232 N.C. App.—No. 3 Pages 339-523

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 1, 2016

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1] Appointed 1 January 2015. [2] Sworn in 1 January 2015. [3] Sworn in 1 January 2015. [4] Appointed 31 July 2015. [5] Deceased 3 May 2015.
[6] Deceased 11 September 2015. [7] Retired 31 December 2014. [8] Resigned 31 December 2014. [9] Resigned 31 December 2014.

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COURT OF APPEALS

CASES REPORTED

FILED 18 FEBRUARY 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

review of its determination that defendant was not placed under arrest when he was detained for nearly two hours. On remand, the trial court must make appropriate findings about whether the officer diligently pursued his investigation so as to justify an extended detention. **State v. Thorpe, 468.**

COSTS

Expert witnesses—denial of motion for funds—failure to meet burden of proof—The trial court did not abuse its discretion in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by denying respondent minor's motion for funds to hire an expert witness. Respondent failed to meet his burden to convince the trial court that there existed some valid concern or reason to provide funds for an "independent" expert. **In re A.N.B., 406.**

CRIMINAL LAW

Motion for appropriate relief—constitutional challenge—trial court jurisdiction—The trial court had jurisdiction to consider defendant's motion for appropriate relief to challenge his original sentence as cruel and unusual punishment under evolving standards of decency. The fact that defendant did not cite N.C.G.S. § 15A-1415(b)(4) before the trial court was irrelevant to the required jurisdictional determination given the fact that the constitutional nature of defendant's challenge to Judge Gore's original judgments was clearly stated in defendant's motion for appropriate relief and the fact that the trial court has the authority, in appropriate cases, to grant postconviction relief on its own motion. **State v. Wilkerson, 482.**

Prosecutor's closing argument—defendant's failure to produce evidence—There was no error in a prosecution for rape and other offenses where defendant argued that the State was allowed to comment on his invocation of his right to remain silent. The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. Moreover, in this case the State actually noted defendant's right to remain silent rather than highlighting his failure to testify. **State v. Goins, 451.**

CONSTITUTIONAL LAW

Eighth Amendment—former sentence—evolving standards of decency—The trial court erred by determining that the sentences that defendant was currently serving subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The trial court failed to make a determination that defendant's sentence was grossly disproportionate before considering the extent to which defendant would have been subject to a less severe sentence under current law. Additionally, the Court of Appeals was unable to say that the sentence embodied in the original judgments was grossly disproportionate in light of the number of felony offenses for which defendant was convicted, the fact that one of the offenses for which defendant was convicted was a particularly serious one, and the fact that defendant's conduct involved great financial harm and led to criminal activity on the part of a younger individual. **State v. Wilkerson, 482.**

Speedy trial—balancing factors—no violation—Defendant's right to a speedy trial was not violated, balancing all of the factors in *Barker v. Wingo*, 407 U.S. 514. Although the length of delay was greater than one year, defendant's failure to show neglect or willfulness by the State and his failure to argue how his defense was prejudiced weighed heavily against his claim. S**tate v. Goins, 451.**

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.

CHARTER DAY SCHOOL, INC., PLAINTIFF-APPELLEE
v.
THE NEW HANOVER COUNTY BOARD OF EDUCATION AND TIM MARKLEY, SUPERINTENDENT IN HIS OFFICIAL CAPACITY, D/B/A "NEW HANOVER COUNTY SCHOOLS," DEFENDANT-APPELLANTS

No. COA13-488

Filed 18 February 2014

1. Schools and Education—calculations of per pupil local current expense appropriation—pro rata allocation

The trial court erred by including the entire fund balance in the calculations of the per pupil local current expense appropriation. Only that portion of the fund balance that is actually appropriated in a particular year is to be included in the local current expense fund and subject to *pro rata* allocation pursuant to the Charter School Funding Statute.

2. Schools and Education—calculations of per pupil local current expense appropriation—exclusion of pre-K students

The trial court did not err by excluding pre-K students from the calculations of the per pupil local current expense appropriation. Pre-K students are not entitled to enrollment in North Carolina's public school system or charter schools.

Appeal by defendant from order and judgment entered 4 December 2012 by Judge W. Douglas Parsons in New Hanover County Superior Court. Heard in the Court of Appeals 23 October 2013.

Shipman & Wright, LLP, by Gary K. Shipman and Gregory M. Katzman, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson, Robert J. King, III, and Jennifer K. Van Zant, for defendant-appellant.

Allison B. Schafer and Christine T. Scheef for the North Carolina School Boards Association, amicus curiae.

McCULLOUGH, Judge.

Defendant, New Hanover County Board of Education d/b/a New Hanover County Schools ("NHCS"), appeals from the order and

judgment entered by the trial court on 4 December 2012. For the following reasons, we reverse in part and affirm in part.

I. Background

Plaintiff, Charter Day School, Inc. ("Charter Day"), is a charter school in Brunswick County that provides free public education to students from various southeastern North Carolina counties, including New Hanover County. As a public school, *see* N.C. Gen. Stat. § 115C-238.29E(a) (2013) ("A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located."), Charter Day is entitled to state and local funding. Specifically, for the time period pertinent to this case, N.C. Gen. Stat. § 115C-238.29H (the "Charter School Funding Statute") provided, "[i]f a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b) (2007).[1]

On 30 June 2011, Charter Day commenced this action against NHCS and Al Lerch, in his official capacity as Superintendent of NHCS, by filing a complaint in New Hanover County Superior Court.[2] In the complaint, Charter Day asserted two claims for relief: (1) a declaratory judgment that NHCS failed to transfer all amounts owed to Charter Day under the Charter School Funding Statute from the time Charter Day opened, the 2001-2002 fiscal year ending 30 June 2002, through the 2010-2011 fiscal year ending 30 June 2011; and (2) a judgment against NHCS to recover the amount Charter Day alleged to be underfunded. By amended complaint filed shortly thereafter, Charter Day replaced defendant Al Lerch, who retired prior to the commencement of the action, with Tim Markley, the superintendent of NHCS at the time. NHCS and Tim Markley (together "defendants") answered the complaint on 1 September 2011.

On 12 April 2012, Charter Day filed a motion for partial summary judgment on defendants' seventh and eighth defenses, in which defendants alleged "Charter Day School is not a legitimate non-profit entity, as required by North Carolina law for the operation of a charter school."

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1. The years at issue in this appeal are the 2007-2008 through 2009-2010 fiscal years. Thus, we cite to the 2007 version of the North Carolina General Statutes, which were unaltered during the relevant time period.

2. Columbus Charter School initially joined Charter Day as a plaintiff in the lawsuit; however, on 11 April 2012, Columbus Charter voluntarily dismissed its claims without prejudice.

Thereafter, on 25 April 2012, defendants filed their own motion for partial summary judgment on Charter Day's claims for the 2001-2002 through 2006-2007 fiscal years on the ground that the claims were barred by the applicable three-year statute of limitations. Both partial summary judgment motions came on for hearing in New Hanover County Superior Court on 7 May 2012, the Honorable W. Allen Cobb, Jr., Judge presiding. Following the hearing, the trial court granted the motions in separate 14 May 2012 orders.

On 22 June 2012, Charter Day filed a motion for summary judgment on the remaining issues. Charter Day's motion came on for hearing in New Hanover County Superior Court before the Honorable W. Douglas Parsons on 5 July 2012.

On 17 July 2012, the trial court filed an order for partial summary judgment in favor of Charter Day. The trial court concluded defendants' "methods for calculating the per pupil local current expense appropriation for the fiscal years in question (2008, 2009 and 2010) [was] improper, as a matter of law[.]" Specifically, defendants "were required to include the entire Fund Balance for the fiscal years in question, and not just the 'modified' or 'appropriated' Fund Balance[,]" and defendants "improperly included 'pre-Kindergarten' ('pre-K') students in their total student enrollment[.]" The trial court did not, however, grant Charter Day's motion for summary judgment "as to the amounts due from the [d]efendants[.]" Instead, the trial court ordered defendants to "re-calculate its' Funding Formula for the fiscal years in question[] . . . [and] provide its re-calculated per pupil allocation for the years in question for the pupils attending [Charter Day] to [Charter Day]" within ninety (90) days.

Defendants filed a submission regarding per pupil allocations for the fiscal years in question on 12 October 2012 and a revised submission on 20 November 2012.

Following the submissions of defendants' recalculations, the trial court filed a final order and judgment on 4 December 2012. In the order and judgment, the trial court reiterated its prior determination that "[d]efendants' method for calculating the per pupil local current expense appropriation for the fiscal years in question was improper, as a matter of law, and failed to comply with the requirements of [N.C. Gen. Stat.] § 115C-238.29H(b), in that the [d]efendants did not include the entire Fund Balance in the numerator and included pre-K students in the denominator." Then, based on defendants' submissions regarding per pupil allocations, the trial court entered judgment against NHCS in favor

of Charter Day in the amount of $138,878.91. Additionally, the trial court dismissed all claims against Tim Markley and ordered NHCS, "[s]ubject to any subsequent changes in the law," to "transfer to [Charter Day] an amount equal to the per pupil local current expense appropriation for each student enrolled in a charter school operated by [Charter Day]" in accordance with the order "for all subsequent fiscal years beyond those in question in [the] action[.]"

NHCS filed notice of appeal on 21 December 2012 and execution of the judgment was stayed pursuant to the terms of the order and judgment.

II. Discussion

On appeal of the trial court's grant of summary judgment in favor of Charter Day, NHCS raises two issues: whether the trial court erred by (1) including the entire fund balance in the calculations of the per pupil local current expense appropriation, and (2) excluding pre-K students from the calculations of the per pupil local current expense appropriation.

Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). In the present case, the facts are not in dispute and we need only determine whether the trial court erred as a matter of law in entering summary judgment in Charter Day's favor.

Fund Balance

[1] Fund balance results where money appropriated to the local school administrative unit is not spent in the fiscal year in which it was intended, but is saved for future use. Thus, the fund balance is essentially a savings account. In this case, NHCS acknowledges that the portion of the fund balance appropriated for use in any given year is included in the local current expense appropriation and shared pursuant to the Charter School Funding Statute. Yet, NHCS argues the trial erred in ordering the entire fund balance to be included in the local current expense appropriation. Upon review, we hold the trial court erred.

As noted above, charter school funding is governed by statute. During the years at issue in this case, subsection (b) of the Charter

School Funding Statute provided, in pertinent part, "[i]f a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b) (2007). Similar to previous charter school funding cases decided by this Court, the predominant issue for our determination is what comprises the local current expense appropriation that must be shared *pro rata*.

In *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 563 S.E.2d 92 (2002), this Court addressed whether revenues from fines, forfeitures, and supplemental school taxes accruing to the "local current expense fund" pursuant to N.C. Gen. Stat. § 115C-426(e) of the Fiscal Control Act were required to be shared on a per pupil basis with charter schools pursuant to N.C. Gen. Stat. § 115C-238.29H(b) of the Charter School Funding Statute as part of the "local current expense appropriation." In deciding the charter school was entitled to a share of the supplemental revenues, this Court affirmed the trial court's conclusion "that the phrase 'local current expense appropriation' in the Charter School Funding Statute, [N.C. Gen. Stat.] § 115C-238.29H(b), is synonymous with the phrase 'local current expense fund' in the [Fiscal Control Act], [N.C. Gen. Stat.] § 115C-426(e)." *Id.* at 347, 563 S.E.2d at 98. Accordingly, charter schools are entitled to a *pro rata* share of the local current expense fund under the Charter School Funding Statute.[3]

Subsequent to *Francine Delany*, this Court has decided several additional charter school funding cases determining whether certain funds held in the local current expense fund must be shared *pro rata* with charter schools. *See Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 655 S.E.2d 850 (*Sugar Creek I*), *disc. review denied*, 362 N.C. 481, 667 S.E.2d 460 (2008), (holding the charter school was entitled to a share of funds earmarked for Bright Beginnings, a special program for at-risk pre-K children, and a High School Challenge grant because the funds were included in the local current expense fund); *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 673 S.E.2d 667 (*Sugar Creek II*), *appeal dismissed and disc. review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009) (holding the charter school was entitled

3. Subsequent to the time period at issue in this case, the General Assembly amended N.C. Gen. Stat. § 115C-238.29H(b) to replace "per pupil local current expense appropriation to the local school administrative unit" with "per pupil share of the local current expense fund of the local school administrative unit[.]" 2013 N.C. Sess. Laws c.355 s. 1(h).

to a share of funds carried over from previous years into the current year's local current expense fund and other earmarked funds included in the local current expense fund). As this Court noted in *Thomas Jefferson Classical Academy v. Rutherford County Bd. of Educ.*, __ N.C. App __, __, 715 S.E.2d 625, 630 (2011), *appeal dismissed and disc. review denied*, N.C. __, 724 S.E.2d 531 (2012), "[t]he common thread running through each of these holdings is that if funds are placed in the 'local current expense fund[,]' . . . they must be considered as being part of the 'local current expense fund' used to determine the *pro rata* share due to the charter schools."

The present case, however, is unlike the previous cases. Here, the issue is not whether certain funds in the local current expense fund must be shared, but rather what portion of the fund balance is included in the local current expense fund and subject to allocation pursuant to the Charter School Funding Statute.

The Fiscal Control Act provides guidance.

> The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and *other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system*.

N.C. Gen. Stat. § 115C-426(e) (2007) (emphasis added). Thus, fund balance is included in the local current expense fund when it is "made available or accruing to the local school administrative unit for the current operating expenses[.]"

Charter Day contends the entire fund balance is available to the local school administrative unit for current operating expenses because

it can be appropriated for use. NHCS, on the other hand, contends only that portion of the fund balance that is appropriated for use is available to the local school administrative unit for current operating expenses. We agree with NHCS.

The Fiscal Control Act mandates "[e]ach local school administrative unit shall operate under an annual balanced budget resolution[.]" N.C. Gen. Stat. § 115C-425(a) (2007). "A budget resolution is balanced when the sum of estimated net revenues and appropriated fund balances is equal to appropriations." *Id.* Moreover, "no local school administrative unit may expend any moneys, regardless of their source . . . , except in accordance with a[n adopted] budget resolution." N.C. Gen. Stat. § 115C-425(b). A budget resolution must be adopted by the local board of education. *See* N.C. Gen. Stat. § 115C-432 (2007).

Considering these provisions together, we hold the fund balance is not available to the local school administrative unit for current operating expenses until it is appropriated for use in a budget resolution adopted by the local board of education. Therefore, only that portion of the fund balance that is actually appropriated in a particular year is to be included in the local current expense fund and subject to *pro rata* allocation pursuant to the Charter School Funding Statute. That portion of the fund balance that is not appropriated remains a balance sheet entry, subject to appropriation in future years.

In addition to deciding the issue on appeal, we take this opportunity to reconcile the holding in *Sugar Creek II*, which Charter Day argues already resolved the issue at hand. Because we determine the issue presented to this Court in *Sugar Creek II* is different from the issue in the present case, we are not bound by *Sugar Creek II*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

In *Sugar Creek II*, this Court addressed, among other issues, whether the trial court properly included the fund balance in the local current expense fund for purposes of calculating its award to the charter school. 195 N.C. App. at 360, 673 S.E.2d at 675. Following a brief discussion, this Court held "the trial court did not err in including the fund balance in its calculation of its award." *Id.* The Court reasoned, "[a]s the fund balance is carried over from the previous fiscal year to the current fiscal year, it constitutes moneys in [d]efendants' local current expense fund." *Id.*

Charter Day argues that, because *Sugar Creek II* does not specify appropriated fund balance, the opinion requires the entire fund balance to be included in the local current expense fund. We disagree. Although we acknowledge the court did not specify appropriated fund balance, it is clear that this court upheld the trial court's decision. Upon careful review of the record in *Sugar Creek II*, it is evident the trial court determined only that the "fund balance appropriated" was "other local revenue" to be included in the local current expense fund and shared pursuant to the Charter School Funding Statute. Thus, in holding "the trial court did not err in including the fund balance in its calculation of its award[,]" this Court considered only that portion of the fund balance that was appropriated for use in the current fiscal year.

We find this Court's analysis in *Sugar Creek II* further supports both our interpretation of the *Sugar Creek II* decision and our holding in this case. In deciding the fund balance issue in *Sugar Creek II*, this Court was guided by its observation "that the General Assembly intended that charter school children have access to the same level of funding as children attending the regular public schools of this State." 195 N.C. App at 357, 673 S.E.2d at 673. This Court then focused on each year individually and determined whether the fund balance at issue must be included in the local current expense fund, discounting defendants' "double dip" argument and stating, "[d]efendants' argument is double-edged. If [d]efendants do not share the fund balance with [p]laintiff's, then [d]efendants' students will receive more per pupil funds in the current fiscal year than [p]laintiff's students." *Id.* at 360, 673 S.E.2d at 675.

Looking at each year individually, it is evident that when the appropriated portion of the fund balance is included in the local current expense fund, "charter school children have access to the same level of funding as children attending the regular public schools of this State." On the other hand, when the entire fund balance is included in the local current expense fund, charter school students receive greater funding than students attending regular public schools because charter school students receive a share of the unappropriated fund balance that is not available to students attending regular public schools. Thus, the only interpretation of *Sugar Creek II* that gives effect to the recognized intent of the General Assembly is that this Court considered only the appropriated fund balance when it stated, "[a]s the fund balance is carried over from the previous fiscal year to the current fiscal year, it constitutes moneys in [d]efendants' local current expense fund."[4]

4. We further note that following the *Sugar Creek II* decision, effective beginning with the 2010-2011 school year, 2010 N.C. Sess. Laws c.31 s. 7.17(c), the General Assembly

We hold the trial court erred in ordering NHCS to include the entire fund balance in the calculations of the per pupil local current expense appropriation.

Pre-Kindergarten Students

[2] NHCS acknowledges that, during the time period at issue in this case, money it received to fund pre-K programs was included in the local current expense fund and, pursuant to this Court's holding in *Sugar Creek I*, 188 N.C. App. at 461, 655 S.E.2d at 855, is subject to allocation under the Charter School Funding Statute. Yet, in the second issue on appeal, NHCS argues the trial court erred in ordering pre-K students to be excluded from the number of pupils in the calculations of the per pupil local current expense appropriation. Upon review, we hold the trial court did not err.

Simple math demonstrates the inclusion of pre-K students in the calculations of the per pupil local current expense appropriation increases the denominator in the funding formula and results in a smaller per pupil appropriation. In turn, where Charter Day does not operate a pre-K program, the smaller per pupil appropriation results in a lesser share of the local current expense appropriation to Charter Day and a greater share of the local current expense appropriation to NHCS. It is for this reason that NHCS argues pre-K students should be included in the calculations of the per pupil local current expense appropriation. NHCS, however, cites no authority in support of its argument. Instead, NHCS relies merely on the facts that the pre-K funds are included in the calculations pursuant to *Sugar Creek I* and the appropriation is "per pupil." In NHCS's own words,

> [F]or the relevant year, the funds for the pre-Kindergarten programs are included in the local current expense fund. That fund must be shared pro rata with Charter Day School[,] which means it is divided by the sum of the total number of students enrolled in NHCS and the total

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amended N.C. Gen. Stat. § 115C-426(c) to include the following language: "In addition, the appropriation or use of fund balance or interest income by a local school administrative unit shall not be construed as a local current expense appropriation." 2010 N.C. Sess. Laws c.31 s. 7.17(a). Although we recognize the amendment does not apply retroactively, the amendment supports our interpretation of *Sugar Creek II*, as the legislature acted to prevent appropriations from the fund balance from being apportioned pursuant to the Charter School Funding Statute. Had *Sugar Creek II* considered the entire fund balance, following the amendment to N.C. Gen. Stat. § 115C-426(c), the unappropriated portion of the fund balance would continue to be included in the local current expense appropriation while the appropriated fund balance would not. This would be an absurd and illogical result.

> number of students enrolled at Charter Day School. If the funds are in, the students should be in.

We are not persuaded by NHCS's argument.

Admission into North Carolina's public school system is governed by statute. The admission requirements provide that only those children who have "reached the age of 5 on or before August 31 of that school year" or those children who had "been attending school during that school year in another state in accordance with the laws or rules of that state before the child moved to and became a resident of North Carolina[]" may enroll in public schools. N.C. Gen. Stat. § 115C-364(a) (2007). Furthermore, when a child is enrolled, "[t]he initial point of entry into the public school system shall be at the kindergarten level." N.C. Gen. Stat. § 115C-364(c). Admission into North Carolina's charter schools is subject to these same restrictions. *See* N.C. Gen. Stat. § 115C-238.29F(g)(1) (2007) ("Any child who is qualified under the laws of this State for admission to a public school is qualified for admission to a charter school."). Based on these statutes, it is evident pre-K students are not entitled to enrollment in North Carolina's public school system or charter schools.

Although charter school funding is calculated on a "per pupil" basis, because pre-K students are not entitled to enrollment in North Carolina's public school system or charter schools, we hold pre-K students should not be included in the pupil count for purposes of calculating the per pupil local current expense appropriation.

To this point, NHCS does not dispute that pre-K students are not entitled to enrollment under the statutes, but instead argues that because it is required to serve a population of pre-K students under this Court's holding in *Hoke County Bd. of Educ. v. State of North Carolina*, __ N.C. App. __, 731 S.E.2d 691 (2012), *appeal dismissed and opinion vacated*, __ N.C. __, 749 S.E.2d 451 (2013), it should be allowed to include them in its calculations of the per pupil local current expense appropriation. Again, we disagree.

In *Hoke County*, this Court upheld the trial court's order "mandating the State to not deny any eligible 'at-risk' four year old admission to the North Carolina Pre-Kindergarten Program." _ N.C. App. at _, 731 S.E.2d at 695. That decision, however, is not controlling in the present case for two reasons. First, the trial court's mandate in *Hoke County* was issued by order dated 18 July 2011 and upheld by this Court in 2012, subsequent to the years at issue in this case. Second, and more importantly, our Supreme Court recently vacated this Court's *Hoke County*

decision and remanded the case to this Court with instructions to vacate the trial court's order. *See Hoke County Bd. of Educ. v. State of North Carolina*, __ N.C. __, 749 S.E.2d 451 (2013). As a result, there is no mandate that the State admit at-risk students into the North Carolina Pre-Kindergarten Program.

Without a mandate requiring pre-K admissions, we are left with the holdings of *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997) (*Leandro I*), and *Hoke County Bd. of Educ. v. State of North Carolina*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Leandro II*). In *Leandro I*, our Supreme Court held "Article I, Section 15 and Article IX, Section 2 of the North Carolina constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." 346 N.C. at 347, 488 S.E.2d at 255. Thereafter, in *Leandro II*, our Supreme Court recognized that the issue with pre-K programs was "whether the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education." 358 N.C. at 639, 599 S.E.2d at 391. Yet, while recognizing the challenges of at-risk enrollees in *Leandro II*, the Court expressly rejected the portion of the trial court's order mandating a pre-K program. *Id.* at 645, 599 S.E.2d at 395. Thus, while NHCS was required to prepare students to obtain a sound basic education, they were not required to enroll any students in a pre-K program.

We hold the trial court did not err in ordering NHCS to exclude pre-K students from the calculations of the per pupil local current expense appropriation.

III. Conclusion

For the reasons discussed above, we reverse the trial court's decision to the extent it includes the entire fund balance in the per pupil local current expense appropriation calculations and we affirm the trial court's decision to the extent it excludes pre-K students from the per pupil local current expense appropriation calculations.

Reversed in part, affirmed in part.

Judges ELMORE and DAVIS concur.

ANJELIKA DECHKOVSKAIA, PLAINTIFF
v.
ALEX DECHKOVSKAIA, (MALE'S NAME SPELLED DESHKOVSKI), DEFENDANT

No. COA13-766

Filed 18 February 2014

1. Divorce—equitable distribution—valuation of marital estate—houses titled in minor child's name

The trial court erred in an equitable distribution action in its valuation of the marital estate by classifying two houses titled in the divorcing couple's minor child's name as martial property, including them in the valuation of the marital estate, and distributing them to defendant.

2. Divorce—equitable distribution—value of marital residence—stipulation

The trial court erred in an equitable distribution action by determining that the marital residence was worth $210,000 when the parties stipulated that it was worth $205,000. The matter was remanded to fix this apparent typographical error.

3. Divorce—alimony—marital misconduct—findings of fact supported—indignities

Defendant's argument that the trial court abused its discretion in a divorce proceeding by awarding plaintiff $3,500 per month in alimony because its findings relating to marital misconduct were unsupported by competent evidence was overruled. There was evidence to support the trial court's finding of marital misconduct by defendant. Furthermore, even assuming that a "want of provocation" is still an element of indignities under N.C.G.S. § 50-16.1A, the trial court did not err in finding that defendant had subjected plaintiff to indignities constituting marital misconduct.

Appeal by defendant from Orders entered 26 July 2012 by Judge Beverly A. Scarlett and 3 December 2012 by Judge Joseph M. Buckner in District Court, Orange County. Heard in the Court of Appeals 12 December 2013.

Sandlin & Davidian, PA, by Lisa Kamarchik, for plaintiff-appellee.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

STROUD, Judge.

Alex Deshkovski[1] ("defendant") appeals from an equitable distribution and alimony order entered 26 July 2012 distributing property the trial court classified as marital and awarding Anjelika Dechkovskaia ("plaintiff") $3,500 per month in alimony for twelve years. Defendant also appeals from an order entered 3 December 2012 denying his motion for a new trial and for a stay of proceedings.

I. Background

Plaintiff and defendant were married on 7 July 1990 in the Soviet Union, in what is now Belarus, separated on or about 25 February 2011, and divorced on 30 April 2012. They have two children—one born September 1991 and a minor child born December 2004. They are both highly educated and both work in scientific fields—defendant as a professor and lecturer, and plaintiff as a researcher. Defendant moved to the United States in 1996 to pursue his higher education, achieving a master's degree and two doctorates. Within a year, plaintiff followed defendant to the United States and, in 1997, began working as a scientific research assistant and lab technician.

On 4 March 2011, plaintiff filed a complaint in Orange County requesting permanent custody of the parties' minor child, child support, postseparation support, alimony, and equitable distribution. Plaintiff alleged in the complaint that defendant had committed marital misconduct by "engaging in indignities which have rendered the condition of the plaintiff intolerable and life burdensome in that defendant has controlled the plaintiff and the plaintiff's life throughout most of the marriage." Defendant denied the allegation, but did not allege that plaintiff had herself engaged in marital misconduct. The trial court awarded sole legal and physical custody of the parties' minor child to plaintiff and visitation for defendant by order entered 15 February 2012.

After a hearing on 30 April 2012, at which plaintiff was represented by counsel and defendant appeared *pro se*, the trial court resolved the equitable distribution and alimony issues by order entered 25 July 2012. The trial court classified various pieces of property acquired by the parties as marital property, including two houses titled in the name of the minor child. The trial court valued the parties' total estate at $591,702.00,

1. There is some confusion in the record regarding how to spell defendant's last name—the order lists his name both as Dechkovskaia and Deshkovski, but in various pleadings defendant has spelled his name Deshkovski, so we will use that spelling.

found that an equal distribution of property would be equitable, and distributed the marital property accordingly. The trial court also found that defendant was a supporting spouse, that plaintiff was a dependent spouse, that defendant had committed marital misconduct by offering indignities to plaintiff during the marriage, and that defendant's post-separation conduct corroborated its finding of marital misconduct prior to separation. The trial court awarded plaintiff $3,500 per month in alimony for twelve years and attorney's fees.

On 13 August 2012, defendant, now represented by counsel, filed a motion for a new trial and stay of execution under Rules 59 and 62 of the North Carolina Rules of Civil Procedure. The trial court denied defendant's motion by order entered 3 December 2012. Defendant filed notice of appeal on 2 January 2013 both from the order denying his post-trial motion and the order addressing equitable distribution and alimony.[2]

II. Equitable Distribution

[1] Defendant first argues that the trial court erred in its valuation of the marital estate because it included two houses in the estate not owned by either party on the date of separation. We agree.

> [T]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

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2. Although defendant appealed from both orders, he makes no argument on appeal regarding the order denying his post-trial motions. Therefore, any argument concerning that order has been abandoned. N.C.R. App. P. 28(a).

Peltzer v. Peltzer, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359-60 (citations, quotation marks, and brackets omitted), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

The trial court determined that two houses purchased by the parties during the marriage were marital property despite being titled in the name of the parties' minor child. On the date of separation, neither party owned the houses at issue. The trial court specifically found that both properties were titled "in the minor child's name upon acquisition." Nevertheless, plaintiff now argues that even if the houses were titled in the minor child's name, defendant had an equitable interest in the property, such as a constructive trust, with the minor child as trustee.[3]

"In an equitable distribution proceeding, only marital property is subject to distribution by the court. G.S. 50–20(a)." *Lawrence v. Lawrence*, 100 N.C. App. 1, 16, 394 S.E.2d 267, 275 (1990). For purposes of N.C. Gen. Stat. § 50-20, "marital property" "means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned . . . ." N.C. Gen. Stat. § 50-20(b)(1) (2011). Based upon the unchallenged finding by the trial court, it appears that the houses were titled to the minor child when they were purchased, and it is uncontested that only the parties' minor child held title to the two contested houses on the date of separation.

First, we must consider whether this issue has been preserved for our review. We conclude that it has. As discussed below, the trial court must join the title owner, in this case the minor child, as a necessary party to the action in order to adjudicate ownership of the two houses. "Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property." *Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 64, *disc. rev. denied*, 343 N.C. 517, 472 S.E.2d 26 (1996). Our review of this issue has not been waived by defendant's failure to raise it below. *See Kor Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 600 (2008) ("An appellate court has the power to inquire into jurisdiction in a case before it at any time . . . .").

To the extent that plaintiff claims that the minor child holds the properties only in some sort of constructive trust for the marital estate, that issue cannot be determined unless the minor child—who holds title to the property—is made a party to the action. *See Upchurch*, 122 N.C.

3. We note that the property was apparently acquired some time prior to the child's seventh birthday.

App. at 176, 468 S.E.2d at 63-64 (discussing the classification of property allegedly held in trust for the marital estate and holding that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property."). Where, as here, a minor child's property interests are adverse to that of his parent, the trial court must appoint a guardian ad litem to represent his interests.[4] *Kohler v. Kohler*, 21 N.C. App. 339, 341, 204 S.E.2d 177, 178 (1974) (concluding that "an infant must appear by guardian or guardian ad litem" to determine his property interests); *Irvin v. Harris*, 189 N.C. 465, 468, 127 S.E. 529, 531 (1925) (observing that the better practice to determine property rights when the parent's interests are not identical to that of the minor child owner is to appoint a guardian ad litem). Without the presence of the minor as a party to the action, represented by a guardian ad litem or next friend, the trial court cannot divest him of his ownership interest in the real property. *See Dorton v. Dorton*, 77 N.C. App. 667, 676, 336 S.E.2d 415, 421 (1985) ("Defendant's mother was not a party to this action, and the trial court cannot deprive her of rights as a creditor without affording her the due process rights to notice and an opportunity to be heard."); *Lawrence*, 100 N.C. App. at 16, 394 S.E.2d at 274 (holding that the trial court could not order the minor children of the divorcing parties to pay certain taxes when they are not parties to the action); *Parker v. Moore*, 263 N.C. 89, 90-91, 138 S.E.2d 821, 822 (1964) ("Before funds belonging to infants and incompetents may be taken from them, the law requires that they be represented by guardian, guardian *ad litem*, or next friend as the situation may require."). Moreover, once the minor child is made a party to the action, if the trial court were to determine that the houses were held in a constructive trust created during the marriage, it must make appropriate findings to that effect based on clear and convincing evidence. *Glaspy v. Glaspy*, 143 N.C. App. 435, 441, 545 S.E.2d 782, 786 (2001). No such findings have been made here. Therefore, the trial court lacked authority to classify the two houses as martial property, to include them in the valuation of the marital estate, and to distribute them to defendant.

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4. Here, the trial court did appoint a guardian ad litem, but the order appointing the guardian specifically limited his duties to investigation of custodial issues and to file a report ("GAL report") addressing the parties' treatment of each other and the minor child, not to represent the minor's property interests. The GAL's report indicates that he considered only the issues as directed by the trial court's order.

[2] Defendant also challenges the trial court's finding that the parties had stipulated that their marital residence had a net value of $210,000. He contends, and plaintiff concedes, that they had actually stipulated that the marital residence was worth $205,000. The $5,000 difference appears to be simply a typographical error, and *de minimis* at best, given that the trial court found the total marital estate to be worth $591,702. *See Cohoon v. Cooper*, 186 N.C. 26, 28, 118 S.E. 834, 835 (1923) (declaring that an error of 95 cents out of a $663 verdict would be *de minimis*). Nevertheless, since we must remand on the other equitable distribution issue, the trial court should also correct this finding on remand.

To determine ownership of the two houses, the trial court must join the minor child as a party and appoint a guardian ad litem to represent his property interests. Because it failed to do so here, it had no authority to classify the houses as marital property and distribute them as such. Additionally, it made no finding that the houses were held in constructive trust for the martial estate. Although the findings of fact also do not reveal the parties' reasons, if any, for vesting title to real estate in a young child, the trial court on remand may also consider, as appropriate and if raised by the parties, whether an unequal distribution of the marital property may be equitable under N.C. Gen. Stat. § 50-20(c). Therefore, we must vacate the equitable distribution order and remand for further proceedings. *See Boone v. Rogers*, 210 N.C. App. 269, 272, 708 S.E.2d 103, 106 (2011) (vacating judgment where the trial court failed to join all necessary parties); *Balawejder v. Balawejder*, ___ N.C. App. ___, ___, 721 S.E.2d 679, 691 (2011) (vacating order entered without jurisdiction).

III. Alimony

[3] Defendant next argues that the trial court abused its discretion in awarding plaintiff $3,500 per month in alimony and that its findings relating to marital misconduct are unsupported by competent evidence. Defendant does not otherwise challenge the appropriateness of the alimony award or the adequacy of the trial court's findings. Nor does defendant challenge the amount or duration of the alimony award on the basis that it is not supported by the evidence as to the parties' incomes, needs, and expenses. Therefore, we deem any such arguments abandoned. N.C.R. App. P. 28(a). It is uncontested that plaintiff is a dependent spouse, that defendant is the supporting spouse, and that plaintiff is entitled to alimony. Yet it does appear from the findings that the trial court considered the marital misconduct as a factor in establishing the amount and term of alimony. The only disagreement concerns whether the trial court's findings on the marital misconduct factor were supported by competent evidence.

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, ___ N.C. App. ___, ___, 747 S.E.2d 268, 272-73 (2013) (citations and quotation marks omitted).

One of the factors that a trial court must take into account in awarding alimony, when relevant, is marital misconduct. N.C. Gen. Stat. § 50-16.3A(b)(1) (2011). Marital misconduct includes "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome" during the marriage and on or before the date of separation. N.C. Gen. Stat. § 50-16.1A(3)(f) (2011).

> Our courts have declined to specifically define "indignities," preferring instead to examine the facts on a case by case basis. Indignities consist of a course of conduct or repeated treatment over a period of time including behavior such as unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement.

Evans v. Evans, 169 N.C. App. 358, 363-64, 610 S.E.2d 264, 269 (2005) (citations and quotation marks omitted).[5]

The trial court found that defendant had engaged in marital misconduct by offering indignities to plaintiff. Specifically, the trial court found that defendant had:

> a. Refused to live with Plaintiff and the children in the marital home separate and apart from his mother;

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5. *See also Barwick v. Barwick*, 228 N.C. 109, 112, 44 S.E.2d 597, 599 (1947) (noting the difficulty of creating a clear definition of indignities); *Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976) (observing that indignities must consist of a course of conduct, "*repeated and persisted in* over a period of time." (citation and quotation marks omitted)).

b. Refused to allow Plaintiff and the children to associate with others who are not Russian;

c. Controlled the food eaten by Plaintiff and the children. Consistently telling Plaintiff and the children American food was bad for them and would not let them eat at public places.

d. Refused to allow the Parties' minor son to attend public school resulting in the Plaintiff receiving letters from the Durham County District Attorney's office pursuant to the truancy laws of this State. As a result, Plaintiff sought and obtained an emergency order which ordered the minor child attend school.

Additionally, the trial court found that "Defendant has controlled all the finances during the marriage without giving Plaintiff access to the bank accounts or PINs for the accounts," that "Defendant has engaged in parental alienation prior to the date of separation and after the date of separation," and that defendant's actions had been intentional and malicious.[6]

The trial court further found that plaintiff had suffered emotional abuse from defendant's control and his attempts to make plaintiff and their children reliant upon him by isolating them from the larger community. Finally, it found that defendant's post-separation conduct corroborated its finding that defendant had subjected plaintiff to indignities during the marriage, as permitted by N.C. Gen. Stat. § 50-16.3A(b)(1).

Defendant argues that these findings are unsupported by the evidence. First, we note that defendant concedes that several of the challenged findings may be supported by the GAL report, but argues that the report was inadmissible for purposes of alimony. Defendant did not object to the trial court's consideration of this report in considering alimony, so any objection thereto has not been preserved. N.C.R. App. P. 10(a)(1).

