors.

Appeal by Defendants from order entered 1 October 2012 by Judge Arnold O. Jones, II in Superior Court, Wayne County. Heard in the Court of Appeals 7 January 2014.

Farris & Farris, PA, by Robert A. Farris, Jr. and Rhyan A. Breen, and Thomas & Farris, PA, by Albert S. Thomas, Jr., for Plaintiffs-Appellees Janet May and Curtis Hill, Co-Administrators of the Estate of Mark Curtis Hill; Donald E. Clark, Jr., PLLC, by Donald E. Clark, Jr., and The Wright Law Firm, by Paul M. Wright for Plaintiff-Appellee Judy B. Gray, Administrator of the Estate of Melissa Annette Simmons; Riddle & Brantley, LLP, by Gene A. Riddle and Jonathan M. Smith, for Plaintiff-Appellee Kevin F. MacQueen, Administrator of the Estate of Charles Nathaniel Kirkland, Jr.; and Jerry Braswell for Plaintiff-Appellee Martez Holland.

Cranfill Sumner Hartzog LLP, by Daniel G. Katzenbach and M. Denisse Gonzalez, for Defendants-Appellants.

McGEE, Judge.

This case is before us on remand from the North Carolina Supreme Court. Our Court originally dismissed the appeal in this matter as interlocutory on 8 August 2013. Melrose South Pyrotechnics, Inc. ("Melrose") and East Coast Pyrotechnics, Inc. petitioned our Supreme Court for writ of certiorari, and the Supreme Court, in an order entered 3 October 2013, allowed the petition "for the limited purpose of remanding to the Court of Appeals for consideration of the merits." This Court therefore reviews the merits of Defendants' appeal.

This action arises out of a fireworks explosion in which several people were killed or seriously injured. Janet May ("May") and Curtis Hill ("Hill"), co-administrators of the estate of Mark Curtis Hill, filed a complaint on 2 December 2010 against Melrose and Ocracoke Civic & Business Association d/b/a Ocracoke Island Civic and Business Association ("Ocracoke") (together, "Defendants"), alleging negligent hiring, gross negligence, and strict liability.

May and Hill alleged that Melrose was "in the business of providing fireworks displays[;]" that Terry Holland "had been a part-time employee of . . . Melrose since 2000;" that Ocracoke "contracted with . . . Melrose to

provide a fireworks display[;]" that Terry Holland "received some training from . . . Melrose as 'Chief Pyrotechnician' to work on its behalf conducting fireworks displays in North Carolina;" and that Terry Holland "was advanced sums of money to retain the independent services of a crew to assist him in performing fireworks displays" by Melrose.

Judy B. Gray ("Gray"), as administrator of the estate of Melissa Annette Simmons, and Kevin F. MacQueen ("MacQueen"), as administrator of the estate of Charles Nathaniel Kirkland, Jr., filed separate complaints on 1 July 2011 against East Coast Pyrotechnics, Inc., formerly known as Melrose, alleging negligence, gross negligence, strict liability, and, in the alternative, a *Woodson* claim. Martez Holland filed a complaint on 1 July 2011 against Melrose, alleging negligent hiring, gross negligence, and strict liability.

The trial court, in an order entered 15 November 2011, consolidated the actions of May and Hill, Gray, MacQueen, and Martez Holland (together, "Plaintiffs"). Defendants filed a motion for summary judgment on 24 August 2012. The trial court denied Defendants' motion for summary judgment in an order entered 1 October 2012 because "there do exist genuine issues of fact[.]"

I. Standard of Review

"We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *D.G. II*, *LLC v. Nix*, 213 N.C. App. 220, 229, 713 S.E.2d 140, 147 (2011) (internal quotation marks omitted).

II. Rule

A trial court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013); *see also D.G. II*, 213 N.C. App. at 228, 713 S.E.2d at 147.

The purpose of N.C.G.S. § 1A-1, Rule 56 "is to eliminate formal trials where only questions of law are involved." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Id.*

III. Relationship Between Plaintiffs and Defendants

[1] Defendants first argue the trial court erred in denying their motion for summary judgment because "[t]he issue of whether Plaintiffs are employees or independent contractors can be decided as a matter of law." We disagree.

As stated above, summary judgment requires that (1) "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 (2) "any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). In the present case, there remain several genuine issues of fact that are material to determining the nature of the relationship between Plaintiffs and Defendants.

Defendants contend there are some undisputed facts that "show conclusively that Plaintiffs were employees" of Melrose. Defendants cite *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), for support of their argument. However, in *Hayes*, there was "no substantial controversy as to the facts." *Id.* at 15, 29 S.E.2d at 139. By contrast, in the present case, there is substantial controversy as to the facts, as will be shown in this section. We therefore cannot determine the nature of the relationship between Plaintiffs and Defendants at this stage in the proceedings.

In their complaint, May and Hill alleged that Terry Holland "had been a part-time employee of . . . Melrose since 2000[.]" They further alleged that the "crew members selected by [Terry] Holland were not employees of . . . Melrose but were contracted by [Terry] Holland for . . . Melrose on a job by job basis[.]" Melrose denied this allegation in its answer.

Similarly, in her complaint, Gray alleged that "Simmons and the other crew members were not employees of Defendant but were contracted by [Melrose] by and through its employee, [Terry] Holland, to work on the July 4, 2009, fireworks display for" Ocracoke. Melrose denied this allegation in its answer.

Likewise, in his complaint, MacQueen alleged that Charles Nathaniel Kirkland, Jr. "and the other crew members were not employees of Defendant but were independent contractors retained by Defendant by and through its employee, [Terry] Holland, to work on the July 4, 2009, fireworks display for" Ocracoke. Melrose denied this allegation in its answer.

In his complaint, Martez Holland alleged that the "crew members selected by [Terry] Holland were not employees of [Melrose] but were

contracted by [Terry] Holland for [Melrose] on a job by job basis[.]" Melrose denied this allegation in its answer.

To determine "whether the relationship of employer-employee, or that of independent contractor, exists, our Supreme Court has stated, 'The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.' " *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 714, 698 S.E.2d 91, 93-94 (2010). Factors to consider in determining whether the relationship of employer-employee exists include that the person employed:

> (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 714, 698 S.E.2d at 94.

Thomas Thompson, president of Melrose, testified in a deposition that the lead technician is paid ten percent of the value of the show and has the "choice to decide how he wants to split that up" among his crew. However, May stated in an affidavit that at no time "did Mark [Curtis] Hill ever represent to [her] that he was working for Melrose[.]" May further stated that Melrose "never issued any compensation for the work performed by Mark [Curtis] Hill." Furthermore, Ronnie Tessenner ("Tessenner"), who worked for Melrose in 2009, testified that Mark Curtis Hill, in his past work experience, had repaired items in homes. Tessenner also testified that Charles Nathaniel Kirkland, Jr. was an electrician and that "it would be helpful to have an assistant that had some electrical experience" in a fireworks display.

The pleadings and depositions show that there is substantial controversy as to the facts that define the nature of the relationship between Plaintiffs and Defendants. Because there is a substantial controversy as to the facts, at this stage in the proceedings, we cannot determine the nature of the relationship. Defendants have not shown that the trial court erred in denying Defendants' motion for summary judgment on this basis.

IV. Negligence, Gross Negligence, Strict Liability, and Negligent Hiring

[2] Defendants also argue the trial court erred in denying Defendants' motion for summary judgment "as to Plaintiffs' claims for negligence, gross negligence, strict liability, and negligent hiring because no issues of fact exist to support any of those claims." We disagree.

Defendants contend that "[e]ven if Plaintiffs are found to be independent contractors, they fail to set forth evidence to support any recognized exception to the 'no liability' rule for general contractors." However, Defendants' argument overlooks the fact, discussed in the previous section, that genuine issues of material fact remain as to the nature of the relationship between Plaintiffs and Defendants.

"Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983); *see also Goodman v. Wenco Foods*, *Inc.*, 333 N.C. 1, 27, 423 S.E.2d 444, 457 (1992) ("Summary judgment 'is a drastic measure, and it should be used with caution.' "). Because genuine issues of material fact remain to be determined in the trial court as to the nature of the relationship between Plaintiffs and Defendants, the trial court did not err in denying Defendants' motion for summary judgment.

V. *Woodson* Claims

[3] Defendants also argue the trial court erred in denying Defendants' motion for summary judgment as to the alternative *Woodson* claims "because no issue of fact exists to support the higher standard required for such a claim."

When an "employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer." *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991).

Defendants argue on appeal that Plaintiffs failed to allege certain elements of a *Woodson* claim. However, as stated above, the issue on a motion for summary judgment is whether the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c).

As in the previous section, because genuine issues of material fact remain to be determined in the trial court regarding the nature of the relationship between Plaintiffs and Defendants, Defendants have not shown that the trial court erred in denying Defendants' motion for summary judgment.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

STATE OF NORTH CAROLINA
v.
CHRISTINE RENA CHAMBERLAIN

No. COA13-886

Filed 4 February 2014

1. Constitutional Law—double jeopardy—two summonses—same facts

The superior court did not violate double jeopardy when it denied defendant's motion to dismiss a charge of willful and wanton injury to real property arising from a dispute between two neighbors and damage to shrubbery. Although the two cases involved the same facts, the two summonses to district court that began the cases listed different dates for the offense. The district court granted defendant's motion to dismiss the first case due to a fatal variance between the allegations in the charge and the proof at trial, and the State was permitted to retry defendant because the second allegation corrected the dates of the offense.

2. Criminal Law—damage to shrubbery—determination of boundary—jury question

The superior court did not err by denying defendant's motion to dismiss a charge of willful and wanton injury to real property (N.C.G.S. § 14-127) where defendant's testimony and her signed letter indicated that she did not know whether the damaged shrubs were on her property or her neighbor's. It was for the jury to determine where the shrubs were planted and whether defendant was legally justified in cutting them down.

3. Criminal Law—question from jury—instructions

The trial court did not err (much less plainly err) in a prosecution for willfully damaging real property by declining to answer a question from the jury directly. Defendant's proposed jury instructions were substantially similar to those actually given by the court.

Appeal by Defendant from judgment entered 26 March 2013 by Judge Allen Baddour in Durham County Superior Court. Heard in the Court of Appeals 11 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Carolyn McLain, for the State.

Peter Wood for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

On 31 December 2011, the district court in Durham County issued a misdemeanor criminal summons ("First Summons") asserting that probable cause was present to believe that Christine Rena Chamberlain ("Defendant") committed one count of injury to real property. According to the summons, Anthony Waraksa ("Waraksa"), the complainant, alleged that Defendant destroyed "THREE LIGUSTRUM TREES" located on his property on 5 April 2011. The case was later dismissed by the district court due to a "fatal variance."[1]

Following dismissal, on 22 July 2012, the district court issued a second misdemeanor criminal summons ("Second Summons") alleging probable cause to believe that Defendant had committed two counts of injury to real property. According to the Second Summons, Waraksa alleged that Defendant had destroyed, respective to the two counts charged, (1) "TREES, LAWN[,] AND FLOWERBEDS" and (2) "THREE LIGUSTRUM SHRUBS," both located on his property. This allegedly occurred between 30 September 2010 and 22 February 2011. The Second Summons is the origin of the judgment that is now under review.

1. The court did not provide any more detail on the reason for its dismissal. However, Defendant asserts in her brief, pursuant to statements made by her trial counsel in the superior court trial, that "Waraksa was apparently confused when he took out the first warrant[and] gave the wrong date to the magistrate."

After a trial on the Second Summons, the district court found Defendant not guilty on the first count of injury to real property, related to destruction of trees, lawn, and flowerbeds, and guilty on the second count of injury to real property, related to the destruction of the Ligustrum shrubs. Defendant gave written notice of appeal to the Durham County Superior Court on 14 November 2012.

Beginning 25 March 2013, Defendant was tried before a jury in superior court on the second count of injury to real property, regarding the destruction of the shrubs. Defendant made a pre–trial motion to dismiss that charge on double jeopardy grounds, arguing that the original dismissal in the district court constituted an acquittal for the allegedly offending conduct and that she could not be re-tried for that conduct in superior court. That motion was denied. The evidence presented at trial tended to show the following:

Defendant and her husband, James Chamberlain, live next to Waraksa and his wife, Harriett Sander ("Sander") in Durham, North Carolina. They had a friendly relationship until April of 2009, when Defendant published information communicated to her by Waraksa in confidence. At that point, Waraksa broke off the friendship. The following year, in September of 2010, Defendant installed a berm near the property line between their houses. Believing that Defendant's landscaping had encroached upon his property line, Waraksa "repaired the encroachment" and planted a line of Ligustrum shrubs on his side of the line. On 11 November 2010, Defendant left Waraksa a note asking him to refrain from planting "hedge[s]. . . until [the] dispute [was] resolved regarding the property line."

Waraksa testified that property lines in his subdivision "are set out with embedded iron pipes." Prior to planting the Ligustrum shrubs, Waraksa had his property surveyed, and the surveyor identified the corners of his lot based on those pipes. There was no testimony that Defendant ever had the property surveyed. Defendant and her husband nonetheless testified that Waraksa's shrubs were planted over the property line, on their property.

On 22 February 2011, Sander observed that the Ligustrum shrubs had been destroyed and saw Defendant walking away from the shrubs with "huge scissors." Later in the trial, Defendant admitted to cutting the shrubs, knowing they belonged to Waraksa:

> [THE STATE:] Okay. It's your testimony that you intended to remove the Ligustrum bushes that had been planted by

> Mr. Waraksa, is that right? You intended to remove them; that's why you cut them down?
>
> [DEFENDANT:] Right, yeah, they were on my property.
>
> [THE STATE:] Right.
>
> [DEFENDANT:] They were planted where I needed to fix the berm.
>
> [THE STATE:] And you chose to cut them off, right? Is that what you did; you cut them?
>
> [DEFENDANT:] Yes, with a shovel.
>
> [THE STATE:] You knew . . . Waraksa had planted those bushes?
>
> [DEFENDANT:] Well, yes, uh-huh.

Defendant moved to dismiss the charges against her at the close of the State's evidence and at the close of all of the evidence. Those motions were denied. After the presentation of evidence, the jury found Defendant guilty of injury to real property. Defendant appeals the judgment entered upon the jury's verdict.

Discussion

On appeal, Defendant argues the trial court erred by (1) denying Defendant's motion to dismiss based on double jeopardy, (2) denying Defendant's motion to dismiss at the close of the State's evidence and again at the close of all the evidence because the State did not present sufficient evidence to support the charge of injury to real property, and (3) failing to "instruct the jury properly" in response to a question posed during jury deliberations. We find no error.

I. Double Jeopardy

[1] In her first argument on appeal, Defendant contends that the trial court erred in denying her pre–trial motion to dismiss on double jeopardy grounds. In making that argument, Defendant notes that Waraksa took out two different warrants for injury to real property based on the exact same damage to the trees. Defendant also points out that the district court committed a clerical error by keeping the incorrect date on the warrant, instead of amending the warrant to reflect the correct date. As a result, Defendant alleges that it was a violation of the prohibition against double jeopardy for the district court to allow the State to proceed with a second charge. Accordingly, Defendant contends that the

superior court erred in denying her motion to dismiss based upon the first and second district court trials.[2] We disagree.

The doctrine of double jeopardy "provides that no person shall be subject for the same offen[s]e to be twice put in jeopardy of life or limb." *State v. Sparks*, 182 N.C. App. 45, 47, 641 S.E.2d 339, 341 (2007) (citation and internal quotation marks omitted). "[T]he Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Rahaman*, 202 N.C. App. 36, 40, 688 S.E.2d 58, 62 (2010) (citations and internal quotation marks omitted). "[W]hen the trial court grants a defendant's motion to dismiss at the close of evidence, that ruling has the same effect as a verdict of not guilty." *Id.* at 43, 688 S.E.2d at 64; *see also* N.C. Gen. Stat. § 15-173 (2013). "However, the 5th Amendment right to be free from double jeopardy only attaches in a situation where the motion to dismiss is granted due to insufficiency of the evidence to support each element of the crime charged." *Rahaman*, 202 N.C. App. at 44, 688 S.E.2d at 64. Double jeopardy does not preclude a retrial when a charge is dismissed because there was a fatal variance between the proof and the allegations in the charge. *Id.*; *State v. Johnson*, 9 N.C. App. 253, 175 S.E.2d 711 (1970). We review a 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).

> In *Johnson*, the indictment alleged that the defendant committed the crime of breaking and entering "a certain storehouse, shop, warehouse, dwelling house and building occupied by one Lloyd R. Montgomery, 648 Swannanoa River Road, Asheville, N.C." The evidence at trial tended to show that the defendant broke into "438 Swannanoa River Road in Asheville which was occupied by one Elvira L. Montgomery, who was engaged in

2. We note that there is no substantial evidence in the record regarding the nature of the fatal variance beyond (a) the fact of its existence and (b) the district court's dismissal of the original charge against Defendant on that basis. The only other discussion about the variance is counsel's statement to the superior court in Defendant's pre-trial motion to dismiss regarding Waraksa's alleged confusion over the date of the offense. However, "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Therefore, the only evidence properly before us in the record is the handwritten note on the summons stating that the case was dismissed due to a fatal variance, and we are limited to that fact. *See State v. Gillis*, 158 N.C. App. 48, 55, 580 S.E.2d 32, 37-38 (2003) (citation omitted) ("[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it.").

> business under the name of 'Cat and Fiddle Restaurant.' " The trial court granted the defendant's motion to dismiss due to a fatal variance between the indictment and the evidence presented at trial. The State retried [the] defendant for the offense of breaking and entering, but upon an indictment that corresponded to the evidence. The defendant then appealed and asserted that his right to be free from double jeopardy had been violated. Our Supreme Court held that "a judgment of dismissal for whatever reason entered after a trial on the first indictment would not sustain a plea of former jeopardy when [the] defendant was brought to trial on the charge contained in the second indictment."

Rahaman, 202 N.C. App. at 44–45, 688 S.E.2d at 64–65 (citation omitted).

In this case, the two summonses pertain generally to the same facts, but the First Summons lists the date of offense as "04/05/2011" while the Second Summons lists the date of offense as "9/30/2010 through 02/22/2011." Pursuant to the record properly before us, the district court granted Defendant's motion to dismiss due to a fatal variance between the First Summons and the proof at trial, not due to insufficiency of the evidence.[3] Therefore, the State was permitted to retry Defendant because the Second Summons corrected the dates of the offense. Accordingly, we hold that the superior court did not violate the double jeopardy provisions of the state and federal constitutions and did not err by denying Defendant's motion to dismiss. *See also State v. Fraley*, __ N.C. App. __, 749 S.E.2d 111 (unpublished opinion), *available at* 2013 N.C. App. LEXIS 806 ("Double jeopardy does not preclude a retrial when a charge is dismissed because there was a fatal variance between the proof and the allegations in the charge.").[4]

II. Defendant's Motion to Dismiss

[2] Second, Defendant argues that the trial court erred in denying her motion to dismiss due to insufficiency of the evidence, alleging that the State failed to present substantial evidence of every element of the crime charged.

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3. Defendant admits that the district court dismissed the charge for a fatal variance. Defendant also admits that the only evidence of record shows the variance was between the date of offense in the First Summons and the Second Summons.

4. While unpublished decisions are not binding upon this court, the facts in *Fraley* are similar to those here, and we find the Court's reasoning to be especially persuasive.

The test to be applied in ruling on a defendant's motion to dismiss is whether the State has produced substantial evidence of each and every element of the offense charged, or a lesser-included offense, and substantial evidence that the defendant committed the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "If substantial evidence exists supporting [the] defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002).

Substantial evidence is defined as "evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt." *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998). When ruling on a motion to dismiss, the trial court must consider all the evidence in the light most favorable to the State. *Id.* at 679, 505 S.E.2d at 141. "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). The trial court's decision as to whether there is substantial evidence is a "question of law," and, on appeal, we review it *de novo*. *State v. Bumgarne*r, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327 (2001).

Defendant was charged with violating N.C. Gen. Stat. § 14-127, which provides as follows:

> *Willful and wanton injury to real property.*
>
> If any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, [she] shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-127 (2013). Defendant does not challenge the sufficiency of the evidence to prove that she was the perpetrator of the crimes. Rather, she argues that the State presented insufficient evidence as to her mental state. We disagree.

Section 14-127 requires, as an essential element of the offense, a showing that the person charged with violating the statute "willfully" and "wantonly" caused the damage to real property. The words "willful" and "wanton" have substantially the same meaning when used in reference to the requisite state of mind for a violation of a criminal statute. *State v. Williams*, 284 N.C. 67, 72–73, 199 S.E.2d 409, 412 (1973). "[Willful] as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely

and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 475 (1965). "Willfulness" is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case. *Id.*

Despite Defendant's assertion to the contrary, there need not be an *intent* to break the law in order for an act to be "willful." *State v. Coal Co.*, 210 N.C. 742, 754–55, 188 S.E. 412, 420 (1936). Thus, it does not matter whether Defendant knew for certain if the Ligustrum shrubs were on her property or Waraksa's property when she cut them down.

> The word ["willful"], used in a statute creating a criminal [offense], means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority — careless whether [she] has the right or not — in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute.

In re Adoption of Hoose, 243 N.C. 589, 594, 91 S.E.2d 555, 558 (1956) (citation and internal quotation marks omitted).

In this case, the State presented testimony by Waraksa that the Ligustrum shrubs were on his property. The State also presented evidence that Defendant acknowledged that the property line was in dispute through a signed letter in which she asked Waraksa to stop planting hedges until the property-line dispute was resolved. Defendant's testimony and her signed letter indicate that she did not know whether the Ligustrum shrubs were on her property or Waraksa's. Accordingly, it was for the jury to determine whether the shrubs were planted on Waraksa's property or Defendant's and whether Defendant was legally justified in cutting them down. While Defendant presented some evidence to contradict Waraksa's testimony regarding the location of the shrubs in relation to the property line, "[i]t is elementary that the jury may believe all, none, or only part of a witness'[s] testimony[.]" *State v. Miller*, 26 N.C. App. 440, 443, 216 S.E.2d 160, 162, *affirmed*, 289 N.C. 1, 220 S.E.2d 572 (1975). Here, the jury opted to believe Waraksa's testimony that the shrubs were planted on his property. Therefore, the evidence produced by the State, even though it was contested, provided sufficient evidence for the finding that Defendant had cut down the shrubs on Waraksa's property without justification. Accordingly, we hold that the superior court did not err in denying Defendant's motion to dismiss.

III. Jury Instructions

[3] Lastly, Defendant contends that the trial court committed reversible error by failing to directly answer the jury's question: "Is [D]efendant [j]ustified in cutting down property she knew was not hers if she truly believed [that the bushes] were on her property[?]" Defendant contends a proper instruction would have been:

> For you to find[D]efendant guilty of injury to real property, you must find that she willfully damaged trees, lawn[,] and flowerbeds, the real property of[] Waraksa. ["]Willful" is defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of [the] law. ["]Willfully" means "something more than an intention to commit the offense."

Defendant contends that the superior court's failure to give this instruction "affected [the jury's] verdict." Defendant argues that the trial court's decision not to answer this question amounted to a failure to instruct on willfulness and, thus, that the jury might not have properly considered Defendant's state of mind. Therefore, Defendant reasons, the State was improperly required to prove only that Defendant *damaged* the shrubs.

The State argues, and Defendant concedes, that — because Defendant did not object to the trial court's original charge, request a different charge at the charge conference, or request any additional charge when the jury expressed confusion — Defendant did not properly preserve this argument for appeal. We agree.

In matters concerning jury instructions, a party's failure to object at trial limits our review to an examination for plain error. *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995) (citing *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)); *see also* N.C.R. App. P. 10(a)(2). Plain error is "error so fundamental that it tilted the scales and caused the jury to reach its verdict convicting the defendant." *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (internal quotation marks omitted). "In deciding whether a defect in the jury instruction constitutes 'plain error', [sic] the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. "[A] charge must be construed as a whole in the same connected way in which it was given. When thus considered, if it fairly and correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should

be found technically inaccurate." *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E.2d 901, 903 (1970) (internal quotation marks omitted).

In this case, Defendant's proposed jury instructions are substantially similar to those actually given by the superior court. Indeed, the court initially explained the term "willful" as follows:

> THE COURT: . . .
>
> [D]efendant has been charged with willful and wanton damage to, injury to, or destruction of real property. For you to find[D]efendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that [D]efendant damaged, injured, or destroyed Ligustrum shrubs of Anthony Waraksa. Lugustrum [sic] shrubs are real property.
>
> And second, that[] [D]efendant did this willfully and wantonly; that is, intentionally and without justification or excuse, and without regard for the consequences or the rights of others.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, [D]efendant willfully and wantonly damaged, injury, [sic] or destroyed Ligustrum shrubs, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

In addition, the jurors had written copies of the instructions quoted above, and the judge offered to re–read the instructions to the jurors if necessary:

> THE COURT: . . .
>
> I'm happy to re-read them, if they want. But since they all have copies of the instructions, I don't want to insult their intelligence — I won't say that, but something like that. And I'll ask them to return to the jury room to continue deliberating. But if for any reason they, any one of them wants the Court to orally re[-]give the instructions, I'll be happy to do so, and they can just send out another note. I mean I have found in the past from time to time there is a juror who does not read well and prefers to hear something orally. So I want to make sure they understand

> they have that option and that right, whether or not they'll exercise it.

"[T]his Court has consistently held that a trial court is not required to repeat verbatim a . . . specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request." *State v. Brown*, 335 N.C. 477, 490, 439 S.E.2d 589, 597 (1994).

Here, the instruction given clearly sets forth that "willfulness" is a necessary element of injury to real property. To find Defendant guilty of injury to real property, the State had to prove the Defendant had a "willful" state of mind when she damaged the shrubs. If the jury had a reasonable doubt as to the willfulness of Defendant's actions, the jury's duty was to find Defendant not guilty of injury to real property. This is, in substance, the concept Defendant claims the trial court should have reiterated to the jury. Because the trial court gave instructions in substantial conformity with those that Defendant argues for on appeal, Defendant's argument is overruled. The trial court did not err — much less plainly err — in declining to directly answer the jury's question. Accordingly, we find

NO ERROR.

Judges STEELMAN and DAVIS concur.

STATE OF NORTH CAROLINA
v.
TRAVIS ANTONIO LEE, DEFENDANT

No. COA13-775

Filed 4 February 2014

1. Jurisdiction—probation revocation—defendant's address

The trial court had jurisdiction over defendant's probation under N.C.G.S. § 15A-1344(a) where he was indicted and plead guilty in Harnett County and the violation report was filed in Sampson County. Defendant abandoned his argument concerning jurisdiction in Sampson County when he did not contest the State's contention that the address listed both on defendant's affidavit of indigency and the violation report was in Sampson County.

2. Probation and Parole—probation revocation—notice—allegations of charges

The trial court had jurisdiction to revoke defendant's probation for violation of the "commit no criminal offense" condition even though defendant argued that the trial court lacked jurisdiction due to inadequate notice. The violation report alleged only criminal charges, not convictions, but defendant was aware both that the State was alleging a revocation-eligible violation and of the exact violation upon which the State relied. Defendant could have denied the violation and presented evidence in his own defense had he chosen to do so.

3. Probation and Parole—probation revocation—findings—clerical errors

A revocation of probation was remanded for correction of clerical errors where the trial court's written judgment was missing several key findings, but the record clearly supported the grounds, reasoning, and authority for the order.. Any error in failing to check a box on the revocation form was clerical only.

Appeal by defendant from Judgment entered on or about 2 April 2013 by Judge W. Douglas Parsons in Superior Court, Sampson County. Heard in the Court of Appeals 19 November 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General Andrew O. Furuseth, for the State.

Yoder Law PLLC by Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

Travis Lee ("defendant") appeals from the judgment entered on or about 2 April 2013 revoking his probation and activating his sentence. We remand for correction of the clerical errors in the judgment.

I. Background

In June 2012, defendant was indicted in Harnett County for obtaining property by false pretenses, felony larceny of a motor vehicle, and felony possession of a stolen motor vehicle. On 24 September 2012, defendant pled guilty to larceny of a motor vehicle and was sentenced to 10-12 months imprisonment, suspended for 24 months of supervised

probation. On 17 January 2013, defendant's probation officer filed a violation report in Sampson County alleging that defendant had violated four conditions of his probation: (1) that he report as directed to the supervising officer, (2) that he pay all fees owed, (3) that he participate in substance abuse treatment through TASC, and (4) that he commit no criminal offense. On 2 April 2013, the superior court in Sampson County found that defendant had violated his probation as alleged in paragraphs one through four of the violation report, revoked his probation, and sentenced him to 8-10 months imprisonment. Defendant filed written notice of appeal to this Court on 12 April 2013.

II. Subject Matter Jurisdiction

On appeal, defendant contends that the trial court lacked jurisdiction because Sampson County was not in a judicial district which had jurisdiction over his probation and because he received inadequate notice of the State's allegations against him. We disagree.

A. Correct County

[1] Defendant argues for the first time on appeal that the trial court lacked jurisdiction to revoke his probation because Sampson County was not in the judicial district where probation was imposed, Judicial District 11A, there was no evidence he lived in Sampson County, Judicial District 4A, and there was no evidence that any of his alleged violations took place in Sampson County.

Under N.C. Gen. Stat. § 15A-1344(a) (2011),

> probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides.

Defendant fails to note that both his affidavit of indigency and the violation report filed by his probation officer list his residence as one on County Manor Lane in Dunn, North Carolina. The State contends that this address is situated in Sampson County. Defendant does not argue on appeal—and did not argue to the trial court—that this address is not actually in Sampson County, nor that he did not live at that address at the relevant time. Therefore, we deem such arguments abandoned. N.C.R. App. P. 28(a). Accordingly, we conclude that the

trial court had jurisdiction over defendant's probation under N.C. Gen. Stat. § 15A-1344(a) because he was residing in Sampson County, part of Judicial District 4A.

B. Notice

[2] Defendant next argues that the trial court lacked jurisdiction because he had inadequate notice that the State intended to revoke his probation on the basis of a new criminal offense. He contends that "[b]ecause the violation report alleged only criminal charges, and not convictions, it cannot be the sole basis for revoking probation."

Under the Justice Reinvestment Act, a defendant's probation is subject to revocation if he violates the normal condition of probation that he "[c]ommit no criminal offense in any jurisdiction." N.C. Gen. Stat. § 15A-1343(b)(1) (2011); N.C. Gen. Stat. § 15A-1344(a) (2011). A conviction by jury trial or guilty plea is one way for the State to prove that a defendant committed a new criminal offense. *See State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960) ("[W]hen a criminal charge is pending in a court of competent jurisdiction, which charge is the sole basis for activating a previously suspended sentence, such sentence should not be activated *unless there is a conviction on the pending charge or there is a plea of guilty entered thereto*." (emphasis added)). The State may also introduce evidence from which the trial court can independently find that the defendant committed a new offense. *See, e.g.*, *State v. Monroe*, 83 N.C. App. 143, 145-46, 349 S.E.2d 315, 317 (1986), *State v. Debnam*, 23 N.C. App. 478, 480-81, 209 S.E.2d 409, 410-11 (1974).

The State is required to give defendant notice "of the [probation] hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e)(2011). Thus, the relevant piece of information is the violation alleged, not the manner of proving the violation. "The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 290, 293 (2009).

Here, the violation report specifically alleged that defendant violated the condition of probation that he commit no criminal offense in that he had several new pending charges which were specifically identified, including that "on 12/18/12 the defendant was charged with possession of firearm by felon in 12CR057780 and possess marijuana up to 1/2 oz in 12 CR 057779 in Johnston County." The violation report went on to state that "If the defendant is convicted of any of the charges it will be a violation of his current probation."

Defendant is correct that charges alone are insufficient to show that he committed a new criminal offense. *See Guffey*, 253 N.C. at 45, 116 S.E.2d at 150. Nevertheless, the issue here is notice—i.e., whether the information provided was sufficient "to allow the defendant to prepare a defense and to protect the defendant from a second probation hearing for the same act." *Hubbard*, 198 N.C. App. at 158, 678 S.E.2d at 293. Additionally, because of the changes effected by the Justice Reinvestment Act, we have required that defendants be given notice of the particular revocation-eligible violation alleged by the State. *See, e.g.*, *State v. Tindall*, ___ N.C. App. ___, ___, 742 S.E.2d 272, 275 (2013) (holding that defendant received insufficient notice because "defendant did not have notice that her probation could potentially be revoked when she appeared at the hearing."), *State v. Kornegay*, ___ N.C. App. ___, ___, 745 S.E.2d 880, 883 (2013) ("Under *Tindall*, which violation is alleged dictates whether the trial court has the jurisdiction to revoke a defendant's probation or not." (emphasis added)).

Unlike *Tindall* and *Kornegay*, the violation report here put defendant on notice that the State was alleging a revocation-eligible violation, namely that he committed a new criminal offense. The probation officer specifically alleged in the violation report that defendant had violated the condition that he not commit any criminal offense. The violation report identified the criminal offense on which the trial court relied to revoke defendant's probation—possession of a firearm by a felon—and the specific county and case file number of that alleged offense. Given such notice, defendant was aware that the State was alleging a revocation-eligible violation and he was aware of the exact violation upon which the State relied. Defendant could have denied the violation and presented evidence in his own defense had he chosen to do so. Therefore, we conclude that the trial court had jurisdiction to revoke defendant's probation for violation of the "commit no criminal offense" condition.[1]

III. Findings of Fact

[3] Defendant next argues that the trial court made inadequate findings to support its judgment revoking his probation. We agree that the trial court's written judgment is missing several key findings, including findings that, "[u]pon due notice or waiver of notice," defendant admitted the violations and that that defendant had violated the condition that he not commit a new criminal offense. We conclude that these omissions are clerical errors and remand for entry of a corrected judgment.

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1. Because we conclude that the notice provided was adequate we do not address the issue of waiver.

The form which was used here, "Judgment and Commitment Upon Revocation of Probation—Felony," AOC Form CR-607 Rev. 12-12, includes five potential findings of fact with various optional subsections. Finding 1 addresses the particular probation violations alleged against the defendant. Finding 2 addresses "due notice," waiver of notice, and hearing. Finding 3 addresses the specific conditions which the court finds that defendant has violated. Finding 4 addresses the willfulness and timing of violations, and does not require that a box be "checked," unless the subsection is applicable (and here it was not marked, nor should it have been). Finding 5 includes the direction: "NOTE TO COURT: *This finding is required when revoking probation for violations occurring on or after December 1, 2011*" (emphasis in original), gives the Court two optional findings, and at least one of these is necessary to revoke probation.

Here, the trial court made only two findings: No. 3(a), which was "checked" and Finding 4, which does not require any additional notation. The *only* optional finding on Form AOC-CR-607 that the trial court checked was 3(a), where it found that "The condition(s) violated and the facts of each violation are as set forth" in paragraphs 1-4 of the violation report. By failing to check the right boxes, the trial court failed to incorporate the violation reports by reference (Finding 1(a)), made no finding that defendant admitted the violations (Finding 2), and failed to find a willful violation of one of the revocation-eligible conditions under the Justice Reinvestment Act (Finding 5). Finding 5 is particularly important here because only one of the four alleged violations was revocation-eligible. *See State v. Jones*, ___ N.C. App. ___, ___, 736 S.E.2d 634, 637-38 (2013) (concluding that "the trial court should have checked the box finding that it had the authority to revoke defendant's probation under the Justice Reinvestment Act 'for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A–1343 (b)(1), or abscond from supervision, G.S. 15A–1343(b)(3a), as set out above.' ").

But in this case, the record clearly supports the grounds, reasoning, and authority for the trial court's order of revocation of probation, so any error in failing to check a box on the revocation form is clerical only. *See id. at* ___, 736 S.E.2d at 637-38 (concluding that the trial court made a clerical error when it failed to check the right boxes on the AOC form to revoke probation). Defendant admitted the alleged violations through counsel, including that he had been convicted of a new criminal offense on 18 December 2012. The trial court found from the bench that defendant had admitted the violations. Nevertheless, the order must document the findings necessary to the trial court's decision to revoke

defendant's probation. *See* N.C. Gen. Stat. § 15A-1345(e) (2011) ("Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings."); *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E.2d 423, 425 (1983) (noting that due process requires "a written judgment by the judge which shall contain (a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation."). The failure to check the appropriate boxes constitutes a clerical error. *Jones*, ___ N.C. App. at ___, 736 S.E. 2d at 637-38. Therefore, we remand for correction of the clerical errors.

IV. Conclusion

Although we conclude from the current record that the trial court had subject matter jurisdiction to adjudicate defendant's alleged probation violations, due to the failure to "check the boxes" on the order, the trial court's written findings are inadequate to support its decision to revoke defendant's probation. Therefore, we remand for the trial court to correct the clerical errors in the judgment.

REMANDED.

Judges MCGEE and BRYANT concur.

STATE OF NORTH CAROLINA
v.
RONDELL LUVELL SANDERS

No. COA13-750

Filed 4 February 2014

1. Sentencing—prior record level determination—out-of-state statute—correct version

Defendant did not show error on a remand for examination of prior record level points for a Tennessee conviction where defendant argued that the State did not prove the Tennessee statutes were unchanged from the versions under which defendant was convicted. While the date of offense often determines which version of a criminal statute applies in North Carolina, defendant cites no Tennessee authority to show that statutory amendments in Tennessee operate in the same manner as in North Carolina.

2. Sentencing—prior record points—Tennessee offense—substantially similar to North Carolina offense

The trial court did not err by concluding that the Tennessee offense of theft and the North Carolina offense of larceny are substantially similar. The only difference between the elements of the offenses in the two states that defendant pointed out was that the Tennessee offense allegedly required no showing of permanent deprivation. However, courts in Tennessee have held that Tennessee's theft statute requires an intention to permanently deprive the owner of property.

3. Sentencing—prior record level—prior Tennessee offense—elements

The trial court erred when determining defendant's sentence in its consideration of a prior Tennessee conviction. The Tennessee statute referred to another statute, not presented by the State in this case, and both statutes were necessary for an understanding of the elements of the Tennessee offense.

4. Sentencing—prior record level—Tennessee offense—domestic assault—compared to assault on a female

The trial court erred by finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female. The required comparison is of the elements of the two offenses.

Judge BRYANT concurring part and dissenting in part.

Appeal by Defendant from judgment entered 15 February 2013 by Judge Wayland J. Sermons, Jr. in Superior Court, Beaufort County. Heard in the Court of Appeals 19 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General David L. Gore, for the State.

W. Michael Spivey for Defendant.

McGEE, Judge.

Rondell Luvell Sanders ("Defendant") appeals from his re-sentencing for robbery with a dangerous weapon. In an earlier appeal to this Court, Defendant asserted error in the prior record level determination, which included points based on the substantial similarity of Tennessee

offenses to North Carolina offenses. This Court remanded for resentencing because it appeared the trial court compared the *punishments*, rather than comparing the *elements* of the offenses. *State v. Sanders*, ___ N.C. App. ___, 736 S.E.2d 238 (2013).

I. Standard of Review

The "question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law requiring *de novo* review on appeal." *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) (internal quotation marks omitted).

II. Date of Prior Tennessee Offenses

[1] Defendant argues the trial court erred by assigning points for Tennessee convictions because the State did not prove the Tennessee statutes were unchanged from the versions under which Defendant was convicted. We disagree.

In *State v. Burgess*, ___ N.C. App. ___, 715 S.E.2d 867 (2011), this Court remanded for resentencing when the State presented the 2008 versions of the out-of-state statutes and "presented no evidence that the statutes were unchanged from the 1993 and 1994 versions under which [the] defendant had been convicted." *Burgess*, ___ N.C. App. at ___, 715 S.E.2d at 870.

In the present case, the State presented copies of judgments to the trial court showing Defendant was convicted in Tennessee of theft on 10 March 2009 and domestic assault on 6 January 2009. Defendant contends the judgments do not show the date of the offenses. However, Defendant provides no support for his implied assertion that the date of each offense is necessary to determine which version of the Tennessee criminal statute applied.

It is true that, in North Carolina, the date of offense often determines which version of a criminal statute applies. *See*, *e.g.*, "An Act to Provide That If a Defendant Has Four or More Prior Larceny Convictions, A Subsequent Larceny Offense is a Felony," 2012 N.C. Sess. Laws ch. 154 § 2 ("This act becomes effective December 1, 2012, and applies to offenses committed on or after that date."); "An Act to Amend the Law Concerning Assaults on Governmental Officers and Employees and to Make It a Felony to Assault a Governmental Officer or Employee with a Deadly Weapon," 1991 N.C. Sess. Laws ch. 525 § 3 ("This act becomes effective October 1, 1991, and applies to offenses committed on or after

that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act[.]").