The GAL report does in fact fully support all of the trial court's relevant findings and supports its ultimate finding that defendant offered indignities to plaintiff. It paints a picture of defendant as controlling and verbally abusive, and describes a pattern of isolating plaintiff and

6. The trial court included these findings in its section on post-separation conduct, but taken in context, the plain language of the findings indicates that the trial court found that defendant had engaged in this conduct prior to separation.

the parties' children from broader society.[7] This type of overwhelming control and attempted isolation supports the trial court's findings on indignities, especially considering that plaintiff was a relatively recent immigrant to this country. *See Barwick*, 228 N.C. at 112, 44 S.E.2d at 599 (noting that indignities are not specifically defined in part because "[t]he station in life, the temperament, state of health, habits and feelings" of the persons concerned can be quite varied). Moreover, despite defendant's arguments to the contrary, the findings show that these indignities were part of a long-standing course of conduct and not an isolated incident. Therefore, we hold that there was evidence to support the trial court's finding of marital misconduct by defendant.

Defendant further argues that the trial court failed to find that the indignities he offered to plaintiff were "without adequate provocation." Defendant has not alleged that plaintiff provoked the indignities found by the trial court, nor even argued on appeal that there was evidence which could support such a finding. Indeed, the argument that a spouse—of either sex—could legally justify emotional or verbal abuse of the nature found by the trial court by some sort of "provocation" strains credulity, at least based upon modern sensibilities and values.[8] N.C. Gen. Stat. § 50-16.1A does not mention the word "provocation" and we have found no case decided under that statute requiring that the trial court explicitly find an absence of provocation to find that one of the spouses had offered indignities to the other. It is not entirely clear that such a finding is required at all, although as we will discuss below, there is case law to support this argument.

Many of the old cases discussing indignities under the former statutes on fault-based divorce and divorce from bed and board did require a very specific factual allegation that there was no provocation for the indignities offered. Although the words "without provocation" have been repeated and cited since the early 1800s in North Carolina and they continue to be used, an examination of the old cases where the phrase originated reveals that these cases are based not only on antiquated beliefs about the roles of husband and wife, but also upon specific statutes and rules of pleading which existed at that time but have long since been changed by amendments to the relevant substantive statutes and adoption of the North Carolina Rules of Civil Procedure.

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7. We are only describing the GAL report in general terms because it remains under seal by stipulation of the parties and order of the trial court.

8. Such justification was accepted by our Supreme Court as early as the 1800s and as recently as 1955, as we will discuss more fully below.

One early and enlightening example is *Joyner v. Joyner*, 59 N.C. (6 Jones Eq.) 322 (1862). The wife brought a claim against the husband for divorce from bed and board and alimony and was awarded alimony *pendente lite*, from which the husband appealed. *Joyner*, 59 N.C. (6 Jones Eq.) at 322. The wife alleged that the husband had

> manifested great coarseness and brutality, "and even inflicted the most severe corporal punishment. This he did on two different occasions, once with a horse-whip, and once with a switch, leaving several bruises on her person." "He used towards her abusive and insulting language, accused her of carrying away articles of property from his premises to her daughter by a former husband; refused to let said child live with her; has frequently at night, after she had retired, driven her from bed, saying that it was not hers, and that she should not sleep upon it. He has also forbade her sitting down to his table in company with his family," and that "by such like acts of violence and indignity has forced her to leave his house, and that she is now residing with her friends and relatives, having no means of support for herself and an infant son born within the four past weeks."

Id. She further alleged that during her entire marriage to defendant she had "been a dutiful, faithful and affectionate wife." *Id.*

The Supreme Court first addressed the specific requirements of the statute regarding the grounds upon which divorces may be granted and the pleading requirements for these grounds, noting that

> as a check or restraint on applications for divorces, and to guard against abuses, it is provided that the cause or ground on which the divorce is asked for shall be set forth in the petition "particularly and specially." It is settled by the decisions of this Court that this provision of the statute must be strictly observed, and the cause or causes for which the divorce is prayed must be set forth so "particularly and specially," as to enable the Court to see on the face of the petition, that if the facts alleged are true the divorce ought to be granted . . . .

Id. at 323.

At that time, "[b]y the rules of pleading in actions at the common law, every allegation of fact, [had to] be accompanied by an allegation of

'time and place.' " *Id.* at 324. Yet the Supreme Court held that the wife's claim was not defeated by her failure to allege "time and place" of her physical abuse, since those facts were not "material." *Id.*[9] Instead, the wife's fatal pleading error was that she failed to allege what she had done to induce the husband to beat her—apparently based upon the unstated assumption that she clearly did something, and the relevant question would be whether what she did justified the husband's actions. *Id.* The Supreme Court held that she must allege

> the circumstances under which the blow with the horse-whip and the blows with the switch were given; for instance, what was the conduct of the petitioner; what had she done, or said to induce such violence on the part of the husband? . . . . [T]here was an obvious necessity for some explanation, and the cause of divorce could not be set forth "particularly and specially," without stating the circumstances which gave rise to the alleged grievances.

Id.

The Court explained that such "discipline" would be justified in certain circumstances for two reasons. The first reason is the husband's role as set forth in Genesis 3:16: "Thy desire shall be to thy husband, and he shall rule over thee." *Id.* at 325. The Court reasoned that "It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place." *Id.* Second, the Court noted that the husband is legally responsible for the wife's behavior "under the principles of the common law," noting that a husband is responsible to pay damages if "a wife slanders or assaults and beats a neighbor" and that a wife is not responsible for commission of "a criminal offense, less than felony, in the presence of her husband." *Id.* The Court also noted that the wife "cannot make a will disposing of her land" and "cannot sell her land without a privy examination, separate and apart from her husband." *Id.* For these reasons, the Court concluded that the law must give "this power to the husband over the person of the wife, and has adopted proper safe-guards to prevent an abuse of it." *Id.*

The Supreme Court then helpfully discussed some hypothetical situations in which a husband might be justified in horse-whipping his wife:

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9. The reason they were not material is not—as we today might think—because there simply is no proper time or place to horse-whip your wife, but because she did not allege some time or place-sensitive abuse, such as that she was pregnant while he was beating her, or that he had beat her in a public place. *Id.*

> It is sufficient for our purpose to state that there may be circumstances which will mitigate, excuse, and so far justify the husband in striking the wife "with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person," so as not to give her a right to abandon him and claim to be divorced. For instance: suppose a husband comes home and his wife abuses him in the strongest terms—calls him a scoundrel, and repeatedly expresses a wish that he was dead and in torment! and being thus provoked in the *furor brevis*, he strikes her with the horse-whip, which he happens to have in his hands, but is afterwards willing to apologise, and expresses regret for having struck her: or suppose a man and his wife get into a discussion and have a difference of opinion as to a matter of fact, she becomes furious and gives way to her temper, so far as to tell him he *lies*, and upon being admonished not to repeat the word, nevertheless does so, and the husband taking up a switch, tells her if she repeat it again, he will strike her, and after this notice, she again repeats the insulting words, and he thereupon strikes her several blows; these are cases, in which, in our opinion, the circumstances attending the act, and giving rise to it, so far justify the conduct of the husband as to take from the wife any ground of divorce for that cause, and authorise the Court to dismiss her petition, with the admonition, "if you will amend your manners, you may expect better treatment;" see Shelford on Divorce. So that there are circumstances, under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce.

Id. at 325-26.

Thus the Supreme Court held that mere verbal statements by the wife—calling her husband a "scoundrel" or "liar" or wishing him dead—would legally justify his striking her with a horsewhip (if he then apologizes) or striking her "several times with a switch, so hard as to leave marks on her person." *Id.*[10]

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10. Just a few years later, in *State v. Oliver*, 70 N.C. 60 (1874), a criminal case, the Supreme Court rejected the prior cases which allowed a husband to whip his wife "provided he used a switch no larger than his thumb," stating that this "is not law in North

N.C. Gen. Stat. § 50-16.1A(3)(f) does not mention lack of provocation as an element of "indignities." It simply states that one form of marital misconduct consists of "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome." N.C. Gen. Stat. § 50-16.1A(3)(f). Yet it is also true that the definition of indignities under N.C. Gen. Stat. § 50-16.1A(2)(f) is the same as it is under N.C. Gen. Stat. § 50-7, and as it was under the repealed § 50-16.1 and the repealed § 50-16, for which the courts of this state have required an allegation that the indignities were offered without provocation. *See*, *e.g.*, *Puett v. Puett*, 75 N.C. App. 554, 557, 331 S.E.2d 287, 290 (1985), *Vandiver v. Vandiver*, 50 N.C. App. 319, 328, 274 S.E.2d 243, 249 (1981), *and Cushing v. Cushing*, 263 N.C. 181, 187, 139 S.E.2d 217, 222 (1964). Indeed, this same language can be found in every version of the North Carolina divorce and alimony statutes from 1814 onward. *See* 2 Laws of the State of North Carolina 1292, 1294 (Raleigh, Henry Potter 1821). The requirement of a lack of provocation has simply been a judicial gloss on this simple language, added generations ago in cases like *Joyner* and repeated over the years, usually without any consideration of its origins.

In considering how this ancient rule applies to the modern alimony statute, we cannot ignore the substantial changes in procedural law, substantive family law, or "the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country." *State v. Stroud*, 147 N.C. App. 549, 560, 557 S.E.2d 544, 551 (2001) (quoting *United States v. Dege*, 364 U.S. 51, 54, 4 L.Ed.2d 1563, 1565 (1960)), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

First, since this doctrine was created, there have been vast changes in the pleading requirements and procedural law applicable in domestic cases. *See Shingledecker v. Shingledecker*, 103 N.C. App. 783, 786, 407 S.E.2d 589, 591 (1991) (noting that the "defendant's contention [that the plaintiff's complaint was fatally deficient in that it failed to allege lack of provocation of the indignities alleged] was supported by cases decided prior to the enactment of the North Carolina Rules of Civil Procedure at

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Carolina. Indeed, the Courts have advanced from that barbarism until they have reached the position, that the husband has no right to chastise his wife, under any circumstances." *Oliver*, 70 N.C. at 61. Yet the Court still recognized that not all physical abuse would be worthy of intervention by the courts: "But from motives of public policy,—in order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." *Id.* at 61-62.

G.S. § 1A-1," but holding that that issue is not reviewable after a motion to dismiss is denied by the trial court). In addition, a dependent spouse no longer has to plead fault in order to receive a divorce or alimony from a supporting spouse. *See* N.C. Gen. Stat. § 50-6.; N.C. Gen. Stat. § 50-16.3A(a).

Second, the substantive changes to North Carolina family law severely undermine the rationale for the provocation rule. It appears to us that, to the extent this rule is relevant at all, the old consideration of provocation may now be addressed under the various statutory forms of marital misconduct, which the trial court now weighs with other factors in considering the amount of alimony. *See Romulus v. Romulus*, ___ N.C. App. ___, ___, 715 S.E.2d 308, 325 (2011) (explaining that for all forms of marital misconduct other than "illicit sexual behavior," "the trial court has the discretion to weigh all of the other forms of "marital misconduct" and to determine what effect, if any, the misconduct should have upon the alimony award."). For instance, if a husband excessively uses alcohol "so as to render the condition of the other spouse intolerable," N.C. Gen. Stat. § 50-16.1A(3)(h), while his wife constantly verbally abused him, N.C. Gen. Stat. § 50-16.1A(3)(f), a trial court might justifiably find that both parties had engaged in marital misconduct but could still award alimony, after weighing their misconduct in light of the other alimony factors to determine the equitable amount of alimony. *See Romulus*, ___ N.C. App. at ___, 715 S.E.2d at 325. Looking back to the ancient cases on "provocation," perhaps a less enlightened way of looking at this would be to say that the wife must prove that if she verbally abused the husband, she did so only because her husband's excessive drinking "provoked" her to do so, and not that she had driven her husband to drink by her incessant nagging.

But this sort of reasoning as to provocation seems inconsistent with the factor analysis now required by N.C. Gen. Stat. § 50-16.3A, as it would require the complaining spouse to prove a negative—that she did not "provoke" the misconduct of the other spouse—before the trial court may consider the misconduct as a factor supporting an award of alimony.[11] Our Supreme Court has recognized that "[t]o require the complaining party to allege and prove lack of provocation at first blush may seem illogical and out of place." *Allen v. Allen*, 244 N.C. 446, 450, 94 S.E.2d 325, 329 (1956). It justified such a seemingly illogical pleading requirement on the basis that it would allow the courts to ensure "that

11. Of course, fault is no longer required for an award of alimony; it is simply a factor which may be considered if raised by the parties. *See* N.C. Gen. Stat. § 50-16.3A.

the assistance of the law in breaking up the family is used for the benefit of the injured party only." *Id.* at 451, 94 S.E.2d at 329. This rationale no longer applies. Unlike under the former fault-based divorce statutes, a dependent spouse seeking alimony does not have to show that the supporting spouse offered her indignities for the trial court to award the relief she seeks, *see* N.C. Gen. Stat. § 50-16.3A, and, as a result, has no bearing on the state's interest in stable family units.

Finally, it is clear that there have been vast societal changes since the Supreme Court created the provocation rule. In 1920, women obtained the right to vote by the 19th Amendment to the United States Constitution. Husbands are no longer legally responsible for a wife's slander or assault of a neighbor; wives are now responsible for their own criminal offenses of all sorts, felony or misdemeanor. Women can now own and convey property separate and apart from their husbands. Women are now competent to testify against their husbands as to a criminal charge of "assault and battery" even if it does not "inflict[] or threaten[] a lasting injury or great bodily harm."[12] N.C. Gen. Stat. § 8-57 (b)(2) (2013). Husbands and wives are now considered separate legal persons capable of criminal conspiracy between themselves. *Stroud*, 147 N.C. App. at 561, 557 S.E.2d at 551. Beating your wife with a horsewhip, switch, or any other weapon, for that matter, is now both a crime and grounds for entry of a Domestic Violence Protective Order, and the fact that the wife may have verbally "abuse[d] him in the strongest terms," even by calling him a scoundrel and wishing him dead is no defense. *See* N.C. Gen. Stat. § 14-33(c)(2) (assault on a female) (2013); N.C. Gen. Stat. § 50B-2 (2013) (providing for legal relief from domestic violence).

Despite these changes in law and society, as well as many others, our courts have continued on occasion to cite the language of these old cases. *See*, *e.g.*, *Ollis v. Ollis*, 241 N.C. 709, 711, 86 S.E.2d 420, 421-22 (1955) ("It is not enough for the wife to allege the husband has been abusive and violent toward her, ... but also she must set forth what, if anything, she did to start or feed the fire of discord so that the court may determine whether she provoked the difficulty."). This rule required such an allegation despite a similar absence of any such language in

12. *Cf. State v. Hussey*, 44 N.C. (Busb.) 123, 127 (1852) ("The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband from felonies perpetrated, or attempted to be perpetrated on her, and we would say for an assault and battery which inflicted or threatened a lasting injury or great bodily harm; but in all cases of a minor grade she is not. In this case, there is no pretence that any lasting injury was inflicted; on the contrary, the case states that the injury was temporary.").

the relevant statutes.[13] Even fifty years ago, our Supreme Court stated that this "lack of provocation" rule is one of "debatable" benefits that is "so very old that the years have barnacled it in numberless cases upon our practice," *Cushing*, 263 N.C. at 187, 139 S.E.2d at 222, but the Court did not go so far as to overrule these cases. As discussed above, the rule appears to stem from an ancient understanding of marriage which required that a wife show adequate cause to leave her "proper place" and that she would be unable to procure a divorce if she "provoked" the indignities of which she complained.[14] This Court has previously noted that "[t]hese notions no longer accurately represent the society in which we live, and our laws have changed to reflect this fact." *Vann v. Vann*, 128 N.C. App. 516, 518, 495 S.E.2d 370, 372 (1998) (citation and quotation marks omitted).

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Stroud*, 147 N.C. App. at 561, 557 S.E.2d at 551 (quoting *Dege*, 364 U.S. at 53-54, 4 L.Ed.2d at 1565). In 1912, Chief Justice Clark presciently observed that

> Even statutes have been held obsolete and unenforcible [sic] because of changed conditions and the long lapse of time. Certainly this ought to be true of decisions which

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13. *See* N.C. Gen. Stat. § 50-7 (1984); *Puett*, 75 N.C. App. at 557, 331 S.E.2d at 290 ("We agree that in North Carolina a party relying on G.S. 50-7(4) must not have provoked the 'indignities' of which he complains." (citations omitted)); N.C. Gen. Stat. § 50-16.1 (1978); *Vandiver*, 50 N.C. App. at 328, 274 S.E.2d at 249 (under N.C. Gen. Stat. § 50-16.1, approving of jury instructions that required the jury to decide whether the indignities were offered "without provocation"); N.C. Gen. Stat. § 50-16 (1966); *Cushing*, 263 N.C. at 187, 139 S.E.2d at 222 (holding that under N.C. Gen. Stat. § 50-7, "which G.S. § 50-16 incorporates," a wife seeking to prove indignities "is required, therefore, not only to set out with particularity those of her husband's acts which she contends constituted such indignities as to render her condition intolerable and her life burdensome but also to show that those acts were without adequate provocation on her part.").

14. *See Wilcox v. Wilcox*, 36 N.C. (1 Ired.Eq.) 36, 42-43 (1840) ("[I]t cannot for a moment be pretended, that every act of improper conduct, on the part of a husband, will authorise a wife to leave her proper place--his side, and his home--and if she alleges that he has been guilty of such gross misconduct as to justify this seeming revolt from her duty, she must so charge the misconduct, that it may be judicially seen, when the fact is ascertained, whether it be of that character which induces a forfeiture of his right to her society, and that he may have a full opportunity of answering distinctly to the misconduct charged, and of explaining or disproving it."); *Foy v. Foy*, 35 N.C. (13 Ired.) 90, 96 (1851) ("If a wife leave a husband, and refuses to live with him, *without sufficient cause*, and he afterwards lives in adultery, this is no cause of divorce; for, the consequence may be ascribed to her prior violation of the duty of a wife.").

> rest upon no statute and which are now contrary to every sense of right and opposed to the spirit of our Constitution and of the age in which we live.
>
> The "common law" has been praised because of the very fact that, being "judge-made," it was flexible and could be molded from time to time to fit the changing conditions of society. But it loses this sole excellence when it is used to thwart beneficial statutes, expressing the demand of the age for more just and benign laws, by construing them according to the darkened and narrow views of the judges of the fourteenth century, and not according to the intendment of legislators imbued with the enlightened ideas of the twentieth century. . . .
>
> There are of course principles of the common law which are eternally just and which will survive throughout the ages. But this is not because they are found in a mass of error or were enunciated by judges in an ignorant age, but because they are right in themselves and are approved, not disapproved as much of the common law must be, by the intelligence of today.
>
> As, however, common-law views as to the status of women still survive among a few and are still urged as law, it would not be amiss should the General Assembly make such enactment in this regard as that body may deem just and proper. Every age should have laws based upon its own intelligence and expressing its own ideas of right and wrong. Progress and betterment should not be denied us by the dead hand of the Past. The decisions of the courts should always be in accord with the spirit of the legislation of to-day [sic] . . . .

Price v. Charlotte Electric Ry. Co., 160 N.C. 450, 456-57, 76 S.E. 502, 504-05 (1912) (Clark, C.J., concurring).

Nevertheless, we cannot overrule our Supreme Court's opinions or those issued by other panels of this Court simply because the rule they recite is old and developed under statutes repealed long ago. *See Andrews ex rel. Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered by our Supreme Court." (citation, quotation marks, brackets, and ellipses omitted)); *In re Appeal from*

Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that one panel of the Court of Appeals cannot overrule another). The State of North Carolina, its families, and its courts could benefit from the Supreme Court's reconsideration of this ancient doctrine that appears to be inconsistent with our existing statutory scheme of post-separation support and alimony and "inconsistent with the marked trend in this jurisdiction toward gender neutrality in the family law area." *Vann*, 128 N.C. App. at 519, 495 S.E.2d at 372.[15]

Here, even assuming the rule as to provocation does apply, defendant did not raise plaintiff's failure to allege a "lack of provocation" below and did not present any evidence which could sustain a finding of "provocation" on plaintiff's part. The trial court is not normally required to make findings on issues not raised by the evidence. *See Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395 n.3, 545 S.E.2d 788, 794 n.3 (2001) ("The ultimate facts at issue in the case are facts relating to the factors set forth in section 50-16.3A(b) for which evidence is presented at trial."). Moreover, the trial court's findings, taken as a whole, make clear that plaintiff did nothing that could be considered "adequate provocation" of defendant's abuse. Therefore, even assuming that a "want of provocation" is still an element of indignities under N.C. Gen. Stat. § 50-16.1A, the trial court here did not err in finding that defendant had subjected plaintiff to indignities constituting marital misconduct.

As noted above, defendant only argues that the trial court abused its discretion in awarding plaintiff $3,500 per month in alimony for twelve years because its findings on marital misconduct are unsupported by the evidence. Defendant does not otherwise challenge the alimony order or the trial court's consideration of other alimony factors. Therefore, any such arguments have been abandoned. N.C.R. App. P. 28(a). There was sufficient evidence to support the trial court's findings on marital misconduct, and defendant has shown no abuse of discretion in the trial court's consideration of this misconduct in setting the amount and term of the alimony award.

Yet our ruling cannot end here, since we realize that the alimony award was made in conjunction with the equitable distribution award, and the trial court may need to reconsider the alimony amount in

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15. Although the concept is technically "gender neutral" as it is now applied to both husbands and wives, it is clear that in the past the rule was often used in practice as a means for a husband to justify his refusal to continue to support, or even to justify his physical abuse of, a wife who had failed to fulfill her proper role as a wife and mother, and the cases all reflect this background.

light of any changes to the property distribution. *See* N.C. Gen. Stat. § 50-16.3A(a); *Lamb v. Lamb*, 103 N.C. App. 541, 547, 406 S.E.2d 622, 625 (1991). Therefore, we remand the alimony award only so that the trial court may reconsider the amount and term of alimony based upon the new equitable distribution determination.

This opinion does *not* permit the parties to revisit the issue of marital misconduct on remand, as we have found that the trial court did not err as to this issue, and this opinion does not dictate that the trial court should or should not change the alimony award on remand; we merely permit the trial court to exercise its discretion on remand to reconsider the alimony amount and term, as the trial court must have the ability to consider the alimony award in light of the new equitable distribution award entered on remand, since they were considered together in the prior trial and order.

IV. Conclusion

For the foregoing reasons, we vacate the portion of the trial court's order concerning equitable distribution and remand for the trial court to appoint a GAL, or expand the existing GAL's responsibilities, to represent the property interests of the minor child, who is the uncontested holder of legal title to the two houses distributed to defendant. We remand the portion of the trial court's order concerning alimony only for the limited purpose of reconsideration of the amount and term based upon the ultimate equitable distribution award.

VACATED in part and REMANDED.

Judge DILLON concurs.

Judge HUNTER, JR., Robert N. concurs in the result only.

DUNCAN v. DUNCAN

[232 N.C. App. 369 (2014)]

BARBARA R. DUNCAN, PLAINTIFF
v.
JOHN H. DUNCAN, DEFENDANT

No. COA12-399-2

Filed 18 February 2014

1. Marriage—ceremony—declaration of invalidity

N.C.G.S. § 50-4 applied to defendant's counterclaim to declare his first marriage ceremony invalid, even though defendant did not seek to annul his entire marriage.

2. Marriage—ceremony—not properly solemnized

The trial court erred by concluding that a marriage ceremony was properly solemnized as the individual who officiated the ceremony, a minister ordained by the Universal Life Church, was not authorized under the applicable version of N.C.G.S. § 51-1 to solemnize the ceremony.

3. Marriage—validity of ceremony—judicial estoppel

The trial court erred by concluding that defendant was judicially estopped from contesting the validity of his first marriage ceremony. The trial court's order did not contain any finding that defendant took the position in this or any other judicial proceeding that the ceremony was valid.

4. Marriage—validity of ceremony—equitable estoppel

The trial court did not err by concluding that defendant was equitably estopped from contesting the validity of his first marriage ceremony where both plaintiff and defendant were equally negligent in relying on the credentials of the individual who officiated the ceremony.

5. Divorce—dependent spouse—conclusion of law—findings of fact

Defendant's argument that the trial court erred in its conclusion of law that plaintiff was actually substantially dependent on defendant for her support as of the date of separation was overruled. Because defendant failed to argue which, if any, of the findings of fact were unsupported, the findings were binding on appeal. The Court of Appeals thus held that the trial court did not err in finding plaintiff to be actually substantially dependent on defendant.

Judge McGEE concurring in result in separate opinion.

Appeal by Defendant from the following orders and judgment entered in the District Court, Macon County: order entered 15 October 2007 by Judge Monica Leslie; orders entered 31 March and 4 September 2008 by Judge Richard K. Walker; order entered 18 September 2009 and judgment entered 2 September 2010 by Judge Steven J. Bryant; and orders entered 14 April 2011 and 18 January 2012 by Judge Richard K. Walker. Originally heard in the Court of Appeals 11 September 2012, with opinion filed 2 October 2012. Reconsidered pursuant to an opinion of the North Carolina Supreme Court, entered 13 June 2013.

Siemens Family Law Group, by Jim Siemens, and Ruley Law Offices, by Douglas A. Ruley, for Plaintiff.

Hyler & Lopez, PA, by Stephen P. Agan and George B. Hyler, Jr., for Defendant.

DILLON, Judge.

I. Factual & Procedural Background

Barbara R. Duncan (Plaintiff) and John H. Duncan (Defendant) exchanged vows in two separate marriage ceremonies in North Carolina occurring twelve years apart. The first ceremony occurred on 15 October 1989 (the 1989 ceremony) and was presided over by Hawk Littlejohn, who held himself out to be a Cherokee medicine man[1] and who was ordained as a minister by the Universal Life Church. In 2001, the parties' estate planning attorney expressed his concern that the 1989 ceremony was not valid; and, accordingly, on 14 October 2001, Plaintiff and Defendant participated in a second ceremony at the First Presbyterian Church in Franklin, North Carolina (the 2001 ceremony).

In 2005, Plaintiff commenced this action seeking, *inter alia*, divorce, equitable distribution, alimony, and child support, alleging that the parties' date of marriage was 15 October 1989, the date of the 1989 ceremony. Defendant filed responsive pleadings alleging, *inter alia*, that Hawk Littlejohn was not authorized under North Carolina law to perform a valid marriage ceremony; and, therefore, the parties'

1. In Defendant's verified complaint, he alleged that Hawk Littlejohn was not, in fact, a Native American but had changed his name from his given name, Larry Snyder.

date of marriage was 14 October 2001, the date of the 2001 ceremony. Accordingly, Defendant prayed the trial court to declare the 1989 ceremony invalid under North Carolina law.

Following a hearing, the trial court entered an order on 15 October 2007 (the 2007 order), concluding that the 1989 ceremony resulted in a valid marriage, that 15 October 1989 was "the date of marriage for all matters related to this Chapter 50 action" and that Defendant was estopped from contesting the validity of the 1989 ceremony.[2]

The trial court subsequently entered a number of additional orders and an equitable distribution judgment. Defendant appeals from the 2007 order and from a number of subsequently entered orders that he contends were affected by the 2007 order. Defendant also appeals from an order in which the trial court concluded that Plaintiff was "actually substantially dependent on [] Defendant for her support as of the date of separation" and a separate order in which the trial court held open the issue of whether to award attorney's fees. Because the trial court left open the award of attorney's fees, this Court, relying on our Supreme Court's decision in *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 695 S.E.2d 442 (2010), reasoned that Defendant's appeal was interlocutory and dismissed it as untimely. *Duncan v. Duncan*, ___ N.C. App. ___, ___, 732 S.E.2d 390, 392 (2012).

Following discretionary review, our Supreme Court reversed, holding that an open request for attorney's fees does not prevent a judgment on the merits from being final. *Duncan v. Duncan*, 366 N.C. 514, 742 S.E.2d 799 (2013). On remand from our Supreme Court, we now consider the merits of Defendant's appeal.

II. Analysis

Defendant's arguments on appeal are essentially that (1) the trial court erred in its 2007 order by determining that 15 October 1989 was the date of marriage for all matters related to this action; and (2) the trial court erred in its order in which it determined that Plaintiff was actually substantially dependent on Defendant for her support as of the date of separation. For the reasons stated below, we affirm the orders of the trial court.

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2. In late 2007, Defendant appealed from the 2007 order. However, this Court dismissed the interlocutory appeal for lack of jurisdiction. *Duncan v. Duncan*, 193 N.C. App. 752, 761 S.E.2d 71, 2008 WL 4911807 (2008) (unpublished).

A. Date of Marriage

[1] Defendant argues that the 1989 ceremony was invalid; and, therefore, that the trial court erred in establishing the date of marriage based on the 1989 ceremony. As an initial matter, we hold that the issue regarding the validity of the 1989 ceremony was properly before the trial court. A marriage based on a ceremony in North Carolina not properly solemnized pursuant to the requirements of N.C. Gen. Stat. § 51-1 is voidable. *See Fulton v. Vickery*, 73 N.C. App. 382, 387, 326 S.E.2d 354, 358 (1985) (stating that a marriage performed by a minister of the Universal Life Church, not otherwise cured by N.C. Gen. Stat. § 51-1.1, was voidable). A party may apply to the court for a declaration that a voidable marriage "be declared void from the beginning[.]" N.C. Gen. Stat. § 50-4 (2013). However, a voidable marriage remains valid "for all civil purposes, until annulled by a competent tribunal *in a direct proceeding*." *Geitner v. Townsend*, 67 N.C. App. 159, 161, 312 S.E.2d 236, 238 (1984) (emphasis added).

Here, in his counterclaim, Defendant prays the court for an order "to declare [the 1989 ceremony] invalid[,]" which we believe is an application under N.C. Gen. Stat. § 50-4 for an order to "declare [a voidable] marriage void[,]" to the extent that the parties' marriage is based on the 1989 ceremony. In other words, we believe that N.C. Gen. Stat. § 50-4 applies in this case even though Defendant does not seek to annul his marriage *in toto* — indeed, he admits that he and Plaintiff were lawfully married by virtue of their 2001 ceremony — but merely requests that the court declare the marriage invalid insomuch as it is based on the 1989 ceremony. Further, where one party sues for divorce, we believe that a counterclaim by the opposing party seeking an order to declare the marriage invalid constitutes a "direct proceeding." *See Sprinkle v. N.C. Wildlife*, 165 N.C. App. 721, 735, 600 S.E.2d 473, 482 (2004) (holding that "a counterclaim is in the nature of an independent proceeding[, and] the filing of a counterclaim is to initiate a 'civil action' ").

In this case, Defendant argues that the trial court erred by concluding that the 1989 ceremony was properly solemnized and by concluding that he "was judicially and equitably estopped from arguing" otherwise. For the reasons below, we believe that the trial court erred by concluding that the 1989 ceremony was properly solemnized and that Defendant was *judicially* estopped from contesting the validity of the 1989 ceremony; however, we do not believe that the trial court erred by concluding that Defendant was *equitably* estopped from contesting the validity of the 1989 ceremony. Therefore, we affirm the 2007 order to the extent that it concludes that Defendant is equitably estopped from challenging the

validity of the 1989 ceremony and the date of marriage, for purposes of this action, to be 15 October 1989.

1. The 1989 Ceremony Was Voidable

[2] Regarding the validity of the 1989 ceremony, Defendant does *not* argue that the ceremony did not take place. Rather, he contends that Hawk Littlejohn, who officiated the ceremony, was not authorized under the North Carolina law in effect at that time to solemnize a marriage.

Our Supreme Court has held that "[a] common law marriage or marriage by consent is not recognized by this State." *State v. Lynch*, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980). Rather, "[t]o constitute a valid marriage in this State, the requirements of G.S. 51-1 must be met." *Id.* at 486, 272 S.E.2d at 353. The version of N.C. Gen. Stat. § 51-1 in effect in 1989 required, in pertinent part, that the parties " 'express their solemn intent to marry in the presence of (1) an ordained minister of any religious denomination; or (2) a minister authorized by his church; or (3) a magistrate.' " *Pickard v. Pickard*, 176 N.C. App. 193, 196, 625 S.E.2d 869, 872 (2006) (quoting *Lynch*, 301 N.C. at 487, 272 S.E.2d at 354).[3] However, when it is established that a marriage ceremony has occurred – as is the case here – "the burden of showing that it was an invalid marriage rests on the party asserting its invalidity." *Overton v. Overton*, 260 N.C. 139, 143, 132 S.E.2d 349, 352 (1963); *see also Kearney v. Thomas*, 225 N.C. 156, 163, 33 S.E.2d 871, 876 (1945) (stating that where there is "proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage"). Accordingly, Defendant bore the burden of demonstrating that Hawk Littlejohn was not authorized under N.C. Gen. Stat. § 51-1 to solemnize the 1989 marriage ceremony. Based on the evidence that was before the trial court, we believe that Defendant met this high burden.

The record on appeal contains a statement of the evidence that was presented to the trial court, pursuant to Rule 9(c) of our Appellate Rules.[4] With regard to the evidence presented before the trial court concerning Hawk Littlejohn's authority to solemnize the 1989 ceremony, the Rule 9(c) statement sets forth that the parties made the court aware of the Supreme Court's 1980 opinion in *Lynch*, *supra*; and, further, that the

3. N.C. Gen. Stat. § 51-1 was amended in 2001 to add a provision which authorizes a ceremony to be valid as long as it is held "[i]n accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe." N.C. Gen. Stat. § 51-1(2) (2013).

4. The record states that the audio recording of the hearing has been lost.

parties stipulated that Hawk Littlejohn had performed the 1989 ceremony, that he was a minister ordained by the Universal Life Church, and that the relevant facts regarding the Universal Life Church as it applies in this case were essentially the same as described by the Supreme Court in *Lynch*.

In *Lynch*, our Supreme Court reversed a bigamy conviction of a defendant where one of his two marriages was solemnized before a Universal Life Church minister. *Lynch*, *supra*. The Court described the Universal Life Church as a church, headquartered in Modesto, California, with "no traditional doctrine" who "will ordain anyone, without question to his/her faith," and that their ministers, which number over 7 million, have the authority to officiate at marriages but otherwise are "not require[d] to give up [their] membership with any other church to be a minister of the ULC, Inc." *Id.* at 483, 272 S.E.2d at 351. The Court further described that the process of receiving certification as an ordained minister in the Universal Life Church involved simply mailing one's name, address and ten dollars to the Church's California headquarters, and that the Church did not require any further proceedings or training as a requirement for ordination. *Id.* In reversing the bigamy conviction, the Court stated as follows:

> A ceremony solemnized by a [layman] who bought for $10.00 a mail order certificate giving him 'credentials of minister' in the Universal Life Church, Inc. — whatever that is – is not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in the State of North Carolina. *The evidence does not establish — rather, it negates the fact — that [the "minister"] was authorized under the laws of this State to perform a marriage ceremony.*

Id. at 488, 272 S.E.2d at 355 (emphasis added).

Since the record shows that Plaintiff stipulated that the "relevant facts" concerning the Universal Life Church and Hawk Littlejohn's ordination as a minister therein were essentially the same as described by our Supreme Court in *Lynch*, and since our Supreme Court in *Lynch* stated that evidence that an individual was ordained by the Universal Life Church — as the Church is described in that case — "negates the fact that [the individual] was authorized under the laws of this State to perform a marriage ceremony," we are compelled in the present case to conclude that Defendant met his high burden of demonstrating that

Hawk Littlejohn was not authorized under the applicable version of N.C. Gen. Stat. § 51-1 to solemnize the 1989 ceremony.

We do not agree with the trial court's conclusion that N.C. Gen. Stat. § 51-1.1 passed by our Legislature in 1981, the year after *Lynch* was decided, renders the 1989 ceremony valid. Specifically, the trial court correctly found that "the Legislature passed N.C. Gen. Stat. Sec. 51-1.1 in 1981, prior to the parties [sic] marriage, which expressly validated all marriages performed by ministers of the Universal Life Church prior to July 3, 1981[,]" but then erroneously concluded that "the effect of [N.C. Gen. Stat. § 51-1.1] is to give legislative approval to marriages performed by ministers of the Universal Life Church[.]"

In other words, we believe the trial court erred by concluding that our Legislature intended to give its approval to marriage ceremonies performed by ministers of the Universal Life Church, even if they were performed *after* 3 July 1981, because we believe the express terms of the statute validated only those otherwise voidable marriages solemnized by a minister of the Universal Life Church before 3 July 1981. *See Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 66, 692 S.E.2d 96, 100 (2010) (stating that "[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required").

Indeed, in *Fulton v. Vickery*, this Court described N.C. Gen. Stat. § 51-1.1 as a "curative statute." 73 N.C. App. at 385, 326 S.E.2d at 357. In other words, by limiting the scope of the statute only to those marriages performed prior to 3 July 1981, the Legislature intended to provide relief to any "innocent" couple whose marital status was suddenly put in doubt by the *Lynch* decision. However, had the Legislature intended to validate otherwise voidable marriages solemnized by the Universal Life Church *for all time*, it could have easily done so.[5]

In this case, since the trial court found that the parties were married by Hawk Littlejohn on a date *after* 3 July 1981, the curative effect of N.C. Gen. Stat. § 51-1.1 would not apply. Accordingly, the parties' marriage — as based on the 1989 ceremony — was voidable, and subject to attack in a direct proceeding pursuant to N.C. Gen. Stat. § 50-4.