However, because Defendant cites no Tennessee authority to show that statutory amendments in Tennessee operate in the same manner as the North Carolina amendments above, we must assume the State presented the correct versions of the Tennessee criminal statutes at issue. Defendant has thus not demonstrated error on this basis.

III. Substantial Similarity of Tennessee Offense of Theft to North Carolina Offense of Misdemeanor Larceny

[2] Defendant also argues the trial court erred in finding the Tennessee offense of theft substantially similar to the North Carolina offense of misdemeanor larceny.

> If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2011). "For each prior misdemeanor conviction as defined in this subsection, 1 point." N.C. Gen. Stat. § 15A-1340.14(b)(5).

"Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the *elements* of the out-of-state offense to those of the North Carolina offense." *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525 (emphasis added); *see also State v. Sanders*, ___ N.C. App. ___, ___, 736 S.E.2d 238, 240 (2013) ("the trial court must compare 'the *elements* of the out-of-state offense to those of the North Carolina offense"); *State v. Wright*, 210 N.C. App. 52, 71, 708 S.E.2d 112, 126 (2011).

Although the case law is clear that the determination as to substantial similarity involves comparison of the elements of the offenses, the determination as to what exactly constitutes substantial similarity remains unclear. While N.C.G.S. § 15A-1340.14(e) "provides that either the State or the defendant may prove that an offense for which the defendant was convicted in a foreign jurisdiction is substantially similar to a North Carolina offense, the statute does not give guidance as to how a trial court is to make such a determination." *State v. Phillips*, ___ N.C. App. ___, ___, 742 S.E.2d 338, 343 (2013) (citing *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006)).

Defendant cites *State v. Amanns*, 2 S.W.3d 241 (Tenn. Crim. App. 1999) for the elements of "theft of property." "In order to obtain a conviction for theft, the State must prove (1) the defendant knowingly obtained or exercised control over property; (2) the defendant did not have the owner's effective consent; and (3) the defendant intended to deprive the owner of the property." *Amanns*, 2 S.W.3d at 244-45.

The only difference between the elements of the offenses that Defendant points out is that the Tennessee offense requires no showing of permanent deprivation. Defendant asserts that, if a defendant simply "took a joyride on somebody's horse, he would violate Tennessee's theft statute."

However, it appears that the court in *Amanns* was merely giving a shortened recitation of the elements. In a challenge to the sufficiency of evidence in an attempted theft case, the Court of Criminal Appeals of Tennessee considered whether the State showed the defendant "possessed the requisite intent to *permanently* deprive each of the owners of their automobiles." *State v. Roberts*, 943 S.W.2d 403, 410 (Tenn. Crim. App. 1996) (emphasis added), *overruled on other grounds by State v. Ralph*, 6 S.W.3d 251 (Tenn. 1999). Thus, courts in Tennessee have held that Tennessee's theft statute requires an intention to *permanently* deprive the owner of property.

Defendant's contention that the offenses are not substantially similar on this basis is without merit. The trial court did not err in concluding the Tennessee offense of theft and the North Carolina offense of larceny are substantially similar.

IV. Substantial Similarity of Tennessee Offense of Domestic Assault to North Carolina Offense of Assault on a Female

Defendant next argues the trial court erred in finding the Tennessee offense of domestic assault substantially similar to the North Carolina offense of assault on a female. Defendant makes two contentions in support of his argument.

A. Necessity of Reviewing Applicable Statutes

[3] First, Defendant contends "the State did not offer the Tennessee statute necessary to determine the elements of the offense." The State presented a copy of Tenn. Code Ann. § 39-13-111. However, that statute refers to another statute which the State did not provide to the trial court, namely, Tenn. Code Ann. § 39-13-101.

The Tennessee domestic assault statute reads: "A person commits domestic assault who commits an assault as defined in § 39-13-101

against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). Both statutes are thus necessary to understanding the elements of the Tennessee offense of domestic assault. The record contains no indication that the trial court considered both Tenn. Code Ann. §§ 39-13-111 and 39-13-101. Defendant has shown error in the trial court's determination under *Fortney*.

B. Substantial Similarity

[4] Second, Defendant contends the offenses are not substantially similar because "the Tennessee statute is gender and age neutral in its definition of 'domestic abuse victims.' " The North Carolina offense of assault on a female is set forth in N.C. Gen. Stat. § 14-33(c).

> [A]ny person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she . . . [a]ssaults a female, he being a male person at least 18 years of age[.]

N.C. Gen. Stat. § 14-33(c)(2) (2011).

By contrast, the Tennessee offense of domestic assault is as follows: "A person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). "Domestic abuse victim" is defined as any person who falls within the following categories:

> (1) Adults or minors who are current or former spouses;
>
> (2) Adults or minors who live together or who have lived together;
>
> (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context;
>
> (4) Adults or minors related by blood or adoption;
>
> (5) Adults or minors who are related or were formerly related by marriage; or
>
> (6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

Tenn. Code Ann. § 39-13-111(a).

An examination of the elements reveals that the North Carolina offense of assault on a female and the Tennessee offense of domestic assault are not substantially similar, especially given that "the rule of lenity requires us to interpret [N.C.G.S. § 15A-1340.14(e)] in favor of defendant." *Phillips*, ___ N.C. App. at ___, 742 S.E.2d at 343 (quoting *Hanton*, 175 N.C. App. at 259, 623 S.E.2d at 606).

The Tennessee offense requires showing that the victim falls into one of six categories. The categories describe particular relationships between the defendant and the victim. By contrast, the North Carolina offense of assault on a female requires no showing as to a particular relationship between the defendant and the victim.

A second significant difference between the offenses is that the North Carolina offense requires the victim be female. The Tennessee offense does *not* require the victim be female. Based on these two significant differences, we must conclude the trial court erred in finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female.

The dissent analyzes the facts of the Tennessee offense to determine whether Defendant could be convicted of assault on a female in North Carolina. As previously discussed, we are required to compare the elements of the Tennessee offense to the elements of the North Carolina offense. "Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the *elements* of the out-of-state offense to those of the North Carolina offense." *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525 (emphasis added); *see also Sanders*, ___ N.C. App. at ___, 736 S.E.2d at 240 ("the trial court must compare 'the *elements* of the out-of-state offense to those of the North Carolina offense"); *Wright*, 210 N.C. App. at 71, 708 S.E.2d at 126. The trial court erred in finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female.

V. Conclusion

Defendant has demonstrated no error in the trial court's determination as to the Tennessee offense of theft. However, Defendant has shown error in the trial court's determination as to the Tennessee offense of domestic assault, and we remand for resentencing.

Affirmed in part; remanded in part for resentencing.

Judge STROUD concurs.

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

The majority opinion remands for resentencing based on its determination that the trial court erred in finding that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female. Because I believe the trial court did not err in finding that the Tennessee offense of domestic assault is substantially similar to the North Carolina offense of assault on a female, I respectfully dissent from that portion of the majority opinion. I concur in the remainder of the majority opinion.

Pursuant to N.C. Gen. Stat. § 15A-1340.14(e) (2011),

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Here, the State presented the trial court with copies of Tenn. Code Ann. § 39-13-111 and N.C. Gen. Stat. § 14-33(c). The majority opinion agrees with defendant's argument that the trial court erred in finding that T.C.A. § 39-13-111 and N.C.G.S. § 14-33(c) are substantially similar. This Court has held that in considering whether a statute from another state is substantially similar to a North Carolina statute "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008). I find it inconceivable that this requirement of substantial similarity is meant to pose an insurmountable burden for the State, as each state is entitled to tailor its statutes as it sees fit. Accordingly, the State is required to prove merely by a preponderance of the evidence — not by the higher standards of by clear and convincing evidence or beyond a reasonable doubt — that two statutes are substantially similar.

North Carolina does not have a domestic assault statute. Rather, domestic assault in North Carolina is recognized as a form of assault, upon a female, by a male, under N.C.G.S. § 14-33(c)[1]; no other North

1. That N.C.G.S. § 14-33(c) is intended to address domestic assault is further demonstrated by N.C. Gen. Stat. § 15A-534.1 (2011), "Crimes of domestic violence," which establishes specific procedures for determining a defendant's pretrial release "[i]n all cases in which the defendant is charged with assault on, stalking, communicating a threat to, or committing a felony provided in Articles 7A, 8, 10, or 15 of Chapter 14 of the General Statutes upon a spouse or former spouse or a person with whom the defendant lives or has lived as if married . . .

Carolina statute is thus as suitably equivalent to T.C.A. § 39-13-111 in addressing the specific elements of an assault upon a female. Furthermore, North Carolina has no statutory definition of assault, and assault is thus defined by the common law. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). The majority agrees with defendant that because the State did not present the trial court with both T.C.A. § 39-13-111 and the statute to which it refers, T.C.A. § 39-13-101, the State did not meet its burden of proving that T.C.A. § 39-13-111 and N.C.G.S. § 14-33(c) are substantially similar. An examination of T.C.A. § 39-13-111, "domestic assault," reveals that it does indeed reference T.C.A. § 39-13-101, "assault." However, as the trial court examined the elements of assault in T.C.A. § 39-13-111 in relation to the common law definition of assault, it was unnecessary that T.C.A. § 39-13-101 accompany T.C.A. § 39-13-111 in order for the elements of assault in T.C.A. § 39-13-111 to be defined and considered by the trial court.

As defined by the common law, an assault is an unauthorized touching which causes an offensive or harmful contact. Such contact can occur between two people of any age or gender. *See Roberts*; *see also State v. Hill*, 6 N.C. App. 365, 369, 170 S.E.2d 99, 102 (1969) ("Where in a prosecution for assault . . . the evidence tends to show assault on a female at least, it is not error to fail to submit the question of guilt of simple assault."). In creating statutes which distinguish between types of assaults, like domestic assault, these distinctions assist with governmental goals such as identifying particular categories of offenders for sentencing purposes. *See State v. Gurganus*, 39 N.C. App. 395, 400, 250 S.E.2d 668, 672 (1979) ("[N.C.G.S. § 14-33] in its entirety provides a logical pattern protecting the citizens of North Carolina from acts of violence. Subsection (a) of the statute establishes the crimes of assault, assault and battery and affray. Subsection (b) and its subsections do not create additional or separate offenses. Instead, those subsections provide for differing punishments when the presence or absence of certain factors is established.").

The majority appears to accept defendant's argument that T.C.A. § 39-13-111 is not substantially similar to N.C.G.S. § 14-33(c) because T.C.A. § 39-13-111 is gender and age-neutral while N.C.G.S. § 14-33(c) specifically applies to a male over the age of 18 assaulting a female. I find defendant's argument to lack merit, as the State of Tennessee could have chosen to charge defendant under its general assault statute, § 39-13-101. Instead, by charging defendant under the more specific statute for domestic abuse, the State of Tennessee pursued the more specific and relevant charge against defendant of committing assault

upon a female with whom he was in a relationship. Moreover, the State of Tennessee dismissed a charge of regular assault against defendant at the same time it pursued the domestic abuse charge against him. As such, the State of Tennessee demonstrated its intent to charge defendant according to the elements of the most applicable statute. Furthermore, an analysis of Tennessee case law indicates that the domestic abuse statute can and is applied specifically in situations where a male has assaulted a female with whom he had a relationship. *Compare State v. Anderson*, No. W2011-00139-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 707 (Sept. 5, 2012) (finding the male defendant guilty of domestic assault under T.C.A. § 39-13-111 where he admitted to choking and hitting his estranged wife); *State v. Boston*, No. M2010-00919-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 779 (Oct. 18, 2011) (finding the male defendant guilty of domestic assault for hitting his ex-wife during a fight and guilty of aggravated assault for hitting his ex-wife's male friend with a board); *State v. Parham*, No. W2009-02576-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 1049 (Dec. 10, 2010) (finding the male defendant guilty of domestic assault for severely beating his ex-girlfriend with a fireplace log), *remanded on other grounds*, No. W2011-01276-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 788 (Sept. 26, 2012); *State v. Terrell*, No. M2006-01688-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 135 (Jan. 30, 2008) (discussing how domestic abuse under T.C.A. § 39-13-111 is a specific form of assault as defined in T.C.A. § 39-13-101), with *Fain v. State*, No. M2009-01148-CCA-R3-PC, 2010 Tenn. Crim. App. LEXIS 212 (Mar. 9, 2010) (finding defendant-mother guilty of assault for beating her juvenile son); *State v. Hall*, No. W2008-01875-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 147 (Feb. 18, 2010) (finding the male defendant guilty of assault for attacking the male victim with a frying pan); *State v. Adkins*, No. M2007-01728-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 994 (Dec. 4, 2008) (finding the male defendant guilty of assault upon two police officers, one male and one female); *State v. Elkins*, 83 S.W.3d 706 (2002) (finding the male defendant guilty of assault and aggravated sexual battery upon a juvenile girl).

The record in the instant case offers additional evidence in support of the statutory elements necessary to convict defendant of assault upon a female: the judgment for domestic assault indicates that defendant was to have no contact with the victim, Ashley Blango, and to attend 24 domestic abuse counseling classes. Moreover, defendant's criminal history record indicates that he has a neck tattoo which reads "Ashley." Although I acknowledge defendant's contention that "Ashley" is a unisex name, I find it inconceivable that this evidence — (1) a neck tattoo with the name "Ashley," (2) a conviction for domestic assault,

(3) a victim's name of Ashley, (4) an order to attend domestic abuse counseling classes, and (5) an analysis of Tennessee case law showing how T.C.A. § 39-13-111 is specifically used for instances where a male has assaulted a female with whom he has a relationship — fails to meet the State's burden of proving substantial similarity between the elements of the two relevant statutes by a preponderance of the evidence.

Of further note here is that T.C.A. § 39-13-111 states that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." As such, T.C.A. § 39-13-111 is clearly intended to be treated like an assault as defined under T.C.A. § 39-13-101; the distinction between these two statues is thus relevant only as to whether the assault occurred in a domestic situation or not. *See State v. Woosley*, No. M2013-00578-CCA-R3-CD, 2013 Tenn. Crim. App. LEXIS 1045, at *15 (Nov. 26, 2013) ("Domestic assault is an "assault" committed against a "domestic abuse victim." T.C.A. § 39-13-111(b) (2010). As charged in the indictment, an assault occurs when a person "[i]ntentionally, knowingly, or recklessly causes bodily injury to another[.]" Id. § 39-13-101(a)(1) (2010). A "domestic abuse victim" is [also] defined to include "[a]dults . . . who are current or former spouses." *Id.* § 39-13-111(a)(1) (2010)."); *see also* T.C.A. § 39-13-111(a)(2) ("[D]omestic abuse victim means . . . [a]dults . . . who live together or who have lived together[.]"); *Id.* § 39-13-101(a) ("A person commits assault who: (1) [i]ntentionally, knowingly or recklessly causes bodily injury to another; (2) [i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) [i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.").

I also note that the trial court took notice of the common law definition of assault as presented by the State. This Court has recognized that in determining whether two statutes are substantially similar, the underlying purposes of the statutes must be examined to "avoid absurd or bizarre consequences." *State v. Key*, 180 N.C. App. 286, 294, 636 S.E.2d 816, 823 (2006) (holding that a Maryland theft statute was substantially similar to a North Carolina larceny statute because both statutes followed common-law definitions of theft, taking, and asportation).

Here, the underlying purpose of the statutes is clear: to protect females from assaults committed by males. "In adopting G.S. 14-33, the General Assembly of North Carolina clearly sought to prevent bodily injury to the citizens of the State arising from assaults, batteries and affrays." *Gurganus*, 39 N.C. App. at 400, 250 S.E.2d at 672.

> In matters of statutory construction, the role of this court is to ascertain and give effect to the intent of the legislature. Unless ambiguity requires resort elsewhere to ascertain legislative intent, judicial interpretation of a statute is restricted to the natural and ordinary meaning of the language used. "Legislative enactments must be interpreted in their natural and ordinary sense without a forced construction to either limit or expand their meaning." "Courts must construe statutes as a whole and in conjunction with their surrounding parts and their interpretation should be consistent with their legislative purposes." The meaning of a statute is to be determined not from specific words in a single sentence or section but from the act in its entirety in light of the general purpose of the legislation; any interpretation should express the intent and purpose of the legislation. "The cardinal rule of statutory construction is to effectuate legislative intent, with all rules of construction being [aids] to that end."

State v. Cross, 93 S.W.3d 891, 894 (Tenn. Crim. App. 2002) (citations omitted). A review of the elements of the Tennessee domestic assault statute supports a similar purpose as the North Carolina assault on a female statute — to protect females from assault by males. Accordingly, upon *de novo* review of the trial court's ruling after comparison of the elements of the relevant North Carolina and Tennessee assault statutes, I submit that the State met its burden of proof to show by a preponderance of the evidence that these statutes are substantially similar. Therefore, I respectfully dissent.

STATE v. STUBBS

[232 N.C. App. 274 (2014)]

STATE OF NORTH CAROLINA
v.
LARRY STUBBS

No. COA13-174

Filed 4 February 2014

1. Appeal and Error—appellate jurisdiction—subsequent panel—cannot overrule prior panel granting certiorari

A subsequent panel of the Court of Appeals could not overrule a prior panel which had decided the issue of jurisdiction to hear the appeal by granting the State's petition for a writ of *certiorari*.

2. Criminal Law—jurisdiction—MAR—sentence invalid as a matter of law

The State's challenge to the trial court's jurisdiction was overruled where the gravamen of the argument presented in defendant's MAR was that his life sentence for second-degree burglary in 1973 was unconstitutionally excessive under evolving standards of decency,the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. The trial court had jurisdiction over the 1973 judgment to consider whether defendant's sentence was invalid as a matter of law.

3. Constitutional Law—1973 sentence of life with the possibility of parole—not cruel and unusual

The trial court erred by concluding that defendant's 1973 sentence of life imprisonment with the possibility of parole for second-degree burglary violated the prohibitions of the Eighth Amendment to the United States Constitution. Although defendant argued that the original sentence was excessive under evolving standards of decency and the Eighth Amendment, the sentence was severe but not cruel or unusual in the constitutional sense because it allowed for the realistic opportunity to obtain release before the end of his life. The case was remanded for reinstatement of the original sentence.

Judge DILLON concurs in separate opinion.

Judge Stephens dissents in separate opinion.

Appeal by the State from judgment entered 5 December 2012 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Sarah Jessica Farber for defendant-appellee.

BRYANT, Judge.

Where the trial court erred in concluding that defendant's sentence of life in prison with the possibility of parole was a violation of the Eighth Amendment, we reverse and remand the trial court order modifying defendant's original sentence.

On 7 May 1973, a complaint and warrant for arrest was issued against seventeen-year-old defendant Larry Connell Stubbs in Cumberland County.

> [The complainant alleged that on that day, defendant] unlawfully, willfully, and feloniously and burglariously [sic] did break and enter, at or about the hour of two o'clock AM in the night . . . the dwelling house of [the victim] located at 6697 Amanda Circle, Fayetteville, N.C. and then and there actually occupied by the said [victim], with the felonious intent [defendant], [sic] the goods and chattels of the said [victim], in the said dwelling house then and there being, then and there feloniously and burglariously [sic] to steal and carry away, said items stolen and carried away, one table lamp, one General Electric Record Player; one Magnus Electric Organ; One Portable General Electric 19" television set; . . . one man's suit color black, the personal property of [the victim], and valued at $394.00.

In addition to first-degree burglary and felonious larceny, defendant was charged with and later indicted on the charge of rape. On 6 August 1973, defendant pled guilty to second-degree burglary and assault with intent to commit rape. The State dismissed the charge of felonious larceny.

On the charge of second-degree burglary, the trial court accepted defendant's plea, entered judgment, and sentenced defendant to an active term for "his natural life."[1] On the charge of assault with intent

1. Pursuant to N.C. Gen. Stat. § 148-58, effective in 1973, "Time of eligibility of prisoners to have cases considered," "any prisoner serving sentence for life shall be eligible [to have their cases considered for parole] when he has served 10 years of his sentence." N.C. Gen. Stat. § 148-58 (1973) (amended in 1973, effective 1 July 1974, to provide that the period a prisoner sentenced to life imprisonment must serve before being eligible for parole would be changed from ten to twenty years) (repealed 1977).

to commit rape, the trial court sentenced defendant to an active term of fifteen years to run concurrently with his life sentence.

On 11 May 2011, defendant filed a pro se motion for appropriate relief (MAR) in the Cumberland County Superior Court asking that his sentence of life in prison on the charge of second-degree burglary be set aside, that he be resentenced, and after awarding time served as credit toward the new sentence, that he be released from prison. As a statutory basis for the relief requested, defendant cited N.C. Gen. Stat. § 15A-1415(b)(7), "Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time", and G.S. § 15A-1340.17, "Punishment limits for each class of offense and prior record level" pursuant to the Structured Sentencing Act codified at §§ 15A-1340.10, *et seq*. Defendant's contention was that his original sentence was grossly disproportionate to the maximum sentence he could receive for the same crime if sentenced today. Sentenced to an active term for his natural life for second-degree burglary, defendant maintained that if he had been sentenced under the Structured Sentencing Act, effective 1 October 1994, his term would have been between twenty-nine and forty-four months. "Because there has been a 'significant change' in the law," defendant asserted that his life sentence should now be considered cruel and unusual punishment. Defendant petitioned the Superior Court to resentence him based on "evolving standards of decency under the Eighth Amendment of the United States Constitution which prohibits cruel and unusual punishment being inflicted[,] as does [] Article I, section 27 of the North Carolina Constitution." Defendant also petitioned to proceed *in forma pauperis*.

On 10 October 2011, Senior Resident Superior Court Judge Gregory A. Weeks filed an order in which he concluded that defendant's "Motion for Appropriate Relief [was] not frivolous, [had] merit, that a summary disposition [was] inappropriate, and that a hearing [was] necessary." The court appointed the Office of North Carolina Prisoner Legal Services to represent defendant.

On 13 August 2012, the State filed its Memorandum Opposing Defendant's Motion for Appropriate Relief. In its memorandum, the State addressed defendant's motion as a request for retroactive application of the Structured Sentencing Act and a challenge to his life sentence pursuant to the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution. The State maintained that defendant was not entitled to the relief sought: the Structured Sentencing Act was applicable to criminal offenses occurring on or after 1 October 1994; and "[t]o the extent that [] Defendant's

argument challenges his sentence pursuant to the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution," Eighth Amendment jurisprudence proscribes a different analysis than the one proposed by defendant. The State further asserted that our State Appellate Courts have rejected arguments similar to the one defendant presented.

On 15 August 2012, defendant, through appointed counsel, filed a Memorandum Supporting Defendant's Motion for Appropriate Relief. Acknowledging our North Carolina Supreme Court's holding which declined to retroactively apply the sentencing provisions codified under the Structured Sentencing Act, *see State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012), defendant asserted that he was entitled to relief "because his sentence of Life Imprisonment for his conviction of Second Degree Burglary in 1973 is unconstitutionally excessive under evolving standards of decency and the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution." Defendant asserted that "[t]o gauge evolving standards of decency, the [United States] Supreme Court looks to legislative changes and enactments." Defendant also asserted that "[t]he [Structured Sentencing Act] is the most current expression of North Carolina's assessment of appropriate and humane sentences, and [] is an objective index of sentence proportionality for Eighth Amendment analysis purposes." "As of today, Defendant has served **nearly forty years** in prison for his Second Degree Burglary conviction. This is nearly ten times the length of time that any defendant could be ordered to serve today." Defendant contended that his sentence was excessive, that it violated the United States Constitution and the North Carolina Constitution "making it necessary to vacate Defendant's life sentence and to resentence him to a term of years that is not disproportionate, cruel, or unusual."

Following a 13 August 2012 hearing, the trial court on 5 December 2012 entered an order in which it found that on 6 August 1973, defendant pled guilty to second-degree burglary and assault with intent to commit rape. Defendant had been sentenced to life in prison for second-degree burglary along with a concurrent sentence of fifteen years imprisonment for assault with intent to commit rape. Defendant completed his sentence for assault with intent to commit rape in 1983 and was currently incarcerated solely for his second-degree burglary conviction. "As of 30 November 2012, [defendant] has been in the custody of the North Carolina Department of Public Safety for this crime for more than thirty-six years." The court found that defendant was paroled in

December 2008 and that while on parole, he was charged with and convicted of driving while impaired. Subsequent to his conviction, defendant's parole status was revoked, and he was returned to incarceration. The trial court concluded that under "evolving standards, [defendant's] sentence violated the Eighth Amendment and is invalid as a matter of law." The trial court granted defendant's motion for appropriate relief and vacated the judgment entered 6 August 1973 as to the second-degree burglary conviction, resentencing defendant to a term of thirty years. Defendant was given credit for 13,652 days spent in confinement. The trial court further ordered that the North Carolina Department of Public Safety Division of Adult Correction release defendant immediately.

The State filed with this Court petitions for a writ of certiorari to review the 5 December 2012 trial court order and a writ of supersedeas to stay imposition of the trial court's order pending appeal. Both petitions were granted.[2]

On appeal, the State brings forth the issue of whether the Superior Court erred by ruling that defendant's 1973 sentence of life imprisonment with the possibility of parole for a second-degree burglary conviction is now in violation of the Eighth Amendment to the United States Constitution, vacating defendant's 1973 judgment, and resentencing him. The State argues on appeal that (A) the trial court lacked jurisdiction over the original judgment and (B) that it incorrectly interpreted the precedent of the Supreme Court of the United States.

"Our review of a trial court's ruling on a defendant's MAR is 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law

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2. **[1]** We acknowledge with appreciation the responsiveness of the State and defense counsel in providing this Court with memoranda of additional authority regarding a question presented by this Court at oral argument reflecting on our jurisdiction to hear this appeal. We also note that because one panel of this Court has previously decided the jurisdictional issue by granting the State's petition for a writ of certiorari to hear the appeal, we cannot overrule that decision. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion [against] reviewing the trial court's order when a preceding panel had earlier decided to the contrary."). However, a separate concurring and a separate dissenting opinion further address the issue of jurisdiction to hear this appeal.

support the order entered by the trial court.' " *State v. Peterson*, ___ N.C. App. ___, ___, 744 S.E.2d 153, 157 (2013) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

A

[2] The State argues that the trial court lacked jurisdiction over the original judgment. Specifically, the State contends that defendant's motion for appropriate relief was made pursuant to N.C. Gen. Stat. § 15A-1415 but that no provision of section 15A-1415 granted the trial court jurisdiction to modify the original sentence. We disagree.

A trial court loses jurisdiction to modify a defendant's sentence, "subject to limited exceptions, after the adjournment of the session of court in which [the] defendant receive[s] this sentence[,] [a]lthough a trial court may properly modify a sentence after the trial term upon submission of a [Motion for Appropriate Relief (MAR)][.]" *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 495 (citations omitted). Section 15A-1415 of the North Carolina General Statutes lists "the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment[.]" N.C. Gen. Stat. § 15A-1415(b) (2011).

At the 13 August 2012 hearing on defendant's MAR, defendant contended that he was entitled to relief pursuant to N.C. Gen. Stat. § 15A-1415(b)(8). In its 5 December 2012 order, the trial court concluded that its authority over the 6 August 1973 judgment was allowed pursuant to N.C.G.S. § 15A-1415(b)(4) & (b)(8).

Pursuant to General Statutes, section 15A-1415, a defendant may assert by MAR made more than ten days after entry of judgment the following grounds:

> (4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.
>
> . . .
>
> (8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law.

N.C.G.S. § 15A-1415(b)(4) & (b)(8).

The gravamen of the argument presented in defendant's MAR submitted to the trial court is that because "his sentence of Life Imprisonment for his conviction of Second Degree Burglary in 1973 is unconstitutionally excessive under evolving standards of decency and the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution," the trial court had jurisdiction over the 6 August 1973 judgment to consider whether defendant's sentence was "invalid as a matter of law." N.C.G.S. § 15A-1415(b)(8); *see also* N.C.G.S. § 15A-1415(b)(4). We agree and therefore, overrule the State's challenge to the trial court's jurisdiction.

B

[3] The State further contends that the trial court misapplied United States Supreme Court precedent, applying the wrong test to determine whether an Eighth Amendment violation has occurred. We agree in part.

The Eighth Amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[,]" U.S. Const. amend. VIII, and is made applicable to the States by the Fourteenth Amendment, *id.* amend. XIV. The Constitution of North Carolina similarly states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. art. I, § 27. Despite the difference between the two constitutions, one prohibiting "cruel and unusual punishments," the other "cruel or unusual punishments," "[our North Carolina Supreme Court] historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998) (citations omitted), *superseded by statute on other grounds as stated in In re J.L.W.*, 136 N.C. App. 596, 525 S.E.2d 500 (2000).

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . [T]he words of the Amendment are not precise, and [] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01, 2 L. Ed. 2d 630, 642 (1958) (citation omitted). "The [Eighth] Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . , against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102-03, 50 L. Ed. 2d 251, 259 (1976) (citation and quotations omitted).

In *Estelle v. Gamble*, the United States Supreme Court observed that when the Court initially applied the Eight Amendment, the challenged punishments regarded methods of execution. *Id.* at 102, 50 L. Ed. 2d at 258. However, "the Amendment proscribes more than physically barbarous punishments." *Id.* at 102, 50 L. Ed. 2d 259.

> To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Graham v. Florida, 560 U.S. 48, 58, 176 L. Ed. 2d 825, 835 (2010) (citations, quotations, and bracket omitted).

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense. Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.

Kennedy v. Louisiana, 554 U.S. 407, 419, 171 L. Ed. 2d 525, 538 (citations and quotations omitted) *opinion modified on denial of reh'g*, 554 U.S. 945, 171 L. Ed. 2d 932 (2008).

> The concept of proportionality is central to the Eighth Amendment. . . .
>
> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

Graham, 560 U.S. at 59, 176 L. Ed. 2d at 835-36.

As to the first classification, in which the Court considers whether a term-of-years sentence is unconstitutionally excessive given the circumstances of a case, the Court noted that "it has been difficult for [challengers] to establish a lack of proportionality." *Id.* at 59, 176 L. Ed. 2d at 836. Referring to *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836 (1991), as a leading case on the review of Eighth Amendment challenges to term-of-years sentences as disproportionate, Justice Kennedy delivering the opinion of the *Graham* Court acknowledged his concurring opinion in *Harmelin*: "[T]he Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' " *Graham*, 560 U.S. at 59-60, 176 L. Ed. 2d at 836 (quoting *Harmelin*, 501 U.S. at 997, 1000–1001, 115 L. Ed. 2d at 836 (Kennedy, J., concurring in part and concurring in judgment)). *Accord Rummel v. Estelle*, 445 U.S. 263, 288, 63 L. Ed. 2d 382 (1980) (Powell, J., dissenting (The scope of the Cruel and Unusual Punishments Clause extends . . . to punishments that are grossly disproportionate. Disproportionality analysis . . . focuses on whether, a person deserves such punishment . . . . A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged.")).

In *Harmelin*, 501 U.S. 957, 115 L. Ed. 2d 836, the defendant challenged his sentence of life in prison without possibility of parole on the grounds that it was "significantly" disproportionate to his crime, possession of 650 or more grams of cocaine. The defendant further argued that because the sentence was mandatory upon conviction, it amounted to cruel and unusual punishment as it precluded consideration of individual mitigating circumstances. *Id.* at 961, 115 L. Ed. 2d at 843 n.1. In an opinion delivered by Justice Scalia, a majority of the Court held that the sentence was not cruel and unusual punishment solely because it was mandatory upon conviction. In addressing the defendant's alternative argument, that his sentence of life in prison without possibility of parole was significantly disproportionate to his crime of possessing 650 or more grams of cocaine, a majority of the Court concluded that the defendant's sentence did not run afoul of the Eighth Amendment; however, the Court revealed varied views as to whether the Eighth Amendment includes a protection against disproportionate sentencing and if so, to what extent. *See also Ewing v. California*, 538 U.S. 11, 155 L. Ed. 2d 108 (2003) (holding that the defendant's sentence of twenty-five years to life

for felony grand theft under California's "three strikes and you're out" law did not violate the Eighth Amendment's prohibition on cruel and unusual punishments). *Cf. Solem v. Helm*, 463 U.S. 277, 77 L. Ed. 2d 637 (1983) (holding that South Dakota's sentence of life without possibility of parole for uttering a "no account" check after the defendant had previously been convicted of six non-violent felonies was disproportionate to his crime and prohibited by the Eighth Amendment).

We return our attention to *Graham v. Florida* which sets out the second classification of Eighth Amendment proportionality challenges as "implement[ing] the proportionality standard by certain categorical restrictions on the death penalty." *Graham*, 560 U.S. at 59, 176 L. Ed. 2d at 836. But, rather than a challenge to a capital sentence, the *Graham* Court was presented with a categorical challenge to a term-of-years sentence: whether the imposition of life in prison without the possibility of parole for a nonhomicide crime committed by a sixteen-year-old juvenile offender violated the Eighth Amendment. In its reasoning, the Court made the following observation:

> [L]ife without parole is the second most severe penalty permitted by law. . . . [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

Id. at 69-70, 176 L. Ed. 2d at 842. The Court concluded that the severity of a sentence imposing life without parole for a person who was a juvenile at the time his nonhomicide offense was committed is a sentencing practice that is cruel and unusual. *Id.* at 74, 176 L. Ed. 2d at 845. However, the Court went on to note that this sentencing preclusion may not lessen the duration of a sentence.

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [the] defendant[] . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. *It bears emphasis . . . that while the Eighth Amendment forbids a State from imposing*

> *a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.*

Id. at 75, 176 L. Ed. 2d at 845-46 (emphasis added).

As a means of obtaining release from incarceration, our North Carolina General Assembly has created by statute a Post-Release Supervision and Parole Commission. N.C. Gen. Stat. § 143B-720 (2011). With the exception of those sentenced under the Structured Sentencing Act, the Commission has "authority to grant paroles . . . to persons held by virtue of any final order or judgment of any court of this State . . . ." *Id.* § 143B-720(a). Furthermore, the Commission is to assist the Governor and perform such services as the Governor may require in exercising his executive clemency powers. *Id.* We note that in *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012), a case reviewing the retroactive application of a less severe sentencing statute, our Supreme Court also drew attention to the powers of the Post-Release Supervision and Parole Commission.

> In 2005, 2007, 2009, and 2011, the General Assembly directed the Post–Release Supervision and Parole Commission to determine whether inmates sentenced under *previous sentencing standards* have served more time in custody than they would have served if they had received the maximum sentence under the SSA. [Defendant's sentence appears to fall within the purview of this directive.]. . . In addition, wholly independent of the Commission's grant of authority, the state constitution empowers the Governor to "grant reprieves, commutations, and pardons, after conviction, for all offenses ... upon such conditions as he may think proper." N.C. Const. art. III, § 5(6).

Id. at 448, 722 S.E.2d at 496 n.1 (emphasis added).[3]

The *Whitehead* Court considered a trial court order granting a defendant's MAR requesting that his life sentence imposed following a guilty

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3. While this quote from *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496 n.1, is a footnote, we think it is relevant to the instant case wherein defendant, like the defendant in *Whitehead*, was sentenced under a "previous sentencing standard," and defendant would have fallen within the directives of the Parole Commission.

plea entered 29 July 1994 and imposed pursuant to the Fair Sentencing Act for a homicide occurring 25 August 1993 be modified by retroactively applying the sentencing provisions of the Structured Sentencing Act applicable to offenses committed on or after 1 October 1994. *Id.* Vacating and remanding the judgment and order of the trial court, our Supreme Court stated that "[c]riminal sentences may be invalidated for cognizable legal error demonstrated in appropriate proceedings. But, in the absence of legal error, it is not the role of the judiciary to engage in discretionary sentence reduction." *Id.* at 448, 722 S.E.2d at 496.

In the matter before us, we note that on 7 May 1973, the date of the offense for which defendant was charged with committing the offense of second-degree burglary, he was seventeen years old.[4] On 6 August 1973, the date defendant pled guilty to second-degree burglary, defendant was eighteen. Defendant was sentenced to incarceration for "his natural life." Pursuant to our General Statutes in effect at that time, any prisoner serving a life sentence was eligible to have his case considered for parole after serving ten years of his sentence. N.C.G.S. § 148-58. The record is not clear how often defendant was considered for parole. However, after serving over thirty-five years, defendant was paroled in December 2008. In 2010, defendant was convicted of driving while impaired. He was sentenced and served 120 days in jail. Thereafter, his parole was revoked and his life sentence reinstated.

"[L]ife imprisonment with possibility of parole is [] unique in that it is the third most severe [punishment]." *Harmelin*, 501 U.S. at 996, 115 L. Ed. 2d at 865. Nevertheless, in the body of case law involving those who commit nonhomicide criminal offenses even as juveniles, sentences allowing for the "realistic opportunity to obtain release before the end of [a life] term" do not violate the prohibitions of the Eighth Amendment. *Graham*, 560 U.S. at 82, 176 L. Ed. 2d at 850. Defendant's sentence allows for the realistic opportunity to obtain release before the end of his life. In fact, defendant was placed on parole in December 2008 prior to his 2010 conviction for the offense of driving while impaired, which led to the revocation of his parole and reinstatement of his life sentence. As our Supreme Court has not indicated a preference for discretionary sentence reduction, *see Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496 ("[I]t is not the role of the judiciary to engage in discretionary sentence reduction."),

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4. At the time of his offense, North Carolina General Statutes, Chapter 7A, Article 23, entitled "Jurisdiction and Procedure Applicable to Children," defined "Child" as "any person who has not reached his sixteenth birthday." N.C. Gen. Stat. § 7A-278(1) (1973). As defendant was seventeen at the time of his offense, he did not come within the aegis of the Chapter 7A, Article 23.

and our General Assembly has directed the Post–Release Supervision and Parole Commission to review matters of proportionality, *see* N.C.G.S. § 143B-720; *Whitehead*, 365 N.C. at 449, 722 S.E.2d at 496 n.1, we hold that the trial court erred in concluding defendant's life sentence violated the prohibitions of the Eighth Amendment to the United States Constitution. *See Rummel v. Estelle*, 445 U.S. 263, 283-84, 63 L. Ed. 2d 382, 397 (1980) ("Perhaps . . . time works changes upon the Eighth Amendment, bringing into existence new conditions and purposes. We all, of course, would like to think that we are moving down the road toward human decency. Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies. Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any nationwide trend toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the [] courts." (citations and quotations omitted)). It should be stated that by all accounts based on today's sentencing standards, defendant's sentence cannot be viewed as anything but severe. Since 1973 at the age of eighteen, defendant has been incarcerated for all but less than two years. There is no record of an appeal from the 1973 conviction, and the record before us does not provide details of the circumstances which led to defendant's arrest or the injury to the victim. Regardless, we must address only what is, as opposed to what is not, before us. Upon review of the arguments presented and cases cited, defendant's outstanding sentence of life in prison with possibility of parole for second-degree burglary, though severe, is not cruel or unusual in the constitutional sense. *See Green*, 348 N.C. at 603, 502 S.E.2d at 828. Accordingly, we reverse the Superior Court's 5 December order modifying defendant's original sentence and remand to the trial court for reinstatement of the original 6 August 1973 judgment and commitment.

Reversed and remanded.

DILLON, Judge, concurring in separate opinion.

I agree with the majority opinion. However, I write to address the jurisdiction question raised by the parties and discussed in footnote 2 of the majority opinion. I believe that the "law of the case" principle, referenced in that footnote, generally compels a panel of this Court to follow the decisions of another panel made in the same case. However, I do not believe a panel is compelled to follow the "law of the case" where the issue concerns subject matter jurisdiction. *See McAllister v. Cone Mills Corporation*, 88 N.C. App. 577, 364 S.E.2d 186 (1988). In *McAllister* we

held that a superior court judge had the authority to determine whether it had subject matter jurisdiction to consider a matter after another superior court judge, in a prior hearing, had denied a motion to dismiss the matter based on lack of subject matter jurisdiction, stating that "[i]f a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *Id.* at 579, 364 S.E.2d at 188. Therefore, I believe we are compelled to make a determination whether the panel of this Court which granted the State's petition for writ of certiorari – which is the basis for our panel's jurisdiction - had the authority to do so.

The North Carolina Constitution states that this Court has appellate jurisdiction "as the General Assembly may prescribe." N.C. Const. Article IV, Section 12(2). Our General Assembly has prescribed that this Court has jurisdiction "to issue . . . prerogative writs, including . . . certiorari . . . to supervise and control the proceedings of any of the trial courts. . . ." N.C. Gen. Stat. § 7A-32(c) (2011).[1] The General Assembly further has prescribed that the "practice and procedure" by which this Court exercises its jurisdiction to issue writs of certiorari is provided, in part, by "rule of the Supreme Court." *Id.* The Supreme Court has enacted the Rules of Appellate Procedure, which includes Rule 21, providing that writs of certiorari may be issued by either this Court or the Supreme Court in three specific circumstances, none of which applies to the State's appeal in this case.