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5. There is no evidence in the record regarding the current criteria for ordination in the Universal Life Church; and, accordingly, we express no opinion about marriages that might have been solemnized by other Universal Life Church ministers since *Lynch*. Further, we express no opinion regarding the voidability of marriages solemnized by a Universal Life Church minister under the current version of N.C. Gen. Stat. § 51-1.

2. Judicial Estoppel

[3] Defendant argues that the trial court erred by concluding that, even if the 1989 ceremony was voidable, Defendant was judicially estopped from contesting its validity. We agree.

Our Supreme Court has stated that three factors are to be considered in applying the doctrine of judicial estoppel: (1) whether a party's position in a legal proceeding is clearly inconsistent with an earlier position taken in a legal proceeding; (2) whether the party succeeded in persuading a court to accept the party's earlier position; and (3) whether the party seeking to assert the inconsistent position would derive some unfair advantage or impose an unfair detriment on the opposing party. *Whitacre v. BioSignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 888-89 (2004).

In this case, the trial court's order does not contain any finding that Defendant took the position in this or any other judicial proceeding that the 1989 ceremony was valid. Rather, the record reflects that Defendant *denied* in his initial pleading in this action Plaintiff's allegation that they were married in 1989. Accordingly, we hold that the trial court erred by concluding that Defendant was judicially estopped from contesting the validity of the 1989 ceremony.

3. Equitable Estoppel

[4] Defendant argues that the trial court erred by concluding that he is equitably estopped from challenging the validity of the 1989 ceremony. Specifically, he argues that Plaintiff is barred from asserting equitable estoppel because she has "unclean hands" by having participated in the 1989 ceremony. Plaintiff, on the other hand, argues that estoppel[6] does apply in this case. In support of their respective positions, each party has cited opinions from this Court and our Supreme Court which address the propriety of estopping a party from challenging the validity of a void or voidable marriage. We have carefully reviewed these cases and believe that the trial court correctly concluded that Defendant was equitably estopped from challenging the validity of the 1989 ceremony.

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6. The trial court concluded that Defendant was "equitably estopped" from challenging the validity of the 1989 ceremony. In the cases cited by the parties, the reviewing courts employ both the doctrines of "equitable estoppel" and "quasi-estoppel." Our Supreme Court has described "quasi-estoppel" as a "branch of equitable estoppel" with the key distinction being that the former "may operate without detrimental reliance on the part of the party invoking the estoppel." *Whitacre*, 358 N.C. at 18, 591 S.E.2d at 882. We believe that the distinction is insignificant in the present case and believe that the cases considering either doctrine are helpful in our resolution of this issue. *See Mayer v. Mayer*, 66 N.C. App. 522, 532-36, 311 S.E.2d 659, 666-69 (1984) (relying on analyses in cases applying "equitable estoppel" though applying "quasi-estoppel" principles).

Whether principles of estoppel apply "turn[s] on the particular facts of each case." *Mayer*, 66 N.C. App. at 535, 311 S.E.2d at 668. The application of estoppel in divorce actions in North Carolina can be illustrated in three cases decided by this Court, *Hurston v. Hurston*, 179 N.C. App. 809, 635 S.E.2d 451 (2006); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980); and *Mayer*, *supra*, each of which involved (1) a wife seeking post-marriage support from her husband; (2) the husband seeking to avoid such obligation by asserting that the marriage was void based on the fact that either he or his putative wife had failed to obtain a valid divorce from a prior marriage; and (3) the wife contending that her putative husband was estopped from contesting the validity of their marriage. We compare each of these decisions below.

Hurston, a case relied upon by Defendant, involved facts at one extreme of the spectrum. There, it was the wife who had been previously married and who had obtained an invalid Dominican Republic divorce. Therefore, we held in *Hurston* that the wife could *not* assert estoppel because she had "unclean hands," reasoning that though her putative husband "might have been negligent" by not ever questioning during the marriage the validity of the wife's first divorce, "it was the [wife] who did not obtain the valid divorce decree before attempting to enter into another marriage[,]" describing her as being "culpably negligent." *Hurston*, 179 N.C. App. at 815, 635 S.E.2d at 454. Accordingly, we held that the husband *was no*t equitably estopped from contesting the validity of the marriage.

Redfern involved facts on the other extreme of the spectrum. Specifically, in *Redfern*, it was the husband — and not the wife — who had been previously married and had entered the second marriage before, unbeknownst to his putative wife, the divorce decree from his first marriage had been signed. This Court determined that the husband was culpably negligent in failing to obtain a signed divorce decree; and, therefore, he was estopped from contesting the validity of the second marriage as his defense to avoid paying support to his putative wife. *Redfern*, 49 N.C. App. at 97, 270 S.E.2d 608-09.

The facts in *Mayer* fall between the extremes of *Hurston* and *Redfern*. Like the wife in *Hurston*, the wife in *Mayer* had obtained an invalid Dominican Republic divorce in an attempt to end her first marriage. However, unlike the putative second husband in *Hurston*, the putative second husband in *Mayer* was involved in helping his wife obtain the invalid Dominican divorce from her first husband. Specifically, the putative second husband had insisted that his wife obtain the Dominican divorce and had accompanied her there to help her obtain the divorce.

The putative second husband, nonetheless, argued that his wife should not be able to assert estoppel since "the equities in this case weigh no more heavily for [the wife] than for him since [*inter alia*] she and he are *in pari delicto* [in that she participated equally with him to obtain the Dominican divorce]." *Mayer*, 66 N.C. App. at 531, 311 S.E.2d at 666. This Court concluded that even though no children had been born to the marriage and though the parties had not been married for that long, the scales of equity still tipped towards allowing the wife to assert estoppel to bar her putative second husband's defense to her claim for spousal support. *Id.* at 66 N.C. App. at 535, 311 S.E.2d at 668. Specifically, this Court stated that to allow a party to a marriage to challenge the validity of that marriage where he was actively involved in obtaining an invalid divorce for his putative spouse and which was relied upon by his putative spouse would cause "matrimonial uncertainty." *Id.* We note that in *Taylor v. Taylor*, our Supreme Court cited our analysis in *Mayer* with approval, quoting our reasoning that " 'in spite of the criticism that the application of a quasi-estoppel doctrine circumvents a state's divorce law, it would be even more inimical to our law and to our public policy to permit [the husband] to avoid his marital obligations by acting inconsistently with his prior conduct." 321 N.C. 244, 250-51, 362 S.E.2d 542, 546-47 (1987) (citation omitted) (alteration in original).

We believe that the facts in the present case — as found by the trial court in the 2007 order — are most similar to the facts in *Mayer*. Specifically, the findings suggest that both Plaintiff and Defendant were equally negligent in relying on Hawk Littlejohn's credentials. Accordingly, we believe that the trial court correctly applied the law in concluding that Defendant was equitably estopped from challenging the validity of the 1989 ceremony.

The scales of equity might have tipped towards Defendant had the evidence shown that Plaintiff had actually known at the time of the 1989 ceremony that Hawk Littlejohn was not authorized to solemnize a North Carolina marriage *or* that she had misrepresented to Defendant prior to the 1989 ceremony that she had engaged in some due diligence to determine the validity of Hawk Littlejohn's credentials where she, in fact, had not done so. Further, had Plaintiff not agreed to participate in the 2001 ceremony, the scales of equity would have swayed against her, at least with respect to any benefit she seeks in this action that relates to the period of the marriage occurring after she had learned in 2001 that her marriage was voidable. However, there is no evidence in the record indicating that Plaintiff was any more culpable than the wife in *Mayer*. We note that Defendant has pled allegations that might enhance Plaintiff's

culpability, including allegations about her expertise in Native American culture and her desire and insistence that she and Defendant participate in the traditional Cherokee ceremony officiated by Hawk Littlejohn. However, there is nothing in the Rule 9(c) statement indicating that any testimony or other evidence was presented to the trial court regarding these allegations. Rather, the Rule 9(c) statement simply recites that the parties both testified and that the testimonial evidence supported many of the trial court's findings in the 2007 order.

Accordingly, we affirm the trial court's determination that the date of marriage for purposes of this action is 15 October 1989. Further, because we hold that the trial court did not err in concluding that 15 October 1989 was the date of marriage for all matters related to this action, we necessarily hold that the trial court did not err in basing all subsequent orders on that date of marriage.

III. Dependent Spouse Determination

In his final argument, Defendant contends that, in its 31 March 2008 order, the trial court erred in making its conclusion of law 2, which states as follows:

> Taking into account the income and expenses of the parties living as [a] family unit for the several months prior [to] the separation of the parties, . . . Plaintiff is without sufficient means to maintain her accustomed standard of living and . . . Plaintiff is, therefore, a dependent spouse in that she is actually substantially dependent on . . . Defendant for her support as of the date of separation. Further, given that . . . Plaintiff's income is not sufficient to meet her monthly expenses, . . . Plaintiff is substantially in need of maintenance and support.

Defendant, however, makes no argument in his brief that any specific findings in the order are not supported by competent evidence. Defendant only nonspecifically argues that "the trial court erred in its legal conclusion #2 that . . . [P]laintiff is 'actually substantially dependent on . . . Defendant for her support as of the date of separation,' . . . as that conclusion was based on a finding that is not supported by the evidence." "Findings of fact to which no error is assigned 'are presumed to be supported by competent evidence and are binding on appeal.' " *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (citation omitted). This Court has held that when an appellant, as here, fails to argue specifically in his brief that contested findings of fact were unsupported by the evidence, any such argument is abandoned. *Peters*

v. Pennington, 210 N.C. App. 1, 16, 707 S.E.2d 724, 735 (2011) (citation omitted). Since Defendant made no argument as to which, if any, of the findings of fact in the trial court's 31 March 2008 order were unsupported, "this Court is therefore bound to accept as true the information therein." *Pascoe*, 183 N.C. App. at 651, 645 S.E.2d at 158 (citation omitted). We have nevertheless reviewed the relevant findings of fact and conclude that they are supported by competent record evidence and are binding on appeal. Therefore, we hold that the trial court did not err in finding Plaintiff to be actually substantially dependent on Defendant, and Defendant's argument to the contrary is without merit.

AFFIRMED.

Judge DAVIS concurs.

McGEE, Judge, concurring in result with separate opinion.

I concur in Section II A. 3., Equitable Estoppel, and in Section III, Dependent Spouse Determination, of the majority's opinion. I agree that the trial court did not err in ruling that Defendant was equitably estopped from denying 15 October 1989 as the date of marriage. I write separately because I believe the remainder of Section II of the majority opinion is dicta, which unnecessarily, and perhaps erroneously, addresses issues better left to future panels of this Court, should these issues again arise.

I.

Though I do not believe we need to, or should, address any issues beyond equitable estoppel in Section II, I am concerned with the statement of the majority that "Defendant met his high burden [of] show[ing] that Hawk Littlejohn was not authorized under the applicable version of N.C. Gen. Stat. § 51-1 to solemnize the 1989 ceremony." I am not at all certain Defendant met his burden in this regard, and would much prefer we not address this issue in dicta.

Initially, pursuant to N.C. Gen. Stat. § 51-1, a marriage ceremony results in a valid marriage if, *inter alia*, it is conducted "[i]n the presence of a minister authorized by a church[.]" N.C. Gen. Stat. § 51-1 (2013). Though I tend to agree with the majority opinion that Hawk Littlejohn's association with the Universal Life Church does not satisfy the requirements of N.C.G.S. § 51-1 in light of precedent of this Court and our Supreme Court, the majority fails to consider Hawk Littlejohn's uncontested status as a Cherokee Medicine Man.

The trial court made the following relevant findings of fact in its 15 October 2007 order:

> 10. That, on . . . October 15th, 1989, . . . Plaintiff and Defendant participated in a marriage ceremony performed by Hawk Littlejohn, a Cherokee Medicine Man;
>
> . . . .
>
> 12. That the ceremony was attended by friends and family, had several sweat lodges, there was an exchange of corn and blankets, bagpipes were played and the exchanging of gold wedding bands took place. Further, . . . Defendant wore a kilt for the ceremony;
>
> . . . .
>
> 27. That the parties in this case expressed their solemn intent to marry at a traditional Cherokee ceremony attended by family and friends[.]
>
> . . . .
>
> 29. That . . . Defendant failed to produce any evidence or offer controlling law that Hawk Littlejohn was not . . . "authorized by his church" to perform weddings in accordance with the traditions of the Cherokee Indian Nation or in accordance with N.C. Gen. Stat. Sec. 51-1.

Defendant does not challenge the portion of finding of fact twenty-nine that states: "Defendant failed to produce any evidence or offer controlling law that Hawk Littlejohn was not . . . 'authorized by his church' to perform weddings in accordance with the traditions of the Cherokee Indian Nation or in accordance with N.C. Gen. Stat. Sec. 51-1." Because Defendant does not challenge this portion of finding of fact twenty-nine, it is binding on appeal. *Bethea v. Bethea*, 43 N.C. App. 372, 374, 258 S.E.2d 796, 798 (1979). Further, Defendant does not argue on appeal that Hawk Littlejohn, as a Cherokee Medicine Man, was not authorized to perform weddings. Having failed to challenge this finding, or the conclusions based upon it, Defendant has abandoned any such challenge. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008).

Because Defendant has failed to challenge the validity of the 1989 marriage based on one of the grounds found by the trial court in support of its ruling, Defendant has abandoned that challenge. I therefore disagree with the majority opinion's statement that "Defendant met his high burden [of] show[ing] that Hawk Littlejohn was not authorized under the applicable version of N.C. Gen. Stat. § 51-1 to solemnize the 1989 ceremony" on this ground as well.

I would also note that the issue of whether Hawk Littlejohn, or another Native American religious figure, could validly perform marriages pursuant to N.C.G.S. § 51-1 before it's amendment on 1 October 2001 has never been answered by our appellate courts. In dissenting from the majority opinion in *Pickard*, *supra*, that a marriage performed by Hawk Littlejohn in 1991 was valid through the application of judicial estoppel, the dissenting judge made the argument that the marriage was valid as performed, due in part to Hawk Littlejohn's status as a Cherokee Medicine Man. *Pickard*, 176 N.C. App. at 203-04, 625 S.E.2d at 876. Though the dissent in *Pickard* does not constitute controlling law, the argument included therein has never been directly addressed in North Carolina, and the majority does not address it here, though the trial court in this matter ruled the 1989 marriage valid, in part, for similar reasons.

II.

Finally, though not an issue argued on this appeal, I disagree with the definitive statement of the majority declaring the 1989 ceremony invalid, and thus the resulting marriage "voidable," because I recognize a possibility, as of yet undecided by any appellate court of this state, that the 1989 ceremony resulted in a valid marriage by action of statute.

Our General Assembly, on 10 May 2001, approved legislation to amend N.C.G.S. § 51-1 and other statutes ("the Act"). The Act was titled, in part: "MARRIAGE—LICENSING—SOLEMNIZATION[:] AN ACT TO AMEND THE MARRIAGE STATUTES TO BROADEN THE LIST OF PERSONS AUTHORIZED TO SOLEMNIZE MARRIAGES; *TO VALIDATE A MARRIAGE LICENSED AND SOLEMNIZED BY A FEDERALLY RECOGNIZED INDIAN TRIBE OR NATION*[.]" 2001 North Carolina Laws S.L. 2001-62 (H.B. 142) (emphasis added). By Section 1 of H.B. 142, N.C.G.S. § 51-1 was amended in part to read:

> A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:

(1) a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and

b. With the consequent declaration by the minister or magistrate that the persons are husband and wife; or

(2) *In accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe.*

N.C.G.S. § 51-1 (emphasis added).

The relevant enacting language of H.B. 142 is as follows: "[Section 1] of this act becomes effective October 1, 2001." 2001 North Carolina Laws S.L. 2001-62 (H.B. 142), Section 18. Because the Act was enacted in part to *validate* marriages performed in accordance with recognized Native American nations or tribes, and because there is no temporal restriction in the enacting language[1], I would not declare the 1989 marriage in this matter invalid and voidable, and would not imply that other marriage ceremonies performed in a similar manner before 1 October 2001, are invalid and therefore voidable.

I therefore limit my concurrence in Section II to the following: Assuming, *arguendo*, the 1989 marriage ceremony was invalid, and the resulting marriage was voidable, Defendant is equitably estopped from denying the validity of that marriage.

1. For example, the General Assembly could have used language similar to "The remainder of this act applies to marriage ceremonies performed *on or after* October 1, 2001," but did not.

EQUITY SOLUTIONS OF THE CAROLINAS, INC., PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RESPONDENT

No. COA13-300

Filed 18 February 2014

1. Appeal and Error—appealability—review of agency—no agency ruling

The merits of Equity Solutions' arguments were not before the trial court or the Court of Appeals where Equity Solutions, which assisted people with the recovery of surplus funds from foreclosure sales, requested from the State Treasurer a declaratory ruling that N.C.G.S. § 116B-78 did not apply to its business plan. The State Treasurer never rendered a declaratory ruling, despite investigative actions, letters, and allegations in an enforcement action complaint.

2. Administrative Law—trial court review of agency denial—de novo—properly applied

The trial court properly applied the *de novo* standard of review when reviewing Equity Solutions' petition for review of the State Treasurer's denial of its request for a declaratory ruling. The order demonstrated that the court properly reviewed the record, found there was evidence supporting the State Treasurer's reasons for declining to issue a ruling, and concluded that the State Treasurer's reasons, separately or together, constituted good cause for the denial.

3. Administrative Law—request for declaratory ruling—denied—good cause

The State Treasurer and the trial court properly determined that good cause existed to decline to issue a ruling on Equity Solutions' request for a declaratory ruling that N.C.G.S. § 116B-78 did not apply to its business plan, as it related to business practices at the time of the request. The State Treasurer was not obligated to ignore the existence of information discovered during an investigation that led to an enforcement action, it would have been a waste of administrative resources to issue a ruling on a matter that would likely be judicially determined in pending litigation, and the State Treasurer was not required to allow Equity Solutions to preempt the enforcement proceedings by requesting a declaratory ruling.

4. Administrative Law—request for declaratory ruling—hypothetical question

In a case which involved a company (Equity Solutions) that assisted people with the recovery of surplus funds from foreclosure sales, the State Treasurer could properly determine that good cause existed to deny Equity Solutions' request for a declaratory ruling as to potential future agreements because material terms were missing from the contracts. Any ruling would have been purely hypothetical.

Appeal by petitioner from order entered 11 September 2012 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 9 September 2013.

Ward and Smith, P.A., by A. Charles Ellis and Joseph A. Schouten, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Solicitor General Gary R. Govert, Special Deputy Attorney General K.D. Sturgis, and Special Deputy Attorney General M.A. Kelly Chambers, for respondent-appellee.

GEER, Judge.

Petitioner Equity Solutions of the Carolinas, Inc. appeals from the trial court's order affirming the North Carolina Department of State Treasurer's decision to deny Equity Solutions' request for a declaratory ruling and dismissing Equity Solutions' petition for judicial review of the State Treasurer's decision. On appeal, while Equity Solutions contends that the trial court applied an improper standard of review when reviewing the State Treasurer's decision to deny Equity Solutions' request for a declaratory ruling, we hold that the trial court employed the correct standard of review.

Further, Equity Solutions contends that the State Treasurer in fact issued a "*de facto* ruling" against Equity Solutions on the merits that the trial court should have reviewed. We disagree. The State Treasurer never rendered a declaratory ruling, and the merits of Equity Solutions' arguments were, therefore, not before the trial court and are not before this Court.

Facts

Equity Solutions is a business that identifies the possible existence of surplus funds remaining from foreclosure sales and contacts people

or entities it believes are entitled to some or all of the surplus funds. After then entering into an agreement with the owner of the surplus funds, Equity Solutions files before the clerk of the superior court holding the surplus funds a special proceeding pursuant to N.C. Gen. Stat. § 1-339.71 (2013).

Equity Solutions asserts that it attached to its "Petition for Surplus Funds" initiating the special proceeding a copy of its agreement with the owner of the surplus funds, which purports to assign the right to the funds to Equity Solutions in exchange for payment of a percentage of the amount of the funds. If the clerk of court allows the petition and directs that the foreclosure surplus funds be paid to Equity Solutions, then Equity Solutions pays the owner of the surplus funds the portion of the funds designated in the agreement.

The State has contended that Equity Solutions' business constitutes the recovery of abandoned and unclaimed property governed by the Unclaimed Property Act, N.C. Gen. Stat. §§ 116B-51 *et seq*. (2013). N.C. Gen. Stat. § 116B-78(a1) (2013) governs an "agreement . . . if its primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned." Agreements covered by the statute must be in writing and include certain disclosures regarding the property at issue and the fee being charged for the property's recovery. N.C. Gen. Stat. § 116B-78(b). The statute also generally limits the maximum allowable property finder's fee. N.C. Gen. Stat. § 116B-78(b)(6). A violation of the provisions of the statute constitutes an unfair or deceptive act or practice in violation of N.C. Gen. Stat. § 75-1.1 (2013). N.C. Gen. Stat. § 116B-78(g).

On 11 May 2010, the Attorney General of North Carolina issued an investigative demand to Equity Solutions seeking documents relating to Equity Solutions' business, claiming that it involved the recovery of abandoned or unclaimed property located in North Carolina. In April and June 2010, Allen Martin, an employee of the State Treasurer's office, sent letters to two county clerks of court stating that the agreements between Equity Solutions and its clients filed by Equity Solutions in superior court violated N.C. Gen. Stat. § 116B-78 and were, therefore, invalid.

On 18 June 2010, Equity Solutions submitted a letter to the State Treasurer describing its business model and attaching two sets of business documents that Equity Solutions claimed were representative of those it had used in the past and those it planned to use in the future. Equity Solutions requested that the State Treasurer issue "a declaratory ruling as to the applicability of N.C. Gen. Stat. § 116B-78 to the

assignment agreements which Equity Solutions has employed in its business operations in the past . . . and the agreements it intends to employ in the future . . . ."

On 13 August 2010, the State, through the Attorney General and the State Treasurer, filed an action against Equity Solutions and several individuals alleging claims for racketeering, unfair and deceptive practices, and unjust enrichment (the "enforcement action"). The complaint alleged that the assignment agreements referred to in Equity Solutions' request for a declaratory ruling were, in fact, "sham agreements" that were not supported by consideration. The complaint further alleged that Equity Solutions' business model included inducing "the apparent owners to agree to pay defendant Equity Solutions a 'contingency fee' and other fees and charges" that exceed the statutory maximum property finder's fee under the Unclaimed Property Act and that those contingency fee agreements constituted the real agreements between the parties. The complaint alleged that since the contingency fee agreements did not comply with N.C. Gen. Stat. § 116B-78 for several reasons, they were unenforceable.

On 16 August 2010, the State Treasurer sent a letter to Equity Solutions declining to issue a declaratory ruling and stating:

> Pursuant to N.C.G.S. § 150B-4 and 20 N.C.A.C. 01F 0205, I have determined that the issuance of a declaratory ruling is undesirable. Therefore, the Petitioner's request is denied for the following reasons:
>
> 1. The subject matter of the request is the subject of active litigation in Wake County between Equity Solutions, the State Treasurer, and the Attorney General.
>
> 2. The request seeks application of N.C.G.S. § 116B-78 to an "Absolute Assignment" and "Conveyance Agreement" without disclosing the full factual setting surrounding these documents, including any representations made to induce the apparent owner to sign these documents, and the manner in which any of these documents may have been used in court proceedings seeking disbursement of unclaimed or abandoned funds.
>
> 3. The request involves disputed issues of material fact, including whether the "Absolute

Assignment" represents an actual agreement between the parties.

4. The proposed "Purchase Agreement" offers only blank spaces for its material terms, such as the amount of the finder's fee, and the amount of the costs and expenses to be borne by the apparent owner.

On 15 September 2010, Equity Solutions filed a petition for judicial review of the State Treasurer's denial of its request for a declaratory ruling. On 15 October 2010, the State Treasurer moved to dismiss Equity Solutions' petition for judicial review pursuant to Rules 12(b)(1), (6), and (7) of the Rules of Civil Procedure.

On 18 October 2010, the defendants in the enforcement action, including Equity Solutions, filed an answer, motions to dismiss, a motion for Rule 11 sanctions, counterclaims against the State, and a third-party complaint against State Treasurer Janet Cowell, individually. On 17 November 2010, the State filed a motion to dismiss the third-party complaint against the State Treasurer, individually, and the counterclaims against the State. On 11 September 2012, the trial court entered an order denying the defendants' motions to dismiss in the enforcement action, but granting the State's motion to dismiss the counterclaims and third-party complaint in the enforcement action.

Also on 11 September 2012, the trial court entered an order affirming the State Treasurer's decision to deny Equity Solutions' request for a declaratory ruling and dismissing Equity Solutions' petition for judicial review. Equity Solutions timely appealed the order to this Court.

Discussion

"This Court's review of 'a superior court order entered upon review of an administrative agency decision, . . . [involves a] two-fold task: (1) [to] determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) [to] decide whether the court did so properly.' " *In re Denial of NC IDEA's Refund of Sales*, 196 N.C. App. 426, 433-34, 675 S.E.2d 88, 94-95 (2009) (quoting *Cnty. of Wake v. N.C. Dep't of Env't & Natural Res.*, 155 N.C. App. 225, 233–34, 573 S.E.2d 572, 579 (2002)).

Here, Equity Solutions sought a declaratory ruling from the State Treasurer pursuant to N.C. Gen. Stat. § 150B-4(a) (2009).[1] N.C. Gen. Stat.

1. The General Assembly enacted a revised version of N.C. Gen. Stat. § 150B-4 in 2011 N.C. Sess. Law ch. 398, § 56 (effective June 18, 2011). Given the date of Equity

§ 150B-4(a) provides in relevant part: "On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable."

After the State Treasurer denied Equity Solutions' request for a declaratory ruling, Equity Solutions petitioned the trial court for judicial review. The trial court's review of the State Treasurer's denial was governed by N.C. Gen. Stat. § 150B-51(b) (2009).[2] N.C. Gen. Stat. § 150B-51(b) provides that the trial court may

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

"During judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *In re Denial*, 196 N.C. App. at 432, 675 S.E.2d at 94. The first four grounds for reversing or modifying an agency's decision provided in N.C. Gen. Stat. § 150B-51(b) give rise to questions of law and the trial court, accordingly, reviews arguments based on those grounds de novo. *In re Denial*, 196 N.C. App. at 433, 675 S.E.2d at 94. However, the fifth and sixth grounds for reversing or modifying an agency's decision set

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Solutions' request for a declaratory ruling and the State Treasurer's denial of Equity Solutions' request, the revised version of N.C. Gen. Stat. § 150B-4 does not apply to this case.

2. The General Assembly's revised version of N.C. Gen. Stat. § 150B-51, enacted in 2011 N.C. Sess. Law ch. 398, § 27, applies "to contested cases commenced on or after" 1 January 2012 and, therefore, does not apply to this case. *Id.*

out in N.C. Gen. Stat. § 150B-51(b) involve factual inquiries, and the trial court, therefore, reviews arguments on those two grounds under the whole record test. *In re Denial*, 196 N.C. App. at 433, 675 S.E.2d at 94.

"Under the *de novo* standard of review, the trial court 'consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's[.]' " *Id.* (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "In conducting 'whole record' review, the trial court must examine all the record evidence in order to determine whether there is substantial evidence to support the agency's decision." *Id.* "When the trial court reviews an administrative decision under the whole record test, it 'may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*.' " *Id.* (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)).

In this case, in reviewing the State Treasurer's decision, the trial court concluded (1) that "[t]here is substantial, competent evidence to support each of the State Treasurer's reasons for denying the requested declaratory rulings" and (2) that "[t]he State Treasurer's reasons for denying the request, each standing alone or taken together, constitute 'good cause' for the denial." The trial court further observed that "material factual representations in, and omissions from, Equity Solutions' request . . . presented merely hypothetical circumstances and did not provide 'a given state of facts' regarding genuine and legally valid 'assignments' about which Equity Solutions is presently 'aggrieved' within the meaning of N.C. Gen. Stat. § 150B-4."

The order additionally found:

> Regarding Equity Solutions' proposed new "Purchase Contracts," on the face of the record and Equity Solutions' pleadings, these documents are simply possible future contracts, with several material terms not provided by Equity Solutions. Therefore, Equity Solutions is not presently "aggrieved" regarding the possible validity or invalidity of those potential contracts under N.C. Gen. Stat. § 116B-78 (whatever their material terms may end up being), and the State Treasurer therefore could not have lawfully rendered an advisory opinion on that matter as well.

The trial court ultimately concluded that "[t]he State Treasurer's denial of the request for declaratory rulings was not arbitrary, capricious, an

abuse of discretion, or otherwise in violation of substantive or procedural law."

I

[1] Equity Solutions first argues that the trial court erred in limiting its decision to whether the State Treasurer properly declined to give a declaratory ruling. Equity Solutions argues that the trial court should have reached — and this Court should reach — the merits of Equity Solutions' request for a declaratory ruling and hold that N.C. Gen. Stat. § 116B-78 does not apply to its business model. Equity Solutions contends that the State Treasurer issued a "*de facto* ruling" denying its request on the merits since the State Treasurer "made [her] position very clear, through [her] Complaint in the State Action and by the actions taken by Allen Martin and the Attorney General's Office, that Section 116B-78 *did* apply to Equity Solutions' business arrangements."

However, investigative actions by the Attorney General's Office, letters from a State Treasurer's Office employee to two county clerks of court, and allegations in the enforcement action complaint do not individually or collectively constitute a formal decision by a State agency that is legally binding on Equity Solutions and the State Treasurer, as a formal declaratory ruling would be. *See* N.C. Gen. Stat. § 150B-4(a) ("A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court."). Since there has been no declaratory ruling that actually binds Equity Solutions and the State Treasurer, there was no decision on the merits before the trial court or this Court.

Equity Solutions nonetheless contends that because its request sought a decision on a solely legal issue — whether N.C. Gen. Stat. § 116B-78 applies to its business model as described in its request to the State Treasurer — and because this Court reviews legal issues de novo, this Court can properly reach the merits of the request for a declaratory ruling. Equity Solutions' argument appears to confuse the concept of a trial de novo, in which a court conducts a " 'new trial on the entire case . . . as if there had been no trial in the first instance[,]' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 661 n.3, 599 S.E.2d 888, 895 n.3 (2004) (quoting *Black's Law Dictionary* 1512 (7th ed. 1999)), with the concept of a de novo standard of review "that applies when the trial court acts, as here, in the capacity of an appellate court and reviews an agency decision for errors of law and procedure," *id.* (internal citation omitted). Again, because there has been no agency decision on the

merits in this case, there is no decision to which this Court can apply a de novo standard of review.

We, therefore, offer no opinion on the merits of Equity Solutions' request for a declaratory ruling. That issue was not before the trial court and is not before this Court.

II

[2] Equity Solutions next argues that the trial court applied an improper standard of review when reviewing the petition from the State Treasurer's denial of its request for a declaratory ruling. We disagree.

When reviewing the issue whether an agency had good cause to decline to issue a declaratory ruling, the reviewing court must first determine whether the record supports the reasons given by the agency for declining to issue a ruling. *Cf. Charlotte-Mecklenburg Hosp. Auth. v. Bruton*, 145 N.C. App. 190, 191-92, 550 S.E.2d 524, 525-26 (2001) (setting out pertinent facts in record supporting agency's determination that good cause existed to decline to issue declaratory ruling). If the reviewing court determines there is record support for the reason given by the agency, the reviewing court then reviews de novo whether the reason given constitutes good cause to decline to issue a ruling. *Id.* at 193, 550 S.E.2d at 526.

Here, the trial court's order detailed the facts in the record supporting the State Treasurer's reasons for declining to issue a ruling. The court then determined that there was "substantial, competent evidence to support each of the State Treasurer's reasons for denying the requested declaratory rulings." Thus, the order demonstrates that the court properly reviewed the record and found there was evidence supporting the State Treasurer's reasons for declining to issue a ruling.

After determining that the record supported the reasons given by the State Treasurer, the trial court further concluded, in a separately numbered conclusion of law, that the "State Treasurer's reasons for denying the request, each standing alone or taken together, constitute 'good cause' for the denial." Given this language, we hold that the trial court properly applied a de novo standard of review to the issue whether the reasons set forth by the trial court constituted good cause to decline to issue a ruling. We note, however, that the better practice is for a trial court reviewing an agency decision to expressly state which standard of review it has applied to each distinct issue decided in an order.

Equity Solutions nonetheless points to the language in the trial court's order stating that the court "reviewed the whole record to

determine whether there is substantial, competent evidence to support the denial of the request for declaratory rulings" in support of its contention that the court erroneously applied the whole record test rather than de novo review. However, this language supports our determination that the trial court first properly concluded that the record contained evidence supporting the State Treasurer's reasons for declining to issue a ruling, and it does not demonstrate that the trial court erroneously applied whole record review to the legal issue before the trial court: whether the reasons given by the State Treasurer constituted good cause. The trial court, therefore, applied the proper standard of review.

III

[3] Equity Solutions next contends that even if the trial court did apply the proper standard of review, the court erred in affirming the State Treasurer's determination that good cause existed to decline to issue a ruling. We, like the trial court, review this issue de novo. *Id.*

The first three reasons given by the State Treasurer in declining to issue a ruling were (1) that the subject matter of the request was "the subject of active litigation in Wake County between Equity Solutions, the State Treasurer, and the Attorney General"; (2) that the request failed to disclose the "full factual setting" of Equity Solutions' business model, including "any representations made to induce the apparent owner" to sign the conveyance and assignment agreements used by Equity Solutions; and (3) that the request involved "disputed issues of material fact," including whether the assignment agreements represented "an actual agreement between the parties." The trial court agreed.

Equity Solutions has conceded on appeal that this declaratory ruling action concerns "the same subject matter" as the enforcement action and that the issues presented in its request for a declaratory ruling will probably be decided in the course of the enforcement action. In addition, in its request for a declaratory ruling, Equity Solutions did not disclose that it entered into contingency fee agreements with the owners of surplus funds prior to entering into subsequent conveyance and assignment agreements. Equity Solutions later filed an affidavit of its vice president in superior court that acknowledged its practice of entering into an initial "Authority to Represent & Contingency Fee Agreement" with the apparent owners. It was these contingency fee agreements that the Attorney General and State Treasurer contended, in the enforcement action, constituted, in whole or in part, the actual agreements between the parties.

This Court has previously held that an agency had good cause to decline to issue a ruling where the agency had already issued a ruling on the same matter and issuing a second ruling would, therefore, constitute a waste of administrative resources. *Id.* at 192-93, 550 S.E.2d at 526-27; *Catawba Mem'l Hosp. v. N.C. Dep't of Human Res.*, 112 N.C. App. 557, 563, 436 S.E.2d 390, 393 (1993). Although the State Treasurer had not, in this case, already decided the issue presented in Equity Solutions' request, we believe that the principle underlying the holdings in *Charlotte-Mecklenburg Hospital* and *Catawba Memorial Hospital* is also applicable here.

It would be a waste of administrative resources for the State Treasurer to issue a ruling on a matter that would likely be judicially determined during the course of pending litigation between Equity Solutions and the State Treasurer. This is particularly true since the trial court ruling on the issues in the enforcement action will have the benefit of a fully developed factual record following discovery, while Equity Solutions' request to the State Treasurer presented only an alleged factual basis for a ruling that did not mention the contingency fee agreements that Equity Solutions has since admitted were part of its business model. Indeed, the State Treasurer was aware that the request submitted by Equity Solutions presented the State Treasurer with an inadequate record from which to issue a ruling.

Equity Solutions, however, asserts that the State Treasurer should not be allowed to "manufacture 'good cause' to avoid issuing a ruling" by, as here, "filing a complaint on the same subject matter *after* receiving the request for a ruling." However, the record shows that the Attorney General and State Treasurer were openly investigating Equity Solutions at least one month prior to the time of Equity Solutions' request and that Equity Solutions was aware of that investigation. We do not believe that the Attorney General or the State Treasurer's discretion in determining when to file their enforcement action resulting from months of investigation should have been curtailed because of the timing of Equity Solutions' decision to request a declaratory ruling from the State Treasurer. The State Treasurer was not required to allow Equity Solutions to preempt the enforcement proceedings by requesting a declaratory ruling.

With respect to the issue of a factual dispute, Equity Solutions contends that the "sole purpose" of N.C. Gen. Stat. § 150B-4 is for an agency to aid an aggrieved person by applying the statute to a "given set of facts." Equity Solutions asserts that "[t]he agency is not charged with a broader authority to investigate the 'given set of facts' to determine

whether other legal issues exist or to otherwise assess the legal validity or viability of the proposed transaction . . . ."

However, in *Catawba Memorial Hospital*, this Court determined that the set of facts provided by the petitioner in its belated request for a declaratory ruling would not control where the agency had already closed the record of a contested case hearing on the same matter, and the agency had determined, in the contested case, the actual facts to be inconsistent with the set of facts provided in the petitioner's request. *See* 112 N.C. App. at 563, 436 S.E.2d at 393 ("Whereas a declaratory ruling by definition involves the application of a statute or agency rule to a given state of facts, the facts regarding [the petitioner's] proposed surgical services were established by the record in the contested case."). Similarly, here, the State Treasurer was not obligated to ignore the existence of the information regarding this same matter that had been discovered during the investigation that led to the enforcement action when deciding whether good cause existed to decline to issue a ruling on Equity Solutions' request.

Equity Solutions also cites *Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 276, 691 S.E.2d 421 (2010), *disc. review denied*, 365 N.C. 87, 706 S.E.2d 254 (2011), in support of its argument that its failure to provide a more factually complete request for a declaratory ruling did not constitute good cause for the State Treasurer to decline to issue a ruling. However, the Court in *Hope* did not address whether circumstances existed, in that case, that would have constituted good cause to deny issuing a ruling since the agency, in fact, issued a ruling on the relevant request. *Id.* at 279, 282, 691 S.E.2d at 423, 425. *Hope* does not, therefore, support Equity Solutions' argument.

We, accordingly, hold that the State Treasurer, and the trial court, properly determined that good cause existed to decline to issue a ruling on Equity Solutions' request, based on the first three grounds asserted by the State Treasurer, as it related to the business practices already used by Equity Solutions at the time of the request.

[4] The issue remains whether the State Treasurer had good cause to decline to issue a ruling as to the business practice that Equity Solutions planned to employ in the future. With respect to the agreements that Equity Solutions' request stated that it proposed to use, the State Treasurer declined to issue a ruling regarding the propriety of those agreements because "[t]he proposed 'Purchase Agreement[]' offer[ed] only blank spaces for its material terms, such as the amount of the finder's fee, and the amount of the costs and expenses to be borne by the

apparent owner." As the State Treasurer noted, the purchase agreement Equity Solutions claimed it planned to use in the future had blank spaces for material terms, including the percentage of the surplus funds which would be paid by Equity Solutions to the apparent owner in exchange for the apparent owner's selling Equity Solutions the owner's right to the funds — in other words, Equity Solutions' fee.

In *Diggs v. N.C. Dep't of Health & Human Servs.*, 157 N.C. App. 344, 345, 578 S.E.2d 666, 667 (2003), the petitioner was a custodial parent of three children and had previously been the caretaker of her niece, and she petitioned an agency for a declaratory ruling that the practice of calculating the debt owed to the State when an adult caretaker accepts payment of benefits under certain government programs was invalid. In order to demonstrate that she was a "person aggrieved" under N.C. Gen. Stat. § 150B-4, the petitioner set out "two hypothetical situations involving whether child support paid by the biological father of petitioner's children . . . pursuant to a court order for the support of their biological children may be taken by the State for reimbursement of earlier and separate public assistance grants made solely for the use and benefit of petitioner's niece . . . ." *Diggs*, 157 N.C. App. at 347, 578 S.E.2d at 668.

On appeal, this Court held that the petitioner was not entitled to a declaratory ruling since she was "not presently aggrieved." *Id.* at 348, 578 S.E.2d at 668. The Court reasoned that the petitioner's request presented merely hypothetical scenarios that were not certain to occur and, therefore, the petitioner could not show that her legal rights had, in some way, been impaired. *Id.*, 578 S.E.2d at 668-69. Because the agency had, nonetheless, issued a ruling on the petitioner's request, the court further held that "the request was ineffective to trigger the issuance of a declaratory ruling, and the declaratory ruling has no effect, binding or otherwise, on petitioner . . . ." *Id.* at 349, 578 S.E.2d at 669.

Similarly, here, the State Treasurer could properly determine that good cause existed to deny Equity Solutions' request for a declaratory ruling as to the potential future agreements since, given the missing material terms of the contracts, any ruling on whether the contracts were in compliance with N.C. Gen. Stat. § 116B-78 would be purely hypothetical. Notably, the allegations in the enforcement action that the agreements actually used by Equity Solutions in the past violated N.C. Gen. Stat. § 116B-78 are focused, in part, on allegations that the fees charged by Equity Solutions exceeded the statutory limit for property finder's fees. Yet, the proposed purchase agreements did not specify the amount of the finder's fee.

In the absence of a proposed agreement setting out all terms material to the request for a declaratory ruling, the State Treasurer did not have authority to issue a ruling because, as in *Diggs*, she was presented only with a hypothetical scenario, and Equity Solutions could not show that any of its legal rights were legally impaired. We, therefore, hold that the State Treasurer had good cause to decline to issue a ruling as to the future purchase agreements based upon the fourth ground provided by the State Treasurer.

In sum, the trial court applied the proper standard of review and did not err in affirming the State Treasurer's decision to decline to issue a ruling on Equity Solutions' request based upon all four grounds provided by the State Treasurer. Consequently, we affirm the trial court's order.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

DOUGLAS SCOTT FILE, EMPLOYEE-PLAINTIFF
v.
NORANDAL USA, INC., EMPLOYER, ACE USA, CARRIER, DEFENDANTS

No. COA13-977

Filed 18 February 2014

Workers' Compensation—occupational disease—brain cancer—denial of claim

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's claim alleging that his close proximity to high energy machinery at his workplace exposed him to radiation that contributed to the development of brain cancer. The Commission properly considered all of the evidence, made findings of fact that were supported by competent evidence, appropriately accepted evidence of causation, and correctly found that the claim was not compensable. Further, the evidence supported the Commission's finding that plaintiff did not have a greater exposure to radiation than the general public.

Appeal by Douglas Scott File from Opinion and Award entered 10 May 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2014.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff.

Hedrick, Gardner, Kincheloe, & Garofalo, L.L.P., by Paul C. Lawrence, Zachary V. Renegar, and M. Duane Jones, for defendants.

ELMORE, Judge.

Douglas Scott File (plaintiff) appeals from the North Carolina Industrial Commission's denial of his claim for workers' compensation benefits pursuant to N.C. Gen. Stat. § 97-53. After careful review, we affirm the Opinion and Award of the Industrial Commission.

I. Background

On 28 April 2005, plaintiff filed a Form 18 "Notice of Accident to Employer and Claim of Employee" alleging that his close proximity to high energy machinery at his workplace exposed him to radiation that contributed to the development of brain cancer. Plaintiff's employer, Norandal USA, Inc. (defendant), denied plaintiff's claim. Thereafter, the claim was assigned for hearing before the Industrial Commission, and Deputy Commissioner J. Brad Donovan denied plaintiff's claim for workers' compensation benefits. Plaintiff subsequently appealed to the Full Commission (the Commission). In an Opinion and Award filed 10 May 2013, the Commission ruled that plaintiff failed to "prove that he suffer[ed] from an occupational disease compensable within the meaning of N.C. Gen. Stat. § 97-53(13)" and denied his claim. Plaintiff now appeals to this Court from the Commission's 10 May 2013 Opinion and Award.

II. Facts

Defendant is a company that owns an aluminum plant (the plant) in Salisbury and manufactures aluminum foil. Plaintiff worked for defendant in the plant from 1984 until 2007. Between the years of 1984 and 1994, plaintiff was employed as a mill operator. The mill is a machine that transforms a thick sheet of aluminum to a thin sheet of aluminum foil. The plant has five mills in operation, and each utilizes a "Measurex" device (collectively "the devices"), which sends x-ray beams through an aluminum sheet to measure its thickness. Once the thickness is determined, the device sends the data to a computer that modifies the mill rolls to make sure the aluminum thickness is appropriate.

Plaintiff worked in the maintenance department from 1994 until his retirement in 2007. Plaintiff was diagnosed with brain cancer in 2000, had surgery to remove a benign tumor, and returned to work after six

months. The brain cancer returned in 2004, and once again plaintiff missed time from work to treat his condition. Plaintiff returned to work, only to be diagnosed with brain cancer again and develop a malignant tumor in 2007. Due to complications from the third surgery, plaintiff was unable to perform his occupational responsibilities and he retired on disability.

During plaintiff's employment, his work duties included preventative maintenance and repairs on the mills, which exposed him to the devices on a daily basis. Plaintiff testified that he worked within three to five feet of the devices while they were running. This was corroborated by Terry Walker, a colleague of plaintiff's, who performed the same job responsibilities. Plaintiff called Dr. Max Costa and Dr. David Schwartz as expert witnesses. They both opined that plaintiff's employment increased his risk of developing brain cancer due to radiation exposure from the devices.

The devices were manufactured by Honeywell Corporation, and Robert Kesslick was Honeywell's on-site technician during plaintiff's employment. Kesslick maintained the devices' control system and made repairs on the devices. Defendant called Kesslick as a witness, and he testified that the closest an individual could get to Mills #2 and #3 was five feet and ten feet on Mills #1 and #4. He further stated that throughout his years testing the devices, he "never received a dosage of any recordable level of radiation." Defendant tendered Dr. Robert Dixon as an expert in x-ray physics with subspecialties in radiation shielding and radiation dosimetry. He concluded that any radiation exposure to employees from the devices would be "virtually non-existent[.]"

At the hearing, plaintiff introduced the on-site device safety manual provided by Honeywell to defendant, an "Ionizing Radiation Fact Book[,]" and the "BEIR Study" to contradict defendant's witnesses about the devices' radiation levels and the effects of radiation on humans.

III. Analysis

a.) Consideration of Evidence

Plaintiff argues that the Commission erred by disregarding documentary evidence introduced by him during Dixon's testimony and Kesslick's deposition. We disagree.

Review of an Opinion and Award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to

support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). This Court conducts a *de novo* review of the Commission's conclusions of law. *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008).

Before the Commission makes findings of fact, it "must consider and evaluate all of the evidence. Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence." *Lineback v. Wake Cnty. Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (citations omitted). Where the Commission's Opinion and Award fails to indicate that it considered testimony "relevant to the exact point in controversy," it "must be vacated, and the proceeding remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order." *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 78-79, 541 S.E.2d 510, 515 (2001) (citation and quotation omitted). However, we have specifically declined to "require findings of fact regarding a report" used during depositions. *Hunt v. N. Carolina State Univ.*, 194 N.C. App. 662, 666, 670 S.E.2d 309, 312 (2009).

In *Hunt*, the plaintiff argued on appeal that the Commission erroneously ignored an opinion of an expert "by not considering or mentioning [the expert's] vocational report" in its Opinion and Award. *Id.* at 664-65, 670 S.E.2d at 311. The expert did not testify at the hearing in front of the Commission or by deposition. *Id.* at 665, 670 S.E.2d at 312. Instead, two doctors relied on the expert's report during their testimony. *Id.* at 666, 670 S.E.2d at 312. Because the Commission made specific findings as to the doctors' testimony, this Court ruled that "[i]t was not necessary for the Commission to make further findings regarding the documents used during the depositions." *Id.*

Similarly, plaintiff in this case introduced the safety manual, the "Ionizing Radiation Fact Book[,]" and the "BEIR Study" to contradict Dixon's testimony about the devices' radiation levels and the effects of radiation on humans. The safety manual was also discussed in detail during Kesslick's deposition. While the Commission did not specifically mention the documents in its Opinion and Award, it made detailed findings about both Dixon's and Kesslick's testimony. Thus, similar to *Hunt*, the Commission was not required to make specific findings of fact related to the documents used during the testimony of Dixon and Kesslick. *See Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502

S.E.2d 58, 62 (1998) (quotation omitted) (acknowledging that while the Commission "did not specifically find that it was rejecting the evidence" in support of appellant's contention, "[s]uch negative findings are not required"); *See also Graham v. Masonry Reinforcing Corp. of Am.*, 188 N.C. App. 755, 763, 656 S.E.2d 676, 682 (2008)("[T]he Commission is not required to make findings as to each fact presented by the evidence[.]").

b.) Findings of Fact

Next, plaintiff argues that the trial court erred in making findings of fact that were not supported by any competent evidence. Specifically, plaintiff challenges findings of fact #11, #13, #6, and #8. We disagree.

"If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary." *Graham*, 188 N.C. App. at 758, 656 S.E.2d at 679.

First, plaintiff challenges part of finding #11, which states:

> 11. It is Dr. Dixon's opinion that plaintiff was not exposed to radiation above background levels, and therefore, that his employment did not contribute to his development of brain cancer.

Dixon testified that he measured the level of background radiation (radiation levels found in the general environment) outside the facility and next to the device while it emitted x-rays. Dixon stated that he "couldn't detect anything above the natural background when [he] made the measurement." He "got as close as [he] could with [his] detector, got nothing, and also made a measurement where people would normally be around called the bridle area." He "looked around and nothing could be found." Based on his measurements, Dixon concluded that "the chances of any radiation above — significantly above background would be very, very small, if any. I couldn't measure any. And I got a lot closer than [plaintiff] would normally be if he were exposed. . . . In other words, it couldn't have produced this cancer." Clearly, finding #11 is supported by competent evidence.

Plaintiff also challenges finding #13, which states, in relevant part,

> 13. Dr. Costa's opinion that plaintiff's employment with defendant-employer placed him at an increased risk of developing brain cancer and that it was a significant contributing factor to his development of brain cancer was predicated on a belief that there was a "general leakage

> of radiation" in the area in which plaintiff worked, an assumption which is not borne out by the testimony of Mr. Kesslick and Dr. Dixon. With regard to increased risk specifically, Dr. Costa testified, "I imagine those machines give off radiation so I think that that [sic] would be higher than the general public . . ." When Dr. Costa testified on cross examination that "these machines tend to leak all over, . . ." he offered no basis in fact for that opinion and went on to concede that he is not an expert in x-ray leaks. Dr. Costa did not know how much or how far radiation is emitted from the Honeywell/Measurex devices, nor did he have any information about how much radiation above background, if any, plaintiff might have been exposed to in his employment.

Costa admitted that he did not know "the amount of any radiation that [plaintiff] might have been exposed to[.]" He testified that plaintiff's "exposure would be greater than the general population" if plaintiff was merely "near" the machine. However, he conceded that he did not know how far the devices emit radiation. Costa then testified that "[t]hese machines tend to leak all over, so, you know, I just assumed that there was a . . . general leakage of radiation[.]" This assertion contravenes Dixon's testimony that the "x-ray tube is shielded against leakage" and has a "very little chance of scatter." Furthermore, Costa stated that he is "not an expert" with regard to radiation machines or x-ray leaks. The aforementioned testimony indicates that the Commission's finding #13 is supported by competent evidence.

Plaintiff also contests a portion of finding #6, which states:

> 6. During operation, it is impossible for any employee to get within ten feet of the Measurex device on Mills #1 and #4. An employee can get no closer than five feet to the sensor on Mills #2, #3, and #5.

Kesslick testified that a person "couldn't get within ten feet" of the device on Mill #1 or #4. While Mills #2, #3, and #5 were in operation, Kesslick stated that an individual "couldn't get within five feet of [them]." Thus, Kesslick's testimony provided the Commission with competent evidence to support finding #6.

Plaintiff also argues that the Commission's finding of fact #8 is not supported by competent evidence because it relies on Kesslick's radiation badge readings to conclude that no excessive radiation levels emitted in the work area. Specifically, plaintiff argues that when Kesslick

worked on the devices, the mills would be shut down such that the devices were unable to emit any radiation. Finding of fact #8 states:

> 8. [a]ccording to Mr. Kesslick, the Honeywell/Measurex control system has multiple safety interlock devices that function to prevent the x-ray from emitting radiation when not in operation. These safety devices were checked at six-month intervals and were never found to be malfunctioning. Mr. Kesslick also wore a radiation dosimetry badge designed to record any type of radiation dose. During the time he worked at defendant-employer's plant, Mr. Kesslick never received a dosage of any recordable level of radiation.

The testimony indicates that Kesslick has worked for Honeywell-Measurex for twenty-five years as a maintenance control technician. One of his responsibilities is to conduct radiation safety tests on the devices every six months. When Kesslick performed these tests, he always wore a radiation badge, which is "designed to record any type of radiation dose[.]" During the testing, Kesslick ensured that amber lights were illuminated on the device. This indicated that power was supplied to the x-ray tube, allowing the device to produce x-rays. He also verified that a red lamp was on, which indicated that the device's shutter was open. When the shutter was open, x-rays were emitted. Thus, when Kesslick tested the devices, they emitted x-rays, and his radiation badge could appropriately measure any radiation exposure. Accordingly, the Commission's find of fact #8 is supported by competent evidence.

c.) Causation

Next on appeal, plaintiff argues that the Commission erroneously relied on Dixon's testimony that plaintiff's "employment did not contribute to his development of brain cancer." We disagree.

Plaintiff bears the burden of establishing the elements of an occupational disease pursuant to N.C. Gen. Stat. § 97–53(13). *Gibbs v. Leggett & Platt, Inc.*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993). Plaintiff must show that the occupational disease is

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the [claimant's] employment.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations and quotation omitted). Thus, the Commission must, in part, determine that plaintiff's employment "exposed him to a greater risk of [disease] than members of the public generally[.]" *Perry v. Burlington Indus., Inc.*, 80 N.C. App. 650, 655, 343 S.E.2d 215, 219 (1986). Only once such a determination is made can the Commission decide whether the "occupational exposure substantially contributed to development of the disease." *Id.* Once the issue of causation is reached, if an "injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citation omitted).

Here, plaintiff mischaracterizes Dixon's testimony as an opinion about causation rather than testimony about the level of exposure to radiation. Plaintiff urges us to rule, pursuant to *Click*, that Dixon's testimony was not competent evidence because he is not an expert in providing medical causation testimony. However, we find *Click* inapplicable in the present case because the crux of Dixon's testimony related to whether plaintiff's exposure to the devices subjected him to higher radiation levels than the general public. Through this lens, Dixon's testimony was competent within the subject matter of his expertise in "x-ray and physics with subspecialties in radiation shielding and radiation dosimetry." The Commission reflected Dixon's exposure testimony in its finding of fact, which states "[i]t is Dr. Dixon's opinion that plaintiff was not exposed to radiation above background levels, and therefore, that his employment did not contribute to his development of brain cancer." Since the Commission found that plaintiff was not exposed to radiation above background levels, it did not need to rely on testimony as to whether such exposure substantially contributed to the development of plaintiff's brain cancer. Thus, the Commission properly relied on Dixon's testimony and concluded that plaintiff's theory was mere "speculation of exposure which is not supported by the greater weight of the record" and "[p]laintiff has failed to show that his condition . . . was caused by exposure to radiation."

d.) Compensable Claim

Plaintiff argues that contrary to the Commission's decision, he met his burden as to each element for a compensable claim under N.C. Gen. Stat. § 97–53(13). Specifically, plaintiff argues that there was no competent evidence to support the Commission's finding that plaintiff was not at an increased risk for the development of cancer from radiation exposure compared to the general public. We disagree.

A plaintiff is not required to prove that he was exposed to a specific quantity of a harmful agent to present a compensable claim. *Gay v. J.P. Stevens & Co., Inc.*, 79 N.C. App. 324, 333-34, 339 S.E.2d 490, 496 (1986). However, a plaintiff must establish that "the substance [to which he was exposed] is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed." *Matthews v. City of Raleigh*, 160 N.C. App. 597, 605-06, 586 S.E.2d 829, 836-37 (2003) (citation omitted).

Here, the Commission considered all the evidence and assigned weight to each piece of evidence in making its final determination. Defendant's evidence showed the following: 1.) the device's shield against radiation leakage and has an extremely low probability of scatter; 2.) employees cannot stand within five feet of the devices; 3.) employees have no direct contact with the devices; 4.) Kesslick never received a measurable level of radiation during his testing of the devices; and 5.) the radiation levels next to the devices were no different than normal background radiation that is found in all environments. Furthermore, the Commission found that plaintiff did not meet his burden, not because of his own failure to quantify the degree of exposure, but because the Commission "plac[ed] greater weight on the testimony of [Kesslick] and . . . Dr. Dixon" than plaintiff's witnesses. Thus, the evidence supports the Commission's finding that plaintiff did not have a greater exposure to radiation than the general public.

IV. Conclusion

In sum, the Commission properly considered all of the evidence, made findings of fact that were supported by competent evidence, appropriately accepted evidence of causation, and correctly found that the claim was not compensable. Thus, we affirm the 10 May 2013 Opinion and Award of the Commission.

Affirmed.

Judge McGEE and Judge HUNTER, Robert C., concur.

IN RE A.N.B.

[232 N.C. App. 406 (2014)]

IN THE MATTER OF A.N.B.

No. COA13-554

Filed 18 February 2014

1. Appeal and Error—appealability—voluntary admission of minor to psychiatric treatment facility—capable of repetition yet evading review exception—public policy exception

Orders of voluntary admission of a minor to a twenty-four hour psychiatric treatment facility can only be for a maximum length of ninety days under N.C.G.S. § 122C-224.3(g), and thus, appeals from these orders fall into the "capable of repetition, yet evading review" exception. Because of the State's great interest in preventing unwarranted admission of juveniles into these treatment facilities, appeal from these orders also falls into the public policy exception.

2. Costs—expert witnesses—denial of motion for funds—failure to meet burden of proof

The trial court did not abuse its discretion in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by denying respondent minor's motion for funds to hire an expert witness. Respondent failed to meet his burden to convince the trial court that there existed some valid concern or reason to provide funds for an "independent" expert.

3. Witnesses—expert witnesses—better qualified than jury to form opinion

The trial court did not abuse its discretion in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by qualifying two witnesses as experts in the fields of counseling and diagnosis and treatment of mental illness and substance abuse in minors. There was substantial evidence presented on *voir dire* to support the trial court's determination that they were better qualified than the jury to form an opinion on the particular subject of their testimony.

4. Evidence—expert opinion—continued inpatient treatment

The trial court did not err in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by overruling respondent minor's objections to an expert's opinion that respondent was in need of continued inpatient treatment. There was evidence presented that the expert relied on her own assessments of

respondent, as well as evidence such as patient history and group clinical discussion, reasonably relied upon by similar experts.

5. Mental Illness—minor's continued admission to twenty-four hour psychiatric treatment facility—no medical evaluation required

Respondent minor's continued admission to a twenty-four hour psychiatric treatment facility was lawful even though respondent contended that the record did not show he was evaluated by a physician within twenty-four hours. There was insufficient record evidence that medical care was an integral component of treatment at the facility, and there was no statutory requirement that respondent receive a medical examination within twenty-four hours of admission. Respondent made no argument that the requirements of N.C.G.S. § 122C-211(d) were violated.

6. Evidence—failure to make ultimate findings of fact—voluntary admission of minor to twenty-four hour psychiatric treatment facility

The trial court erred in a voluntary admission of a minor to a twenty-four hour psychiatric treatment facility case by failing to make a finding that respondent minor was in need of further treatment at the facility. The required ultimate findings of fact must be made explicitly.

Appeal by Respondent from order entered 29 October 2012 by Judge Don W. Creed, Jr. in District Court, Moore County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah Hall, for Respondent-Appellant.

McGEE, Judge.

A.N.B. ("Respondent"), a minor, was voluntarily admitted by his guardian to Jackson Springs Treatment Facility ("Jackson Springs") on 2 October 2012. Jackson Springs is a secure twenty-four hour, or inpatient, psychiatric treatment facility. Respondent was assessed by Freida Green ("Green") on 2 October 2012, and Green filed an evaluation for admission on the following day. Respondent was appointed counsel

on 4 October 2012. Respondent moved for funds to hire a psychiatric expert on 8 October 2012. A hearing was conducted on 15 October 2012 to determine if the trial court concurred in Respondent's admission to Jackson Springs. At the 15 October hearing, the trial court deferred ruling on Respondent's 8 October 2012 motion for funds, and continued the matter until 29 October 2012 to allow time for Respondent's attorney to interview experts from Jackson Springs. At the 29 October 2012 hearing, the trial court denied Respondent's 8 October 2012 motion for funds to hire an expert. Two witnesses from Jackson Springs, Green and Leah McCallum ("McCallum"), were allowed to testify as experts at the hearing. The trial court, by order entered 29 October 2012, concurred with the voluntary admission of Respondent to Jackson Springs, and Respondent's admission at Jackson Springs was continued for ninety days, the statutory maximum. Respondent appeals.

Appealability

[1] The order continuing Respondent's admission at Jackson Springs for ninety days was entered on 29 October 2012. This meant the order expired in late January 2013. Because Respondent is not currently being affected by the 29 October 2012 order, this appeal would normally be dismissed as moot. " 'The general rule is that an appeal presenting a question which has become moot will be dismissed.' " *Thomas v. N.C. Dept. of Human Resources*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996) (citation omitted). However, there are exceptions to this general rule, including "that courts may review cases that are otherwise moot but that are 'capable of repetition, yet evading review[,]' " and "that the court has a 'duty' to address an otherwise moot case when the 'question involved is a matter of public interest.' " *Id.* at 705, 478 S.E.2d at 820-21 (citations omitted).

Because orders of voluntary admission of a minor to a twenty-four hour psychiatric treatment facility can only be for a maximum length of ninety days, N.C. Gen. Stat. § 122C-224.3(g) (2013), we hold that appeal from orders of voluntary admission of a minor to a twenty-four hour facility falls into the "capable of repetition, yet evading review" exception. Because of the State's great interest in preventing unwarranted admission of juveniles into these treatment facilities, we further hold that appeal from these orders falls into the public policy exception. This appeal is properly before us.

I.

The issues on appeal are whether: (1) the trial court erred by denying Respondent's motion for funds to hire an expert, (2) the trial

court abused its discretion by qualifying two witnesses as experts, (3) the trial court erred by allowing certain expert opinion testimony, (4) Respondent's continued admission to Jackson Springs was contrary to law because a medical examination should have been performed on Respondent within twenty-four hours of admission and, (5) the trial court's findings of fact were insufficient to support its conclusions and order.

II.

[2] Respondent first argues that the trial court abused its discretion in denying Respondent's motion for funds to hire an expert witness. We disagree.

> It is State policy to encourage voluntary admissions to facilities. It is further State policy that no individual shall be involuntarily committed to a 24-hour facility unless that individual is mentally ill or a substance abuser and dangerous to self or others. All admissions and commitments shall be accomplished under conditions that protect the dignity and constitutional rights of the individual.

N.C. Gen. Stat. § 122C-201 (2013). Commitment hearings are civil proceedings. *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 780 (1978). Voluntary admission of minors is covered by N.C. Gen. Stat. § 122C-221:

> Except as otherwise provided in this Part, a minor may be admitted to a facility if the minor is mentally ill or a substance abuser and in need of treatment. Except as otherwise provided in this Part, the provisions of G.S. 122C-211 shall apply to admissions of minors under this Part. Except as provided in G.S. 90-21.5, in applying for admission to a facility, in consenting to medical treatment when consent is required, and in any other legal procedure under this Article, the legally responsible person shall act for the minor.

N.C. Gen. Stat. § 122C-221(a) (2013).

Respondent was provided counsel as required. "Within 48 hours of receipt of notice that a minor has been admitted to a 24-hour facility wherein his freedom of movement will be restricted, an attorney shall be appointed for the minor in accordance with rules adopted by the Office of Indigent Defense Services." N.C. Gen. Stat. § 122C-224.1(a) (2013). N.C. Gen. Stat. § 7A-498.3 states:

> (a) The Office of Indigent Defense Services shall be responsible for establishing, supervising, and maintaining a system for providing legal representation and related services in the following cases:
>
> (1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;
>
> . . . .
>
> (3) Any other cases in which the Office of Indigent Defense Services is designated by statute as responsible for providing legal representation.
>
> . . . .
>
> (c) In all cases subject to this Article, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services.

N.C. Gen. Stat. § 7A-498.3 (2013). "In . . . non-criminal cases, the court may approve fees for the service of expert witnesses, investigators, and others providing services related to legal representation in accordance with all applicable IDS rules and policies." NC R IND DEF SERV Rule 1.10 (Amended eff. Dec. 9, 2011). There are no statutes or rules that more definitively state when fees for expert witnesses should be granted in a situation such as the one before us. The decision to grant or deny fees in the present case was discretionary. *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citation omitted) ("Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory.").

Similar language from Article 36 of Chapter 7A of our General Statutes, "Entitlement of Indigent Persons Generally," has been held to be discretionary:

> N.C. Gen. Stat. § 7A–454 (2003) states, "[f]ees for the services of an expert witness for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services." . . . . [I]t is in the trial court's discretion whether to grant requests for expenses to retain an expert witness or to conduct a deposition.

In re D.R., 172 N.C. App. 300, 304-05, 616 S.E.2d 300, 304 (2005) (citations omitted). In the Article 36, Chapter 7A context, our Courts have held that funds for an expert witness should be provided when there is a reasonable likelihood that the expert witness will be of material assistance in the preparation of the defense, or that without such help it is probable that the respondent or defendant will not receive a fair trial. *D.R.*, 172 N.C. App. at 305, 616 S.E.2d at 304-05 (holding trial court did not abuse its discretion in denying funds for expert witness in termination of parental rights hearing). " 'Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided.' " *Id.* at 305, 616 S.E.2d at 304 (citations omitted). We hold the same rule applies in a voluntary commitment proceeding of a minor.

However, what is required to show that an expert witness will be of material assistance in the preparation of the defense or, that without such help, it is probable the respondent will not receive a fair hearing, is different in a commitment hearing than it is in a criminal trial or a termination of parental rights proceeding. *See Addington v. Texas*, 441 U.S. 418, 429, 431, 60 L. Ed. 2d 323, 333 (1979) ("the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution").

This Court has held that a minor, facing commitment pursuant to the voluntary commitment statute, is entitled to due process protections. *In re Long*, 25 N.C. App. 702, 706-07, 214 S.E.2d 626, 628-29 (1975). "It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment." *Parham v. J. R.*, 442 U.S. 584, 600, 61 L. Ed. 2d 101 (1979) (citations omitted).

When addressing constitutional issues involving a child and his parent or guardian, the law starts with the presumption that the parent or guardian acts with the best interests of the child as the primary goal. *Parham v. J. R.*, 442 U.S. 584, 602, 61 L. Ed. 2d 101, 117 (1979). However:

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in

> *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.
>
> Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.

Id. at 602-03, 61 L. Ed. 2d at 119.

> In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized.

Id. at 604, 61 L. Ed. 2d at 120.

Due process requires an inquiry by a "neutral factfinder" to determine whether constitutionally adequate procedures are followed before a child is voluntarily committed based upon his guardian's affirmations. *See Id.* at 606, 61 L. Ed. 2d at 121. The Second Circuit has held:

> We conclude that the due process clause does not require a state to provide an indigent patient with a consulting psychiatrist in every commitment or retention proceeding. Such a psychiatrist would perform two functions: (i) providing testimony favorable to non-commitment or release if the psychiatrist's professional judgment so warrants; and (ii) providing assistance to counsel in preparing the patient's case even where the doctor favors commitment or retention. These functions are not of sufficient import to implicate due process in every proceeding.

Goetz v. Crosson, 967 F.2d 29, 34-35 (2d Cir. 1992). The Second Circuit further stated that it has "no basis for assuming that psychiatrists associated with the state have a bias toward institutionalization." *Id.*

> Unlike civil or criminal proceedings, the interests of the parties to a civil commitment proceeding are not entirely

> adverse. The state's concerns are to provide care to those whose mental disorders render them unable to care for themselves and to protect both the community and the individuals themselves from dangerous manifestations of their mental illness. A major component of the state policy is thus the protection of mentally ill individuals[.]

Id. at 34-35 (citation omitted). We agree with and adopt the Second Circuit's reasoning. The analysis may change somewhat when the mental health professional or professionals, testifying as experts, do not work for the State. As an example, it is conceivable, though certainly not expected, that self-serving financial motivations could affect the neutrality of mental health professionals working for private institutions. Institutional pressure to "fill the beds" in an effort to maximize profits is a hypothetical possibility. However, we do not mean to suggest that a different standard should apply to private institutions, only that there might be different concerns for the trial court to consider, depending on the facts of any particular admission.

In the present case, it appears Respondent was voluntarily committed to a private institution. It was Respondent's burden to convince the trial court that there existed some valid concern or reason to provide funds for an "independent" expert.

> [T]he Due Process Clause does not grant an indigent individual subject to involuntary commitment an absolute right to the assistance of a consulting psychiatrist. Such a right might arise in a case in which counsel has shown a compelling fact-specific need for the assistance of a psychiatrist to educate counsel in particular aspects of a case.

Id. at 36. In the present case, Respondent argues funding for an additional expert was necessary because that expert might find something objectionable in the determinations of the experts who did testify, might help Respondent's attorney better understand the testimony of the other experts, or might provide expert testimony that continued admission was not appropriate. However, Respondent failed to provide the trial court with any evidence from which it could have determined that the motivations of the testifying experts were suspect, or that there existed some particularized reason, outside reasons that would be found in a standard case, why this case required funding an expert for Respondent. Because we hold that Respondent has failed to meet this burden, we further hold that the trial court did not abuse its discretion in refusing to order fees for an expert witness for Respondent. Respondent fails

to meet his burden of showing an abuse of discretion. This argument is without merit.

III.

[3] In Respondent's second argument, he contends the trial court abused its discretion by qualifying McCallum and Green as experts. We disagree.

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. When making such determinations, trial courts are not bound by the rules of evidence. In this capacity, trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted). "Opinion testimony given by an expert witness is competent when evidence is presented showing 'that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Cannizzaro v. Food Lion*, 198 N.C. App. 660, 666, 680 S.E.2d 265, 269 (2009) (citation omitted).

McCallum testified on *voir dire* that, at the time of the hearing, that she taught mental health "diagnosis and assessment courses" at an accredited online program in mental health counseling. She also testified that she worked for Jackson Springs, conducting their "comprehensive clinical assessments for all the new admissions[.]" She had a master's degree in counseling, a post-master's degree in advanced school counseling and a doctorate in counselor education and supervision. McCallum had worked in the mental health and substance abuse field since 1996, and had the Licensed Professional Counselor credential, which allowed her to diagnose and treat mental illness patients in North Carolina. McCallum had also been a school counselor for ten years, had previously worked in a day treatment facility, working mostly with children and adolescents, and had been conducting comprehensive clinical assessments since 2009.

Green testified on *voir dire* that she was currently employed with Pinnacle Management Group ("Pinnacle"), which owned Jackson Springs, and that she was providing clinical oversight for the patients in the facilities owned by Pinnacle. Green testified she had a master's degree in clinical counseling, had the Licensed Professional Counselor license for North Carolina, and the Licensed Clinical Addiction Specialist license for North Carolina, which allowed her to diagnose and treat substance abuse, and that she was nationally accredited as a clinical counselor. She testified that she had "provided treatment in mental health and substance abuse for families, adults and children in both public and private sectors and in several different settings to include inpatient treatment as well as the judicial system." Green testified that she had been providing these services since 1988, "but in a professional capacity since the year 2001."

We hold that there was substantial evidence presented on *voir dire* to support the trial court's determination that McCallum and Green were "better qualified than the jury to form an opinion on the particular subject of [their] testimony." *Cannizzaro*, 198 N.C. App. at 666, 680 S.E.2d at 269 (citation omitted). The trial court did not abuse its discretion in allowing McCallum and Green to testify as experts in the fields of counseling and diagnosis and treatment of mental illness and substance abuse in minors. This argument is without merit.

IV.

[4] In Respondent's third argument, he contends the trial court erred in overruling his objections to McCallum's opinion that Respondent was in need of continued inpatient treatment because McCallum relied on conclusions of the clinical staff and failed to form an independent opinion. We disagree.

> N.C.R. Evid. 703 provides that the facts or data upon which an expert bases her opinion may be those (1) perceived by the witness or (2) made known to her at or before the hearing. The expert's opinion may even be based upon facts not otherwise admissible in evidence, provided the facts so considered are of the type reasonably relied upon by similar experts in forming opinions on the subject.

State v. Black, 111 N.C. App. 284, 293, 432 S.E.2d 710, 716-17 (1993) (citation omitted). "We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."

State v. Ortiz-Zape, __ N.C. App. __, __, 743 S.E.2d 156, 162 (2013) (citation omitted).

McCallum interviewed and assessed Respondent when Respondent was first admitted to Jackson Springs. McCallum testified concerning her approach to her 23 May 2012 interview of Respondent:

> [B]efore I look at the records I like to talk with the client, and I always tell my clients the record is what other people say about you. I want to hear from you because you're the best source of information.
>
> Once I interview the child and get a current bio, psycho-social history, I then proceed to the record and start looking for inconsistencies maybe in what the client said and what's in the record and begin to sort of sort through all of that.
>
> Sometimes I have access to a case manager or a legal guardian. And I have noted in here that I did not speak with his legal guardian. I think I called and got an answering machine and did not ever speak with his legal guardian directly.
>
> So I depended on notes, the case manager, and my interview with him to come up with a diagnosis and to determine that he did in fact meet the criteria for PRTF placement.

McCallum assessed Respondent again on 2 October 2012. McCallum was asked: "And based on your examinations of [Respondent], especially the one most recently conducted in October, is it your expert opinion that he continues to suffer from a mental illness?" McCallum answered: "It is." She testified concerning the criteria required to admit a person into a twenty-four hour treatment facility and was asked on cross-examination: "But you have to look at him individually and decide whether or not he meets [the criteria for inpatient treatment][.]" McCallum replied: "Absolutely. And I did." McCallum testified that she also consulted with the clinical staff at least monthly, and factored their discussions into her diagnoses. We hold there was evidence presented that McCallum relied on her own assessments of Respondent, as well as evidence such as patient history and group clinical discussion, reasonably relied upon by similar experts. *Black*, 111 N.C. App. at 293, 432 S.E.2d at 716-17. This argument is without merit.

V.

[5] In Respondent's fourth argument, he contends Respondent's continued admission to Jackson Springs was unlawful because "the record does not show that [Respondent] was evaluated by a physician within twenty-four hours" as required by law. We disagree.