Defendant argues that the subject matter jurisdiction of this Court to issue writs of certiorari is limited to the three circumstances listed in Rule 21. The State argues that Rule 21 is not intended to limit the subject matter jurisdiction of this Court but is simply a "rule" establishing a "practice and procedure," and that Rule 2 – which allows this Court to "suspend or vary the requirements of any of these rules" – provides an avenue by which this Court may exercise the jurisdiction granted by the General Assembly in N.C. Gen. Stat. § 7A-32 to issue writs of certiorari for matters not stated in Rule 21. There is language in decisions of this Court which *suggests* that our authority to grant writs of certiorari is limited to the three circumstances described in Rule 21. *See, e.g.*, *State v. Pimental*, 153 N.C. App. 69, 77, 568 S.E.2d 867, 872 (2002) (*dismissing* a petition for writ of certiorari, stating that since the appeal was

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1. This language employed by the General Assembly is similar to the language in our Constitution defining the jurisdictional limits of our Supreme Court, which includes the authority of "general supervision and control over the proceedings of the other courts." N.C. Const. art. IV, § 12(1).

not within the scope of Rule 21, this Court "does not have the authority to issue a writ of certiorari"). However, there is language in other decisions which *suggests* that this Court may invoke Rule 2 to consider writs of certiorari in circumstances not covered by Rule 21. *See, e.g.*, *State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 426 (2006) (*denying* a petition for writ of certiorari by refusing to invoke Rule 2).

I believe that our approach in *Starkey* – suggesting that our subject matter jurisdiction to issue writs of certiorari is not limited to the circumstances contained in Rule 21 – is correct. Our Supreme Court and this Court has recognized the authority of our appellate courts to issue writs of certiorari in circumstances not contained in Rule 21. *See, e.g.*, *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987) (holding that a defendant may obtain appellate review through a writ of certiorari to challenge the procedures followed in accepting a guilty plea, notwithstanding that the defendant does not have the statutory right to appellate review); *see also State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (holding that a challenge to procedures in accepting a guilty plea is reviewable by *certiorari*). Additionally, in Rule 1 of the Rules of Appellate Procedure, our Supreme Court stated that the appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division[.]" *Id.*

Accordingly, I believe that the panel of this Court which considered the State's petition for a writ of certiorari had the authority to grant the writ, notwithstanding that an appeal by the State from an order granting a defendant's motion for appropriate relief is not among the circumstances contained in N.C.R. App. P. 21; and, therefore, we are bound by the decision of that panel.

STEPHENS, Judge, dissenting.

Because I believe that this Court lacks subject matter jurisdiction to review the State's arguments, I respectfully dissent.

In support of its determination that this panel is bound by the decision of a petition panel of this Court that we have subject matter jurisdiction to grant the State's petition for writ of *certiorari*, the majority cites our Supreme Court's opinion in *North Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power

of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion in favor of reviewing the trial court's order when a preceding panel had earlier decided to the contrary."). In my view, *Virginia Carolina Builders* is clearly distinguishable from the issue presented in the case at bar because it concerned a Court of Appeals panel's reconsideration of a prior panel's exercise of discretion, rather than a question regarding this Court's subject matter jurisdiction over a matter.

In *Virginia Carolina Builders*, the appellant sought review of an interlocutory order. *Id.* at 565, 299 S.E.2d at 630. The appellant gave notice of appeal from the order, but prior to filing the record with this Court, he petitioned for writ of *certiorari*. *Id.* A panel of this Court denied that petition. *Id.* Thereafter, the appellant filed the record on appeal with this Court and presented arguments on the merits of his claims. *Id.* Two judges of a second panel of this Court, to whom the appeal was assigned, recognized that the order appealed from was interlocutory and would ordinarily be nonappealable, but nonetheless elected to reach the merits in their "discretion[.]" *Id.* at 565, 299 S.E.2d at 630-31. Based on the dissent of one judge who would have dismissed the appeal, the appellees sought review as a matter of right in the Supreme Court. *Id.* at 565-66, 299 S.E.2d at 631.

The Supreme Court stated:

> Although we have never considered the question, well-established analogies in our law lead us to conclude that the second panel of the Court of Appeals was without authority to overrule the first on the same question in the same case. Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case. At the trial level the well[-]established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. The power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term

> of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous.
>
> Applying these principles to the question before us, we conclude that once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion in favor of reviewing the trial court's order when a preceding panel had earlier decided to the contrary.
>
> Our decision on this point in no way impinges on the power of this Court or the Court of Appeals to change its ruling upon a motion to rehear, or on the court's own motion, if the court determines that its former ruling was clearly erroneous. In the case of the Court of Appeals, however, such a change must be made, if at all, by the same panel which initially decided the matter. Otherwise, a party against whom a decision was made by one panel of the Court of Appeals could simply continue to press a point in that court hoping that some other panel would eventually decide it favorably, as indeed the plaintiff did in this case; and we would not have that orderly administration of the law by the courts, which litigants have a right to expect.

Id. at 566-67, 299 S.E.2d at 631-32 (citations, internal quotation marks, and some brackets omitted).

I fully agree that in matters such as the exercise of discretion, factual determinations, and legal rulings, one panel of this Court cannot overrule another. However, I believe that determination of subject matter jurisdiction presents a different situation, one to which the analysis of *Virginia Carolina Builders* plainly does not apply. "Characterizing a rule as jurisdictional renders it unique in our adversarial system." *Sebelius v. Auburn Reg'l Med. Ctr.*, __ U.S. __, __, 184 L. Ed. 2d 627, 637 (2013) (noting that "[o]bjections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy"). "Subject[]matter jurisdiction defines the court's authority to hear a given type of case[.]"

United States v. Morton, 467 U.S. 822, 828, 81 L. Ed. 2d 680, 688 (1984). A "lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative." *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E.2d 417, 419, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971). "If a court finds *at any stage of the proceedings* that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988) (emphasis added) (citing *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E. 2d 806, 808 (1964) ("[T]he proceedings of a court without jurisdiction of the subject matter are a nullity. If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. So, *ex necessitate*, the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceeding.") (citation and internal quotation marks omitted)). Further, "parties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists." *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (citation omitted), *disc. review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004).

My careful review of our State's statutory and case law reveals that this Court lacks subject matter jurisdiction to consider the State's arguments via review of a trial court's allowance of a motion for appropriate relief ("MAR") or by issuance of a writ of *certiorari*.

In *State v. Starkey*, immediately after entering judgment on a jury's verdict, the trial court entered an order *sua sponte* granting its own MAR regarding the defendant's sentence. 177 N.C. App. 264, 266, 628 S.E.2d 424, 425, *cert denied*, __ N.C. __, 636 S.E.2d 196 (2006). The trial court found that the defendant's sentence violated "his rights under the Eighth and Fourteenth Amendments to the United States Constitution." *Id.* On appeal, in *Starkey*, we considered the same two issues as presented in this matter: "(I) whether the State ha[d] a right to appeal from the entry of [an] order granting the trial court's motion for appropriate relief; and (II) whether this Court [could] grant the State's [p]etition for [w]rit of [*c*]*ertiorari*.") (italics added). *Id.*

As noted in that case, "the right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *Id.* (citation, internal quotation marks, and brackets omitted). Two sections of our General Statutes touch on the State's possible right of appeal here: that discussing appeals by the

State in general and those covering appeals from MARs specifically. My careful review, along with a plain reading of *Starkey*, reveals no authority for the State's purported appeal or petition for writ of *certiorari* here.

Our General Statutes provide:

> (a) Unless the rule against double jeopardy prohibits further prosecution, *the State may appeal*[1] *from the superior court to the appellate division:*
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
>
> (3) When the State alleges that the sentence imposed:
>
> a. Results from an incorrect determination of the defendant's prior record level under [section] 15A-1340.14 or the defendant's prior conviction level under [section] 15A-1340.21;
>
> b. Contains a type of sentence disposition that is not authorized by [section] 15A-1340.17 or [section] 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
>
> c. Contains a term of imprisonment that is for a duration not authorized by [section] 15A-1340.17 or [section] 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> d. Imposes an intermediate punishment pursuant to [section] 15A-1340.13(g) based on findings of

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1. As this Court has noted,

> [a]ppeal is defined in [section] 15A-101(0.1): "Appeal. — When used in a general context, the term 'appeal' also includes appellate review upon writ of *certiorari*." Applying this definition to [section] 15A-1445, we hold the word "appeal" in the statute includes "appellate review upon writ of *certiorari*." Otherwise, the legislature would have used such language as "the [S]tate shall have a right of appeal." By way of contrast, the legislature in setting out when a defendant may appeal, uses the phrase "is entitled to appeal as a matter of right." N.C. Gen. Stat. [§] 15A-1444(a).

State v. Ward, 46 N.C. App. 200, 204, 264 S.E.2d 737, 740 (1980) (italics added).

> extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in [section] 15A-979.

N.C. Gen. Stat. § 15A-1445 (2013) (emphasis added).

As observed in *Starkey*, an appeal from the grant of a defendant's MAR as occurred here implicates none of these conditions:

> The relief granted by the trial court might be considered to have effectively dismissed [the] defendant's charge of having attained the status of an habitual felon or imposed an unauthorized prison term in light of [the] defendant's status as an habitual felon. However, it is the underlying judgment and not the order granting this relief from which the State must have the right to take an appeal. The State does not argue and we do not find that the underlying judgment dismisses a charge against defendant or that the term of imprisonment imposed was not authorized. The State therefore has no right to appeal from the underlying judgment and this appeal is not one "regularly taken." This appeal must be dismissed.

Starkey, 177 N.C. App. at 267, 628 S.E.2d at 426.

The mention of an appeal "regularly taken" refers to subsection 15A-1422(b) of our General Statutes, which covers MARs: "The grant or denial of relief sought pursuant to [section] 15A-1414 is subject to appellate review only in an appeal regularly taken." N.C. Gen. Stat. § 15A-1422(b) (2013). In turn, section 15A-1414 covers errors which may be asserted in MARs filed within ten days following entry of a judgment upon conviction, N.C. Gen. Stat. § 15A-1414 (2013), while section 15A-1415 specifies the "[g]rounds for appropriate relief which may be asserted by [a] defendant" outside that ten-day time period. N.C. Gen. Stat. § 15A-1415 (2013). Because Defendant here filed his MAR more than ten days after entry of judgment upon his convictions, section 15A-1422(c) applies to the matter before us:[2]

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2. Nothing in *Starkey* or the relevant statutes suggests that the timing of the MAR's filing (*i.e.*, within or outside of the ten-day period) would have any effect on the reasoning of the Court in dismissing the State's purported appeal. Neither section 15A-1414 nor 15A-1415 would permit the appeal by the State in the case before us.

> The court's ruling on a motion for appropriate relief pursuant to [section] 15A-1415 is subject to review:
>
> (1) If the time for appeal from the conviction has not expired, by appeal.
>
> (2) If an appeal is pending when the ruling is entered, in that appeal.
>
> (3) *If the time for appeal has expired and no appeal is pending, by writ of certiorari.*

N.C. Gen. Stat. § 15A-1422(c) (emphasis added). Here, the time for appeal had long passed, and there was no appeal pending when the MAR was ruled upon, rendering subsections (a) and (b) inapplicable.

As for the availability of appellate review via writ of *certiorari*, this Court in *Starkey* held:

> Review by this Court pursuant to a [p]etition for [w]rit of [*c*]*ertiorari* is governed by Rule 21 of the North Carolina Rules of Appellate Procedure. Pursuant to Rule 21, this Court is limited to issuing a writ of *certiorari*:
>
> to permit review of the judgments and orders of trial tribunals when [1] the right to prosecute an appeal has been lost by failure to take timely action, or [2] when no right of appeal from an interlocutory order exists, or [3] for review pursuant to [section] 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.
>
> The State recognizes that its petition does not satisfy any of the conditions of Rule 21 and asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review the trial court's order.

Starkey, 177 N.C. App. at 268, 628 S.E.2d at 426 (citation and internal quotation marks omitted; italics added). This Court declined "the State's request to invoke Rule 2 and den[ied] the State's [p]etition for [w]rit of [*c*]*ertiorari*." *Id.*[3] (italics added). As noted *supra* and as was the case in

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3. Although the language used by this Court in *Starkey* suggests that the panel *could* have invoked Rule 2 and granted the petition, Rule 21 is jurisdictional, *see* N.C. Gen. Stat. § 7A-32(c) (2013), and thus cannot be obviated by invocation of Rule 2. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (noting that "in the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2").

Starkey, none of the circumstances permitting this Court to grant a writ of *certiorari* are presented in the matter before us.

The order entered by this Court on 13 December 2012 cites three authorities which purportedly give this Court jurisdiction to grant the State's petition: N.C. Const. art. IV, § 12(2), N.C. Gen. Stat. § 7A-32(c), and *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012). The cited constitutional provision merely states that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). In turn, section 7A-32(c) provides:

> The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including *mandamus*, prohibition, certiorari, and *supersedeas*, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. *The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.*

N.C. Gen. Stat. § 7A-32(c) (emphasis added). The 13 December 2012 order states that this Court has jurisdiction to grant the State's petition in order "to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]" *Id.* However, the plain language of the statute states that this jurisdiction is circumscribed by "*statute*[,] *rule of the Supreme Court*, . . . [*or*] *the common law*." *Id.* There is no statute or common law principle giving us jurisdiction to grant the State's petition. Further, as discussed *supra*, Rule 21 of our Rules of Appellate Procedure, set forth by our Supreme Court, does not permit this Court to grant petitions of *certiorari* in the circumstances presented here.

Finally, *Whitehead* is inapposite. That case was issued by our Supreme Court which, in contrast to the purely statutory and rule-based jurisdiction and power of this Court, has independent constitutional " 'jurisdiction to review upon appeal any decision of the courts below.' " 365 N.C. at 445, 722 S.E.2d at 494 (quoting N.C. Const. art. IV, § 12(1) ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference.")). The Supreme Court stated that it "will not hesitate to exercise *its* rarely used *general supervisory authority* when necessary . . . ." *Id.* at 446, 722 S.E.2d at 494 (citation and internal quotation marks omitted;

emphasis added). I find it telling that the Supreme Court, exercising *its* constitutional general supervisory authority, allowed the State's petition for writ of *certiorari* in *Whitehead* to review the identical issue as is raised in the case at bar, with no prior review by this Court. This suggests that the State's procedure in *Whitehead*, to wit, seeking review of the trial court's MAR decision via petition for *certiorari* directly to the Supreme Court, is the proper route for this appeal.

In sum, this Court lacks jurisdiction to review the State's arguments by direct appeal, writ of *certiorari*, or any other procedure.[4] Accordingly, I dissent.

STATE OF NORTH CAROLINA
v.
GARRY WHITE

No. COA13-494

Filed 4 February 2014

1. Search and Seizure—driver's license checkpoint—findings and conclusions

There was no error in the findings and conclusions supporting the trial court's ultimate conclusion that there was a substantial violation of N.C.G.S. § 20-16.3A in a case arising from a driver's license checkpoint

2. Search and Seizure—driver's license checkpoint—no written policy

The trial court did not err by concluding that the lack of a written policy in full force and effect at the time of defendant's stop at the driver's license checkpoint constituted a substantial violation of N.C.G.S. § 20-16.3A.

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4. Further, the decision of the petition panel overruled this Court's published opinion in *Starkey*, which constituted binding precedent mandating that we dismiss the State's purported appeal and deny its petition for writ of *certiorari*. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

3. Evidence—driver's license checkpoint—motion to suppress evidence—statutory authorization

The trial court did not err by granting defendant's motion to suppress evidence obtained during a driver's license checkpoint. Although the General Assembly specifically included language in subsection N.C.G.S. § 20-16.3A(d) that violation of that section should not be grounds for a motion to suppress, it excluded the same language in N.C.G.S. § 20-16.3A (a)(2a), making that subsection a proper basis for a motion to suppress.

Appeal by the State from order entered 16 January 2013 by Judge Tanya T. Wallace in Anson County Superior Court. Heard in the Court of Appeals 23 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Carrie D. Randa, for the State-appellant.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.

McCULLOUGH, Judge.

The State appeals from an order granting defendant's motion to suppress evidence obtained during a checkpoint stop. For the reasons set forth below, we affirm.

I. Background

On 11 September 2009, defendant Garry Anthony White was arrested and charged with one count of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and one count of driving while license revoked in violation of N.C. Gen. Stat. § 20-28.

On 17 October 2011, defendant was convicted in Anson County District Court of driving while impaired and given a six (6) month active sentence. Defendant was also convicted of driving while license revoked and given an active sentence of forty-five (45) days. Defendant appealed the judgments to Anson County Superior Court.

On 12 April 2010, defendant filed a motion to suppress evidence alleging the following:

1. That on or about September 11, 2009, a blue GMC Sonoma was stopped at a checkpoint on High Street in Polkton, North Carolina, by officers with the Anson County Sheriff's Department.

2. There was no reasonable articulable suspicion to stop the afore-mentioned vehicle. The stop of the afore-mentioned vehicle was made without probable cause and was an unreasonable seizure in violation of the Constitution of the United States of America and the North Carolina Constitution.

3. The stop was in contravention of the statutory policy on checking stations and roadblocks set out in G.S. 20-16.3(A).

A hearing on defendant's motion to suppress was held on 10 September 2012. J.R. Horne ("Horne") testified that on 11 September 2009, he was serving as a traffic supervisor for the Anson County Sheriff's Office and was asked to operate a checking station in Polkton, North Carolina. Horne testified that at that time, the Anson County Sheriff's Department did not have a written policy regarding checking stations, but instead, had an oral policy.[1]

The checking station was designated to be a license checking station located at High Street and College Street in Polkton. Sometime before the checkpoint commenced, Horne wrote a "Traffic Operational Plan" that provided the following: the checkpoint was to begin at 7:55 p.m. on 11 September 2009; Deputy Jenkins and Detective Erdmanczyk would assist Horne in the license checkpoint; all cars coming through the target area would be checked; officers would wear their traffic vests when out of their cars; and that the "Chase Policy" would be in full effect. Horne testified that although he was under the assumption that the checkpoint would conclude around midnight since the stores in Polkton closed around 11:00 p.m., there was no end time indicated in the "Traffic Operational Plan."

Following a briefing held at 7:30 p.m. on 11 September 2009, the checkpoint began at 7:55 p.m. All three officers – Horne, Jenkins, and Erdmanczyk – were present with safety vests on. The officers were checking both northbound and southbound traffic coming to the checkpoint on High Street, as well as westbound traffic coming from College Street. During the license checkpoint, all three of the officers' vehicles had their blue lights activated. All vehicles coming through the checking station were stopped.

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1. The Anson County Sheriff's Department did not have a written policy concerning checking stations until 17 February 2012.

Horne testified that at 8:01 p.m., an individual was arrested and charged with driving while impaired. At 8:24 p.m., Horne left the checking station, accompanied by Officer Jenkins, and transported the arrested individual to the Sheriff's Office. Officer Erdmanczyk stayed at the checking station but did not check any vehicles until Horne and Jenkins returned at 9:57 p.m. From approximately 8:24 p.m. until 9:57 p.m., no vehicles were checked at the checkpoint. At 9:57 p.m., the checkpoint resumed. At 10:56 p.m., defendant was stopped and arrested and the checkpoint concluded around 11:20 p.m.

On 16 January 2013, the trial court entered an order finding the following in pertinent part:

> 1. The day before the actual driver's license check point, Corporal Horne was contacted by Captain Dunn of the Sheriff's Department who requested him to operate as a supervisory officer over a checkpoint.
>
> . . .
>
> 3. On September 11, 2009, the Anson County Sheriff's Department had no written policy providing guidelines for motor vehicle law checking stations as mandated by G.S. 20-16.3A.
>
> . . .
>
> 5. Corporal Horne did complete a written checking station plan prior to conducting the checkpoint on September 11, 2009. The plan provided for a license check after a briefing at the Polkton Fire Department to commence at 7:55 p.m. at the intersection of High Street and College Street which called for the officers to wear traffic vests, to stop all vehicles coming through the checkpoint, to have at least one vehicle with its blue lights activated, and to operate said checkpoint pursuant to an oral policy that was in force at that time.
>
> 6. Corporal Horne testified that the reason for the checkpoint was because there had been complaints by the store owners of speeding and reckless operation of motor vehicles in this area and that this check point was to start at 7:55 p.m. with an anticipated conclusion time of 12:00 a.m., since the stores in the area close at approximately 11:00 p.m.