Respondent contends this issue is controlled by N.C. Gen. Stat. § 122C-211(c), which states in part: "Any individual who voluntarily seeks admission to a 24-hour facility in which medical care is an integral component of the treatment shall be examined and evaluated by a physician of the facility within 24 hours of admission." N.C. Gen. Stat. § 122C-211(c) (2013). However, there is not sufficient record evidence that Jackson Springs is a "facility in which medical care is an integral component of the treatment." Respondent argues that he receives prescription medication at Jackson Springs, but we do not believe the use of prescription medications at Jackson Springs is sufficient to define Jackson Springs as such a facility. N.C.G.S. § 122C-211(d) states in part:

> Any individual who voluntarily seeks admission to any 24-hour facility, other than one in which medical care is an integral component of the treatment, shall have a medical examination within 30 days before or after admission if it is reasonably expected that the individual will receive treatment for more than 30 days or shall produce a current, valid physical examination report, signed by a physician, completed within 12 months prior to the current admission.

N.C.G.S. § 122C-211(d). Because there is insufficient record evidence that medical care is an integral component of treatment at Jackson Springs, there was no statutory requirement that Respondent receive a medical examination within twenty-four hours of admission. Respondent makes no argument that the requirements of N.C.G.S. § 122C-211(d) have been violated in the present case. This argument is without merit.

VI.

[6] In Respondent's final argument, he contends the trial court erred in failing to make a finding that Respondent was in need of further treatment at Jackson Springs. We agree.

Hearings for review of voluntary admission of minors to twenty-four hour treatment facilities are covered by N.C. Gen. Stat. § 122C-224.3, which states in relevant part:

> (f) 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.
>
> (g) The court shall make one of the following dispositions:
>
> (1) If the court finds by clear, cogent, and convincing evidence that the requirements of subsection (f) have been met, the court shall concur with the voluntary admission and set the length of the authorized admission of the minor for a period not to exceed 90 days[.]

N.C. Gen. Stat. § 122C-224.3 (2013). When reviewing a prior but substantially similar statute, this Court held that making the required findings is mandatory, and that failure to do so will result in reversal of the commitment order. *In re Hiatt*, 45 N.C. App. 318, 319, 262 S.E.2d 685, 686 (1980) ("We hold that under G.S. 122-56.7(b) before a court can concur with a voluntary commitment for an incompetent, it must find that the incompetent is mentally ill or an inebriate and is in need of further treatment at the treatment facility.").

In the case before us, the trial court found in the 29 October 2012 order that Respondent was mentally ill, and that no less restrictive measures would be sufficient. The trial court then "authorize[d] the continued admission of . . . [R]espondent[.]" However, the trial court failed to specifically find that Respondent was in need of further treatment. Under the conclusions section of the AOC-SP-913M form, "Order Voluntary Admission of Minor," there are boxes to indicate whether the trial court "concludes" that the minor is "mentally ill," a "substance abuser," "in need of continued treatment at the 24-hour facility to which [Respondent] has been admitted," and whether "less restrictive measures would not be sufficient." The trial court checked the boxes indicating that Respondent was mentally ill and that less restrictive measures would not be sufficient. The trial court failed to check a box to indicate that Respondent either was or was not in need of continued treatment at Jackson Springs. Though need for further treatment is a reasonable inference of the findings and conclusions made, we hold that the required ultimate findings of fact must be made explicitly and reverse the order

of the trial court. *Id.* at 319-20, 262 S.E.2d at 686. We realize there will be no practical effect to Respondent in reversal of the 29 October 2012 order, as the order is no longer in effect, but this Court held in similar circumstances in *Hiatt* that failure to make the required findings results in reversal. *See Id.*

Reversed.

Judges BRYANT and STROUD concur.

IN THE MATTER OF P.Q.M.

No. COA13-899

Filed 18 February 2014

1. Sentencing—juvenile delinquency—prior history level—consolidation of offenses—calculation

The trial court did not err in a juvenile delinquency case when it calculated a juvenile's prior delinquency history level and in entering a Level 3 rather than a Level 2 disposition. The trial court was not required to consolidate the offenses for disposition, and the consolidation requirement of N.C.G.S. § 7B-2508(h) did not apply.

2. Juveniles—delinquency—prior adjudication

The trial court did not improperly consider a larceny of a firearm offense as a prior adjudication under N.C.G.S. § 7B-2507(a) in a juvenile delinquency case. Although the dispositional hearing for the offenses was not held until 4 March 2013, the adjudication, which was similar to a conviction, of his larceny of a firearm offense occurred prior to the 4 March 2013 disposition hearing and entry of the disposition.

3. Sentencing—juvenile delinquency—Level 3 disposition—extraordinary needs—no abuse of discretion

The trial court did not err in a juvenile delinquency case by ordering a Level 3 disposition even though the juvenile contended that the evidence supporting extraordinary needs warranted a Level 2 disposition. The juvenile failed to show that the trial court's decision to impose a Level 3 disposition amounted to an abuse of discretion.

IN RE P.Q.M.

[232 N.C. App. 419 (2014)]

Appeal by juvenile from order entered 7 March 2013 by Judge Ralph C. Gingles in Gaston County District Court. Heard in the Court of Appeals 8 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

James N. Freeman, Jr., for juvenile-appellant.

CALABRIA, Judge.

Juvenile P.Q.M. ("Paul")[1] appeals from a disposition order committing him to a youth development center ("YDC") of the North Carolina Division of Juvenile Justice for a minimum of six months and a maximum term not to exceed his eighteenth birthday. We affirm.

I. Background

Paul was adjudicated delinquent on 29 November 2012 in Cleveland County for robbery with a dangerous weapon ("RWDW"), a Class D felony pursuant to N.C. Gen. Stat. § 14-87 (2011). On 5 January 2012, Paul was adjudicated delinquent for, *inter alia*, communicating threats pursuant to N.C. Gen. Stat. § 14-277.1 (2011), a Class 1 misdemeanor. On 3 December 2012, Paul was again adjudicated delinquent in Gaston County for, *inter alia*, larceny of a firearm, a Class H felony pursuant to N.C. Gen. Stat. § 14-72 (2011). The Cleveland County adjudication for RWDW was transferred to Gaston County and all of Paul's adjudications were calendared for disposition in Gaston County.

The disposition hearing on 4 March 2013 in Gaston County District Court included all three of Paul's adjudications. The trial court found three delinquency history points, a high delinquency level, that Paul had previously been adjudicated delinquent for two or more felony offenses, and that he had previously been committed to a YDC. Therefore, the trial court entered a Level 3 disposition. On 7 March 2013, the trial court entered an amended Level 3 disposition ("the amended order"). In both the original and the amended order, the trial court found that Paul's most serious offense was RWDW. The amended order indicated that Paul had been adjudicated for a violent or serious offense pursuant to N.C. Gen. Stat. § 7B-2508 (2011). In the amended order, the trial court again found,

1. We use this pseudonym to protect the juvenile's privacy and for ease of reading.

pursuant to N.C. Gen. Stat. § 7B-2507(a) (2011), Paul had three delinquency history points: two for the larceny of a firearm offense, and one for the communicating threats offense. The trial court imposed a Level 3 disposition. However, the amended order added Paul's adjudication for communicating threats on 5 January 2012 and deleted Paul's 3 December 2012 Breaking and Entering ("B & E") offense.[2]

The trial court amended Paul's delinquency history level and found that Paul had a medium delinquency level rather than a high delinquency level. The trial court ordered Paul committed to a YDC for a minimum of six months and a maximum term not to exceed his eighteenth birthday. Paul appeals only the amended order. Paul's adjudications are undisputed.

II. Standard of Review

On appeal, this Court "will not disturb a trial court's ruling regarding a juvenile's disposition absent an abuse of discretion, which occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.B.*, 172 N.C. App. 747, 751, 616 S.E.2d 385, 387 (2005) (citation and quotation marks omitted). "Although the trial court has discretion under N.C. Gen. Stat. § 7B-2506 [] in determining the proper disposition for a delinquent juvenile, the trial court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile[.]" *In re Ferrell*, 162 N.C. App. 175, 176, 589 S.E.2d 894, 895 (2004) (citations omitted). Accordingly, the court "shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile." N.C. Gen. Stat. § 7B-2501(c) (2011).

III. Consolidation of Offenses

[1] Paul argues that the trial court erroneously calculated his prior history level and erred in entering a Level 3 rather than a Level 2 disposition. In addition to the improper calculation, Paul contends the trial court failed to properly consolidate his offenses and also failed to consider his extraordinary needs that warranted a Level 2 rather than a Level 3 disposition. We disagree.

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2. Paul's B & E and larceny of a firearm offenses are both Class H felonies adjudicated in the same session of juvenile court, and pursuant to N.C. Gen. Stat. § 7B-2507(d) (2011), only one of these offenses could be included in the disposition. ("For purposes of determining the delinquency history level, if a juvenile is adjudicated delinquent for more than one offense in a single session of district court, only the adjudication for the offense with the highest point total is used.")

After a juvenile is adjudicated delinquent, the level of punishment depends on "the juvenile's delinquency history and the type of offense committed." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002). The court determines the delinquency history level "by calculating the sum of the points assigned to each of the juvenile's prior adjudications and to the juvenile's probation status, if any[.]" N.C. Gen. Stat. § 7B-2507(a) (2011). "If a juvenile is adjudicated of more than one offense during a session of juvenile court, the court shall consolidate the offenses . . . and impose a single disposition . . . . The disposition shall be specified for the class of offense and delinquency history level of the most serious offense." N.C. Gen. Stat. § 7B-2508(h) (2011). "'Session' is not defined within the definitions section of the Juvenile Code, but is defined in case law as that which designates the typical one-week assignment to a particular location during the term." *In re D.R.H.*, 194 N.C. App. 166, 169, 668 S.E.2d 919, 921 (2008) (citation and quotation marks omitted).

In the instant case, Paul was adjudicated delinquent on three different days in three different calendar weeks in three different sessions. Paul was first adjudicated on 5 January 2012 for communicating threats pursuant to N.C. Gen. Stat. § 14-277.1 (2011), a Class 1 misdemeanor. On Thursday, 29 November 2012, he was adjudicated delinquent for RWDW, a Class D felony pursuant to N.C. Gen. Stat. § 14-87 (2011), in Cleveland County, which is in Judicial District 27B. On Monday, 3 December 2012, Paul was adjudicated delinquent for larceny of a firearm, a Class H felony pursuant to N.C. Gen. Stat. § 14-72 (2011), in Gaston County, which is in Judicial District 27A.

The trial court clearly transferred Paul's RWDW adjudication from Cleveland County to Gaston County for disposition. The Cleveland County adjudication order states that "[t]he legal file and disposition are to be transferred to Gaston County." Merely transferring an adjudication to another county for disposition does not require the court to consolidate offenses that were adjudicated in separate sessions of juvenile court in a disposition. In addition, the order on its face did not require or order the Cleveland County adjudication consolidated with the Gaston County adjudication for disposition. Therefore, the trial court was not required to consolidate the offenses for disposition, and the consolidation requirement of N.C. Gen. Stat. § 7B-2508(h) does not apply.

IV. Prior Adjudication

[2] Paul further contends that since his adjudication for larceny of a firearm was on 3 December 2012 and for RWDW was on 29 November 2012,

the trial court improperly considered the larceny of a firearm offense as a prior adjudication. Since the Juvenile Code does not provide a definition of "prior adjudication," we turn to criminal law in order to resolve this procedural issue. This Court has compared and analogized criminal statutes with juvenile statutes to resolve procedural issues. *See In re D.R.H.*, 194 N.C. App. at 170, 668 S.E.2d at 921 (analogizing proof of prior juvenile adjudications with proof of prior criminal convictions); *see In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004) (analogizing juvenile petitions with felony indictments). "A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime[.]" N.C. Gen. Stat. § 15A-1340.11(7) (2011). *See also* N.C. Gen. Stat. § 15A-1331(b) (2011) ("For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.").

In the instant case, Paul was adjudicated for RWDW on Thursday, 29 November 2012. The following week, on Monday, 3 December 2012, in a different session of court from the prior week, Paul was adjudicated for larceny of a firearm. Although the dispositional hearing for Paul's offenses was not held until 4 March 2013, the adjudication, which is similar to a conviction, of Paul's larceny of a firearm offense occurred prior to the 4 March 2013 disposition hearing and entry of the disposition. Therefore, the trial court properly considered Paul's larceny of a firearm offense as a "prior adjudication" pursuant to N.C. Gen. Stat. § 7B-2507(a) (2011).

V. Level 3 Disposition

[3] Paul also argues the trial court erred in ordering a Level 3 disposition when evidence supporting extraordinary needs warranted a Level 2 disposition. We disagree.

"Based upon the delinquency history level determined pursuant to G.S. § 7B-2507, and the offense classification for the current offense, N.C. Gen. Stat. § 7B-2508 then dictates the dispositional limits available." *In re Allison*, 143 N.C. App. 586, 597, 547 S.E.2d 169, 176 (2001). When the dispositional chart prescribes a Level 3 disposition, the trial court shall commit the adjudicated juvenile to a YDC. N.C. Gen. Stat. § 7B-2508(e) (2011). "However, a court may impose a Level 2 disposition rather than a Level 3 disposition if the court submits written findings on the record that substantiate extraordinary needs on the part of the offending juvenile." *Id.* "[C]hoosing between two appropriate dispositional levels is within the trial court's discretion. Absent an abuse of

discretion, we will not disturb the trial court's choice. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. at 737, 567 S.E.2d at 229 (citation and quotation marks omitted). In choosing a disposition,

> the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2011). This Court has previously upheld a Level 3 disposition for a juvenile who had no prior delinquency history, had a low risk of re-offending, and a low needs assessment. *In re N.B.*, 167 N.C. App. 305, 310-11, 605 S.E.2d 488, 491-92 (2004). The juvenile in *N.B.* had been adjudicated delinquent for assault with a deadly weapon inflicting serious injury, and the trial court had the authority to impose either a Level 2 or Level 3 disposition pursuant to N.C. Gen. Stat. § 7B-2508(f). *Id.* at 311, 605 S.E.2d at 492. This Court held that the juvenile failed to show the trial court's decision to impose a Level 3 disposition amounted to an abuse of discretion. *Id.*

In the instant case, since Paul was previously adjudicated delinquent, the trial court determined Paul's delinquency history level to be medium. With a violent offense and a medium delinquency level, a Level 3 disposition is required pursuant to N.C. Gen. Stat. § 7B-2508(f) (2011). However, the court had the discretion to impose either a Level 2 disposition with written findings of Paul's extraordinary needs or a Level 3 disposition. N.C. Gen. Stat. § 7B-2508(e) (2011).

The trial court heard evidence from several witnesses involved in Paul's case to determine which level of disposition to impose. Specifically, the court heard evidence from Juvenile Court Counselor Stephania Sarvis ("Sarvis"); Dr. Stephen Strezlecki ("Dr. Strezlecki"), a psychologist working with juveniles involved with the court system; family therapist Logan Cohen ("Cohen"); and mental health professional

Rory Barrington ("Barrington"). The court also considered and incorporated by reference a predisposition report, a risk assessment, and a needs assessment. Paul had been evaluated in the assessments as presenting a medium risk and having medium needs.

At the disposition hearing, Sarvis testified that Paul was suspended from the alternative school he had been attending when the alternative school was notified of the pending RWDW offense. Sarvis recommended a Level 3 disposition and commitment to a YDC where Paul could resume his schooling immediately, receive individual, group, and family counseling, and remain on any currently prescribed medications. According to Sarvis, the counseling available at the YDC enables juvenile offenders to "understand the seriousness of their offense [sic] and they can get a perspective from the victim's point of view[.]" She also indicated that placement with a YDC would provide Paul with his treatment needs, be rehabilitative, and also provide some measure of protection to public safety.

Dr. Strezlecki performed a psychological evaluation on Paul on 9 January 2013 as part of Paul's involvement in the juvenile court system. Dr. Strezlecki testified that, based upon "a combination of reviewing [Paul's] history in terms of involvement with the juvenile court system, as well as behavioral difficulties at school, and also looking at his more recent history" of detention and house arrest, Paul needed a high level of structure. Dr. Strezlecki specifically recommended to the court that Paul should have "a highly structured supervised residential placement," because it did not appear that Paul could receive the level of structure he needed at home.

Cohen and Barrington both testified on Paul's behalf regarding the therapeutic services they provided through Support, Incorporated ("Support"). Cohen had been providing Paul with in-home therapy since November 2012. At the time of the hearing, Cohen was providing Paul with therapy for two hours per day, four days a week. Barrington testified that he and Paul had been participating in volunteer work for a local animal shelter as part of Paul's therapy. Cohen and Barrington stressed the importance of Paul's awareness of his behavior and acknowledging accountability for his actions as part of his treatment plan, and both testified to Paul's positive progress in the Support therapy program. However, while Cohen and Barrington both indicated Paul was making positive progress in the Support program, the risk and needs assessments in the record indicated that Paul presented a medium risk and had medium needs.

The court heard and considered the evidence of all the witnesses, as well as the needs and risk assessments. There is nothing in the record to indicate that the court's failure to find that Paul had extraordinary needs was so arbitrary that it could not have been the result of a reasoned decision. Just as the juvenile in *N.B.* with a low risk and low needs assessment failed to show that the trial court abused its discretion by imposing a Level 3 disposition, here Paul also has failed to show that the trial court's decision to impose a Level 3 disposition amounted to an abuse of discretion. *In re N.B.* at 311, 605 S.E.2d at 492.

VI. Conclusion

The trial court heard and considered the evidence presented at the disposition hearing and properly selected a Level 3 disposition based on the seriousness of the offense; the need to hold Paul accountable; the importance of public safety; Paul's degree of culpability; and Paul's rehabilitative and treatment needs as indicated by the risk and needs assessments. N.C. Gen. Stat. § 7B-2501(c) (2011). In addition, the trial court selected the Level 3 disposition after considering Paul's rehabilitation and treatment needs and decided the disposition would meet Paul's best interests. *Id.* Therefore, the trial court made a reasoned decision and did not abuse its discretion in imposing the Level 3 disposition. We affirm the trial court's order committing Paul to a YDC for a minimum of six months and a maximum term not to exceed his eighteenth birthday.

Affirmed.

Judges BRYANT and GEER concur.

LEXISNEXIS RISK DATA MANAGEMENT INC., A FLORIDA CORPORATION, AND LEXISNEXIS RISK SOLUTIONS INC., A GEORGIA CORPORATION, PLAINTIFFS

v.

NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS; JOHN W. SMITH II, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS; AND NANCY LORRIN FREEMAN, IN HER OFFICIAL CAPACITY AS THE CLERK OF THE WAKE COUNTY SUPERIOR COURT, DEFENDANTS

No. COA13-547

Filed 18 February 2014

1. Public Records—ACIS database—electronic data-processing record—AOC custodian

The trial court erred in an action concerning whether the Automated Criminal/Infraction System database (ACIS) is subject to public disclosure under the North Carolina Public Records Act, N.C.G.S. § 132-1 *et seq.* by granting defendants judgment on the pleadings. The ACIS database falls squarely within the definition of a public record as an electronic data-processing record and the Administrative Office of the Courts (AOC) is its custodian.

2. Public Records—ACIS database—no statutory exemption from disclosure

The trial court erred in an action concerning whether the Automated Criminal/Infraction System database (ACIS) is subject to public disclosure under the North Carolina Public Records Act (Act), N.C.G.S. § 132-1 *et seq.* by concluding that requiring the Administrative Office of the Courts (AOC) to provide a copy of the ACIS database upon request would negate the provisions of N.C.G.S. § 7A-109(d). There is no clear statutory exemption or exception to the Act applicable to the ACIS database.

Appeal by Plaintiffs from order entered 8 February 2013 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 October 2013.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander, and Meyer, Klipper & Mohr, PLLC, by Christopher A. Mohr, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for Defendants.

Arnall Golden Gregory LLP, by W. Jerad Rissler, for amicus curiae Consumer Data Industry Association.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, for amici curiae The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal raises the issue of whether the Automated Criminal/Infraction System database ("ACIS") is subject to public disclosure under the North Carolina Public Records Act, N.C. Gen. Stat. § 132-1 *et seq.* ("the Act"). In its order dismissing the matter on the pleadings, the trial court summarized the factual background of the case as follows:

> 1. The parties agree there are no facts in dispute and the matter before the [trial c]ourt is a question of law.
>
> 2. Plaintiffs' corporations [(collectively "Lexis")], which aggregate information from a variety of public sources, load and operate databases, and offer information services to government and private sector clients, bring this action pursuant to the Public Records Act.
>
> 3. Defendant Administrative Office of the Courts [("the AOC")] administers, supports, and maintains [ACIS] for the elected [c]lerks of [s]uperior [c]ourt for the 100 counties of the State of North Carolina for use as the electronic storage index of their criminal records.
>
> 4. ACIS is a real-time criminal records database that is a compilation of the criminal court records, including records subject to disclosure and records not subject to disclosure, of the 100 [c]lerks of [s]uperior [c]ourt.
>
> 5. The various [c]lerks of [s]uperior [c]ourt enter the information contained in the database in real time from the physical records contained in each of their respective offices.[1] As such, the compilation of records stored in ACIS

1. Some information contained in ACIS is entered by other public officials.

> is constantly changing. The information in the database is exactly what is entered by the [c]lerks of [s]uperior [c]ourt, and changes to the information are made by the various [c]lerks accordingly. Not every employee in each [c]lerk of [s]uperior [c]ourt's office can access all of the information in ACIS, nor can one [c]lerk of [s]uperior [c]ourt access the records for modification of another [c]lerk.
>
> 6. Clerks of [s]uperior [c]ourt have the ability to make electronic and paper copies of criminal records information they enter in the ACIS database that is subject to disclosure, and they routinely make such records available pursuant to public records requests. None of the 100 [c]lerks of [s]uperior [c]ourt has the ability to make an electronic copy of the entire ACIS database.
>
> 7. Criminal records information contained in the ACIS database that is subject to disclosure is made available by [the] AOC to the public via remote public access and extracts of certain information in the ACIS database is also made available by [the] AOC to private vendors pursuant to agreements entered into between them and [the] AOC under N.C. Gen. Stat. § 7A-109. [The] AOC also makes criminal records information contained in the ACIS database available to various governmental agencies pursuant to agreements and various statutory mandates.

In the fall of 2011, Lexis sent letters to Defendant John W. Smith II, in his official capacity as Director of the AOC, and to Defendant Nancy Lorrin Freeman, in her official capacity as the elected Clerk of the Wake County Superior Court ("the clerk"). Citing the Act, Lexis requested an *index*[2] of all computer databases and an electronic copy of the entire ACIS database.[3] In a written response, the AOC agreed to provide Lexis with "the indexing done to date for databases maintained by the []AOC and subject to [section] 132-6.1[,]" but maintained that the statute's requirement for compiling indexes "does not apply to databases created before the effective date [of section 132-6.1, and] ACIS pre-dates

2. Under the Act, an "index" is a description of various form and content details about an agency's database, and it is undisputed that these indexes are public records. N.C. Gen. Stat. § 132-6.1(b) (2013).

3. Lexis requested only "non-confidential or non-restricted information" in ACIS.

[the effective date.] A]s a result there is no index of ACIS that we can provide you."[4] Both the AOC and the clerk refused Lexis's request for a copy of the ACIS database itself. The AOC asserted that ACIS is a mainframe application which serves as a record-keeping tool for clerks of court statewide, but that the individual clerks are the custodians of the actual records. Because the Act provides that the duty to disclose public records lies with their custodian, the AOC asserted that it had "no records responsive to" Lexis's request for an electronic copy of ACIS. The clerk asserted that, while she could enter information from her county's criminal records into ACIS, she lacked the ability to make a copy of the entire database. Accordingly, the clerk also informed Lexis that she had "no records responsive to" its request.

On 13 October 2011, Lexis filed a complaint alleging that the clerk's and the AOC's refusal to provide an electronic copy of the ACIS database violates the Act. Lexis sought declarations that the ACIS database is a public record under the Act and that the AOC and/or the clerk are custodians of ACIS, as well as an order requiring the release of ACIS as a public record pursuant to the Act. Defendants filed a joint answer on 15 December 2011. On 6 February 2012, Lexis moved for judgment on the pleadings. Following a hearing, by order entered 8 February 2013, the trial court denied Lexis's motion, granted judgment on the pleadings in favor of Defendants, and dismissed the matter. Lexis appeals.

Discussion

On appeal, Lexis brings forward four arguments: that the trial court (1) misapplied the standard for judgment on the pleadings by assuming the counter-allegations in Defendants' answer to be true, and erred in (2) failing to address whether ACIS is a public record subject to disclosure under the Act, (3) concluding that the AOC is not the custodian of ACIS, and (4) denying disclosure of ACIS pursuant to N.C. Gen. Stat. § 7A-109(d). Because they are closely related and are dispositive of the merits of Lexis's position on appeal, we address Lexis's second and third arguments together. We reverse and remand the trial court's order as to the AOC. In light of this result, we do not address Lexis's first argument. We affirm as to the clerk.[5]

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4. Lexis's complaint, discussed *supra*, did not contain any allegations regarding an index of ACIS and did not seek a copy thereof. Accordingly, the AOC's refusal to provide Lexis with an index of ACIS was not before the trial court and is not before this Court on appeal.

5. Despite having named the clerk as a defendant, Lexis did not contend in the trial court or on appeal that the clerk is actually the custodian of the ACIS database. As discussed herein, under the Act, only the "custodian" of public records has a duty to provide

Standard of Review

We review a trial court's ruling on a motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Trust. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). "Under a *de novo* review, the [appellate] court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and internal quotation marks omitted).

I. ACIS is a public record and the AOC is its custodian

[1] Lexis argues that the ACIS database is a "public record" as defined in the Act and the AOC is its custodian. We agree.

The Act provides that

> "[p]ublic record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, *electronic data-processing records*, *artifacts*, or *other documentary material*, *regardless of physical form or characteristics*, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. . . .

N.C. Gen. Stat. § 132-1(a) (2013) (emphasis added). Further,

> [e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law. As used herein, "custodian" does not mean an agency that holds the public records of other agencies solely for purposes of storage or safekeeping or solely to provide data processing.

N.C. Gen. Stat. § 132-6(a).

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copies thereof upon request. N.C. Gen. Stat. § 132-6(a) (2013) (providing that "[e]very custodian of public records shall . . . furnish copies thereof . . . ."). All parties agree that the clerk did not create ACIS and does not have the ability to make a copy of the database. On appeal, Lexis does not argue that the trial court erred in concluding that the clerk did not violate the Act when she refused Lexis's request for a copy of the ACIS database. Accordingly, we affirm the order to the extent it concludes that the clerk did not violate the Act.

Both parties agree that the individual criminal records of the clerks of court are public records and that the clerks are the custodians of those records. As required by the Act, the clerk of court in each county will, upon request, provide copies of the criminal records for his or her county.[6] The disputed issues are whether ACIS, the database compiling information from those records, is a public record and, if so, whether the AOC is its custodian.

As for the first issue, we agree with Lexis's assertion that, once the clerks of court enter information from their criminal records into ACIS, the database becomes a new public record "existing distinctly and separately from" the individual criminal records from which it is created.[7] The plain language of the Act includes "electronic data-processing records" in its definition of public records. N.C. Gen. Stat. § 132-1(a). In turn, a database is a

> *[c]ollection of data or information organized for rapid search and retrieval, especially by a computer. Databases are structured to facilitate storage, retrieval, modification, and deletion of data in conjunction with various data-processing operations.* A database consists of a file or set of files that can be broken down into records, each of which consists of one or more fields. Fields are the basic units of data storage. Users retrieve database information primarily through queries. Using keywords and sorting commands, users can rapidly search, rearrange, group, and select the field in many records to retrieve or create reports on particular aggregates of data according to the rules of the database management system being used.

"Database." Merriam-Webster.com. Concise Encyclopedia, http://www.merriam-webster.com/concise/database (last visited Jan. 23, 2014) (emphasis added). Thus, we conclude that the ACIS database falls squarely within the definition of a public record as an electronic data-processing record.[8]

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6. As noted *supra*, the trial court found, and Lexis does not dispute, that the individual clerks of court cannot provide the records from any other counties or make a copy of the entire ACIS database.

7. As Lexis correctly observes, the trial court's order does not contain a conclusion of law about whether ACIS is a public record.

8. Further, we note that the ACIS database would certainly be encompassed under the Act's broadly worded catch-all provision including "other documentary material" in the definition of public records. N.C. Gen. Stat. § 132-1(a).

Next, as noted *supra*, the Act provides that the custodian of public records has the duty to provide the public with copies of those records when requested. N.C. Gen. Stat. § 132-6(a). The AOC argues that it is not the custodian of the criminal records whose information is used to create ACIS. We agree, but find this assertion inapposite. Lexis is not seeking copies of the criminal records, but rather a copy of ACIS.

We also reject as misplaced the AOC's related argument that it is not the custodian of the *information* contained in ACIS. The Act does not refer to custodians of *information* but of *records*. *See id.* The plain language of the Act requires custodians to provide copies of their public *records* and nothing in the Act suggests that this requirement is obviated because the *information* contained in a public record is publically available from some other source. Many public records contain information that is derived from and/or contained in other public records. For example, a city council might use information from its police department to create a report about crime statistics within its borders during a given year. Even though the *information* in the city council's report came from the police department and is available in the police department's own public records, the city council's report is still a public record and the city council is the custodian of its report. Our State's Department of Justice might use information from the city council's report in creating a chart comparing crime rates in many different cities. That chart would in turn become a new public record in the custody of the Department. Here, the AOC has admitted that it created, maintains, and controls ACIS and is the only entity with the ability to copy the database. Thus, ACIS is not the public record of another agency. Rather, ACIS is a record *of the AOC* and *in the AOC's custody*.

Further, we find irrelevant the AOC's observations that individual clerks of court input information from their counties' criminal records into ACIS and retain the sole ability to alter the information they input. In opposing the AOC's argument on this point, Lexis cites *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). In *Poole*, the plaintiffs sought

> materials . . . compiled on behalf of a commission appointed by the president of the University of North Carolina system of higher education. The Commission's purpose was to investigate and report on certain alleged improprieties relating to the men's basketball team at North Carolina State University (NCSU), one of the system's component universities. . . .

> The records sought to be disclosed [we]re *investigative reports prepared for the Commission by special agents of the State Bureau of Investigation (SBI)*, Commission minutes, and draft reports prepared by individual Commission members.

Id. at 470, 412 S.E.2d at 10 (emphasis added). The Commission acknowledged that many of the materials it generated or gathered were public records, but argued that the reports prepared by the SBI were not public records, citing a statutory provision which specifically exempts records and evidence created by the SBI from the definition of public records under the Act. *Id.* (citation omitted). The Supreme Court disagreed, concluding that, "when the SBI submitted its investigative reports to the Commission, they became Commission records. As such they are subject to the Public Records Law and must be disclosed to the same extent that other Commission materials must be disclosed under that law." *Id.* at 473, 412 S.E.2d at 12. Thus, the rule established by *Poole* is that, even when one government agency wholly creates a record and then simply delivers a copy of that record to a second agency, the second agency becomes a custodian of the record under the Act. *See id.*

Here, the case for disclosure under the Act is even stronger than in *Poole*. The clerks of court have not simply made copies of their records and sent them to the AOC. Rather, as explained *supra*, the clerks have acted at the direction of the AOC to create an entirely new and distinct public record, to wit, ACIS. *See* N.C. Gen. Stat. § 7A-109(a) (2013) ("Each clerk [of court] shall maintain such records, files, dockets[,] and indexes as are prescribed by rules of the Director of the [AOC]."). For all the reasons stated above, we hold that ACIS is a public record in the custody of the AOC.

II. Effect of section 7A-109(d)

[2] We also agree with Lexis that the trial court erred in concluding that requiring the AOC to provide a copy of ACIS upon request would "negate the provisions of N.C. Gen. Stat. § 7A-109(d)[.]"

Subsection (d) of the statute provides:

> In order to facilitate public access to court records, except where public access is prohibited by law, the Director [of the AOC] may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access to the records by the public. . . .

N.C. Gen. Stat. § 7A-109(d). Nothing in this subsection limits the public's ability to obtain *copies* of public records under the Act. The plain language of this subsection simply allows the AOC to offer an additional method of access to "court records" via "remote electronic access[.]" *Id.* Here, Lexis is not seeking remote electronic access to ACIS, but rather has requested a copy of the entire database. As such, the provisions of section 7A-109(d) are inapposite.

We are sympathetic to the AOC's argument that, if copies of the entire ACIS database are available upon request under the Act, third parties may be discouraged from entering into "contracts under reasonable cost recovery terms . . . to provide remote electronic access to [court] records . . . ." *Id.* However, we note that section 7A-109(d) is expressly permissive, rather than mandatory. *See id.* (providing that "the Director [of the AOC] *may* enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties") (emphasis added). If provision of copies of ACIS under the Act renders the option of providing remote electronic access unnecessary or not cost-effective, the AOC can simply decline to offer this additional method of access.

Our Supreme Court has directed "that in the absence of *clear statutory exemption or exception*, documents falling within the definition of 'public records' in the [Act] must be made available for public inspection." *Poole*, 330 N.C. at 486, 412 S.E.2d at 19 (emphasis added). We conclude there is no clear statutory exemption or exception applicable to the ACIS database. Accordingly, as to the AOC, the order of the trial court is reversed. We remand the matter to the trial court with directions to enter judgment for Lexis.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges GEER and ERVIN concur.

MOUNT ULLA HISTORICAL PRESERVATION SOCIETY, INC., ET AL., PETITIONERS
v.
ROWAN COUNTY, DAVIDSON COUNTY BROADCASTING, INC., RICHARD AND DORCAS PARKER, AND MAURICE E. AND MARY LEE PARKER, RESPONDENTS

No. COA13-447

Filed 18 February 2014

Res Judicata and Collateral Estoppel—res judicata—conditional use permit application—no material change

The superior court did not err by reversing the Rowan County Board of Commissioners' approval of a conditional use permit application because the application was barred by the doctrine of res judicata. Res judicata generally applies to quasi-judicial land use decisions unless there is a material change in the facts or circumstances since the prior decision was rendered. In this case, a whole record review provided no evidence that the lowering of a proposed tower by 150 feet in the 2010 CUP application constituted a material change from a 2005 application.

Appeal by respondent from order entered 27 September 2012 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 23 October 2013.

Smith Moore Leatherwood LLP, by Thomas E. Terrell, Jr. and Elizabeth Brooks Scherer; Kluttz, Reamer, Hayes, Randolph, Adkins & Carter, L.L.P., by Richard R. Reamer; and Sherrill and Cameron, PLLC, by Carlyle Sherrill, for petitioner-appellees.

Parker Poe Adams & Bernstein LLP, by Anthony Fox and Benjamin Sullivan, for respondent-appellant Rowan County.

CALABRIA, Judge.

Respondent Rowan County ("the County") appeals from the trial court's order reversing the decision of the Rowan County Board of Commissioners ("the Board") to issue a conditional use permit ("CUP") to respondent Davidson County Broadcasting, Inc. ("DBCI") on the basis that the CUP application was barred by the doctrines of *res judicata* and collateral estoppel. We affirm.

I. Background

On 18 January 2005, DCBI applied to the Board for a CUP ("the 2005 CUP application") to construct a 1,350 foot radio tower ("the tower") on property owned by respondents Richard and Dorcas Parker ("the Parkers"). After conducting a public hearing regarding the application, the Board voted to deny the CUP. The written decision denying the application indicated that it was denied because the proposed tower would pose an air safety hazard to Miller Airpark, a nearby private airport.

DCBI and the Parkers then filed a petition for writ of *certiorari* in Rowan County Superior Court to review the Board's decision. The court granted the petition and affirmed the denial of the CUP. DCBI and the Parkers appealed to this Court, which affirmed the decision of the superior court. *Davidson Cty. Broadcasting, Inc. v. Rowan Cty. Bd. of Comm'rs*, 186 N.C. App. 81, 649 S.E.2d 904 (2007)("DCBI I").

On 26 May 2010, DCBI applied to the Board for a CUP for a 1,200 foot radio tower ("the 2010 CUP application") in substantially the same proposed location as the tower in the 2005 application that had been denied. On 24 March 2011, DCBI filed a supplemental application to include property owned by respondents Maurice E. Parker and Mary Lee Parker as a fall zone. Petitioners[1] moved to dismiss the 2010 CUP application as being barred by the doctrines of *res judicata* and collateral estoppel. The Board denied the motion on 5 July 2011. Beginning 1 August 2011, the Board held a quasi-judicial hearing to consider the new application. On 6 September 2011, the Board entered a written decision approving the CUP. The Board found, *inter alia*, that the proposed tower would not create any hazardous safety conditions.

On 3 October 2011, petitioners filed a petition for writ of *certiorari* in Rowan County Superior Court, seeking review of the Board's CUP approval. Petitioners once again argued that the 2010 CUP application was barred by *res judicata* and collateral estoppel. Petitioners also alleged that the approved CUP did not conform to the Rowan County Zoning Ordinance.

On 27 September 2012, the superior court entered an order reversing the Board's approval of the 2010 CUP application. The court concluded that the 2010 CUP application was barred by *res judicata* and collateral estoppel. Respondents appeal.[2]

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1. Petitioners consist of Mt. Ulla Historical Preservation Society, Inc., Miller Air Park Owners Association, and several dozen private individuals.

2. While all respondents entered notice of appeal from the superior court's order, only respondent Rowan County filed a brief with this Court.

II. Standard of Review

"Special and conditional use permit decisions are quasi-judicial zoning decisions." *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 508, 434 S.E.2d 604, 613 (1993). "Our task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review." *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999).

> The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, [i]f a petitioner contends the [b]oard's decision was based on an error of law, de novo review is proper. Moreover, the trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (internal quotations and citations omitted).

III. *Res Judicata*

The County argues that the superior court erred by reversing the Board's approval of the 2010 CUP application because the application was barred by the doctrine of *res judicata*. We disagree.

"Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Nicholson v. Jackson Cty. School Bd.*, 170 N.C. App. 650, 654, 614 S.E.2d 319, 322 (2005) (internal quotations and citation omitted). "The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994). "[W]hether the doctrine of *res judicata* operates to bar a cause of action is a question of law reviewed *de novo* on appeal." *Housecalls Home Health Care, Inc. v. State*, ___ N.C. App. ___, ___, 738 S.E.2d 753, 758 (2013).

Our Supreme Court has specifically held that *res judicata* "is available with respect to the proceedings and final decision of a judicial or *quasi*-judicial body." *Little v. Raleigh*, 195 N.C. 793, 795, 143 S.E. 827, 828 (1928). In *Little*, a building permit to construct a gasoline filling station was denied by the building inspector and the board of adjustment, and the denial was upheld by our Supreme Court. *See Harden v. Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926). The property owner then petitioned the building inspector to reopen the case. *Little*, 195 N.C. at 793, 143 S.E. at 827. The building inspector reversed his prior determination and the previously-denied building permit was issued. *Id.* The issuance of the permit was upheld by the board of adjustment and the superior court. *Id.* at 793-94, 143 S.E. at 827-28. On appeal, our Supreme Court reversed the issuance of the building permit on the basis of *res judicata*:

> There is no allegation, no proof, and no finding by the trial court that the facts in the case at bar are in anywise different from the facts in the case of *Harden v. Raleigh*. Indeed, the trial judge finds that Mrs. Harden applied to the building inspector "to reopen and rehear its former decision upon the building of the filling station upon her said lot."
>
> Upon these circumstances we are constrained to hold that the plea of *res judicata*, duly filed in apt time by the petitioners, was available, and therefore that the owner of the lot is not entitled to reopen and rehear the case upon the identical facts presented in the former record.

Id. at 795, 143 S.E. at 828.

Little was subsequently distinguished by *In re Broughton Estate*, 210 N.C. 62, 185 S.E. 434 (1936). In *Broughton*, a permit was issued to construct a filling station. *Id.* at 62, 185 S.E. at 434. The permit issuance was challenged because, *inter alia*, a similar application had been denied three years earlier. *Id.* The superior court reversed the granting of the permit based upon *Little*, concluding that there had been "no substantial change in conditions" since the prior permit denial. *Id.* at 62-63, 185 S.E. at 434. That decision was then appealed to our Supreme Court, which reversed the superior court after determining that *Little* was inapplicable:

> The trial court held that the case was controlled by the decision in *Little v. Raleigh*, 195 N. C., 793, 143 S. E., 827. The two cases are not alike. In the first place, the cited

> case was on application "to reopen and rehear" a former decision which had received judicial approval *sub nomine Harden v. Raleigh*, 192 N. C., 395, 135 S. E., 151. Not so here. In the next place, *Little's case*, *supra*, was not only identical in allegation and fact with the original case, but was in truth the same case. Here, the traffic conditions as found by the board, "have materially changed since the former application was acted on . . . ."

Id. at 63, 185 S.E. at 435.

The County contends that, when read together, *Little* and *Broughton* stand for the proposition that *res judicata* applies to quasi-judicial land use decisions only when the applicant is attempting to "reopen and rehear the case upon the identical facts presented in the former record." *Little*, 195 N.C. at 795, 143 S.E. at 828. However, the County reads the *Broughton* Court's interpretation of *Little* too narrowly.

The *Broughton* Court determined that the use of *res judicata* by the trial court was improper based upon two differences between the permit approval before it and the permit approval at issue in *Little*. First, the permit issued in *Little* was based upon an "application 'to reopen and rehear' a former decision which had received judicial approval . . . ." *Broughton*, 210 N.C. at 63, 185 S.E. at 435. Second, the Court noted that "the traffic conditions as found by the board, 'have *materially changed* since the former application was acted on . . . .'" *Id.* (emphasis added). Thus, the *Broughton* Court did not conclude that *res judicata* did not apply merely because the two applications at issue in that case were not exactly the same. The Court's conclusion also depended upon the board's finding that there was a material change in conditions between the prior permit application and the subsequent permit application. This requirement of a material change in order to preclude the use of the defense of *res judicata* for quasi-judicial land use decisions is consistent with the law in other jurisdictions which have considered the question, *see*, *e.g.*, *Curless v. County of Clay*, 395 So. 2d 255, 258 (Fla. Dist. Ct. App. 1981); *Whittle v. Board of Zoning Appeals*, 125 A.2d 41, 46 (Md. 1956); *Fisher v. City of Dover*, 412 A.2d 1024, 1027 (N.H. 1980); and *Cohen v. Fair Lawn*, 204 A.2d 375, 377 (N.J. Super. Ct. App. Div. 1964), as well as with general *res judicata* principles. *See* Restatement (Second) of Judgments § 24 cmt. f. (1982)("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.").

Although our Courts have not specifically defined what constitutes a material change, the consensus among other jurisdictions which have analyzed whether *res judicata* bars a quasi-judicial land use decision appears to be that

> [t]he change in conditions or circumstances which would justify the reconsideration of an action must be a change in the particular circumstance or condition which induced the prior denial. The change in circumstances must be such that the application for the same or a substantially similar special exception or variance no longer can be characterized as the same claim.

83 Am. Jur. 2d Zoning and Planning § 700 (2013)(footnotes omitted). This definition of material change makes sense in the context of quasi-judicial land use decisions because

> [w]hen the facts and circumstances which actuated an order or a decision are alleged and shown to have so changed as to vitiate or materially affect the reasons which produced and supported it and no vested rights have intervened, it is reasonable and appropriate to the functions of the board that the subject-matter be re-examined in the light of the altered circumstances.

St. Patrick's Church Corp. v. Daniels, 154 A. 343, 345 (Conn. 1931).

We find the preceding authorities persuasive and utilize them to formulate the following definition of "material change" in the context of quasi-judicial land use decisions in North Carolina: a material change which precludes the use of the defense of *res judicata* occurs when the specific facts or circumstances which led to the prior quasi-judicial land use decision have changed to the extent that they "vitiate . . . the reasons which produced and supported" the prior decision such that the application "can no longer can be characterized as the same claim." *Id.*; 83 Am. Jur. 2d Zoning and Planning § 700.

In the instant case, the 2005 CUP application was denied because the proposed tower was determined to be a safety hazard to Miller Airpark. *See DCBI I*, 186 N.C. App. at 91-92, 649 S.E.2d at 912. Accordingly, in order to avoid being barred by *res judicata*, DCBI's 2010 CUP application must have materially changed the design of the proposed tower in such a way as to vitiate the concerns regarding air safety which led to the denial of the 2005 CUP application.

Although the Board denied petitioners' motion to dismiss on the basis of *res judicata*, it did not include, as part of its written decision approving the 2010 CUP application, any findings which suggest that there was a material change from the denied 2005 CUP application. However, by denying petitioners' motion to dismiss, the Board necessarily found that there was a material change between the two applications. This inference is consistent with Rowan County Commissioner Jim Sides, Jr.'s explanation of his motion to deny petitioners' motion to dismiss:

> [t]here has been considerable change in this application from the previous application, and I realize that the previous decision was made based primarily on safety factors. We do not know, at this point, based on a 1200 feet (sic) tower versus a 1350 feet (sic) tower, what the facts would be in relation to safety. Based on that, I would move against the motion to dismiss . . . ."

The County makes substantially the same argument to this Court, contending that the lowering of the tower by 150 feet in the 2010 CUP application was a material change that would preclude the use of *res judicata*.

Prior to determining whether the Board's finding of a material change was correct, we must first determine the proper standard of review, which our Courts have not explicitly considered previously. The consensus from other jurisdictions is that the determination of whether a subsequent application demonstrates a material change from a prior application is a factual question, with deference given to the quasi-judicial body's finding. *See Russell v. Bd. of Adjustment of Borough of Tenafly*, 155 A.2d 83, 88 (N.J. 1959)("Whether the requirement [of a material change] has been met is for the board, in the first instance, to determine. This finding, as any other made by the board, will be overturned on review only if it is shown to be unreasonable, arbitrary or capricious." (internal citation omitted)); *Freeman v. Ithaca Zoning Bd. of Appeals*, 403 N.Y.S.2d 142, 143 (N.Y. App. Div. 1978)("[I]t is for the board to determine whether or not changed facts or circumstances are presented and, in so doing, it may give weight even to slight differences not easily discernible[.]" (internal quotations and citation omitted). This deferential standard is consistent with *Broughton*, in which our Supreme Court overturned the superior court's conclusion "that there had been no substantial change in conditions" based upon the board of adjustment's finding that "traffic conditions . . . 'have materially changed since the former application was acted on . . . .' " 210 N.C. at 63, 185 S.E.

at 434-35. Accordingly, we conclude that the deferential whole record test applies to the Board's finding of a material change. We note that the superior court correctly applied this standard of review below, holding that "[a] whole record review . . . fails to disclose competent, material or substantial evidence that the height variance materially alters the proposed use from that use proposed in the earlier application."

"When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by substantial evidence." *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 17 (internal quotations and citation omitted). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

The County is correct that the lowering of the tower by 150 feet constituted a change from the denied 2005 CUP application. However, a review of the whole record does not reveal any evidence that this change would undermine the reasoning behind the denial of the 2005 CUP application. The County points to general evidence presented during the 2010 CUP application hearing that the proposed 1,200 foot tower would be safe for air travel, but fails to connect this evidence in any way to the change in the height of the tower from the 2005 CUP application. The safety evidence cited by the County would be equally applicable to both a 1,350 foot tower and a 1,200 foot tower. As this Court explicitly recognized in *DCBI I*, the 2005 CUP application was supported by "evidence from which the Board could have found that the tower would not pose an unreasonable or unjustifiable safety hazard" to air travel, but the Board nonetheless found that evidence to be outweighed by other evidence that the tower would create such a hazard. 186 N.C. App. at 92, 649 S.E.2d at 913. Since there is nothing in the whole record which suggests that the prior evidence regarding the tower's potential safety hazard to air travel from the 2005 CUP application hearing was vitiated by lowering the tower by 150 feet, the Board's finding in the instant case that there was a material change in the 2010 CUP application was not supported by the evidence. *See St. Patrick's Church*, 154 A. at 345. The whole record reflects that the Board essentially considered the same information in both the 2005 and 2010 CUP applications and reached different decisions. *Res judicata* forbids such a result. *See King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 804 (1973)("(W)hen a fact has been agreed upon or decided in a court of record, neither of the

parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." (internal quotation and citation omitted)). Ultimately, as there was no material change between the 2005 and 2010 CUP applications, *res judicata* barred the Board from reconsidering its previous decision. Therefore, the superior court properly concluded that *res judicata* required the Board to dismiss the 2010 CUP application. This argument is overruled.

IV. Conclusion

Res judicata generally applies to quasi-judicial land use decisions unless there is a material change in the facts or circumstances since the prior decision was rendered. In the instant case, a whole record review provides no evidence that the lowering of the proposed tower by 150 feet in the 2010 CUP application constituted a material change. Therefore, the superior court properly concluded that the 2010 CUP application was barred by *res judicata*. The superior court's order is affirmed.

Affirmed.

Judges BRYANT and HUNTER, Jr., Robert N. concur.

JERMAINE S. PETERS, Plaintiff/Husband/Father
v.
RASHEEDAH PETERS, Defendant/Wife/Mother

No. COA13-816

Filed 18 February 2014

Child Support—retroactive child support—interlocutory order—no substantial right

Defendant's appeal from an order denying her retroactive child support was dismissed as interlocutory. Defendant's statement of grounds for appellate review included no citation to a statute permitting review and defendant failed to offer any legal reason that the trial court's order affected a substantial right. Furthermore, defendant's appeal was improper because it was based on an interlocutory order not affecting a substantial right.

Appeal by Defendant from Order entered 8 April 2013 by Judge Ralph C. Gingles in Gaston County District Court. Heard in the Court of Appeals 11 December 2013.

Law Office of Yolanda M. Trotman, PLLC, by Yolanda M. Trotman, for Plaintiff.

The Blain Law Firm, PC, by Sabrina Blain, for Defendant.

STEPHENS, Judge.

Factual and Procedural History

This case arises from the separation on 19 April 2011 of Plaintiff Jermaine Peters and Defendant Rasheedah Peters. The couple was married on 28 September 2002. They have one minor child and reside in Gaston County. On 5 August 2012, acting *pro se*, Plaintiff submitted his divorce complaint in Mecklenburg County. Defendant submitted her answer two months later, on 8 October 2012, counterclaiming for child custody, child support, retroactive child support, equitable distribution, resumption of the use of her maiden name, and attorneys' fees. On 13 November 2012, venue was changed from Mecklenburg County to Gaston County pursuant to a consent order filed in Mecklenburg County District Court.[1] Despite that change, Plaintiff filed a reply to Defendant's answer with the assistance of counsel on 11 December 2012 in Mecklenburg County.[2] Defendant thereafter replied to Plaintiff's reply on 14 January 2013 in Gaston County.

The case was heard in Gaston County District Court during the 21 February 2013 civil session. During the hearing, Plaintiff made a motion to "dismiss/deny" Defendant's claim for retroactive child support on grounds that Defendant "failed to state a claim for which relief can be granted[] and failed to submit an [a]ffidavit of reasonable and necessary expenses as required by case law cited in the North Carolina

1. Though the consent order was not included in the record on appeal, its existence is not disputed by the parties. Therefore, we take judicial notice of the order for purposes of appellate review. *E.g.*, *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) ("[G]enerally a judge or a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or *is capable of demonstration by readily accessible sources of indisputable accuracy*.") (citations omitted; emphasis in original).

2. There is nothing in the record to explain why Plaintiff filed his reply in Mecklenburg County instead of Gaston County, and the parties do not discuss it in their briefs.

Trial Judge's Bench Book."[3] Defendant argued that "such an [a]ffidavit is not required and that the child's expenses could be established through testimony." The district court issued an order on 8 April 2013, *nunc pro tunc*, to 21 February 2013, which denied Defendant's claim for retroactive child support. Defendant appeals from that order.

Discussion

On appeal, Defendant contends that the trial court erred in denying her claim because (1) her factual allegations regarding retroactive child support were adequate and (2) she was not required to file an affidavit to show the necessary and reasonable expenses incurred by the parties' child. Plaintiff responds by arguing, *inter alia*, that Defendant's appeal is interlocutory and should be dismissed. We agree with Plaintiff and dismiss Defendant's appeal as interlocutory. Accordingly, we do not address the parties' other arguments.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). In contrast, a final judgment "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361–62, 57 S.E.2d at 381. "Generally there is no right of immediate appeal from interlocutory orders and judgments." *Goldson v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "The reason for this rule is to prevent fragmentary, premature[,] and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 619–20, 677 S.E.2d 854, 857–58 (2009).

Despite this general rule,

> [i]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay [pursuant to Rule 54(b)]. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

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3. There is no transcript of the proceedings in the record on appeal. This recitation of events comes from the trial court's 8 April 2013 order.

Sharpe v. Worland, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (citations omitted). "When an appeal is interlocutory [and not certified for appellate review pursuant to Rule 54(b)], the appellant must include in [the] statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (citing N.C.R. App. P. 28(b)(4)), *affirmed per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). Otherwise, the appeal is subject to dismissal. *Rousselo v. Starling*, 128 N.C. App. 439, 444, 495 S.E.2d 725, 729 (1998) (noting that failure on the part of the appellant to establish that the trial court's order affects a substantial right "subjects an appeal to dismissal").

In this case, Defendant provided the following statement regarding the grounds for her appeal of the trial court's order:

> At the time this appeal was filed, other claims remained outstanding between the parties in the trial court, so this appeal from [the o]rder is interlocutory. However, the [o]rder affects [Defendant's] substantial right in that it deprives her [of r]etroactive [s]upport and more particularly deprives her of the use of funds expended in supporting the child prior to the date of filing her claim for [c]hild [s]upport and impedes her ability to support the child in the future.

This statement is insufficient.

> It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). In making such a showing, "[t]he appellant[] must present more than a bare assertion that the order affects a substantial right; [she] must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (emphasis in original). Rule 28 of the North Carolina Rules of Appellate Procedure clarifies that, at a minimum, a party's statement of grounds for appellate review must "include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument

to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4).

Defendant's statement of grounds for appellate review in this case includes no citation to the statute permitting review. In addition, Defendant fails to offer any legal reason that the trial court's order affects a substantial right. Instead, she simply asserts that it does. Where the appellant fails to carry her burden in this circumstance, the appeal will be dismissed. *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254 ("[The defendant] presented neither argument nor citation to show this Court that [the defendant] had the right to appeal the order dismissing its counterclaims."). Because Defendant presents no argument to show that she has the right to immediate review of the trial court's order, we hold that she failed to carry her burden and dismiss her appeal as interlocutory. *See id*; *Plomaritis v. Plomaritis*, 200 N.C. App. 426, 429, 684 S.E.2d 702, 704 (2009) (dismissing as interlocutory the defendant-husband's appeal of an order modifying his monthly child support obligation because the defendant "offers no argument that the . . . order has affected a substantial right, and we decline to construct one for him").

Nevertheless, we also conclude that Defendant's appeal is improper because it is based on an interlocutory order not affecting a substantial right. "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and internal quotation marks omitted).

> The test for whether a substantial right has been affected consists of two parts: (1) the right itself must be substantial; and (2) the deprivation of that substantial right must potentially work injury to the appealing party if not corrected before appeal from final judgment. Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed.

Builders Mut. Ins. Co. v. Meeting Street Builders, LLC, __ N.C. App. __, __, 736 S.E.2d 197, 199 (2012) (citations, internal quotation marks, and brackets omitted).

> The right to immediate appeal [of an order affecting a substantial right] is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. Our courts have generally taken a restrictive view of the substantial right exception.

Turner, 137 N.C. App. at 142, 526 S.E.2d at 670. While this Court has not determined whether an ordering denying *retroactive* child support, standing alone, affects a substantial right, *cf. Appert v. Appert*, 80 N.C. App. 27, 33, 341 S.E.2d 342, 345 (1986) (holding that an order regarding *prospective* child support affects a substantial right), we have addressed the substantial right question in a number of similar, instructive scenarios.

In *Stephenson v. Stephenson*, we held that an order awarding alimony *pendente lite*, child support *pendente lite*, and attorneys' fees *pendente lite* constituted an interlocutory decree, which could not be immediately appealed. 55 N.C. App. 250, 251, 285 S.E.2d 281, 282 (1981). There we noted that, "[i]n the majority of appeals from *pendente lite* awards[,] it is obvious that a final hearing may be had in the district court and final judgment entered much more quickly than this Court can review and dispose of the *pendente lite* order." *Id.* (italics added). Therefore, we reasoned,

> [t]here is an inescapable inference drawn from an overwhelming number of appeals involving *pendente lite* awards that the appeal too often is pursued for the purpose of delay rather than to accelerate determination of the parties' rights. The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable.

Id. (italics added). The following year we applied the reasoning of *Stephenson* to an award of child support and a *pendente lite* award of alimony, concluding that "child support orders entered in conjunction with orders for alimony *pendente lite*" are not subject to immediate appellate review even when the child support order is not designated "*pendente lite*." *Fliehr v. Fliehr*, 56 N.C. App. 465, 466, 289 S.E.2d 105, 106 (1982) (citing the delay rationale articulated in *Stephenson*). Relying on *Stephenson* and other similar cases, we stated in 2001 that "[i]nterlocutory appeals [challenging] *only the financial repercussions* of a separation or divorce generally have not been held to affect a substantial right." *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 262 (2001) (collecting cases) (emphasis added).

In certain *limited* factual contexts, however, we have nonetheless determined that an order pertaining to the financial repercussions of a separation or divorce affects a substantial right. In *McGinnis v. McGinnis*, for example, we held that an order enforcing an out-of-state order, which granted the plaintiff's claim for $4,225.00 in arrearages

for alimony and child support and *imposed a continuing support obligation*, affected a substantial right and was immediately appealable. 44 N.C. App. 381, 387, 261 S.E.2d 491, 495 (1980) (citations omitted). Six years later, in *Appert*, we determined that an order affected a substantial right when it directed that *prospective* child support funds be placed in escrow if the parties' minor children failed or refused to abide by certain visitation privileges. 80 N.C. App. at 28, 33, 341 S.E.2d at 342, 345. There, in determining that the order affected a substantial right, we focused on the trial court's statement that the support was "*reasonably necessary for the support and maintenance of the children*." *Id.* at 33, 341 S.E.2d at 345 (noting that "[i]t is usually necessary to resolve the question in each case by considering *the particular facts of that case and the procedural context* in which the order from which appeal is sought was entered") (citation and internal quotation marks omitted; emphasis added).

In both *McGinnis* and *Appert*, we elected to review the parties' appeals as affecting a substantial right when the trial courts' respective orders dealt, in part, with whether *future* child support payments would be available. In those cases, one party's right to receive or access future payments, if actually owed, was in jeopardy. Therefore, we correctly determined that the right was substantial as implicating the child's right to receive support. In this case, however, Defendant is appealing the trial court's denial of her claim for *past* child support payments. While such payments might be owed, the right to receive reimbursement cannot be lost by our decision to refrain from granting immediate appellate review. The funds have already been expended, and Defendant's right to reimbursement cannot be irremediably adversely affected by waiting until the natural conclusion of the proceedings below. The harm done to Defendant, if any, has already occurred and cannot intensify. This is distinct from the harm that *could be* done in the context of *prospective* child support payments. There, immediate appellate review might function to reverse or mitigate such harm if child support payments were improvidently granted or denied. Therefore, we believe we are bound by the general rule articulated in *Embler* and applied in *Stephenson* and *Fliehr*.

For the above reasons, Defendant's appeal is dismissed as based on an interlocutory order not affecting a substantial right.

DISMISSED.

Judges STEELMAN and DAVIS concur.

STATE OF NORTH CAROLINA
v.
HAROLD GOINS, JR.

No. COA13-998

Filed 18 February 2014

1. Constitutional Law—speedy trial—balancing factors—no violation

Defendant's right to a speedy trial was not violated, balancing all of the factors in *Barker v. Wingo*, 407 U.S. 514. Although the length of delay was greater than one year, defendant's failure to show neglect or willfulness by the State and his failure to argue how his defense was prejudiced weighed heavily against his claim.

2. Witnesses—impeachment of own witness—testimony vital—limiting instruction

The trial court did not abuse its discretion by allowing the State to impeach the credibility of its own witness with a recording where the witness was unable to remember an interview with a detective. The record indicates impeachment was permissible because the witness's testimony was vital to the State's case and the trial court both preceded and followed the recording with a limiting instruction.

3. Evidence—prior crimes or bad acts—defendant's recent incarceration—admissible

The trial court did not err by admitting evidence that defendant had very recently been incarcerated where the State elicited testimony from a witness regarding why she corresponded via postal mail with defendant. Defendant offers no case holding that discussing the mere fact of recent incarceration amounts to evidence of other crimes, wrongs, or acts.

4. Criminal Law—prosecutor's closing argument—defendant's failure to produce evidence

There was no error in a prosecution for rape and other offenses where defendant argued that the State was allowed to comment on his invocation of his right to remain silent. The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. Moreover, in this case the State actually noted defendant's right to remain silent rather than highlighting his failure to testify.

Appeal by Defendant from judgments entered 11 April 2013 by Judge Arnold O. Jones, II in Superior Court, New Hanover County. Heard in the Court of Appeals 21 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General K.D. Sturgis, for the State.

Ryan McKaig for Defendant.

McGEE, Judge.

Harold Goins, Jr. ("Defendant") appeals from his convictions for first-degree rape, first-degree kidnapping, three counts of first-degree sexual offense, assault with a deadly weapon, communicating threats, and being a violent habitual felon. At trial, the State's witnesses included Johnathan Stevens ("Mr. Stevens"), who testified that he drove Defendant to the apartment of Jacquelyn Goins ("Ms. Goins") on 21 July 2010. Ms. Goins testified that Defendant is her cousin and that Defendant came to her apartment with his brother, Mr. Stevens. She testified that Mr. Stevens left the apartment after about twenty minutes, and Defendant subsequently attacked her. The facts relevant to the issues on appeal are discussed in greater detail in the analysis section of this opinion.

I. Speedy Trial

[1] Defendant first argues the trial court "abused its discretion when it denied [Defendant's] motion to dismiss for lack of a speedy trial." To determine whether a defendant's right to a speedy trial has been infringed, we consider four factors: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay." *State v. McBride*, 187 N.C. App. 48;96, 498, 653 S.E.2d 218, 220 (2007); *see also Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972).

A. Length of Delay

For speedy trial analysis, the relevant period of delay begins at indictment. *State v. Friend*, ___ N.C. App. ___, ___, 724 S.E.2d 85, 90, *disc. review denied*, 366 N.C. 402, 735 S.E.2d 188 (2012). In the present case, the relevant period began 18 January 2011 and ended upon Defendant's trial, on 1 April 2013. Thus, the relevant period for the first *Barker* factor is approximately twenty-seven months, from 18 January 2011 to 1 April 2013.

B. Reason for the Delay

As to the reason for the delay, Defendant bears the burden of "offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution[.]" *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 804 (2008). Only after the defendant has carried his burden "must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Id.* The "constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case." *Id.*

Defendant failed to carry this burden. In his brief to this Court, Defendant concedes there is no "deliberate delay in an attempt to hamper the defense" by the State. In his motion for a speedy trial, Defendant offered no evidence showing that the State's neglect or willfulness caused a delay. Furthermore, in arguing to the trial court that the charges should be dismissed for speedy trial violations, defense counsel alleged merely that "the defense has never, to my knowledge, made a motion to continue, joined in any motion to continue, asked for any continuance or delay for this trial." Defendant made no allegations as to neglect or willfulness of the State.

Nevertheless, the State offered reasons to explain the delay. Defendant contends the State's reasons — a backlog at the State Bureau of Investigation ("SBI") crime lab, the SBI's failure to fully analyze the rape kit, other cases on the docket, the need to have an out-of-county judge, and Defendant's motion for a change of venue — "were entirely caused by or under the control of the [S]tate to rectify."

In *State v. Tann*, 302 N.C. 89, 93, 273 S.E.2d 720, 723 (1981), a speedy trial case, the defendant moved for an examination to determine competency. Further delay resulted when defense counsel withdrew. The case was calendared for trial "one or more times" but not reached due to the length of the calendar. *Id.* at 95, 273 S.E.2d at 724. Our Supreme Court held that "[a]ll such reasons have been recognized consistently as valid justification for delay." *Id.* "Inherent in every criminal prosecution is the probability of some delay . . . and for that reason the right to a speedy trial is necessarily relative." *Id.* at 94, 273 S.E.2d at 724.

As in *Tann*, there is no indication in the present case that the State either negligently or purposefully underutilized court resources. Accordingly, we conclude the delay was caused by neutral factors. Defendant failed to carry his burden to show that delay was caused by

the State's neglect or willfulness. This factor weighs against Defendant's speedy trial claim.

C. Assertion of the Right to a Speedy Trial

Defendant asserted his right to a speedy trial in November 2011. "Defendant's failure to assert his right to a speedy trial, or his failure to assert his right sooner in the process, does not foreclose his speedy trial claim, but does weigh against his contention[.]" *State v. Grooms*, 353 N.C. 50, 63, 540 S.E.2d 713, 722 (2000). In *Grooms*, the defendant's assertion came three years after indictment. *Id.* This Court held that his delay in asserting the speedy trial right weighed against his claim. *Id.* In the present case, Defendant's assertion came nearly a year after the indictments, which are dated 18 January 2011. Given the relative speed with which he asserted the right, this factor tends to weigh in favor of Defendant's claim.

D. Prejudice

The "defendant must show actual, substantial prejudice." *State v. Spivey*, 357 N.C. 114, 122, 579 S.E.2d 251, 257 (2003). "The right to a speedy trial is designed: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *State v. Lee*, ___ N.C. App. ___, ___, 720 S.E.2d 884, 893, *disc. review improvidently allowed*, 366 N.C. 329, 734 S.E.2d 371 (2012) (quoting *State v. Webster*, 337 N.C. 674, 680-81, 447 S.E.2d 349, 352 (1994)).

In the present case, Defendant argues he suffered "oppressive" pre-trial incarceration in federal prison because he was "labeled a sex offender by the United States Bureau of Prisons," causing him anxiety and concern. However, as Defendant acknowledges, he was a federal inmate before the trial at issue in this case.

Defendant next argues his appointed attorney "left the case," and Defendant "had an attorney who was forced to play catch-up." However, Defendant does not indicate how his second attorney was deficient and how that deficiency prejudiced him. Similarly, in *Webster*, the defendant "appears to concede that there has been no actual impairment of her ability to defend caused by the delay in trial." *Webster*, 337 N.C. at 681, 447 S.E.2d at 352.

Defendant also contends there were "potential defense witnesses who were originally ready and willing to testify" who "became reticent." In *Lee*, the defendant argued his defense was impaired because an eye-witness to the incident became unavailable. *Lee*, ___ N.C. App. at ___,

720 S.E.2d at 893. The defendant did not state what evidence he might have obtained. *Id.* This Court held the defendant failed to show "any actual or substantial prejudice resulting from the delay." *Lee*, ___ N.C. App. at ___, 720 S.E.2d at 893.

In the present case, Defendant does not explain how the delay caused reticence or what evidence Defendant would have elicited had the witnesses testified. Finally, Defendant notes that "the victim's story kept changing between the accusation, indictment and trial." Defendant does not explain how the delay caused the victim's story to change or how a changing story impaired Defendant's defense. Because Defendant has not shown actual, substantial prejudice, this factor weighs against his claim.

E. Balancing of the *Barker* Factors

Our Courts have described a one-year trial delay as "presumptively prejudicial." *Webster*, 337 N.C. at 678, 447 S.E.2d at 351 (quoting *Doggett v. United States*, 505 U.S. 647, 652, 120 L. Ed. 2d 520, 528 (1992)). However, where the other factors weigh against a defendant's claim, our Courts have found no violation of the right to a speedy trial in a delay of three years and seven months. *McBride*, 187 N.C. App. at 498-99, 653 S.E.2d at 220. The four *Barker* factors must be balanced against one another. "No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *Id.* at 498, 653 S.E.2d at 220.

In the present case, balancing the *Barker* factors reveals Defendant's right to a speedy trial was not violated. Although the length of delay was greater than one year, Defendant's failure to show neglect or willfulness of the State and failure to argue how his defense was prejudiced weigh heavily against his claim. We conclude Defendant's right to a speedy trial was not violated.

II. Allowing the State to Impeach Its Own Witness

[2] Defendant next argues the trial court erred "by allowing the State to impeach the credibility of its own witness[,]" Mr. Stevens, because the trial court allowed the State to "mask impermissible hearsay as impeachment evidence." We disagree.

A. Standard of Review

"Rulings by the trial court concerning whether a party may attack the credibility of its own witness are reviewed for an abuse of discretion." *State v. Banks*, 210 N.C. App. 30, 37, 706 S.E.2d 807, 814 (2011).

"Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 38, 706 S.E.2d at 814.

B. Analysis

"The credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2013). "[W]hile North Carolina Rule of Evidence 607 allows a party to impeach its own witness on a material matter with a prior inconsistent statement, impeachment is impermissible where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible." *State v. Riccard*, 142 N.C. App. 298, 304, 542 S.E.2d 320, 324 (2001) (citing *State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989)).

"Although unsworn prior statements are not hearsay when not offered for their truth, the difficulty with which a jury distinguishes between impeachment and substantive evidence and the danger of confusion that results has been widely recognized." *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757.

> Circumstances indicating good faith and the absence of subterfuge . . . have included the facts that the witness's testimony was extensive and vital to the government's case . . . ; that the party calling the witness was genuinely surprised by his reversal . . . ; or that the trial court followed the introduction of the statement with an effective limiting instruction. . . .

Riccard, 142 N.C. App. at 304, 542 S.E.2d at 324 (alterations in original). Our Supreme Court in *Hunt* analyzed the State's introduction of impeachment evidence to determine if the witness's testimony either "was critical to the state's case or that it was introduced altogether in good faith and followed by effective limiting instructions." *Hunt*, 324 N.C. at 351, 378 S.E.2d at 758.

In the case before us, the State asked Mr. Stevens on direct examination about his interview with detectives. Mr. Stevens testified that he remembered the interview, but that looking at the video recording of the interview would not refresh his recollection of what he told the detectives. The State asked the trial court for permission to treat Mr. Stevens as a hostile witness and to play a video recording of the interview. The State had a video recording that had been redacted to remove information regarding Defendant "being in prison, the amount of time he spent in prison[,]" and various rumors.

Defendant objected to the introduction of the recording, citing *Hunt*, *supra*. The prosecutor contended that he met with Mr. Stevens before trial and asked him if he remembered speaking with detectives in 2010 and that Mr. Stevens responded affirmatively. The prosecutor also said that he read portions of the interview to Mr. Stevens and that Mr. Stevens had no questions. The prosecutor then stated:

> [Mr. Stevens] didn't express to me that he was going to refuse to testify. He didn't express any interest to me that he was not going to cooperate. There was no indication of anything -- what he said on the stand today, that he wanted to take the Fifth, that he didn't want to testify, that he didn't want to answer questions, that he didn't remember talking to the cops, he didn't remember the specific questions, or that he was so intoxicated. . . . None of that came up in the short conversation that I had with him.

We need not decide whether the record shows the State was genuinely surprised by Mr. Stevens' reversal because the testimony was critical to the State's case. Mr. Stevens testified that Defendant is his brother; that he met Ms. Goins when he drove Defendant and dropped him off at Ms. Goins' apartment; that he went into her apartment, observed her there alone, and stayed for about five minutes before returning home; that he left Defendant and Ms. Goins alone at her apartment; and that he returned "[a]bout two or three hours" later to pick up Defendant because he got a phone call from Ms. Goins. Mr. Stevens' testimony was critical to the State's case because Mr. Stevens had the best opportunity to observe Defendant's demeanor and hear his statements just before and just after the alleged offenses.

By contrast, in *Hunt*, the witness's testimony "consisted entirely of responding to challenges to her credibility and bias[,]" except for "brief testimony about the color of her bicycle, which another of the state's witnesses thought he had seen [the] defendant riding[.]" *Hunt*, 324 N.C. at 351, 378 S.E.2d at 758. In the present case, the record indicates impeachment was permissible because Mr. Stevens' testimony was vital to the State's case.

Furthermore, the trial court both preceded and followed the introduction of the recording with a limiting instruction. As discussed in *Hunt*, the use of an effective limiting instruction weighs against the claim that the State's witness was impermissibly impeached. *Hunt*, 324 N.C. at 349, 378 S.E.2d at 758. Because the record indicates that Mr. Stevens' testimony was vital to the State's case and the trial court gave

an effective limiting instruction, the trial court did not err in allowing the State to impeach its own witness.

III. Evidence of Defendant's Recent Incarceration

[3] Defendant next argues the trial court erred in admitting evidence that Defendant "had very recently been incarcerated[.]" Defendant contends that the admission of evidence of Defendant's recent incarceration violated N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013).

Although Defendant alleges that the "transcript is replete with references to [Defendant's] recent incarceration," the only reference Defendant pinpoints in his brief is page 447 of the trial transcript. The testimony relevant to this issue is as follows:

> [The State]. [W]hy did you -- why did you start writing [Defendant] letters at the age of 18?
>
> [Ms. Goins]. My brother, the one that's incarcerated, asked me to.
>
> [The State]. And if you know, where was [D]efendant when you wrote him these letters?
>
> [Ms. Goins]. Incarcerated.
>
> > [Defense Counsel]. Your Honor, I'm sorry. At this point I would renew my prior objections that we argued based on due process, under Article 1, Section 23 of the North Carolina Constitution.
> >
> > The Court: Overruled.
>
> [The State]. Where was [D]efendant? Where did you send these letters to?
>
> [Ms. Goins]. To the incarceration where he was.
>
> Q. Was he in jail, prison?
>
> A. In prison.
>
> > [Defense Counsel]. I'm sorry, Your Honor, I would note that, that is a standing objection to this line of questioning.
> >
> > The Court: Okay, standing objection. It's overruled.

The subsequent examination reveals no details identifying or describing the conviction or convictions that led to Defendant's incarceration.

Rule 404(b) governs the admission of evidence "of other crimes, wrongs, or acts[.]" N.C.G.S. § 8C-1, Rule 404(b). Defendant cites *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), for support of his argument. In *McClain*, our Supreme Court noted that "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged." *Id.* at 174, 81 S.E.2d at 366.