7. Three (3) officers were assigned to this checkpoint including the traffic unit supervisor Corporal Horne . . . and Corporal Horne testified that all officers were to wear traffic vests, the blue lights on each vehicle were to be activated, that all vehicles were to be stopped coming through this intersection and that the chase policy was to be in force at this checkpoint.

. . .

9. The Defendant was stopped at approximately 10:56 p.m.

10. Prior to the Defendant being stopped, after the checkpoint was established, at 8:24 p.m., a vehicle was stopped which resulted in the arrest of a driver by the name of Ab Griffin for DWI and Corporal Horne testified that between 8:24 p.m. and 9:57 p.m. he and Deputy Jenkins left the checkpoint to process the arrest but left Detective Erdmanczyk at the scene until they returned, however, Detective Erdmanczyk did not continue with the checkpoint or stop any vehicles.

11. At approximately 9:57 p.m. officers Horne and Jenkins returned to the scene of the checkpoint and the checkpoint continued and the officers followed the same procedures in operating the checkpoint as were used prior to the suspension at 8:24 p.m.

. . .

13. The Court is unsure of whether or not there was a suspension of the original checkpoint for a period of almost an hour and a half or whether this is a new stop at 10:56 a.m. with no guidelines or plan in place.

The trial court concluded that

> the nature of the stop of the Defendant which occurred after the checkpoint had been abandoned for a period of approximately an hour and a half was in the nature of a spontaneous stop. Coupled with the lack of a written policy in full force and effect and taking into consideration whether a plan was reinstituted, or a new plan instituted, upon the return of the officers to the checkpoint at 9:27 p.m. mandates a conclusion that there was a substantial

> violation of G.S. 20-16.3A and the Court hereby orders that all evidence obtained as a result of the stop of the Defendant's vehicle is suppressed.

From this order, the State appeals.

II. Standard of Review

"Generally, an appellate court's review of a trial court's order on a motion to suppress is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735 (2004) (citation and quotation marks omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) (citation omitted).

"While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000) (citation omitted).

III. Discussion

The State argues that the trial court erred in granting defendant's motion to suppress where: (A) finding of fact 13 is not supported by the evidence; (B) there was no substantial violation of N.C. Gen. Stat. § 20-16.3A; and (C) no constitutional violation or violation of Chapter 15A of the North Carolina General Statutes was found. Because arguments (A) and (B) are closely related, we will address them together.

A. Finding of Fact Number 13

and

B. N.C. Gen. Stat. § 20-16.3A

[1] First, the State argues that finding of fact number 13 is not supported by the evidence and thus, does not support the trial court's conclusion of law number 5.

The trial court noted in finding of fact number 13 that:

> 13. The Court is unsure of whether or not there was a suspension of the original checkpoint for a period of almost an hour and a half or whether this is a new stop at 10:56 a.m. with no guidelines or plan in place.

It also concluded in conclusion of law number 5 that:

> 5. That the nature of the stop of the Defendant which occurred after the checkpoint had been abandoned for a period of approximately an hour and a half was in the nature of a spontaneous stop. Coupled with the lack of a written policy in full force and effect and taking into consideration whether a plan was reinstituted, or a new plan instituted, upon the return of the officers to the checkpoint at 9:27 p.m. mandates a conclusion that there was a substantial violation of G.S. 20-16.3A and the Court hereby orders that all evidence obtained as a result of the stop of the Defendant's vehicle is suppressed.

We note that during defendant's motion to suppress hearing, there was ample testimony concerning the suspension of the checkpoint for an hour and half, from 8:24 p.m. until 9:57 p.m. Horne testified that at 8:01 p.m., an individual was arrested and charged with driving while impaired. Horne and Jenkins left the checkpoint from 8:24 p.m. until 9:57 p.m. in order to transport this individual to the Sheriff's Office. Horne made a decision that during the time period that he and Jenkins were absent from the checkpoint, "the checkpoint would stop[.]" Erdmanczyk remained at the checkpoint, but did not check any vehicles or licenses during this time at the direction of Horne. The following exchange occurred at defendant's hearing:

> [Defense Counsel:] We have a checking station that was basically – not due to your fault but the fault of, I guess, the driver who allegedly offended the law – that was abandoned by you for almost an hour and a half, where vehicles were free to come and go without being checked; is that correct?
>
> [Horne:] Yes, sir.

In addition, evidence established that defendant was stopped at the checkpoint at 10:56 p.m. Based on the foregoing, we hold that there was sufficient competent evidence to support the trial court's finding of fact 13 and overrule the State's argument.

Even assuming *arguendo* that finding of fact 13 was not supported by the evidence, the State's argument that the trial court erred by making conclusion of law number 5 is without merit. The remaining unchallenged findings of fact, which are binding on appeal, support the

trial court's ultimate conclusion that there was a substantial violation of section 20-16.3A of the North Carolina General Statutes.

We call attention to unchallenged finding of fact 3, which provides the following:

> On September 11, 2009, the Anson County Sheriff's Department had no written policy providing guidelines for motor vehicle law checking stations as mandated by G.S. 20-16.3A.

"When findings that are unchallenged, or are supported by competent evidence, are sufficient to support the judgment, the judgment will not be disturbed because another finding, which does not affect the conclusion, is not supported by evidence." *Dawson Industries, Inc. v. Godley Constr. Co.*, 29 N.C. App. 270, 275, 224 S.E.2d 266, 269 (1976) (citation omitted).

[2] Section 20-16.3A of the North Carolina General Statutes, which sets forth the requirements for checking stations and roadblocks, provides that:

> (a) A law-enforcement agency may conduct checking stations to determine compliance with the provisions of this Chapter. If the agency is conducting a checking station for the purposes of determining compliance with this Chapter, it *must*:
>
> . . .
>
> (2a) *Operate under a written policy* that provides guidelines for the pattern, which need not be in writing. The policy may be either the agency's own policy, or if the agency does not have a written policy, it may be the policy of another law enforcement agency, and may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to produce drivers license, registration, or insurance information. If officers of a law enforcement agency are operating under another agency's policy, it must be stated in writing.

N.C.G.S. § 20-16.3A(a)(2a) (2013) (emphasis added).

It is well established that

> [t]he paramount objective of statutory interpretation is to give effect to the intent of the legislature. The primary indicator of legislative intent is statutory language; the judiciary must give clear and unambiguous language its plain and definite meaning. Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning[.]

State v. Largent, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citations and quotation marks omitted).

We observe that the language used in N.C.G.S. § 20-16.3A(a)(2a) is mandatory – "If the agency is conducting a checking station . . ., it *must* [o]perate under a written policy[.]" (emphasis added). *See State v. Inman*, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005) (noting that the word "must" in a statute is ordinarily "deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action").

In light of the mandatory language contained within N.C.G.S. § 20-16.3A, we conclude that the trial court did not err by concluding that a lack of a written policy in full force and effect at the time of defendant's stop at the checkpoint constituted a substantial violation of section 20-16.3A.

C. Constitutional Violation or Violation of Chapter 15A

[3] Next, the State argues that "evidence must only be suppressed if there is a Constitutional violation or a substantial violation of the provisions of Chapter 15A. . . . Provisions outside of chapter 15A do not require suppression." The State asserts that even assuming *arguendo* that a violation of N.C. Gen. Stat. § 20-16.3A occurred[2], the trial court should not have suppressed the evidence obtained at defendant's stop, and doing so amounted to error. We disagree.

The State relies on section 15A-974 of the North Carolina General Statutes, titled "Exclusion or suppression of unlawfully obtained

2. Here, the trial court did not reach the question of the constitutionality of the checkpoint and instead, rested its analysis on the State's violation of section 20-16.3A of the North Carolina General Statues as previously discussed.

evidence," for its contention. N.C. Gen. Stat. § 15A-974 states that evidence must be suppressed if "(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or (2) It is obtained as a result of a substantial violation of the provisions of [Chapter 15A (Criminal Procedure Act).]" N.C.G.S. § 15A-974(a)(1) – (2) (2013).

In response to the State's arguments, defendant directs our attention to subsection (d) of N.C.G.S. § 20-16.3A. In subsection (d), the General Assembly provided that "[t]he placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity." N.C.G.S. § 20-16.3A(d) (2013). Notably, the General Assembly further provided that "[t]his subsection shall *not be grounds for a motion to suppress* or a defense to any offense arising out of the operation of a checking station." *Id.* (emphasis added).

A "well-known canon of statutory construction [is] *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of another." *State v. Dewalt*, 209 N.C. App. 187, 191-92, 703 S.E.2d 872, 875 (2011) (citation omitted). Applying this principle to the case at hand, we hold that because the General Assembly specifically included language in subsection (d) that it shall not be a basis for a motion to suppress, meanwhile excluding the same language in subsection (a)(2a), subsection (a)(2a) is a proper basis for a motion to suppress.

Furthermore, our Court has held that a violation of another section of Chapter 20 is an appropriate basis for a motion to suppress, despite the lack of express statutory language authorizing suppression. For example, in *State v. Buckheit*, __ N.C. App. __, __, 735 S.E.2d 345, 347 (2012), our Court reversed a trial court's denial of the defendant's motion to suppress evidence obtained in the violation of section 20-16.2(a) of the North Carolina General Statutes. *See also State v. Hatley*, 190 N.C. App. 639, 661 S.E.2d 43 (2008) (holding that because the State violated N.C. Gen. Stat. § 20-16.2(a), the trial court should have granted the defendant's motion to suppress evidence obtained from that violation).

Based on the foregoing analysis, we hold that the trial court did not err by granting defendant's motion to suppress and affirm the order of the trial court.

Affirmed.

Judges DAVIS and ELMORE concur.

JAMES P. TORRENCE, SR., and TONYA BURKE,
on behalf of themselves and all other persons similarly situated, Plaintiffs
v.
NATIONWIDE BUDGET FINANCE, QC HOLDINGS, INC., QC FINANCIAL SERVICES, INC. FINANCIAL SERVICES OF NC, INC. and DON EARLY, Defendants

No. COA12-453

Filed 4 February 2014

1. Appeal and Error—interlocutory orders and appeals—compel arbitration—personal jurisdiction—substantial right

The trial court's interlocutory orders denying defendants' motion to compel arbitration and to dismiss for lack of personal jurisdiction affected substantial rights and were immediately appealable.

2. Arbitration and Mediation—appointment of substitute arbitrator—Federal Arbitration Act

The trial court erred by not compelling arbitration and appointing a substitute arbitrator where the agreement of the parties evinced a clear intent to resolve disputes through arbitration. Where the arbitrator named in the arbitration agreement was no longer conducting arbitrations, the trial court erred in not appointing a substitute arbitrator pursuant to § 5 of the Federal Arbitration Act.

3. Arbitration and Mediation—agreement—unconscionable

The trial court erred by ruling that the arbitration agreement between the parties was unconscionable based upon the decisions of the United States Supreme Court in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304.

4. Jurisdiction—personal jurisdiction—arbitration—issue not addressed

The Court of Appeals did not address defendants' contention that personal jurisdiction was improper where the Court concluded that the matter should have been submitted to arbitration.

Appeal by defendants from orders entered 25 January 2012 by Judge D. Jack Hooks, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2012.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, and North Carolina Justice & Community Development Center, by Carlene McNulty, for plaintiff-appellees.

Ellis & Winters LLP, by Paul K. Sun, Jr. and Kelly Margolis Dagger, and Katten Muchin Rosenman LLP, by Claudia Callaway, for defendant-appellants.

STEELMAN, Judge.

Where the arbitrator named in the arbitration agreement was no longer conducting arbitrations, the trial court erred in not appointing a substitute arbitrator pursuant to § 5 of the Federal Arbitration Act. Based upon the decisions of the United States Supreme Court in *Concepcion* and *Italian Colors*, the trial court erred in holding that the arbitration agreement was unconscionable and refusing to compel arbitration.

I. Factual and Procedural History

County Bank of Rehoboth Beach, Delaware ("County Bank"), an FDIC-insured Delaware bank, began offering short-term consumer loans to North Carolina residents in 2002. In March 2003, County Bank retained Financial Services of North Carolina, Inc., ("FSNC") to offer County Bank loans at FSNC locations. Applications for loans were submitted at FSNC locations, and were transmitted to County Bank for approval. Approved applications were sent back by County Bank with a proposed loan agreement.

Between May 2003 and February 2004, James Torrence ("Torrence") applied for eleven County Bank loans or renewals. On each occasion, he signed an identical loan note and disclosure agreement that contained a clause entitled "Agreement to Arbitrate All Disputes."

Between October 2003 and January 2004, Tonya Burke ("Burke") applied for seven County Bank loans and/or renewals. On each occasion, she signed an identical loan note and disclosure agreement that contained a clause entitled "Agreement to Arbitrate All Disputes."

Each of the loans signed by the plaintiffs with County Bank contained the following arbitration provisions:

> **AGREEMENT TO ARBITRATE ALL DISPUTES: You and we agree that any and all claims, disputes or controversies between you and us and/or the Company, any claim by either of us against the other or the Company (or the employees, officers, directors, agents or assigns of the other or the Company) and any claim arising from or relating to your application for this loan or any other loan you previously,**

now or may later obtain from us, this Loan Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation, whether under the common law or pursuant to federal, state or local statute, regulation, or ordinance, including disputes as to the matters subject to arbitration, or otherwise, shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed.

This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims shall be filed at any NAF office, on the World Wide Web at www.arb-forum.com, by telephone at 800-474-2371, or at "National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota 55405." Your arbitration fees may be waived by the NAF in the event you cannot afford to pay them. The cost of any participatory, documentary or telephone hearing, if one is held at your or our request, will be paid for solely by us as provided in the NAF Rules and, if a participatory hearing is requested, it will take place at a location near your residence. This arbitration agreement is made pursuant to a transaction involving interstate commerce. It shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction.

NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.

AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS: To the extent permitted by law, you agree that you will not bring, join or participate in any class action as to any

> **claim, dispute or controversy you may have against us, our employees, officers, directors, servicers and assigns. You agree to the entry of injunctive relief to stop such a lawsuit or to remove you as a participant in the suit. You agree to pay the attorney's fees and court costs we incur in seeking such relief. This Agreement does not constitute a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided above.**
>
> **SURVIVAL:** The provisions of this Note dealing with the Agreement to Arbitrate All Disputes and the Agreement Not To Bring, Join Or Participate In Class Actions shall survive repayment in full and/or default of this Note.

Subsequent to plaintiffs executing the notes containing the arbitration agreements, the National Arbitration Forum ("NAF") ceased conducting arbitrations, in accordance with the terms of a consent judgment entered into with the Attorney General of Minnesota on 17 July 2009. This judgment arose from allegations of bias on the part of NAF in favor of business claimants against consumer claimants.

On 8 February 2005, plaintiffs filed a complaint in this action as a class action. Plaintiffs alleged that defendants QC Holdings, Inc., QC Financial Services, Inc., and Don Early, under the name Nationwide Budget Finance (collectively, "defendants") violated the North Carolina Consumer Finance Act, the North Carolina unfair trade practices laws, and North Carolina usury laws. Plaintiffs further sought to pierce the corporate veil in order to hold QC Holdings, Inc. and Don Early personally liable. On 11 April 2005, defendants filed an answer, as well as a motion to dismiss for lack of personal jurisdiction and a motion to compel arbitration.

On 25 January 2012, the trial court filed three orders that: (1) denied defendants' motion to compel arbitration; (2) granted plaintiffs' motion for class certification; and (3) denied the motions of QC Holdings, Inc. and Don Early to dismiss for lack of personal jurisdiction.

Defendants appeal.

On 20 June 2013, the United States Supreme Court handed down its decision in *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013). On 15 July 2013, this Court granted the motion of plaintiffs-appellees to allow the parties to submit

supplemental briefs to this Court concerning their respective positions on the impact of the *Italian Colors* decision upon this case. Both plaintiffs and defendants submitted supplemental briefs.

II. Interlocutory Appeal

[1] The trial court's orders do not constitute a final judgment and are therefore interlocutory. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, where an interlocutory order affects a substantial right, an immediate appeal may be taken. N.C. Gen. Stat. § 1-277 (2013).

"The right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881, *review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L.Ed.2d 1072 (2000). "Jurisdiction in this Court over an interlocutory order is proper where the appeal is from the denial of a motion to dismiss for lack of personal jurisdiction." *Hammond v. Hammond*, 209 N.C. App. 616, 621, 708 S.E.2d 74, 78 (2011) (citing N.C. Gen. Stat. § 1-277(b)).

The trial court's rulings denying defendants' motion to compel arbitration and to dismiss for lack of personal jurisdiction are properly before this Court.

III. Standard of Review

> The standard governing our review of this case is that "findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if … there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). "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).

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008).

IV. Defendants' Motion to Compel Arbitration

The trial court entered a detailed order denying defendants' motion to compel arbitration. This order contained a number of separate rulings. First, the trial court held that "[t]he designation of the National Arbitration Forum ("NAF") as the sole arbitration provider and the designation of NAF rules were integral features of the arbitration clause." Second, the trial court held that there was not a valid arbitration agreement because of the taint of NAF, "because there was no legally effective and knowing consent." Third, the trial court held as a matter of law that the North Carolina Supreme Court case of *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008) was not overruled by the United States Supreme Court case of *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Fourth, the trial court held that the arbitration agreement was substantively unconscionable. Fifth, the trial court held that the arbitration agreement was procedurally unconscionable. Sixth, the trial court held that the arbitration clause prohibiting class actions "is an unlawful exculpatory clause and is unenforceable."[1]

V. Appointment of a Substitute Arbitrator

[2] In their first argument, defendants contend that the trial court erred in not compelling arbitration and appointing a substitute arbitrator. This argument encompasses the first two rulings of the trial court outlined above. We agree.

There is no dispute that the parties entered into an agreement for binding arbitration governed by the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 1 *et seq.* There is no dispute that NAF can no longer serve as arbitrator of any dispute between the parties, by virtue of the consent judgment entered into with the Attorney General of Minnesota. There is also no dispute that the FAA contains a specific provision that controls a situation where the arbitrator named in the agreement is unable to serve, or the method agreed upon for the selection of the arbitrator fails. § 5 of the FAA provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method

1. In their Supplemental Memorandum filed 25 July 2013, plaintiffs acknowledged that pursuant to the United States Supreme Court's ruling in *Italian Colors*, the exculpatory clause ground for the trial court's decision "is no longer valid." We therefore do not address this ground in our opinion.

> be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5.

In the recent case of *King v. Bryant*, ___ N.C. App. ___, 737 S.E.2d 802 (2013), we analyzed the effect of § 5 of the FAA upon an agreement to arbitrate. The trial court held that an arbitration agreement, under the terms of which the parties agreed to select three arbitrators, was nothing more than an "agreement to agree" and was an unconscionable agreement. We held that:

> Congress enacted the FAA, 9 U.S.C. § 1 *et seq.*, "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), and to declare "a national policy favoring arbitration of claims that parties contract to settle in that manner." *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (quotation marks and citation omitted).

King, ___ N.C. App. at ___, 737 S.E.2d at 806. We further held that the trial court had failed to consider the applicability of § 5 of the FAA, which "provides the trial court authority to appoint a panel of arbitrators if the parties cannot come to an agreement." *Id.* at ___, 737 S.E.2d at 807. Indeed, § 5 is explicit on that point, providing a vehicle for the court to appoint an arbitrator where there is evidence that the parties agreed to arbitrate. Similarly, under North Carolina law, "[w]here the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced." N.C. Gen. Stat. § 1-567.45(a) (2013).

The specific issue of the enforceability of arbitration agreements with reference to NAF has been addressed in other courts as well. For

example, the United States Court of Appeals for the Seventh Circuit has noted that:

> Two courts of appeals have held that the identity of the Forum as arbitrator is not "integral" to arbitration agreements and that § 5 may be used to appoint a substitute. *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 n. 13 (11th Cir. 2012); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000). The Supreme Court must have assumed this in *CompuCredit Corp. v. Greenwood*, —— U.S. ——, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012), which held that claims under the Credit Repair Organizations Act are arbitrable. The agreement in that case specified use of the Forum, *see id.* at 677 n. 2 (Ginsburg, J., dissenting), yet the Court saw no obstacle to enforcing the arbitration clause. We grant that *Ranzy v. Tijerina*, 393 Fed. Appx. 174 (5th Cir. 2010), deems designation of the Forum "important" to arbitration and makes an agreement unenforceable once the Forum becomes unavailable, but *Ranzy* is not precedential. The decisions of the third and eleventh circuits, and the assumption of the Supreme Court, deserve greater weight.

Green v. U.S. Cash Advance Illinois, LLC, 724 F.3d. 787, 790 (7th Cir. 2013). The Seventh Circuit correctly notes that *CompuCredit*, which the United States Supreme Court decided after the 2009 consent judgment against NAF, held that the arbitration clause involving NAF could nonetheless be enforced.

The opinions cited above reaffirm the proposition that the key aspect of the analysis of an agreement to arbitrate is the intent of the parties to arbitrate, not the identity of the arbitrator. We further note the United States Supreme Court's assertion that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1748, 179 L.Ed.2d at 753. The United States Supreme Court has made it clear that it will no longer tolerate State courts or laws which seek to frustrate the intent of Congress in enacting the FAA.

We hold that the agreement of the parties evinced a clear intent to resolve disputes through arbitration. The trial court erred in not appointing a substitute arbitrator pursuant to § 5 of the FAA.

The trial court's second ruling was that the lack of impartiality of NAF was a basis for voiding the arbitration agreement. At the time that the defendants' motion to compel arbitration was heard by the trial court, NAF was no longer conducting arbitration, and since it was not going to arbitrate the claims between the parties, its prior conduct was not a relevant consideration for the trial court. Accordingly, we hold that the trial court erred in considering the lack of impartiality of a body which, the trial court acknowledged, could not serve as an arbitrator in this case.

VI. Unconscionability

[3] In their second argument, defendants contend that the trial court erred in ruling that the arbitration agreement was unconscionable. This argument encompasses the fourth and fifth rulings of the trial court set forth in Section IV of this opinion. We agree.

A. *Tillman*

The leading case in North Carolina dealing with unconscionability in the context of an agreement to arbitrate is *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008). In *Tillman*, plaintiffs obtained loans from defendants. Each of the loan agreements contained arbitration provisions that required any disputes to be resolved by binding arbitration in accordance with the FAA.[2] Plaintiffs filed suit against the defendant lender seeking damages arising out of the lender's requirement that they purchase single premium credit life insurance in connection with the loans. Defendants sought to compel arbitration. The trial court found the agreement to arbitrate to be unconscionable and unenforceable. On appeal, a divided panel of the Court of Appeals reversed and remanded the case to the trial court for entry of an order to compel arbitration. *Tillman v. Commercial Credit Loans, Inc.*, 177 N.C. App. 568, 629 S.E.2d 865 (2006). On appeal, the North Carolina Supreme Court reversed the Court of Appeals, holding the arbitration agreement to be unconscionable.

In that case, a plurality of three justices concurred in the decision of the Court, two justices concurred in the result only, and two justices dissented. The plurality opinion stated that unconscionability was an affirmative defense, and that the party asserting that defense had the burden of establishing that the agreement was unconscionable. *Tillman*,

2. While the agreements called for arbitration under the FAA, the plurality opinion and the concurring opinion of the Supreme Court make no reference to the FAA, and contain no analysis under the FAA. The dissent makes only a passing reference to the FAA.

362 N.C. at 102, 655 S.E.2d at 369. To establish unconscionability, a party must demonstrate both procedural unconscionability and substantive unconscionability. *Id.* at 102, 655 S.E.2d at 370 (citing *Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991); 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 4–7, at 315 (5th ed. 2006)). While both elements of unconscionability must be present, a court may rule that a contract is unconscionable "when [the] contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa." *Id.* at 103, 655 S.E.2d at 370.

The Supreme Court began its analysis by restating North Carolina's policy in favor of arbitration. *Id.* at 101, 655 S.E.2d at 369. The Court first examined the issue of unconscionability based upon procedural unconscionability:

> In the instant case, the trial court did not explicitly conclude that the facts supported a finding of procedural unconscionability. We note, however, that the trial court made the following finding of fact, which is supported by evidence in the record: "[Mrs.] Tillman and [Mrs.] Richardson were rushed through the loan closings, and the Commercial Credit loan officer indicated where [Mrs.] Tillman and [Mrs.] Richardson were to sign or initial the loan documents. There was no mention of credit insurance or the arbitration clause at the loan closings." In addition, defendants admit that they would have refused to make a loan to plaintiffs rather than negotiate with them over the terms of the arbitration agreement. Finally, the bargaining power between defendants and plaintiffs was unquestionably unequal in that plaintiffs are relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements. We therefore conclude that plaintiffs made a sufficient showing to establish procedural unconscionability.

Id. at 103, 655 S.E.2d at 370.

With regard to substantive unconscionability, the Court restated the trial court's conclusion, noting that:

> The trial court found the arbitration clause to be substantively unconscionable because (1) the arbitration costs borrowers may face are "prohibitively high"; (2) "the arbitration clause is excessively one-sided and lacks

> mutuality"; and (3) the clause prohibits joinder of claims and class actions. We agree that here, the collective effect of the arbitration provisions is that plaintiffs are precluded from "effectively vindicating [their] … rights in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

Id. at 104, 655 S.E.2d at 370-71. Relying on *Green Tree*, and on the Fourth Circuit's decision in *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001), the Court held that, because plaintiffs were financially ill-equipped to cover the costs of arbitration, the "loser pays" provision of the arbitration agreement presented a powerful deterrent. The Court then contrasted arbitration with litigation, and stated that "paying for arbitrators is a significant cost that is simply not faced in filing a lawsuit in court[,]" but that "the trial court found that it is 'unlikely that any attorneys would be willing to accept the risks attendant to pursuing [these] claims.' " *Id.* at 105, 655 S.E.2d at 371. The Court concluded that "the combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation. We agree with the trial court that '[d]efendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights.' " *Id.* at 106, 655 S.E.2d at 372.

Finally, the Court examined unconscionability based on the provision prohibiting class actions and joinder. The Court observed that:

> Taken alone, such a prohibition may be insufficient to render an arbitration agreement unenforceable, but *Brenner* instructs that an unconscionability analysis must consider all of the facts and circumstances of a particular case. Therefore, the trial court correctly concluded that a prohibition on joinder of claims and class actions is a factor to be considered in determining whether an arbitration provision is unconscionable.

Id. at 107, 655 S.E.2d at 373 (citations and quotations omitted).

The Court observed, however, that:

> In the instant case, the prohibition on joinder of claims and class actions affects the unconscionability analysis in two specific ways. First, the prohibition contributes to the financial inaccessibility of the arbitral forum as established

> by this arbitration clause because it deters potential plaintiffs from bringing and attorneys from taking cases with low damage amounts in the face of large costs that cannot be shared with other plaintiffs. Second, the prohibition contributes to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers.

Id. at 108, 655 S.E.2d 373.

The Court concluded that:

> [T]he arbitration clause in plaintiffs' loan agreements is unconscionable and therefore unenforceable. The inequality of bargaining power between the parties and the oppressive and one-sided nature of the clause itself lead us to this conclusion. Through the arbitration clause at issue in this case, defendants have not only unilaterally chosen the forum in which they want to resolve disputes, but they have also severely limited plaintiffs' access to the forum of their choice. Defendants argue that finding this clause to be unconscionable would be "hostile to arbitration." We disagree but at the same time reaffirm this Court's previous statements acknowledging the State's strong public policy favoring arbitration. However, this particular arbitration clause simply does not allow for meaningful redress of grievances and therefore, under *Green Tree*, must be held unenforceable.

Id. at 108-09, 655 S.E.2d 373-74.

Our Supreme Court analyzed *Tillman* solely under unconscionability. It did not address any issues under the FAA, which clearly governed the agreement. Further, the Supreme Court did not have the benefit of two cases subsequently decided by the United States Supreme Court, construing arbitration agreements under the FAA; *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013).

B. *Concepcion*

In *Concepcion*, plaintiffs entered into a cellular telephone contract with defendant. This contract included an arbitration provision that contained a class action waiver. Plaintiffs filed a putative class action suit in the federal district court seeking damages for false advertising and fraud.

Defendant's motion to compel arbitration was denied by the district court, and this ruling was affirmed by the United States Court of Appeals for the Ninth Circuit. The district court and Court of Appeals relied upon a decision of the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (2005). The holding in *Discover Bank* was that class waivers in consumer arbitration agreements were unconscionable if the agreement was contained within a contract of adhesion. *Discover Bank*, 36 Cal.4th at 162-63, 113 P.3d at 1110.

The United States Supreme Court recited § 2 of the FAA as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Concepcion, ___ U.S. at ___, 131 S.Ct. at 1745, 179 L.Ed.2d at 750-51 (quotations omitted).

The Supreme Court held that this provision

> permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Id. at ___, 131 S.Ct. at 1746, 179 L.Ed.2d at 751 (citations omitted). The Court further stated that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at ___, 131 S.Ct. at 1748, 179 L.Ed.2d at 753. The Court cited to a number of its own prior opinions to emphasize that these prior cases clearly stated that the FAA supersedes any state law that sets aside arbitration agreements or holds them to be unconscionable upon grounds that are exclusive to arbitration agreements.

The Supreme Court expressly overruled *Discover Bank*, which invalidated class action waivers, holding that it had the effect of "manufacturing" class arbitration, contrary to the express intent of the parties,

which was "inconsistent with the FAA." *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1753, 179 L.Ed.2d at 759. The Court further dismissed the notion that class action waivers somehow prevented consumers from seeking relief.

Subsequent to *Concepcion*, the question of whether the provisions of the FAA superseded state court rulings similar to *Discover Bank* has been discussed in a number of cases. The Fourth Circuit recently followed *Concepcion* in holding that the trial court erred in finding a class action waiver in an arbitration agreement to be unconscionable. *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 180-81 (4th Cir. 2013). In *Muriithi*, the Fourth Circuit held that the holding of *Concepcion* was broader than simply overruling *Discover Bank*:

> In *Concepcion*, the Supreme Court cautioned that the generally applicable contract defense of unconscionability may not be applied in a manner that targets the existence of an agreement to arbitrate as the basis for invalidating that agreement. 131 S.Ct. at 1746–47. Applying that principle to the *Discover Bank* "rule" at issue, the Court explained that state law cannot "stand as an obstacle to the accomplishment of the FAA's objectives," by interfering with "the fundamental attributes of arbitration." 131 S.Ct. at 1748.
>
> We recently discussed the holding in *Concepcion* in our decision in *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 606–07 (4th Cir. 2013). We explained that the holding "prohibited courts from altering otherwise valid arbitration agreements by applying the doctrine of unconscionability to eliminate a term barring classwide procedures." *Id.* (citing *Concepcion*, 131 S.Ct. at 1750–53). Thus, contrary to Muriithi's contention, the Supreme Court's holding was not merely an assertion of federal preemption, but also plainly prohibited application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances. The district court in the present case, deciding the same issue of unconscionability prior to *Concepcion*, reached the opposite conclusion. Accordingly, we conclude that the district court erred in holding that the class action waiver was unconscionable.

Id.

C. *Italian Colors*

In the recent case of *Italian Colors*, the United States Supreme Court considered the question of whether "the Federal Arbitration Act permits courts ... to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim[.]" *Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2308, 186 L.Ed.2d at 423 (citing petition for certiorari). The United States Court of Appeals for the Second Circuit held that the class action waiver was unenforceable and therefore that arbitration could not proceed. It then held *Concepcion* to be inapplicable because it was a case involving pre-emption.

The Supreme Court reiterated its prior holding that "Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Id.* at ___, 133 S.Ct. at 2308-09, 186 L.Ed.2d at 423-24 (citing *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1745). Plaintiffs argued that if they were required to arbitrate their claims individually, it would contravene the policies of the antitrust laws. The Supreme Court held that:

> The antitrust laws do not "evinc[e] an intention to preclude a waiver" of class-action procedure. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The parties here agreed to arbitrate pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

Id. at ___, 133 S.Ct. at 2309, 186 L.Ed.2d at 424-25.

Plaintiffs then advanced the argument that there was a judge-made exception to the FAA that allowed courts to invalidate agreements that prevent the "effective vindication" of a federal statutory right. While acknowledging the existence of the cases dealing with "effective vindication," the Supreme Court held that:

> The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938[.]

Id. at ___, 133 S.Ct. at 2311, 186 L.Ed.2d at 426 (citations omitted).

The Supreme Court then concluded:

> Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of arbitration." 563 U.S., at ——, 131 S. Ct. 1740, 179 L. Ed. 2d 742. "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*, at ——, 131 S. Ct. 1740, 179 L. Ed. 2d 742. We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." *Id.*, at ——, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

Id. at ___, 133 S.Ct. at 2312, 186 L.Ed.2d at 427.

D. Conclusions from *Tillman*, *Concepcion* and *Italian Colors*

The FAA embodies a strong Congressional policy in favor of arbitration. *Concepcion* and *Italian Colors* clearly state that the United States Supreme Court is weary of state and federal trial courts assisting plaintiffs in getting around the mandatory provisions of the FAA. While both *Concepcion* and *Italian Colors* dealt with class action waivers, underlying those decisions was a broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated. *See Muriithi*, *supra*.

This places the North Carolina Court of Appeals in the difficult position that the holdings of the North Carolina Supreme Court in *Tillman* conflict with those of the United States Supreme Court in *Concepcion* and *Italian Colors*. Ultimately, we are bound by the decisions of the United States Supreme Court construing federal laws, such as the FAA. *In re Fifth Third Bank, Nat. Ass'n*, ___ N.C. App. ___, ___, 716 S.E.2d 850, 855 (2011) (quoting *Dooley v. Seaboard Air Line Ry. Co.*, 163 N.C. 454, 457–58, 79 S.E. 970, 971 (1913)). Certain of the holdings of *Tillman* may be distinguished, because even though arbitration provisions of the *Tillman* contract referred to the FAA, none of the analysis contained in either the plurality or concurring opinions discussed the FAA and federal law principles.

As noted in Section VI-A of this opinion, a key element of the plurality opinion in *Tillman* on unconscionability is the section dealing with substantive unconscionability. Our Supreme Court cited three factors, the collective effect of which was to preclude plaintiffs from effectively vindicating their rights in an arbitration proceeding. First was the "prohibitively high" potential arbitration costs. *Tillman*, 362 N.C. at 104, 655 S.E.2d at 370-71. In *Italian Colors*, the United States Supreme Court expressly rejected the model proposed by the Court of Appeals for the Second Circuit, which would have required "that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success." *Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2312, 186 L.Ed.2d at 427. The Supreme Court went on to hold that the imposition of such a "preliminary litigating hurdle" at the point in the proceedings where the issue was whether or not the parties were to proceed to arbitration "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." *Id.* We can only construe this language as eliminating the type of cost analysis applied by the North Carolina Supreme Court in *Tillman*.

Second, the North Carolina Supreme Court in *Tillman* held that there was substantive unconscionability based upon the arbitration clause being "excessively one-sided and lack[ing] mutuality[.]" *Tillman*, 362 N.C. at 104, 655 S.E.2d at 371. The United States Supreme Court in *Concepcion* noted, however, that "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1750, 179 L.Ed.2d at 755. The Court in *Concepcion* was dismissive of the idea that an arbitration agreement, apart from any other form of contract, could be found substantively unconscionable based solely upon its adhesive nature. This was an explicit part of the Supreme Court's reasoning in overruling *Discover Bank*. We must therefore hold that the one-sided quality of an arbitration agreement is not sufficient to find it substantively unconscionable.

Third, the North Carolina Supreme Court in *Tillman* held that there was substantive unconscionability based upon the arbitration provision "prohibit[ing] joinder of claims and class actions." *Tillman*, 362 N.C. at 104, 655 S.E.2d at 371. Both *Concepcion* and *Italian Colors* hold that a class action waiver does not render an arbitration agreement unconscionable. *Italian Colors* specifically holds that a party can "effectively vindicate" their rights in the context of a bilateral arbitration. *Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2311, 186 L.Ed.2d at 426.

Thus, the legal theories upon which *Tillman*'s substantive unconscionability analysis is based have been undermined by subsequent decisions of the United States Supreme Court in the context of cases under the FAA.

E. Ruling of the Trial Court

The trial court in the instant case, relying upon *Tillman* as precedent, made the following findings of fact as to substantive unconscionability:

> H SUBSTANTIVE UNCONSCIONABILITY.
>
> 42. No individual arbitration cases have ever been brought challenging payday lending in North Carolina, either against the defendants in this case or against any other payday lenders. In light of the large number of North Carolina payday loan transactions that were undertaken by these defendants and the defendants in the other class cases after the statutory authority for payday lending in North Carolina expired on August 31, 2001, and in light of the evidence that all payday lenders required customers to sign loan agreements with arbitration clauses prohibiting participation in class actions, the complete absence of any individual arbitration cases tends to confirm that legal challenges to North Carolina payday lending conducted in cooperation with out-of-state banks could not be challenged in individual arbitration cases.
>
> 43. The language calling for arbitration before the NAF required plaintiffs to submit claims to an arbitration organization that sought to build business by encouraging relationships and providing accommodations to debt-collector arbitration claimants, and that on June 27, 2007, sold a 40% ownership interest to participants in the consumer debt collection industry. The NAF's lack of neutrality affected arbitrator selection. The arbitration clause requiring arbitration before the NAF was substantively unconscionable.
>
> 44. Plaintiffs offered the affidavit and deposition testimony of attorneys George Hausen, Glenn Barfield and Kenneth Schorr, with live testimony of Mr. Barfield and Mr. Hausen, each offering their opinion it was unlikely an individual payday borrower, proceeding on an individual (non-class) basis, would be able to obtain legal counsel to prosecute claims against defendants such as those raised in this proceeding.

45. The Court notes that each of these witnesses has been involved in recruiting North Carolina lawyers to take civil cases on behalf of low and moderate income persons in North Carolina, specifically including efforts to recruit lawyers both on a pro bono basis and on a fee basis. Mr. Hausen is and since 2002 has been the Executive Director of Legal Aid of North Carolina. Mr. Schorr is the Executive Director of Legal Services of the Southern Piedmont, a nonprofit indigent civil legal services program, serving Charlotte and the western part of North Carolina. Mr. Barfield is a lawyer in private practice who is past president of Legal Services of North Carolina, Inc., and past chairman of the board of directors of Legal Aid of North Carolina. Both Mr. Hausen and Mr. Schorr are and have since 2005 been members of the North Carolina Equal Access to Justice Commission. Accordingly, the Court finds that these witnesses are particularly knowledgeable as to what cases North Carolina lawyers will accept, both on a fee basis and on a pro bono basis.

46. The Court accepts the testimony of Messrs. Barfield, Hausen and Schorr as experts. In addition, because the Court has had the opportunity to observe the demeanor of Mr. Hausen and Mr. Barfield, witnesses, the Court attaches particular weight to their testimony.

47. Mr. Barfield opined that, given the complexity involved in cases challenging payday lending in North Carolina presenting questions such as are in issue in this case, coupled with the motivation of the defendants to vigorously defend, the necessity for out-of-pocket expenditures, the uncertainty of prevailing and the lack of ability to use precedent in an arbitration forum, it is very unlikely that any North Carolina lawyer would be willing to bring such an individual case in arbitration. Mr. Barfield regularly represented defendants/counterclaimants in cases brought by “debt buyers” in counties close to his office. He wrote a manuscript to encourage attorneys across the state to engage in this work, but had virtually no success. In Mr. Barfield’s opinion, the complexity of payday lending cases such as this case far exceeds the complexity of the cases he handled on behalf of consumers in the debt buyer cases. Mr. Barfield testified that it is simply not economically feasible

to prosecute payday lending cases such as this case, in court or in arbitration on an individual basis.

48. Mr. Hausen opined that it is very unlikely that a payday borrower would be able to get representation from a Legal Aid or pro bono attorney in North Carolina. The demand for services far exceeds the capacity to provide legal representation. Legal Aid offices across the state prioritize cases involving basic needs such as preservation of shelter, access to health care, access to public benefits such as food stamps and Medicaid, and protection from domestic violence. Neither Legal Aid nor, in Mr. Hausen's opinion, the private attorneys whom [L]egal Aid recruits to act as pro bono volunteer attorneys, would have the resources to act as attorneys for individual payday borrowers. While his office has devoted significant resources to foreclosure defense, including developing and implementing a series of training events for the private bar as a way to encouraging [sic] referrals, it is not likely that such an effort would be replicated in an effort to represent payday lending borrowers. Neither Legal Aid nor the volunteer attorneys recruited to assist Legal Aid have enough resources to accept cases seeking the return of money from payday lenders.