However, in the present case, the State introduced no evidence of other crimes, wrongs, or acts. Rather, the State elicited testimony from Ms. Goins regarding why she corresponded via postal mail with Defendant. Defendant offers no case holding that discussing merely the fact of recent incarceration amounts to evidence of other crimes, wrongs, or acts. Furthermore, our research reveals no case holding that recent incarceration, in and of itself, amounts to evidence of other crimes, wrongs, or acts. Defendant therefore has not shown that the trial court erred on the basis of violation of N.C.G.S. § 8C-1, Rule 404(b).

IV. State's Closing Remarks

[4] Defendant next argues the trial court erred in allowing the State to "comment on [Defendant's] invocation of his right to remain silent[.]" We disagree.

"A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent." *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). However, in the present case, the State did not refer to Defendant's failure to testify. The relevant part of the State's closing is as follows:

> [The State]. And again, [D]efendant doesn't have to testify. He has the right to remain silent, you can't hold that against him, and the judge is going to instruct you on that, and you know that already. But again, kind of like earlier this week when I got up and told you, if their defense was these two judgments don't belong to [D]efendant, they could have presented --
>
> [Defense Counsel]. Objection, your Honor.
>
> The Court: Overruled.
>
> [The State]. You have heard no evidence contrary to the fact that this is [D]efendant, and both of these judgments are [D]efendant.

"The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *Id.* at 555, 434 S.E.2d at 196. As shown above, the State actually noted Defendant's right to remain silent, rather than highlighting Defendant's failure to testify. Furthermore, the State commented on the failure to present evidence that the two prior judgments relevant to Defendant's violent habitual felon status did not belong to Defendant, which is permissible under *Reid*. The trial court did not err in allowing the State's comment.

No error.

Judges HUNTER, Robert C. and ELMORE concur.

STATE OF NORTH CAROLINA
v.
WILLIAM ROSCOE MILLS, JR.

No. COA13-590

Filed 18 February 2014

1. Appeal and Error—preservation of issues—satellite-based monitoring—notice of basis for eligibility—no objection at hearing

Defendant in a satellite-based monitoring (SBM) case waived his right to raise on appeal the issue of adequate notice of the basis for his eligibility for SBM because he failed to object at the SBM hearing.

2. Appeal and Error—preservation of issues—satellite-based monitoring—hearing not in defendant's county—not raised at hearing

A satellite-based monitoring defendant waived his objection to the hearing not being in the county where he resided by not raising the issue at the hearing. N.C.G.S. § 14–208.40B(b) addresses venue, not subject matter jurisdiction, and a defendant who does not challenge venue at the trial level fails to preserve the issue for appellate review.

3. Appeal and Error—preservation of issues—satellite-based monitoring—notice of hearing

A satellite-based monitoring (SBM) defendant waived his right to raise on appeal a constitutional challenge to his notice of the date of his hearing. In his motion to dismiss the State's petition, defendant put forth no argument that due process was violated by the State's failure to provide him proper notice of the hearing as specified in N.C.G.S. § 14-208.40B(b). Furthermore, defendant did not raise any issue related to notice at the SBM hearing.

4. Sentencing—satellite-based monitoring—civil regulatory scheme—no ex post facto or double jeopardy implications

The North Carolina Supreme Court has held that the satellite-based monitoring program is a civil regulatory scheme that does not implicate constitutional protections against either *ex post facto* laws or double jeopardy. *State v. Bowditch*, 364 N.C. 335.

Appeal by defendant from order entered 22 January 2013 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 20 November 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Jon W. Myers for defendant.

HUNTER, Robert C., Judge.

Defendant William Mills, Jr. appeals the order entered 22 January 2013 requiring him to enroll in Satellite-Based Monitoring ("SBM") for the remainder of his life. On appeal, defendant argues that the trial court's order must be vacated because: (1) the trial court erred in finding that defendant was given proper notice of the basis for which the Department of Correction believed him eligible for SBM and that defendant was given notice of the date of the scheduled SBM hearing; (2) the trial court lacked subject matter jurisdiction to hold the SBM hearing; (3) the trial court erred in concluding defendant had adequate and proper notice of the SBM hearing in violation of his due process rights; and (4) the SBM statutes violate the prohibition against *ex post facto* laws and double jeopardy as applied. After careful review, we affirm the trial court's order.

Background

On 2 June 2003, defendant pled guilty to one count of second degree rape and three counts of second degree sex offense in exchange for the consolidation of the offenses for sentencing, a sentence in the presumptive range, and an agreement by the State to not prosecute defendant for any additional charges involving other victims. The trial court sentenced him to a minimum term of 73 months to a maximum term of 97 months imprisonment.

After defendant served his sentence, the trial court conducted a bring-back hearing to determine defendant's eligibility for enrollment in an SBM program. The State's petition requesting the hearing is not included in the record on appeal. Prior to the hearing, defendant's counsel filed a motion to dismiss the petition, arguing that: (1) retroactive application of the SBM program violates the *ex post facto* provision of the United States and North Carolina Constitutions; (2) ordering defendant to enroll in an SBM program violates the double jeopardy clause; (3) the SBM hearing violates defendant's right to a jury trial and due process by increasing his punishment for prior offenses without submitting the issue to a jury; and (4) the SBM program interferes with defendant's right to travel and the right to be free from warrantless searches.

The matter came on for hearing on 22 January 2013 before Judge Mark E. Powell in Buncombe County Superior Court. The trial court marked the following findings on a preprinted, standard form: (1) defendant was convicted of a reportable offense but the sentencing court made no determination of whether defendant should be required to enroll in SBM; (2) the Department of Correction (the "DOC") determined that defendant fell into at least one of the categories requiring SBM pursuant to N.C. Gen. Stat. § 14-208.40 and gave notice to defendant of this category; (3) the District Attorney scheduled a hearing in the county of defendant's residence and the DOC provided notice to defendant required under 14-208.40B, and the hearing was not held sooner than 15 days after that notice; and (4) the offense defendant was convicted of was an aggravated offense. Based on these findings, the trial court ordered defendant enroll in SBM for the remainder of his natural life. Additionally, the trial court denied defendant's motion to dismiss the petition. Defendant timely appealed.

Arguments

[1] Defendant first argues that there was no evidence presented at the determination hearing establishing that defendant had been provided adequate notice of the basis for which the DOC believed him eligible

for SBM or that defendant had been served the notice of the hearing in compliance with N.C. Gen. Stat. § 14-208.40B(b). Specifically, defendant contends that none of the findings marked on the standard preprinted form were supported by competent evidence at the hearing. Based on the record, we conclude that defendant has waived his right to raise this issue on appeal because he failed to object to these findings at the SBM hearing.

Initially, we note that our Supreme Court has classified an SBM hearing as a civil regulatory proceeding. *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010); *State v. Arrington*, __ N.C. App. __, __, 741 S.E.2d 453, 457 (2013). For SBM enrollment, "the trial court is statutorily required to make findings of fact to support its legal conclusions." *State v. Morrow*, 200 N.C. App. 123, 126, 683 S.E.2d 754, 757 (2009), *aff'd*, 364 N.C. 424, 700 S.E.2d 224 (2010). On appeal, this Court "review[s] the trial court's findings of fact to determine whether they are supported by competent record evidence[.]" *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009).

Pursuant to N.C. Gen. Stat. § 14-208.40B(b),

> [i]f the [DOC] determines that the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a), the district attorney, representing the [DOC], shall schedule a hearing in superior court for the county in which the offender resides. The [DOC] shall notify the offender of the [DOC's] determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt. Upon the court's determination that the offender is indigent and entitled to counsel, the court shall assign counsel to represent the offender at the hearing pursuant to rules adopted by the Office of Indigent Defense Services.

Moreover, this Court has concluded that "N.C. Gen. Stat. § 14–208.40B(b)'s requirement that the [DOC] 'notify the offender of [its] determination' mandates that the [DOC], in its notice, specify the category set out in N.C. Gen. Stat. § 14–208.40(a) into which the [DOC] has determined the offender falls and briefly state the factual basis for that conclusion." *State v. Stines*, 200 N.C. App. 193, 204, 683 S.E.2d 411, 418 (2009).

At the hearing, both defendant and his counsel were present. The following colloquy took place:

> THE COURT: I want to state for the record that—I'll just go down through the form. And I'm reading this out loud so I don't make a mistake when I go through it. The defendant was convicted of a reportable conviction, but no determination was made back in 2002. Check number 2. I think I should, but—
>
> [THE STATE]: Yes, I believe you would, Your Honor.
>
> THE COURT: Sir, do you wish to say anything about that? Counsel, do you wish to respond to me checking number 2 or not?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: I'm just not as familiar with this form. I've checked number 2 and 3 on the form. As to number 4, the defendant falls into at least one of the categories requiring satellite-based monitoring in that the offense of which the defendant was convicted was an aggravated offense. Based on the foregoing, the defendant is subject to satellite-based monitoring for the remainder of his natural life. Counsel, anything else?
>
> [THE STATE]: No, Your Honor.

As defendant correctly notes, there was no evidence presented at the hearing establishing that defendant received proper notice, by certified mail, of the hearing or that defendant received notice of the basis upon which the State believed him eligible for SBM. However, the record is clear that defendant failed to object at the hearing when the trial court was reviewing the findings of fact on the preprinted form. The trial court even invited defendant to argue or challenge them by asking defendant's counsel whether he wanted to "say anything about that." However, defense counsel declined to do so. Furthermore, neither the petition nor the notice of the SBM hearing were included in the record on appeal even though defendant's motion to dismiss referenced the petition. "It is well settled that a silent record supports a presumption that the proceedings below are free from error, and it is the duty of the appellant to see that the record is properly made up and transmitted to the appellate court." *State v. Perry*, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986). Finally, we find it pertinent that defendant made a motion to dismiss the State's petition for SBM but included no argument that

he was not afforded proper notice of the hearing nor did he argue that he received no notice of the category in which he fell that made him eligible for SBM. Consequently, defendant has waived any objection to these findings on appeal.

[2] Next, defendant argues that the trial court lacked subject matter jurisdiction to conduct defendant's SBM hearing because there was no competent evidence presented at the hearing that defendant resided in Buncombe County. Because N.C. Gen. Stat. § 14-208.40B(b)'s requirement that an SBM hearing be brought in the county in which the offender resides addresses venue, not subject matter jurisdiction, defendant's failure to object at the hearing waives this argument on appeal.

N.C. Gen. Stat. § 14–208.40B(b) requires that SBM petition hearings be held "in superior court for the county in which the offender resides." Defendant argues that although he did not object at the hearing that it was not being held in the county in which he resided, this issue may be raised for the first time on appeal since it addresses subject matter jurisdiction. Defendant's argument relies on his contention that only the superior court in the county in which he resides has subject matter jurisdiction over the hearing. However, defendant confuses the concepts of subject matter jurisdiction and venue. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Haker–Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001)). "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, 85-86 (1986) (citation omitted). In contrast, "[v]enue means the place wherein the cause is to be tried" and "is not jurisdictional." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953). A defendant who does not challenge venue at the trial level fails to preserve the issue for appellate review. *See generally*, *State v. Walters*, 357 N.C. 68, 78, 588 S.E.2d 344, 350 (2003); *In re Estate of Hodgin*, 133 N.C. App. 650, 652, 516 S.E.2d 174, 175 (1999). Thus, subject matter jurisdiction and venue are two distinct concepts, each with its own rules regarding the ability of a party to challenge it for the first time on appeal.

Pursuant to N.C. Gen. Stat. § 14–208.40B(b), while the superior court has subject matter jurisdiction over SBM hearings, the requirement that the hearing be held in the superior court in the county in which the offender resides relates to venue. As noted, SBM hearings are civil in nature, *Bowditch*, 364 N.C. at 352, 700 S.E.2d at 13, and our Courts have recognized the distinction between subject matter jurisdiction

and venue in other common civil proceedings, *see generally*, *Smith v. Smith*, 56 N.C. App. 812, 813, 290 S.E.2d 390, 391 (1982) (noting that, while the district court has subject matter jurisdiction over divorce actions, "G.S. § 50-3, which states that summons for divorce proceedings shall be returnable to the court of the county in which either plaintiff or defendant resides, and G.S. § 50-8, which states that a complainant who is a nonresident of this State shall bring any divorce action in the county of defendant's residence, are not jurisdictional, and relate only to venue."); *In re Estate of Hodgin*, 133 N.C. App. at 651, 516 S.E.2d at 175 (concluding that although "the clerk of superior court in each county has exclusive original jurisdiction over the administration of estates[,]" venue is based on the county in which the decedent was domiciled at the time of his death or in the county in which the decedent left property and assets if he is not a resident of the State).

While N.C. Gen. Stat. § 14-208.40B(b) confers subject matter jurisdiction to the superior court, it also sets out the method for determining the proper venue. Defendant is mistakenly characterizing his venue challenge as a challenge to the trial court's subject matter jurisdiction in order to preserve his right to raise this issue for the first time on appeal. However, venue "is waivable by any party . . . if objection thereto is not made 'in apt time.'" *In re Estate of Hodgin*, 133 N.C. App. at 652, 516 S.E.2d at 175. Accordingly, since defendant failed to challenge the venue of his SBM hearing either in his motion to dismiss or in arguments at the hearing, he has waived this issue on appeal.

[3] Next, defendant argues that the trial court erred by ordering him to enroll in SBM when he did not receive adequate and proper notice of the date of the SBM hearing as required by law in violation of the Fourteenth Amendment of the United States Constitution and Article 1, section 19 of the North Carolina Constitution. We conclude that defendant has waived his right to raise this constitutional challenge on appeal.

Our appellate courts will only review constitutional questions raised and passed upon at trial. N.C. R. App. P. 10(b)(1) (2012); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982); *State v. Wilkerson*, 363 N.C. 382, 420, 683 S.E.2d 174, 198 (2009). Here, in his motion to dismiss the State's petition, defendant puts forth no argument that his constitutional protection of due process was violated by the State's failure to provide him proper notice of the hearing as specified in N.C. Gen. Stat. § 14-208.40B(b). Furthermore, defendant did not raise any issue related to notice at the SBM hearing. Therefore, defendant has failed to preserve this constitutional issue for appeal.

Finally, defendant also argues that SBM violates the *ex post facto* and double jeopardy prohibitions of the United States and North Carolina Constitutions. Defendant acknowledges that the North Carolina Supreme Court has previously held that the SBM program is a civil regulatory scheme that does not implicate constitutional protections against either *ex post facto* laws or double jeopardy, *Bowditch*, 364 N.C. 335, 700 S.E.2d 1, but raises this issue for "preservation purposes." As we are bound by the decisions of our Supreme Court, *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993), defendant's argument is overruled.

Conclusion

Because defendant failed to object at trial to the trial court's finding that he was afforded proper notice of the hearing and of the category into which he fell that made him eligible for SBM, defendant has waived this issue on appeal. Since defendant failed to challenge the venue of the hearing at the trial level, he waived his right to raise it for the first time on appeal. We will not address defendant's contention that his due process rights were violated when the State did not follow the proper statutory requirements of notice because he did not raise this issue before the trial court either at the SBM hearing or in his motion to dismiss. Finally, defendant's argument that the imposition of SBM violates the prohibition against *ex post facto* laws and double jeopardy is overruled based on *Bowditch*.

AFFIRMED.

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

STATE v. THORPE

[232 N.C. App. 468 (2014)]

STATE OF NORTH CAROLINA
v.
DEVINE DRAKKAR THORPE

No. COA13-791

Filed 18 February 2014

Confessions and Incriminating Statements—motion to suppress—failure to make adequate findings—extended detention

The trial court erred in a felonious breaking and/or entering and conspiracy to commit felonious breaking and entering case by denying defendant's motion to suppress his statements. The trial court failed to make adequate findings to permit review of its determination that defendant was not placed under arrest when he was detained for nearly two hours. On remand, the trial court must make appropriate findings about whether the officer diligently pursued his investigation so as to justify an extended detention.

Appeal by defendant from order entered 28 July 2011 by Judge Orlando Hudson and judgment entered 3 August 2011 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Melissa H. Taylor, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Devine Thorpe ("Defendant") appeals from the denial of his motion to suppress, arguing (1) that the conduct and duration of his detention constituted a warrantless arrest that required probable cause; (2) that statements taken at the police station after his arrest were impermissible fruits of the unlawful arrest; (3) that Defendant's statement taken in a police car was done in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (4) that Defendant's statements to the arresting officer were coerced; and (5) that Defendant's statements taken at the police station were also taken in violation of the United States Supreme Court's ruling in *Missouri v. Seibert*, 542 U.S. 600 (2004).

We conclude that the trial court failed to make adequate findings to permit review of its determination that Defendant was not placed under arrest when he was detained for nearly two hours. Specifically, on remand the trial court must make appropriate findings about whether Officer Mellown diligently pursued his investigation so as to justify an extended detention.

I. Facts & Procedural History

On 7 February 2011, Defendant was indicted in Durham County on one count of Felonious Breaking and/or Entering and one count of Conspiracy to Commit Felonious Breaking and Entering. On 25 April 2011, Defendant moved to suppress the oral and written statements he made to investigating officers, alleging that they were taken in violation of his Fourth, Fifth, Sixth and Fourteenth Amendment rights. The State moved to dismiss Defendant's motion. Durham Superior Court Judge Orlando Hudson held a suppression hearing on Defendant's motion on 29 June 2011. The trial court denied Defendant's motion to suppress orally at the hearing and filed a written order on 28 July 2011. The transcript of the hearing tended to show the following facts.

T.J. Mellown ("Officer Mellown") is an investigator with the Durham County Sheriff's Office, where he has worked since August 1997. Officer Mellown testified that on 10 December 2010, he was on duty as radio calls were made about the incident around 11:00 a.m. Officer Mellown said there were "various calls on the radio that there had been a subject who had been found shot" and that a residence was broken into in the southern part of Durham County. Officer Mellown also said there were conflicting radio reports of multiple subjects fleeing the scene. Officer Mellown said he heard that a number of other officers were heading to the scene, so instead he went to Duke Hospital arriving around 11:00 a.m. Officer Mellown previously worked in emergency medicine and said

> I've seen situations like this that have happened before where people have been shot during the commission of a crime. My experience has been that, lots of times, people will drive themselves to the hospital. I thought that if one person had been shot, there was a chance that other people had been shot, and so I went to the ER to see if anybody would show up.

When Officer Mellown reached Duke Hospital, he testified that he parked his vehicle in front of the emergency department and stepped inside the hospital. Officer Mellown told the security guards why he was present and that he "was waiting to see if anyone would show up

from this incident." Officer Mellown said he began "calling the emergency departments over at Durham Regional Hospitals and also at UNC Hospitals" to ask them to contact him if anyone arrived in a personally owned vehicle with a gunshot wound.

After "approximately ten minutes," Officer Mellown testified he saw a white Dodge Charger pull in front of the emergency room. Officer Mellown said two men, Defendant and Gary Brady ("Brady"), pulled a critically injured passenger from the front passenger seat. Officer Mellown believed the man was shot and said "it looked like he was going to die in about the next hour or so." Officer Mellown saw Defendant as one of the men pulling the passenger from the car, although he "wasn't sure what his role was in relation to this incident at all," but that he had a "hunch" that Defendant was involved.

Officer Mellown said he was concerned about the safety of Defendant and the public, and so he attempted to detain Defendant and the other young man as they approached the front of the hospital. Officer Mellown frisked both Defendant and Brady, although he "did not know what was going on" at that time. Officer Mellown said Defendant and Brady were "very emotionally charged up. They were upset, they were excited. When I tried to tell them that I needed to pat them down, that I needed to figure out what was going on before anything else happened, there was a lot of yelling back and forth." Officer Mellown said Defendant and Brady "told [him] that [he] did not have the right to detain them, that [he] didn't have the right to pat them down." Officer Mellown said it took a few minutes to calm everyone down to a level where he could proceed. Officer Mellown then performed a pat down and found no weapons on Defendant or Brady. During the pat down, Officer Mellown noticed a gunshot wound to Brady's arm and subsequently Brady was taken by the Duke nursing staff for treatment.

Officer Mellown said he then handcuffed Defendant, took Defendant to his police car, put Defendant in the front passenger seat, and then sat in the driver's seat next to Defendant. Officer Mellown told Defendant "he was being detained, and I had to find out what was going on before I knew what to do." Officer Mellown explicitly told Defendant he was not under arrest, but also said Defendant was not free to leave his vehicle.

Officer Mellown said Defendant "made no verbal threats," but that Defendant "was edging into personal space" while Officer Mellown was frisking Brady. Officer Mellown did not provide *Miranda* warnings at that time to Defendant, and began asking where the man who was shot came from, Defendant's date of birth, and other demographic questions.

Defendant responded to Officer Mellown's questioning by telling him he was playing "video games with some people on the house on Rowena Avenue, and that he [received] a phone call saying that his cousin had been shot in some area behind Parkwood, and that he went there, picked up his cousin, and drove him to the hospital." Officer Mellown said he went through this story a few times with Defendant, who at that point did not admit to anything beyond that statement. Officer Mellown's "concern[s] about gang reprisals kind of went away after [Defendant] told me where they picked up the gentleman who had been shot at."

After ten or fifteen minutes of questioning, Officer Mellown placed Defendant with one of the security guards at the hospital, and "left him sort of in the care of him," while Defendant was still handcuffed. Officer Mellown then went to speak with Brady, saying that there was not a "solemn decision that [Defendant] was going to be arrested" at that time. Defendant was not placed under formal arrest until he was taken to the police station at around 1 p.m.

Officer Mellown said he placed Defendant under formal arrest because he received "statements from some of the other persons involved as to why they had been there . . . that they were involved in breaking into the residence, that this was related to the shooting for which I had gone out to the ER." Officer Mellown also researched the location of Rowena Avenue and said Defendant's statements of traveling from Rowena to Parkwood to retrieve his wounded cousin were not feasible given the timing and sequence of events. Officer Mellown also spoke with Brady, who stated that "they" were driving around, broke into a home, and were shot. After Brady was given *Miranda* warnings, he declined to make any further statements.

Defendant was transported by other officers in a "marked car, with the cage in the back" to the police station. At the police station, Defendant was advised that he was under arrest and given *Miranda* warnings. Defendant asked why he was under arrest and began to cry once being informed he was under arrest. Officer Mellown was present during the videotaped interview and was accompanied by Sergeant Davis. Officer Mellown said Sergeant Davis raised his voice during the interview, pointed his finger at Defendant, and told Defendant to cooperate with Officer Mellown. Defendant waived his *Miranda* rights at that time orally and shortly after by written waiver. After the videotaping ceased, Officer Mellown asked Defendant to clarify his statement to add an admission of breaking and entering, which Officer Mellown said Defendant admitted during their conversation.

In the videotaped interview, Officer Mellown said Defendant admitted to taking part in the breaking and entering of the home:

> He told me that he had spent the night at a house on Ruby Ridge, which is a small housing development in eastern Durham, and that he had spent the night there. Some people came over and woke him up at, I believe, about 8:30 in the morning.
>
> They asked him to -- they asked him to drive them around. Eventually, they drove to a small area behind Parkwood, where they asked him to let them off at a small house that he described as, I think, being tucked back in the woods.
>
> He drove around a little bit. They gave him a call on a cell phone. He drove back to the area, and found that his -- I believe the gentleman's name was Omari Eubanks had been shot in the back. And he was lying on the -- on the yard outside one of the neighboring residences.
>
> And, I'm sorry, I'm not sure if it was Omari that he picked up or the other one. But one of his companions had been shot in the back, was lying in the -- in the yard in a nearby house.
>
> . . . .
>
> Initially in the car, he just told me that he had been playing video games on Rowena Avenue and that he received a phone call, drove to Parkwood and drove around, found where his cousin had been shot, picked him up and drove him to -- drove him to Duke.
>
> When we Mirandized him and he made a statement, he changed that to he took these -- his companions to, I believe, a Shell station that was off of Highway 54 near Southpoint, dropped them off at the Shell station.
>
> We kind of explored that a little bit further, and he told me that he actually picked them -- or they actually left Ruby Ridge, started driving around, found the house that was tucked back in in [sic] the woods.
>
> He dropped them off at the house, drove around for a few minutes, got a phone call to come pick up his cousin, who had been shot, drove back to the residence, picked up his cousin and then drove to Duke.

Defendant was indicted on 7 February 2011. On 25 April 2011 Defendant filed a motion to suppress his statements made to Officer Mellown and at the police station, which was denied on 28 July 2011 via written order. In the trial court's written order, the trial court made the following findings of fact:

> 1. On or about December 10, 2010 at or about 11:19 a.m., Investigator Mellown of the Durham Police Department arrived at Duke Emergency Department.
>
> 2. At or about 11:30 a.m. Investigator Mellown was standing in the area near the entrance to the waiting room when he saw two black males dragging a third black male from a white Dodge Charger. Investigator Mellown observed that the black male being dragged from the car was "limp and appeared to have a diminished level of consciousness."
>
> 3. After emergency room staff took that third person to the patient care area for treatment, Investigator Mellown attempted to detain the other two persons. The other two persons were "both aggressive, belligerent, and noncompliant with orders."
>
> 4. Investigator Mellown was able to determine that the shorter of the two persons had been shot in the arm. A security officer escorted him to the triage nurse for treatment, and the other person, subsequently identified as defendant Devine Thorpe, was handcuffed and searched.
>
> 5. After approximately ten minutes, Defendant had calmed down to the point where Investigator Mellown was able to talk to him without raising his voice. Investigator Mellown escorted Defendant to his vehicle, and placed him in the front passenger's seat. Defendant remained handcuffed.
>
> 6. Investigator Mellown advised Defendant that "he was not under arrest, but that I was going to be detaining him until I could determine what was taking place. I told him that I did not know why he was there, or why his friend had been shot, and that I had to find out what was going on before I knew how to proceed with this situation."
>
> 7. In response, Defendant told Investigator Mellown his name and date of birth. Defendant also stated that "he was at this residence at 1134 Rowena Ave when he got a

call from someone stating that his cousin had been shot. This person told Thorpe to go pick up his cousin near Parkwood. Thorpe said that he drove to Parkwood and found his brother lying on the side of the road. He stated that he put his cousin in the car, and then drove to Duke. Thorpe clarified his story to tell me that his cousin's name was Omari Mitchell."

8. Investigator Mellown told Defendant that he was having a hard time working out a time line of these events, and asked him to tell him again what happened. Defendant stated the same thing.

9. After approximately fifteen minutes, Investigator Mellown escorted Defendant back to the security office at the Emergency Room and left him with a security guard.

10. It is unclear how long Defendant remained held in the security office until Investigator Mellown took Defendant down to the police station.

11. At approximately 1:18 p.m. Investigator Mellown advised Defendant of his Miranda Rights.

12. At or about 1:20 p.m. Defendant signed the waiver of his rights form. He then made a statement that "This morning I woke up and was asked to ride with Omari, James, and Feet. An [sic] we rode to Parkwood where a lot of houses were and I let them out of the car. So they get out and I pulled off. After about 20 mins,[sic] I get a phone call saying that Omari, James, and Feet has [sic] been shot. So, I turn the car around and drive through parkwood [sic] to find them as I come to an entersection [sic] I see Omari laying in the road and I helped him in the car and took him to the hospital. /s/ Devin Thorpe 9-24-1990."

The trial court then made the following conclusions of law:

1. Investigator Mellown had reasonable suspicion to detain the Defendant and perform an investigative stop.

2. The Defendant was not in custody at the time he gave his first statement to Detective Mellown.

3. No Miranda warning was necessary during the investigative stop of the defendant at Duke Hospital.

> 4. The Defendant's statements to Detective Mellown at Duke Hospital were voluntarily made.
>
> 5. The defendant was later placed under arrest.
>
> 6. The Defendant waived his Miranda Rights orally and in written form.
>
> 7. The Defendant's statements made after he waived his right to remain silent were voluntarily given.
>
> 8. Based on the totality of the circumstances, no threat or promises induced the Defendant to make his confession.
>
> 9. None of the [Defendant's] substantive rights were denied by law enforcement during the investigation and arrest of the Defendant.

On 3 August 2011, Defendant entered a negotiated guilty plea to both counts of the indictment before Judge Carl R. Fox, but reserved his right to appeal. The factual basis of the plea stated that on 10 December 2010 at around 11 a.m., Timothy Nelson, Omari Mitchell, and Gary Brady broke into Charles Dellerman's ("Dellerman") home. Dellerman, a photographer by profession, was asleep for around five hours prior to his alarm sounding at that time, as he had worked late the night before. When Dellerman awoke, he heard dogs barking and "a crash and a bang." Dellerman was confused as to the noise's origin, but then heard "another bang." Dellerman retrieved his .45 caliber Taurus firearm and proceeded downstairs to investigate the noises. As he descended, Dellerman "continued to hear rummaging." Dellerman continued to the room where he performed his photographic work and heard someone say "Get him."

Dellerman immediately began "blazing" and discharged several shots. Dellerman later said that there were three individuals in his home, all of whom he hit with his gunshots. Neighbors also reported seeing two individuals limping down the street. The plea also recounted that Defendant was not present at the time Dellerman shot the three intruders, and that he later retrieved Omari Mitchell, who was shot in the abdomen, and brought him to the hospital. Dellerman was not charged, as "he felt like his life was threatened" when the three individuals were within his home. The other three codefendants all pled guilty prior to Defendant's plea.

Defendant was found a Prior Record Level I offender with no prior convictions. On 9 August 2011, the trial court sentenced Defendant to a five to six-month suspended sentence suspended for thirty months of

supervised probation. Defendant also was sentenced to fifty hours of community service and required to pay restitution. Defendant was also required to enroll in a graduate equivalency degree program leading to obtaining his high school diploma.

Defendant filed a timely, but defective written notice of appeal of the order denying suppression on 8 August 2011. *See* N.C. R. App. P. 4(a). This Court dismissed Defendant's appeal on 18 September 2012 for lack of jurisdiction due to the defective notice of appeal. *State v. Thorpe*, COA12-229, 731 S.E.2d 862, 2012 WL 4078409 at *1–2 (N.C. Ct. App. 2012) (unpublished). Specifically, Defendant appealed from the denial of the motion to suppress, but did not appeal the trial court's judgment, which left this Court without jurisdiction to hear the appeal. *Id.* (citing *State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010)). Defendant then filed a petition for writ of certiorari, which this Court granted on 15 October 2012.

II. Jurisdiction & Standard of Review

> Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(e) (2013). However, "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2013). As Defendant previously did not appeal the trial court's judgment, a writ of certiorari was required, which Defendant obtained and this Court granted. N.C. R. App. P. 21.

Defendant argues that the trial court erred in denying his motion to suppress based on Fourth and Fifth Amendment violations. In considering a trial court's ruling on a motion to suppress, this Court must consider whether the lower court's findings of fact are supported by competent evidence, though its factual findings are binding where the appellant does not challenge them. *State v. Richmond*, ___ N.C. App. ___, ___, 715 S.E.2d 581, 583 (2011). This Court must then determine whether the trial court's conclusions of law are supported by its findings of fact. *State v. Milien*, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001). However, "a trial court's conclusions of law as to whether law

enforcement had reasonable suspicion or probable cause to detain a defendant are reviewable *de novo*." *State v. Baublitz, Jr.*, 172 N.C. App. 801, 806, 616 S.E.2d 615, 619 (2005).

III. Analysis

Defendant argues that his statements taken while he was in Officer Mellown's car were taken in violation of the Fourth Amendment. Defendant also argues that the subsequent statements made at the police station were taken in violation of the Fourth Amendment because they were fruits of impermissible police conduct. We conclude that the trial court failed to make adequate findings to justify its conclusion that defendant was not under arrest, given his nearly two-hour detention. Accordingly, we reverse the order denying defendant's motion to suppress and remand to allow the trial court to make adequate findings on this issue. Therefore, we do not address Defendant's remaining arguments.

A. Seizure and Arrest of Defendant

Defendant first argues that Detective Mellown seized Defendant and functionally arrested Defendant without a warrant. Defendant argues that such an arrest was illegal, as it required probable cause not present in this case, and any resulting evidence is subject to the exclusionary rule under *Wong Sun v. United States*, 371 U.S. 471 (1963). We agree.

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. This prohibition applies to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Article I, Section 20 of the North Carolina Constitution similarly prohibits unreasonable searches and seizures. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). There are generally two types of "seizures" under the Fourth Amendment: "(1) arrests and (2) investigatory stops." *Milien*, 144 N.C. App. at 339, 548 S.E.2d at 771. Arrests require that the arresting officer have "probable cause," whereas investigatory stops do not. *Id.*

Under the standard first laid out in *Terry v. Ohio*, 392 U.S. 1 (1968), officers temporarily detaining someone for investigatory purposes only require "reasonable suspicion of criminal activity." *Florida v. Royer*, 460 U.S. 491, 498 (1983). The detaining officer "must be able to articulate something more than an 'inchoate and unparticularized suspicion, or 'hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The officer's reasonable suspicion

> must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed

> through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training.

State v. Watkins, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). In reviewing the validity of a *Terry* stop, the Court must consider "the totality of the circumstances." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Even if a brief detention is justified under *Terry* and its progeny, "[t]he characteristics of the investigatory stop, including its length, the methods used, and any search performed should be the least intrusive means reasonably available to effectuate the purpose of the stop." *State v. Carrouthers*, ___ N.C. App. ___, ___, 714 S.E.2d 460, 464, *disc. rev. denied* 365 N.C. 361, 718 S.E.2d 392 (2011) (alteration in original, quotation marks and citations omitted). "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Royer*, 460 U.S. at 500. "Where the duration or nature of the intrusion exceeds the permissible scope, a court may determine that the seizure constituted a *de facto* arrest that must be justified by probable cause." *Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772.

In sum, the reasonableness of the methods used in the investigatory stop depends on the circumstances. *Id.* ("The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case." (citation and quotation marks omitted)). During a *Terry* stop, police can use "measures of force such as placing handcuffs on suspects, placing the suspect in the back of police cruisers, drawing weapons, and other forms of force typically used during an arrest." *State v. Campbell*, 188 N.C. App. 701, 709, 656 S.E.2d 721, 727 (2008)(quotation marks and citation omitted).

This Court has held that the use of handcuffs is permissible to "'maintain the status quo.'" *Id.* at 709, 727 (quoting *United States v. Hensley*, 469 U.S. 221, 235 (1985)). Additionally, in *Carrouthers*, this Court outlined some of the circumstances in which handcuffs might be reasonable, including when "(1) the suspect is uncooperative . . . or (6) the suspects outnumber the officers." *Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 465 (quotation marks and citations omitted).

Here, the trial court made three findings of fact relevant to the initial detention of Defendant:

> 2. At or about 11:30 a.m. Investigator Mellown was standing in the area near the entrance to the waiting room when

> he saw two black males dragging a third black male from a white Dodge Charger. Investigator Mellown observed that the black male being dragged from the car was "limp and appeared to have a diminished level of consciousness."
>
> 3. After emergency room staff took that third person to the patient care area for treatment, Investigator Mellown attempted to detain the other two persons. The other two persons were "both aggressive, belligerent, and noncompliant with orders."
>
> 4. Investigator Mellown was able to determine that the shorter of the two persons had been shot in the arm. A security officer escorted him to the triage nurse for treatment, and the other person, subsequently identified as defendant Devine Thorpe, was handcuffed and searched.

As a result of these facts, the trial court concluded that "Investigator Mellown had reasonable suspicion to detain the Defendant and perform an investigative stop."

Here, Officer Mellown's initial use of handcuffs was reasonable under the circumstances. Both Defendant and his companion were acting aggressively. Officer Mellown was dealing initially with two individuals, while being the only police officer present. Officer Mellown then led Defendant, still handcuffed, to his car and placed Defendant in the front passenger seat. When dealing with aggressive, noncooperative individuals, handcuffs and placing the suspect in the officer's car are acceptable methods of effecting an investigatory stop. *See Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 464–65. Thus, the stop was not simply a *de facto* arrest as a result of Officer Mellown's initial use of handcuffs or the placement of Defendant in his car.

However, the length of Defendant's detention may have turned the investigative stop into a *de facto* arrest, necessitating probable cause by Officer Mellown for the detention. An investigative stop becomes a *de facto* arrest requiring probable cause when its "duration or nature . . . exceeds the permissible scope" of a *Terry* stop. *Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772.

One of the key elements of a valid *Terry* stop is brevity. *United States v. Place*, 462 U.S. 696, 709 (1983) ("[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor."); *see Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772 (" '[A]n investigative detention *must be temporary* and last no longer than is necessary.' " (emphasis added) (quoting *Royer*, 460 U.S. at 500)).

The Supreme Court of the United States has never approved a *Terry* stop lasting nearly two hours. *Place*, 462 U.S. at 709–10 ("[W]e have never approved a seizure of the person for the prolonged 90-minute period involved here[.]"); *but see Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (holding that preventing defendant from re-entering his home, where probable cause existed showing that drugs were in the defendant's house, was reasonable when the police were waiting for a warrant to search the house). However, the Supreme Court has never adopted an outer limit to the permissible duration of a *Terry* stop. *Place*, 462 U.S. at 709.