49. Mr. Schorr testified that in his opinion, people who were payday lending borrowers would not be able to find attorneys at private firms or with nonprofit organizations to handle their claims on an individual basis. He testified that the amount of damages and attorneys' fees involved was not nearly at the threshold that would make it likely that a private attorney would take such a [c]ase, and that nonprofit agencies would not handle them.

50. Messrs. Barfield, Hausen and Schorr each opined that because the stakes of an individual arbitration on behalf of a payday borrower are so small, no attorney would be willing to pursue a claim on behalf of a payday borrower on an individual basis. They go further to state that this is true despite the availability of statutory attorney fees under G.S. § 75-1.1 *et seq*. The individual claims for individual borrowers that are at issue in this case are in fact modest in amount. Plaintiffs represent that Mr. Torrence's largest damages claim is for treble the amount of his net

interest, which, after trebling, is a total of $2,788.50. Ms. Burke's largest claim is for recovery of all amounts paid, but without trebling, which is a total of $561.

51. These witnesses also opined that because of the nature of the claim and the federal preemption issue, the claims in the instant case are complex. The instant case is complex because defendants contend they were engaged in marketing and servicing loans for County Bank. The Consumer Finance Act provides an exemption for banks. Under federal preemption laws, banks are not subject to state interest rate limits. To prove that defendants are subject to the CFA, a consumer must respond to defendants' claims concerning exemption and preemption. The complexity and proof will be substantially the same regardless of whether a claim is asserted on behalf of a single individual or on behalf of a class.

52. The CFA assigns regulatory responsibility over the small loan business to the North Carolina Commissioner of Banks. The Commissioner of Banks conducted an administrative case against Advance America, to determine whether that company was in violation of the CFA by conducting payday lending in North Carolina in cooperation with an out-of-state bank. An order in that case was rendered on December 22, 2005 (the "COB Opinion"), ruling that Advance America was in violation of the CFA.

53. The COB Opinion reflects that the issue of whether payday lenders can avoid application of the CFA by entering into contracts with banks is complicated. The COB Opinion is 54 single spaced pages and has 292 footnotes. Following an appeal, the COB Opinion was affirmed by order rendered by Judge Donald W. Stephens of Wake County Superior Court on March 29, 2010, who found that the required analysis is "heavily fact dependent," and that Advance America's claim to preemption was "not supported by the facts in this matter."

54. A legal challenge to the issue of whether defendants are lawfully permitted to participate in payday lending in North Carolina by purporting to act on behalf of an out-of-state bank would present a fundamental issue concerning whether defendants and other payday lenders with

similar bank arrangements could continue to operate in North Carolina. A legal challenge over such a fundamental issue should be expected to give rise to a vigorous defense supported by resources that are more substantial that the amount in controversy in a single individual arbitration.

55. The successful prosecution of an individual claim that defendants in this case violated the CFA will likely require factual development through depositions, document review and expert analysis, just as the COB Opinion reflected factual development through depositions, document review and expert analysis.

56. The COB Opinion devoted substantial attention to financial relationships between Advance America and the various banks, to the actual results of such financial relationships, to the historical development of the relationships, to the companies' apparent business objectives, and similar matters.

57. Plaintiffs have submitted the affidavits and depositions of two financial experts. One of these experts, Ronald E. Copley, holds a Ph.D. in Finance, has been a tenured professor of Finance at the University of North Carolina at Wilmington, is a Chartered Financial Analyst, and is a licensed investment advisor. Dr. Copley reviewed the COB Opinion and has opined that it would require a minimum of 100 hours to perform financial analysis similar to the analysis performed by the Commissioner of Banks. The other of these experts, Michael J. Minikus, is a North Carolina certified public accountant. Mr. Minikus has opined that it would require a minimum of 65 hours to perform an analysis similar to the analysis performed by the Commissioner. Dr. Copley charges $225 per hour for his services. Mr. Minikus charges $125 per hour for his services. Regardless of how many hours must be devoted to analysis by a finance professional or a certified public accountant, the costs of such experts are likely to exceed the amount in controversy in an individual case.

58. Regardless of whether the instant case will require as much analysis as set out in the COB Opinion, the legal issues in this case are too factually and legally complex to be addressed in an arbitration case involving

only the amount of damages that would be at issue for a single plaintiff, because the time and expense required to be invested in such a case would be substantially in excess of the amount that could be recovered if the case was successful.

59. Defendants tendered the testimony of two North Carolina lawyers, Samuel Forehand and Woodward Webb, who stated that, in their opinion, some North Carolina lawyer would probably be willing to bring individual payday loan arbitration cases.

60. Attorneys Forehand and Webb acknowledged that they did not consider the complexities of a CFA case challenging payday lending in North Carolina done in cooperation with a bank, such as the preemption issue and the other issues identified in the COB Opinion. Mr. Webb provided representative examples of cases brought by consumer attorneys in North Carolina and other states in an effort to support his opinion that attorneys would accept representation on behalf of a payday borrower. None of these cases, however, involved usury claims, federal preemption, claims against a bank or a need for expert witness testimony. Until the preemption issues were brought to his attention at his deposition, Mr. Forehand was not aware that such a defense was likely to be involved in this case. Mr. Forehand acknowledged that he had no basis for disputing this Court's earlier finding in prior cases that litigating the preemption issue will require extensive deposition, document review and expert analysis as is reflected by the order of the Commissioner of Banks, or that the cost of expert witnesses alone would likely exceed the amounts at issue in individual cases.

61. The significance of the opinion testimony by attorneys Forehand and Webb is also diminished by their failure to identify any North Carolina lawyers who would in fact take such cases. Mr. Webb acknowledged that he would not accept one of these cases himself. In his deposition Mr. Webb mentioned three attorneys whom he thought might. However one of the attorneys mentioned was no longer in practice, and the other two attorneys signed affidavits stating that they would not take such cases on an

individual basis. In his hearing testimony Webb mentioned a fourth attorney, but merely said he had spoken with the attorney in passing who said he would "look at it."

62. Defendants have objected to the tender of affidavits of expert witnesses who were not identified in interrogatory responses. The Court understands this to be an objection to Plaintiffs' Exhibits 47-49 (affidavits of Carlene McNulty, John Van Alst and M. Jason Williams). These affidavits are directed simply to the issue of three specific lawyers' willingness to take on individual cases challenging bank-contract payday lending. The objections are overruled.

63. Mr. Forehand testified that he would need to undertake a detailed case acceptance analysis before deciding whether he would take one of these cases, which he has not yet been able to complete; that even if he went through the process outlined in his affidavit, he would not be competent to state whether he would file an individual arbitration claim, having no prior experience with arbitration; and that he could not identify any attorney willing to represent a payday borrower or even meet with a payday borrower.

64. Defendants introduced two letters written by attorneys in North Carolina as evidence to show that payday lending borrowers were able to find legal representation. One letter made allegations that the payday loan was illegal and demanded that the payday loan company cease collection efforts. The other letter alleged that a payday borrower's check had been cashed prematurely. The defendants presented no evidence indicating that any relief was provided to the clients as a result of either letter, and no evidence that either of these attorneys undertook further representation on behalf of these borrowers or any other borrowers such as filing suit in court.

65. Even if North Carolina attorneys were willing to pursue an individual arbitration on behalf of an individual payday borrower, it is unlikely that payday borrowers generally would be able to obtain legal representation for individual claims, given all witnesses' inability to identify any lawyer who would accept such individual cases.

66. It is extremely unlikely that payday borrowers could effectively represent themselves in pro se litigation or

arbitration against defendants in light of the complexity of the issues, including the factual and legal basis for federal preemption and statutory exemption.

67. Unless consumers received legal assistance that involved analyzing the legal legitimacy of payday lenders' claims to federal preemption and exemption, consumers would be unaware that they possessed any sound basis for a legal claim.

68. Defendants' witness Stephen Ware opined that NAF arbitration afforded consumers a reasonably accessible forum. Mr. Ware has never practiced law in North Carolina and has no familiarity with North Carolina law or North Carolina lawyers, and did not identify any North Carolina lawyer who is willing to take individual payday loan cases such as the instant case. Mr. Ware also did not review any pleadings in this case other than the complaint, did not review any of the briefs, affidavits or depositions in the case; and did not know what plaintiffs would have to prove in order to prevail. He had no opinion as to how many witnesses would be required to make out a claim, or whether expert testimony would be required; and had no knowledge of whether proof of intent would be required.

69. Mr. Ware based his opinion that NAF arbitration afforded consumers a reasonably accessible forum, by comparing the NAF to our court system as he contends it actually exists. Mr. Ware testified that, even taking the allegations of bias and corruption asserted by former managerial employee Deanna Richert as true, the NAF compares favorably to our court system, "given the pressure on a judge to rule in a particular way from a governor or legislator or a contributor to a judge's campaign."

70. Mr. Ware further based his opinion that NAF arbitration afforded consumers a reasonably accessible forum on information that thirteen individual arbitration claims had been advanced by Texas attorney Brian Blakeley in arbitration cases before the American Arbitration Association in which Mr. Blakeley contended that "QC Financial Services of Texas, Inc. was the 'true' lender for these payday loan transactions and that the fees collected by respondent constitute a deceptive practice and that

the respondent has violated the Texas Credit Services Organization Act and/or engaged in usury."

71. Mr. Blakeley provided an affidavit which was introduced in evidence in the present case, and Mr. Blakeley was deposed by defendants. According to his affidavit, Mr. Blakeley began pursuing cases against Texas "credit service organizations" ("CSO's") in late 2009, and sought to assert usury claims on the ground that fees paid by his clients that were purportedly credit service organizations fees "should be considered to be interest because the CSO should be regarded as the true lender in the transaction; or because the relationship between the CSO and the purported lender is such that the purported lender and the CSO are not truly independent." Mr. Blakeley attached to his affidavit a Texas Attorney General letter opining that "[determining the true relationship between a CSO and a lender would be a fact intensive endeavor."

72. However Mr. Blakeley stated in his affidavit and testified at his deposition that he had abandoned usury claims against Texas CSO's and was no longer asserting usury claims in connection with payday lending in Texas. Mr. Blakeley opined that "it is not possible to pursue usury claims on an individual basis in individual arbitrations conducted by the [AAA] for the following reasons," and gave five reasons that he believed such claims could not be pursued in AAA consumer proceedings.

73. Mr. Blakeley was deposed by defendants and provided testimony consistent with his affidavit. He continues to accept payday lending clients, and has been successful in seven out of twenty-two arbitration claims so far in cases involving Texas law disclosure claims unlike the claims in the present case. However, Mr. Blakeley has unequivocally abandoned all claims for usury and has no intention of bringing those claims in the future. Whether or not his decision to abandon these claims is because Mr. Blakeley is "lazy" as characterized by defendants or because the claims are not economically viable, the fact remains that Mr. Blakeley is not providing legal representation to Texas payday borrowers with fact-intensive claims concerning payday lenders' business relationships with third parties,

> and is not providing (nor has ever provided) any representation to North Carolina payday borrowers.
>
> 74. Mr. Blakeley practices law exclusively in Texas, and is not licensed to practice law in North Carolina. The claims brought by Mr. Blakeley in the payday arbitration cases were brought under Texas law, not North Carolina law.
>
> 75. The Court finds that payday borrowers would not be able to effectively vindicate the type of claims raised by plaintiffs here, even if the claims are legally justified and correct, if payday borrowers are required to proceed on an individual rather than class basis. The facts demonstrate that this conclusion is true, regardless of whether consumers were to attempt to pursue their claims in court or in arbitration.
>
> 76. The North Carolina Attorney General filed an amicus brief in *Kucan v. Advance America*, a North Carolina payday lending case alleging similar legal issues as are alleged in the instant case, stating that "no Attorney General will ever have the funds or personnel to pursue every remedy against every person or company preying on North Carolina customers" and that "it is critically important that consumers be able to rely on the private bar— as the legislature intended— for assistance in obtaining restitution for injuries caused by unfair or deceptive business practices."
>
> 77. Defendants' practice of holding customer checks as security for loans gave defendants considerable leverage in the event of a nonpayment or dispute, making resort to court or arbitration unnecessary: if the customer failed to pay defendants could simply deposit the check, either resulting in payment to defendants or causing the customer to be faced with the legal and practical consequences of having their check bounce.
>
> 78. The arbitration agreements restrict customers from bringing a class action. The agreement contains no corresponding prohibition against County Bank or any of the defendants bringing or participating in a class action.

This type of detailed analysis of the types of evidence required for plaintiffs to pursue their claims and of the potential costs of obtaining such evidence, at the stage of the proceeding where the court determines

whether the case should be sent to arbitration, is precisely the approach rejected by the United States Supreme Court in *Italian Colors*. *See Italian Colors*, ___ U.S. at ___, 133 S.Ct. at 2312, 186 L.Ed.2d at 427. This type of analysis, based upon extensive evidentiary presentation, is not only costly, but defeats the very purpose of arbitration, which is for the parties to have a quick, expedited resolution of their dispute.

We hold that, based upon *Italian Colors*, the trial court erred in ruling that the arbitration agreement was substantively unconscionable. In the absence of substantive unconscionability, the entire unconscionability analysis must fail. *See Tillman*, 362 N.C. at 102-03, 655 S.E.2d at 370. Because there was no substantive unconscionability, it is not necessary to review procedural unconscionability. The trial court erred in not granting defendants' motion to compel arbitration.

VII. Impact of *Concepcion* upon *Tillman*

Finally, the third basis of the trial court's decision in the instant case (as set forth in Section IV of this opinion) was that *Concepcion* did not affect the *Tillman* analysis.

The trial court in the instant case acknowledged that *Concepcion* overruled *Discover Bank*. It concluded, however, that *Discover Bank* was distinct from *Tillman*, because where *Discover Bank* featured a "rule of automatic invalidation, in a case in which the plaintiff would be able to effectively vindicate his rights in arbitration[,]" *Tillman* involved "consideration of all facts and circumstances[.]" The trial court concluded that *Tillman* applied because "the instant case involves plaintiffs who would not be able to effectively vindicate their rights in NAF arbitration."

The trial court's attempt to distinguish *Concepcion* from *Tillman* was in error. *Concepcion*, in overruling *Discover Bank*, made clear that the FAA preempts any state law that prevents bilateral arbitration of claims. *Concepcion*, ___ U.S. at ___, 131 S.Ct. at 1747, 179 L.Ed.2d at 752 (holding that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA"). This applies regardless of whether the state standard is "a rule of automatic invalidation," as in *Discover Bank*, or "consideration of all facts and circumstances[,]" as in *Tillman*.

The trial court further concluded that the fact that the agreement was non-negotiable, along with the fact that "all payday lenders doing business in North Carolina required borrowers to execute loan agreements containing arbitration clauses prohibiting participation in class

actions[,]" was further evidence of unconscionability. Yet the United States Supreme Court observed in *Concepcion* that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at ___, 131 S.Ct. at 1750, 179 L.Ed.2d at 755. That Court observed in a footnote that:

> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

Id., fn. 6. The United States Supreme Court's position is explicit—where the FAA governs, state laws (including *Tillman*) cannot carve out exceptions.

VIII. Personal Jurisdiction

[4] In their third argument, defendants contend that the trial court erred in exercising personal jurisdiction over defendant Don Early. However, because we have previously determined that the case should have been submitted to arbitration, the matter was not properly before the trial court. We therefore need not address defendants' contention that personal jurisdiction was improper. *See, e.g., Miller v. Two State Const. Co., Inc.*, 118 N.C. App. 412, 418, 455 S.E.2d 678, 682 (1995) (holding that where the arbitration agreement was valid, we "need not address the other issues raised by defendants"). These issues are properly to be determined by an arbitrator.

IX. Conclusion

The United States Supreme Court has made it clear that the use of unconscionability attacks directed at the arbitration process can no longer serve as a basis to invalidate arbitration agreements. The intent of Congress in enacting the FAA was to overcome judicial hostility to arbitration.

The trial court erred in not designating a substitute arbitrator in this case pursuant to § 5 of the FAA; in determining that the arbitration was unconscionable; and in not entering an order compelling arbitration.

The orders of the trial court denying defendants' motion to compel arbitration, granting plaintiffs' motion for class certification, and denying the motions of QC Holdings and Don Early to dismiss for lack of

personal jurisdiction are vacated, and this matter is remanded to the trial court for entry of an order directing that the parties arbitrate plaintiffs' claims, and appointing a substitute arbitrator.

VACATED AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 4 February 2014)

BROWNSTEAD v. BROWNSTEAD No. 13-815	Mecklenburg (07CVD6452)	Vacated and remanded in part, affirmed in part.
CLEMENTS v. CLEMENTS No. 13-596	New Hanover (10CVS2451)	Dismissed in part; Reversed and Remanded in part
DECESARE v. ISLAND GAMES, LLC No. 13-670	Rowan (12CVS609)	Affirmed
HAIRSTON v. COLLINS No. 13-850	Forsyth (11CVS851)	Affirmed
HALL v. NC SERVS. CORP. No. 13-781	Iredell (11CVS2506)	Affirmed
HARRISON-FLOYD v. FLOYD No. 13-700	Pitt (09CVD3555)	Dismissed
IN RE 109 KINSALE LAND TR. No. 13-623	Property Tax Commission (11PTC944)	Vacated and remanded.
IN RE A.B No. 13-862	Cumberland (12JA491-493)	Affirmed.
IN RE A.G. No. 13-807	Durham (07J23)	Affirmed
IN RE A.P. No. 13-674	Durham (11J98)	Affirmed
IN RE B.W. No. 13-847	Durham (12JA174-176)	Affirmed
IN RE C.B.J. No. 13-985	Wilkes (11JT56)	Affirmed
IN RE C.L.D. No. 13-941	New Hanover (13JA48) (13JA49)	Affirmed
IN RE H.R.A. No. 13-778	Wilkes (11JT23)	Affirmed

IN RE K.R. No. 13-929	Madison (08JA29-30)	Reversed and Remanded
IN RE M.I.J. No. 13-1004	Wake (11JT07-09)	Affirmed
IN RE N.K. No. 13-752	Mecklenburg (13JA7)	Affirmed
INGLE v. INGLE No. 13-453	Catawba (12CVD2053)	Dismissed
LIVINGSTON v. BAKEWELL No. 13-748	Wake (11CVS15)	Affirmed
NAT'L ENTERS. INC. v. HUGHES No. 13-820	Orange (12CVS1841)	Affirmed
ORAEFO v. POUNDS No. 13-101	Wake (11CVS12463)	Affirmed
PETRI v. BANK OF AM., N.A. No. 13-907	Macon (12CVS805)	Affirmed
SCOTT v. MURRAY No. 13-436	Union (07CVD1844) (12CVD2045)	Reversed and Remanded
STATE v. ARMSTRONG No. 12-1109	Edgecombe (10CRS52611) (10CRS52613)	No Error
STATE v. BULLARD No. 13-794	Robeson (06CRS13731) (06CRS13733)	No Error
STATE v. DAVIS No. 13-857	Iredell (09CRS59431)	No Error
STATE v. HERRERA No. 13-888	Mecklenburg (12CRS228345)	No Error
STATE v. HUDSON No. 13-230	Transylvania (10CRS51997) (10CRS51999-52001) (10CRS52003-08) (10CRS52010) (10CRS925)	No Error
STATE v. JOHNSON No. 13-360	Wake (11CRS214093)	No Error

STATE v. KAPFHAMER No. 13-734	Mecklenburg (10CRS258879) (10CRS258881)	No Error
STATE v. LAYSECA No. 13-519	Onslow (11CRS54158-60) (12CRS1727-28) (12CRS602)	No Error
STATE v. LIMANI No. 13-745	Mecklenburg (09CRS218285)	No Error
STATE v. MAHONEY No. 13-716	Hoke (10CRS51622-23) (10CRS52200)	No Error
STATE v. MARTIN No. 13-660	Randolph (98CRS6012)	Affirmed
STATE v. OAKS No. 13-701	Cumberland (09CRS56531) (09CRS56532)	No Error
STATE v. RAYFIELD No. 13-549	Gaston (10CRS57185-86) (11CRS12488-12517)	No Error
STATE v. SMITH No. 13-742	Cabarrus (09CRS7224)	Vacated and remanded for resentencing.
STATE v. WYNN No. 13-337	Hertford (10CRS51612)	Affirmed in part; remanded in part

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