To assess whether a seizure under *Terry* is excessive, the court must decide whether the police could have "minimized the intrusion" by more diligently pursuing their investigation through other means. *Id.* According to the United States Supreme Court, a reviewing court should

> examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

United States v. Sharpe, 470 U.S. 675, 686 (1985). Thus, it is only when the police *unnecessarily* prolong the seizure that an otherwise valid investigative stop becomes a *de facto* arrest. *See id.*

In *Place*, the Supreme Court invalidated a seizure which lasted for approximately ninety minutes. *Place*, 462 U.S. at 709. In that case, DEA agents seized the defendant's bags as he deplaned in New York's La Guardia Airport and waited for the narcotics dogs to arrive. *Id.* at 698–99. The Court reasoned that the since the DEA knew that Place was on his way to New York, they had ample time to prepare the narcotics dogs for Place's arrival, which would have obviated the need to hold him without probable cause for a ninety-minute period. I*d.* at 709–10. Therefore, the Court concluded that the government could have pursued their investigation through more expeditious means and the ninety-minute seizure was unconstitutional. *Id.* at 710.

Here, the trial judge found that the initial conversation between Defendant and Officer Mellown lasted "approximately fifteen minutes" and that Defendant was at the police station by 1:18pm (less than two hours after the first encounter between Officer Mellown and the Defendant). Officer Mellown told Defendant that he was going to be detained until Officer Mellown could "determine what was taking place." It is unclear precisely how long Defendant was held between the end of his conversation with Officer Mellown in the car and his formal arrest at

the police station, but it is clear that Defendant was in handcuffs during this entire period, even after he had calmed down.

Additionally, the trial judge made no findings about what Officer Mellown was doing from the time he "escorted" Defendant to the security office to the point at which he was placed under arrest. Therefore, on the record before us we cannot say that the nearly two-hour delay was reasonably necessary for Officer Mellown's investigation. *See id.* (holding a two-hour restraint while waiting for a warrant was reasonable where "the record reveals [that] this time period was no longer than reasonably necessary").

Although length in and of itself will not normally convert an otherwise valid seizure into a *de facto* arrest, where the detention is more than momentary, as here, there must be some strong justification for the delay to avoid rendering the seizure unreasonable. *See McArthur*, 531 U.S. at 332 (two-hour seizure reasonable when waiting for search warrant); *Place*, 462 U.S. at 709 ("The [90-minute] length of the detention of respondent's luggage *alone* precludes the conclusion that the seizure was reasonable in the absence of probable cause." (emphasis added)); *Royer*, 460 U.S. at 500 ("The scope of the detention must be carefully tailored to its underlying justification."). This detention lasted longer than the normal *Terry* stop. *See*, *e.g.*, *State v. Sanchez*, 147 N.C. App. 619, 626, 556 S.E.2d 602, 608 (2001), *disc. rev. denied* 355 N.C. 220, 560 S.E.2d 358 (2002) (five-minute detention); *State v. Cornelius*, 104 N.C. App. 583, 590, 410 S.E.2d 504, 509 (1991), *disc. rev. denied* 331 N.C. 119, 414 S.E.2d 762 (1992) (considering a ten-minute investigative stop). Here, without any factual findings addressing the justifications for the extended detention, we cannot properly review whether the trial court erred in concluding that defendant was not under arrest.

The evidence contained in the transcript of the suppression hearing would support a finding that Officer Mellown went almost immediately from speaking with Defendant to interviewing Brady. During this conversation, Brady admitted to Officer Mellown that "they had gone out to go into a house." This evidence could support a finding that Officer Mellown was not unnecessarily delaying Defendant's detention. Thus, the trial judge could justifiably conclude that Officer Mellown was diligently pursuing his investigation. *See Cornelius*, 104 N.C. App. at 590, 410 S.E.2d at 509 (ten-minute delay permissible where "the officers acted diligently in their investigation"). If the trial judge does so find, a conclusion that the detention was not unnecessarily prolonged might also be justified. Therefore, we remand the case for findings on whether the extended detention was justified, and if it was not, whether and

when Officer Mellown developed probable cause to arrest Defendant. As a result, we do not address the remainder of Defendant's arguments.

IV. Conclusion

For the reasons stated above, the trial court's denial of Defendant's motion to suppress is

REVERSED AND REMANDED IN PART FOR FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
TERRANCE WILKERSON

No. COA13-365

Filed 18 February 2014

1. Appeal and Error—certiorari granted by prior panel—authority to issue writs

Defendant's contention that the Court of Appeals lacked authority to grant *certiorari* for the State was decided by a prior panel in the course of granting the State's *certiorari* petition. Additionally, according to N.C.G.S. § 7A-32(c), the Court of Appeals has the authority to issue writs of *certiorari* in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts.

2. Criminal Law—motion for appropriate relief—constitutional challenge—trial court jurisdiction

The trial court had jurisdiction to consider defendant's motion for appropriate relief to challenge his original sentence as cruel and unusual punishment under evolving standards of decency. The fact that defendant did not cite N.C.G.S. § 15A-1415(b)(4) before the trial court was irrelevant to the required jurisdictional determination given the fact that the constitutional nature of defendant's challenge to Judge Gore's original judgments was clearly stated in defendant's motion for appropriate relief and the fact that the trial court has the authority, in appropriate cases, to grant postconviction relief on its own motion.

3. Constitutional Law—Eighth Amendment—former sentence—evolving standards of decency

The trial court erred by determining that the sentences that defendant was currently serving subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The trial court failed to make a determination that defendant's sentence was grossly disproportionate before considering the extent to which defendant would have been subject to a less severe sentence under current law. Additionally, the Court of Appeals was unable to say that the sentence embodied in the original judgments was grossly disproportionate in light of the number of felony offenses for which defendant was convicted, the fact that one of the offenses for which defendant was convicted was a particularly serious one, and the fact that defendant's conduct involved great financial harm and led to criminal activity on the part of a younger individual.

Review stemming from the allowance of a petition for the issuance of a writ of certiorari filed by the State challenging an order entered 17 December 2012 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 26 September 2013.

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

Sarah Jessica Farber, for Defendant-Appellee.

ERVIN, Judge.

The State has sought appellate review of an order granting Defendant Terrance Wilkerson's motion for appropriate relief; vacating judgments entered on 5 December 1991 stemming from Defendant's convictions for second degree burglary, three counts of felonious breaking or entering, four counts of felonious larceny, and two counts of possession of stolen property; and resentencing Defendant to a term of 21 years imprisonment. On appeal, the State contends that the trial court erroneously concluded that the sentences contained in the original judgments entered in these cases resulted in the imposition of a cruel and unusual punishment upon Defendant. After careful consideration of the State'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 and that this case should be remanded to the Cumberland County Superior Court for reinstatement of the original judgments imposed in these cases.

I. Factual Background

Between 14 December 1990 and 12 January 1991, Defendant broke into several homes and stole various items of property. At the time that he committed these criminal offenses, Defendant was sixteen years old and had no prior criminal record.

On 13 January 1991, warrants for arrest were issued charging Defendant with two counts of possession of stolen property, second degree burglary, two counts of felonious breaking or entering, and three counts of felonious larceny. On 2 April 1991, the Cumberland County grand jury returned bills of indictment charging Defendant with two counts of second degree burglary, four counts of felonious breaking or entering, six counts of felonious larceny, and six counts of possession of stolen property. On 4 December 1991, Defendant entered pleas of guilty to one count of second degree burglary, four counts of felonious larceny, three counts of felonious breaking or entering, and two counts of possession of stolen property. In return for Defendant's guilty pleas, the State voluntarily dismissed the remaining charges that had been lodged against him. At the conclusion of the proceedings that occurred in connection with the entry of Defendant's guilty pleas, Judge William C. Gore, Jr., found as aggravating factors that "[t]he defendant involved a person under the age of 16 in the commission of the crime" and that "[t]he offense involved the actual taking of property of great monetary value"; found as mitigating factors that "[t]he defendant ha[d] no record of criminal convictions" and that, "[a]t an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer"; determined that the "factors in aggravation outweigh[ed] the factors in mitigation"; and entered a judgment in the case in which Defendant had been convicted of second degree burglary sentencing him to a term of 40 years imprisonment. In addition, based upon the same findings in aggravation and mitigation, Judge Gore consolidated one of Defendant's convictions for felonious breaking or entering and one of Defendant's convictions for felonious larceny for judgment and sentenced Defendant to a consecutive term of ten years imprisonment. Finally, Judge Gore entered judgments sentencing Defendant to a concurrent term of three years imprisonment based upon a conviction for felonious larceny, to a concurrent term of three years imprisonment based upon consolidated convictions for felonious breaking or entering and felonious larceny, to a concurrent term of three years imprisonment based upon a conviction for possession of stolen property, to a concurrent term of three years imprisonment based upon convictions for felonious breaking or entering

and felonious larceny, and to a concurrent term of three years imprisonment based upon a conviction for possession of stolen property. As a result, Judge Gore's judgments effectively required Defendant to serve a term of fifty years imprisonment based upon these convictions.

On 27 June 2012, Defendant filed a motion for appropriate relief in which he requested the court to "arrest" his sentences and resentence him in such a manner as to avoid subjecting him to cruel and unusual punishment. Defendant's motion for appropriate relief rested upon the contention that his fifty year sentence for a series of nonviolent property crimes committed when he was sixteen years old was grossly disproportionate to the maximum sentence that he could receive in the event that he was sentenced for committing the same crimes under the current sentencing statutes and contravened the protections against the imposition of cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and N.C. Const. art. I, § 27.[1] On 25 July 2012, the trial court entered an order concluding that "Defendant's Motion for Appropriate Relief has merit, that summary disposition is inappropriate, and that a hearing is necessary." The State filed a written response to Defendant's motion for appropriate relief on 24 August 2012 in which it requested that Defendant receive no relief.

A hearing was held with respect to Defendant's motion for appropriate relief on 11 December 2012. On 17 December 2012, the trial court entered an order granting Defendant's motion for appropriate relief on the grounds that, "[u]nder evolving standards of decency," the sentence embodied in the judgments entered by Judge Gore was excessive and disproportionate to the crimes for which Defendant had been convicted in violation of the Eighth Amendment and was, for that reason, invalid. As a result, the trial court vacated the judgments that had been entered by Judge Gore, resentenced Defendant to a term of 21 years imprisonment, gave Defendant credit for 21 years and 6 days in pretrial confinement, and ordered that Defendant be immediately released.

On 17 December 2012, the State filed petitions seeking the issuance of a writ of *certiorari* authorizing appellate review of the 17 December 2012 order and the issuance of a writ of *superseadeas* staying the trial

1. Although Defendant argued that his sentences violated N.C. Const. art. I, § 27, in his motion for appropriate relief, the trial court made no reference to this provision of the state constitution in its order and Defendant has not advanced any argument stemming from the state constitution in his brief. For those reasons, we will treat this case as arising solely under the relevant provision of the United States constitution.

court's order pending the completion of the appellate review process. On 2 January 2013, this Court granted the State's petitions.

II. Substantive Legal Analysis

A. Appellate Jurisdiction

[1] As an initial matter, we are required to address Defendant's contention that this Court lacked the authority to grant the State's petition for the issuance of a writ of *certiorari*. In view of the fact that a panel of this Court has previously rejected this contention in the course of granting the State's *certiorari* petition, we are required to do so as well. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) (stating 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" and that, "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"). In addition, for the reasons set forth in detail below, we also believe that this Court had the authority to grant the State's *certiorari* petition.

"The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). According to N.C. Gen. Stat. § 7A-32(c), this Court has the authority to issue writs of *certiorari* "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." N.C. Gen. Stat. § 32(c). As a result, given that a "[trial] court's ruling on a motion for appropriate relief pursuant to [N.C. Gen. Stat. §] 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of *certiorari*," N.C. Gen. Stat. § 15A-1422(c)(3), *see State v. Dammons*, 128 N.C. App. 16, 22, 493 S.E.2d 480, 484 (stating that "[t]his Court may review a trial court's ruling on a motion for appropriate relief if 'the time for appeal has expired and no appeal is pending, by writ of certiorari' ") (quoting N.C. Gen. Stat. § 15A-1422(c)(3)), *disc. review denied*, 342 N.C. 660, 465 S.E.2d 547 (1997); *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) (stating that "[a] trial 'court's ruling on a motion for appropriate relief pursuant to [N.C. Gen. Stat. §] 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari' ") (citations omitted), and given that the issuance of a writ of *certiorari* in situations such as this one is necessary to "supervise and control" proceedings in the trial courts, *see Troy v. Tucker*, 126 N.C. App. 213, 215,

484 S.E.2d 98, 99 (1997) (recognizing the existence of our supervisory jurisdiction over the trial courts as authorized by N.C. Const. art. IV, § 12 and N.C. Gen. Stat. § 7A–32(c)); *In re Robinson*, 120 N.C. App. 874, 875, 464 S.E.2d 86, 87 (1995) (granting *certiorari* "pursuant to [this Court's] supervisory power under [N.C. Gen. Stat. §] 7A–32(c)"), we clearly had ample authority to grant the State's request for the issuance of a writ of *certiorari* authorizing review of the trial court's order in this case.

In support of his contention to the contrary, Defendant cites a previous decision by this Court refusing to issue a writ of *certiorari* requested by the State on the grounds that the issuance of the requested writ was not authorized by N.C. R. App. P. 21(a)(1), which provides that a writ of certiorari may be issued in appropriate circumstances by either appellate court to " 'permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to [N.C. Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.' " *State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 426, *cert denied*, __ N.C. __, 636 S.E.2d 196 (2006) (quoting N.C. R. App. P. 21(a)(1). According to the logic enunciated in *Starkey*, since N.C. R. App. P. 21 limits *certiorari* review of orders granting or denying motions for appropriate relief to orders denying such motions and since the State sought review of an order granting a defendant's motion for appropriate relief, we lacked authority to issue the requested writ. *Id.* As a result, however, of the fact that *Starkey* conflicts with several decisions of the Supreme Court that authorize review of trial court decisions granting motions for appropriate relief filed by a defendant, our decision in *Starkey* does not stand as an obstacle to the allowance of the State's *certiorari* petition. *See State v. Whitehead*, 365 N.C. 444, 445-46, 722 S.E.2d 492, 494 (2012) (granting the State's petition for the issuance of a writ of *certiorari* for the purpose of reviewing a trial court order granting a motion for appropriate relief); *State v. Frogge*, 359 N.C. 228, 230, 607 S.E.2d 627, 628-29 (2005) (granting a petition for the issuance of a writ of *certiorari* authorizing review of a trial court order granting a defendant's motion for appropriate relief), *cert. denied*, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000); *State v. McDowell*, 310 N.C. 61, 62, 310 S.E.2d 301, 301 (1984) (allowing a petition for the issuance of a writ of *certiorari* filed by the State seeking review of a trial court order granting defendant's motion for appropriate relief). As a result of the fact that the logic adopted in *Starkey* would be equally applicable to the situations at issue in *Whitehead*, *Frogge*, and *McDowell*, and since nothing in N.C. R. App. P. 21 makes any distinction between our authority to issue writs

of *certiorari* in response to petitions filed by the State seeking review of orders granting a motion for appropriate relief and that of the Supreme Court, we believe that our decision in *Starkey* is inconsistent with prior and subsequent decisions of the Supreme Court and is not, for that reason, controlling in the present case.[2] *See State v. Davis*, 198 N.C. App. 443, 449, 680 S.E.2d 239, 244 (2009) (this Court "decline[d] to follow" an earlier Court of Appeals decision "inconsistent with prior decisions of this Court and our Supreme Court"); *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 670 n.1, 486 S.E.2d 472, 473 n.1 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998) (stating that, "because that case is inconsistent with prior decisions of this Court and our Supreme Court, we decline to follow it."). Our conclusion to this effect is reinforced by our recognition of the fact that the rules of appellate procedure "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law," N.C. R. App. P. 1(c); the fact that our authority to grant *certiorari* for the purpose of reviewing orders granting or denying motions for appropriate relief is established by N.C. Gen. Stat. § 15A-1422(c)(3); and the fact that the approach adopted in *Starkey*, contrary to N.C. R. App. P. 1, treats N.C. R. App. P. 21 as limiting the jurisdiction afforded to this Court by the General Assembly. As a result, we have no hesitation in concluding that this Court did, in fact, have the authority to grant the State's petition for the issuance of a writ of *certiorari* in this case and will proceed to address the merits of the State's challenge to the trial court's order.

B. Validity of Trial Court's Order

1. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact

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2. In addition, this Court has granted petitions for writs of *certiorari* filed by the State for the purpose of seeking review of orders allowing motions for appropriate relief in previous cases. *See State v. Bonsteel*, 160 N.C. App. 709, __ S.E.2d __ (2003) (unpublished) (granting the State's petition for the issuance of a writ of *certiorari* for the purpose of reviewing a trial court order granting a defendant's motion for appropriate relief); *State v. Rubio*, __ N.C. App. __, 732 S.E.2d 393 (2012) (unpublished), *disc. review dismissed*, __ N.C. __, 735 S.E.2d 824 (2013) (citing N.C. Gen. Stat. § 15A-1422(c)(3) as the basis for asserting jurisdiction over an order granting a defendant's motion for appropriate relief). Although we are not bound by our prior unpublished decisions, *see United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997) (holding that this Court is not bound by a prior unpublished decision of another panel of this Court), we believe that *Bonsteel* and *Rubio* shed additional light on our authority to grant the State's request for *certiorari* review of an order granting a defendant's motion for appropriate relief.

are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *Frogge*, 359 N.C. at 240, 607 S.E.2d at 634 (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). " 'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)). "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). Because the facts underlying this case as described in the trial court's findings of fact are essentially undisputed, the only issue that we are required to address in this case is whether the trial court correctly concluded that, on the basis of the present record, Defendant was entitled to relief from Judge Gore's original judgments on Eighth Amendment grounds.

2. Trial Court's Jurisdiction Over Defendant's Motion

[2] In its initial challenge to the trial court's judgment, the State argues that the trial court lacked jurisdiction to vacate Judge Gore's original judgments. More specifically, the State contends that no provision of N.C. Gen. Stat. § 15A-1415 authorized the trial court to enter an order vacating Defendant's original judgments, resentencing Defendant, and ordering that he be released. We do not find this aspect of the State's argument persuasive.

According to N.C. Gen. Stat. § 15A–1415(b), a convicted criminal defendant is entitled to seek relief from a trial court judgment by means of a motion for appropriate relief filed more than ten days after the entry of judgment on the basis of certain specifically enumerated grounds. *See* N.C. Gen. Stat. § 15A–1415(b). As we have recently stated, "N.C. Gen. Stat. § 15A–1415(b) clearly provides that the eight specific grounds listed in that statutory subsection are 'the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after the entry of judgment,' " so that "a trial court lacks jurisdiction over the subject matter of a claim for postconviction relief which does not fall within one of the categories specified in N.C. Gen. Stat. § 15A–1415(b)." *State v. Harwood*, __ N.C. App. __, __, 746 S.E.2d 445, 450, *disc. review dismissed*, __ N.C. __, 748 S.E.2d 320 (2013).

In its order, the trial court concluded that it had the authority to grant the requested relief pursuant to N.C. Gen. Stat. §§ 15A-1415(b)(4) and (b)(8), which authorize an award of postconviction relief in the event that "[t]he 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," N.C. Gen. Stat. § 15A-1415(b)(4), or that "[t]he 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. Gen. Stat. § 15A-1415(b)(8). The fact that Defendant did not cite N.C. Gen. Stat. § 15A-1415(b)(4) before the trial court is irrelevant to the required jurisdictional determination given the fact that the constitutional nature of Defendant's challenge to Judge Gore's original judgments was clearly stated in Defendant's motion for appropriate relief and the fact that the trial court has the authority, in appropriate cases, to grant postconviction relief on its own motion. N.C. Gen. Stat. § 15A-1420(d) (stating that, "[a]t any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion"). Similarly, the fact that the sentences imposed in Judge Gore's original judgments were not unauthorized, invalid, or otherwise unlawful at the time that they were imposed does not, contrary to the State's argument, preclude an award of relief based on N.C. Gen. Stat. § 15A-1415(b)(8) given that the reference to "at the time imposed" in the relevant statutory language does not modify the language authorizing a grant of relief in the event that the defendant's sentence "is otherwise invalid as a matter of law." In fact, acceptance of the State's argument that the trial court lacked the authority to enter the challenged order would necessarily mean that trial judges have no authority to grant postconviction sentencing relief on Eighth Amendment grounds after the time for noting a direct appeal has expired, an outcome which we do not believe to have been within the General Assembly's contemplation and which is not consistent with our postconviction jurisprudence. *State v. Bonds*, 45 N.C. App. 62, 64, 262 S.E.2d 340, 342 (stating that, "[i]f a judgment is invalid as a matter of law, the courts of North Carolina have always had the authority to vacate such judgments pursuant to petition for writ of habeas corpus and, more recently, by way of postconviction proceedings"), *app. dismissed*, 300 N.C. 376, 267 S.E.2d 687, *cert. denied*, 449 U.S. 883, 101 S. Ct. 235, 66 L. Ed. 2d 107 (1980). As a result of the fact that Defendant has asserted in his motion for appropriate relief that the sentences imposed in Judge Gore's original judgment are disproportionate to the offenses for which he was convicted in violation

of the Eighth Amendment and that those sentences were, for that reason, invalid, the trial court clearly had jurisdiction to reach the merits of Defendant's challenge to Judge Gore's original judgments pursuant to N.C. Gen. Stat. §§ 15A-1415(b)(4) and (b)(8).

This Court has recently addressed and rejected the same argument in a case in which the trial court granted a defendant's motion for appropriate relief and vacated his life sentence, which had been imposed upon him in 1973 as the result of his conviction for second degree burglary, on the basis of a conclusion that, "under evolving standards, [defendant's] sentence violated the Eighth Amendment and is invalid as a matter of law." *State v. Stubbs*, __ N.C. App. __, __, __ S.E.2d __, __ (2014). Although the State argued before this Court in that case, as it has here, that nothing in N.C. Gen. Stat. § 15A-1415 authorized the trial court to modify the defendant's original sentence, *Id.* at __, __ S.E.2d at __, we concluded that "the trial court had jurisdiction over the [original] judgment to consider whether defendant's sentence was 'invalid as a matter of law.' " *Id.* at __, __ S.E.2d at __ (quoting N.C. Gen. Stat. § 15A-1415(b)(8)).[3] As a result, in light of the literal language of N.C. Gen. Stat. §§ 15A-1415(b)(4) and (b)(8) and our decision in *Stubbs*, we hold that the trial court had jurisdiction to consider Defendant's challenges to Judge Gore's original judgments on the merits.

3. Gross Disproportionality

[3] Secondly, the State contends that, even if the trial court had jurisdiction to consider the validity of Defendant's challenge to Judge Gore's original judgments, it erred by determining that the sentences that Defendant was currently serving subjected him to cruel and unusual punishment in violation of the Eighth Amendment. We agree.

The Eighth Amendment to the United States Constitution, which has been made applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines

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3. In support of its argument that the trial court lacked the authority to consider Defendant's challenge to the judgments at issue here, the State cites the Supreme Court's decision in *Whitehead* to the effect that, "[h]aving concluded that defendant is not entitled to resentencing under the [Structured Sentencing Act], we also note that defendant's [motion for appropriate relief] provides no appropriate grounds for resentencing under the [Fair Sentencing Act]." *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 495. In this case, unlike *Whitehead*, Defendant has advanced a constitutional, rather than a merely statutory, challenge to the validity of Judge Gore's original judgments, a fact which distinguishes this case from *Whitehead* and gave the trial court the authority to consider the merits of Defendant's motion for appropriate relief.

imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, 835 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 549, 54 L. Ed. 793, 798 (1910)). We view the concept of proportionality according to " 'the evolving standards of decency that mark the progress of a maturing society.' " *Miller v. Alabama*, __ U.S. __, __, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407, 417 (2012) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290 50 L. Ed. 2d 251, 259 (1976)). "The Eighth Amendment does not[, however,] require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705, 115 L. Ed. 2d 836, 869 (1991) (Justice Kennedy, joined by Justices O'Connor and Souter, concurring) (internal quotations and citations omitted). As a result, " '[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.' " *State v. Clifton*, 158 N.C. App. 88, 94, 580 S.E.2d 40, 45 (quoting *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)), *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003). "[I]n the absence of legal error, it is not the role of the judiciary to engage in discretionary sentence reduction," since "that power resides in the executive branch, as established by the state constitution and acts of the General Assembly," *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496, and since "our General Assembly has directed the Post-Release Supervision and Parole Commission to review matters of proportionality" arising from the changes in the statutory provisions governing the sentencing of convicted criminal defendants that have been enacted in recent years. *Stubbs*, __ N.C. App. at __, __ S.E.2d at __.[4]

As the United States Supreme Court has explained, "cases addressing the proportionality of sentences fall within two general classifications[:]" first, "challenges to the length of term-of-years sentences given all the circumstances in a particular case[;]" and second, "cases in which the

4. Although the State has argued at length that, "outside the capital context, there is no general proportionality principle inherent in the prohibition against cruel and unusual punishment," we believe that the relevant decisions of the United States Supreme Court clearly state the "gross disproportionality" test discussed in the text of this opinion for use in non-capital cases and do not understand the State to be advancing a contrary assertion.

Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021, 176 L. Ed. 2d at 836. "In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive" *Id.*, with that determination beginning with a comparison of "the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 60, 130 S. Ct. at 2022, 176 L. Ed. 2d at 836 (citing *Harmelin*, 501 U.S. at 1005, 111 S. Ct. at 2707, 115 L. Ed. 2d at 871 (Justice Kennedy, joined by Justices O'Connor and Souter, concurring)). " '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality[,]' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272, 100 S. Ct. 1133, 1138, 63 L. Ed. 2d 382, 390 (1980).

The trial court reached the conclusion that Defendant had been subjected to cruel and unusual punishment based upon a consideration of "(1) the gravity of the offense, (2) the harshness of the penalty, and (3) the sentences for other crimes within the jurisdiction." In seeking to persuade us to uphold the trial court's order, Defendant notes that he was a juvenile at the time that the offenses in question were committed, points out that he would receive a significantly shorter term of imprisonment in the event that he were to be sentenced under current law, and argues that his sentence of 50 years imprisonment with the possibility of parole based upon his convictions for second degree burglary, felonious breaking or entering, felonious larceny, and possession of stolen property was grossly disproportionate to the crimes committed. We do not find Defendant's argument persuasive.[5]

The first problem with the trial court's order is that the trial court claimed to have erroneously considered a comparison of the sentence

5. The parties do not appear to agree upon the sentence upon which we should focus our attention in analyzing the validity of the State's challenge to the trial court's order. On the one hand, Defendant's argument rests upon the assumption that we should view the sum total of the sentences embodied in Judge Gore's original judgments as a single term of imprisonment while the State appears to suggest that we should focus our attention on the specific sentence that Defendant is currently serving. As a result of the fact that we do not believe that this difference of opinion has any bearing on the ultimate outcome that we should reach in this case, we will assume, without deciding, that the approach taken by Defendant is the correct one.

imposed upon Defendant with sentences imposed upon others under more recent statutory sentencing provisions in the course of determining whether Defendant's sentence was grossly disproportionate. However, a comparison of the sentence imposed upon Defendant to the sentences that have been or could be imposed upon other convicted felons is not relevant to the issues raised by Defendant's motion for appropriate relief until after a finding of "gross disproportionality" had been made. *See Graham*, 560 U.S. at 60, 130 S. Ct. at 2022, 176 L. Ed. 2d at 836 (stating that an evaluation of the gravity of the offense for which the defendant had been convicted and the severity of the sentence imposed upon the defendant based upon that conviction for the purpose of determining whether the defendant's sentence was grossly disproportionate must be undertaken before the court compares a defendant's sentence to the sentences of others for similar offenses); *Harmelin*, 501 U.S. at 1005, 111 S. Ct. at 2707, 115 L. Ed. 2d at 871 (stating that "[a] better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality") (Justice Kennedy, joined by Justices O'Connor and Souter, concurring). For that reason, the extent to which Defendant would have been subject to a less severe sentence in the event that he had been sentenced under current sentencing law has no bearing upon the initial phase of the required Eighth Amendment analysis. As a result, the trial court erred by apparently failing to make a determination that Defendant's sentence was grossly disproportionate without taking subsequent sentencing amendments into account before concluding that Judge Gore's original judgments should be vacated and that Defendant should be resentenced.

In addition, we are unable to agree that Defendant has established that the sentence embodied in Judge Gore's original judgments was grossly disproportionate. Although Defendant was a juvenile at the time that he committed the offenses that led to the challenged trial court judgments and although the offenses for which Defendant was convicted were not violent in nature, he pled guilty to one count of second degree burglary, three counts of felonious breaking or entering, four counts of felonious larceny, and two counts of possession of stolen property, resulting in a total of ten felony convictions. Moreover, despite the fact that Defendant's convictions did, as he points out in his brief, result from the commission of nonviolent property crimes, the fact that he was convicted of committing ten felony offenses, the fact that second degree burglary is a particularly serious offense involving the breaking and entering of a residence in the nighttime with the intent to commit a

felony or any larceny, *State v. Beaver*, 291 N.C. 137, 141, 229 S.E.2d 179, 181 (1976) (stating that "[t]he distinction between the two degrees [of burglary] depends upon the actual occupancy of the dwelling house or sleeping apartment at the time of the commission of the crime"), and the fact that, in two of the cases at issue here, Defendant was found to have taken property of great value and involved a young person less than sixteen years old in the criminal activity in which he was engaged, are relevant to the constitutional validity of Judge Gore's decision to impose a particularly severe sentence in this case. Simply put, in light of the number of felony offenses for which Defendant was convicted, the fact that one of the offenses for which Defendant was convicted was a particularly serious one, and the fact that Defendant's conduct involved great financial harm and led to criminal activity on the part of a younger individual, we are unable to say that the sentence embodied in Judge Gore's original judgments was "grossly disproportionate." Our conclusion to this effect is buttressed by a careful examination of the reported appellate decisions addressing similar factual circumstances, all of which suggest that this is not one of the "exceedingly rare" and "extreme" cases in which the sentence upon Defendant is "grossly disproportionate." *See Ewing v. California*, 538 U.S. 11, 30-31, 123 S. Ct. 1179, 1190, 155 L. Ed. 2d 108, 123 (2003) (holding that a sentence of 25 years to life imprisonment for larceny pursuant to a "three strikes and you're out" law did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *Harmelin*, 501 U.S. at 1008-09, 111 S. Ct. at 2709, 115 L. Ed. 2d at 874 (holding that a sentence of life imprisonment without the possibility of parole for possession of cocaine was not so grossly disproportionate as to constitute cruel and unusual punishment in violation of the Eighth Amendment) (Justice Kennedy, joined by Justices O'Connor and Souter, concurring); *State v. Green*, 348 N.C. 588, 612, 502 S.E.2d 819, 834 (1998), *cert. denied*, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999) (holding that a sentence of life imprisonment with the possibility of parole based upon a thirteen year old defendant's conviction for first degree sexual offense did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *State v. Ford*, 297 N.C. 28, 32, 252 S.E.2d 717, 719 (1979) (holding that a sentence of life imprisonment for first degree burglary did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *State v. Sweezy*, 291 N.C. 366, 384-85, 230 S.E.2d 524, 536 (1976) (holding that a sentence of life imprisonment for first degree burglary did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *Stubbs*, __ N.C. App. at __, __ S.E.2d at __ (holding that a defendant's sentence of life imprisonment for a second degree burglary

committed when the defendant was a juvenile did not constitute cruel and unusual punishment in violation of the Eighth Amendment); *State v. Pettigrew*, 204 N.C. App. 248, 258-59, 693 S.E.2d 698, 705, *app. dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010) (holding that a sentence of 32 to 40 years imprisonment for two counts of first degree sexual offense committed when the defendant was sixteen years old did not constitute cruel and unusual punishment in violation of the Eighth Amendment). For all of these reasons, we see no basis for concluding that this is one of the "exceedingly rare noncapital cases" in which the sentence imposed is "grossly disproportionate" to the crimes for which Defendant stands convicted. As a result, we conclude that the sentence imposed upon Defendant in this case, while undoubtedly severe, is "not cruel or unusual in the constitutional sense," *Green*, 348 N.C. at 612, 502 S.E.2d at 834, and, for that reason, hold that the trial court's order should be reversed and that this case should be remanded to the Cumberland County Superior Court with instructions to reinstate Judge Gore's original judgments.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by vacating Judge Gore's original judgments, resentencing Defendant, and ordering his immediate release. As a result, the trial court's order should be, and hereby is, reversed, and this case should be, and hereby is, remanded to the Cumberland County Superior Court for reinstatement of Judge Gore's original judgments.

REVERSED AND REMANDED.

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

STEPHENS v. COVINGTON

[232 N.C. App. 497 (2014)]

JOSHUA STEPHENS, PLAINTIFF
v.
SHELBY COVINGTON, JAMES HEWETT, AND GLENDA HEWETT, DEFENDANTS

No. COA13-431

Filed 18 February 2014

Animals—dog bite—landlord's liability—no knowledge of dangerous propensities

The trial court correctly granted defendant's motion for summary judgment in a negligence action against a landlord by a child bitten by a tenant's Rottweiler. The evidence failed to show that defendant knew the dog had dangerous propensities prior to his attack on plaintiff, thus failing to establish that defendant possessed sufficient control to remove the danger under *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501. Plaintiff's assumption that defendant had knowledge of the dog's dangerous propensities based upon breed was misplaced, as the record indicated that the Rottweiler breed is not inherently aggressive.

Appeal by plaintiff from order entered 3 October 2012 by Judge Gary E. Trawick in New Hanover County Superior Court. Heard in the Court of Appeals 9 October 2013.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, and The Kirby Law Firm, by Albert D. Kirby, Jr., for plaintiff-appellant.

Culbreth Law Firm, LLP, by Stephen E. Culbreth, for defendant-appellee.

CALABRIA, Judge.

Joshua Stephens ("plaintiff") appeals from an order granting summary judgment in favor of Shelby Covington ("defendant"). Defendants James and Glenda Hewett (collectively, "the Hewetts") are not parties to this appeal. Plaintiff only appeals the 3 October 2012 order granting summary judgment in defendant's favor. We affirm.

I. Background

In the early 1990s, the Hewetts leased a home located on Louisiana Avenue in Wilmington, North Carolina ("the property") from defendant's husband, John Covington ("Mr. Covington") (collectively with

defendant, "the Covingtons"). Mr. Covington knew that the Hewetts owned a Rottweiler ("Rocky"), and since the houses in the neighborhood were close together, Mr. Covington and the Hewetts contacted Animal Control regarding safety measures for keeping a dog. As a precaution and at the direction of Animal Control, the Hewetts created a fenced area in the backyard with two gates and posted "Beware of Dog" and "No Trespassing" signs on each gate.

Shortly after the Hewetts leased the property, but prior to purchasing it, Rocky grew so large that the Hewetts began keeping Rocky exclusively in the fenced area. At the time the incident in the instant case occurred, plaintiff was eight years old. Plaintiff visited his friend Jeremy Hewett ("Jeremy"), the Hewetts' nine-year-old son. During plaintiff's visit, plaintiff followed Jeremy when he entered the fenced area to refill Rocky's water dish. While the boys stood in the fenced area, Rocky bit plaintiff's lower leg. Jeremy hit Rocky with a stick to make him release plaintiff. When Jeremy was unsuccessful, he ran to get his mother. Rocky briefly released plaintiff, but then bit him again, catching plaintiff's shoulder in his teeth. Eventually Glenda Hewett managed to release plaintiff from Rocky, and a neighbor pulled plaintiff over the fence, safely away from Rocky. Plaintiff sustained "extremely severe" injuries to both his leg and shoulder. Animal Control officers investigated and took statements from witnesses. After Rocky remained at the animal shelter for a ten day mandatory quarantine period, James Hewett decided to have him euthanized.

In October 2008, after plaintiff reached majority, he filed a complaint against the Covingtons and the Hewetts. However, since Mr. Covington died in 1998, the complaint was voluntarily dismissed without prejudice. Plaintiff refiled the complaint against the Hewetts and defendant on 27 January 2011. Plaintiff alleged, *inter alia*, negligence against the Hewetts and defendant. On 21 November 2012, the trial court entered a final judgment of $500,000 against the Hewetts as compensatory damages. On 12 March 2012, defendant filed a motion for summary judgment. After a hearing in New Hanover County Superior Court, the trial court entered an order on 3 October 2012 granting defendant's motion. Plaintiff appeals the order granting summary judgment in defendant's favor.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party

is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* (citation omitted).

III. Landlord's Liability to Third Parties for Injuries by Tenant-Owned Dogs

Plaintiff argues the trial court erred by granting defendant's motion for summary judgment because there was a genuine issue of material fact as to whether defendant had control over the dangerous animal which attacked plaintiff. We disagree.

Plaintiff's argument relies primarily upon *Holcomb v. Colonial Assocs., L.L.C.*, in which our Supreme Court considered "whether a landlord can be held liable for negligence when his tenant's dogs injure a third party." 358 N.C. 501, 503, 597 S.E.2d 710, 712 (2004). In *Holcomb*, a contractor sustained injuries when a tenant's Rottweiler dog "lunged" at him, causing him to fall to the ground. *Id.* at 504, 597 S.E.2d at 713. The landlord had allowed the tenant to keep two Rottweiler dogs which were permitted to run freely on the property despite the landlord's awareness of two prior instances of aggression on the part of the dogs, one of which resulted in a bite. *Id.* at 504, 597 S.E.2d at 712-13. The landlord continued to allow the dogs despite a written lease agreement which required the tenant to promptly remove any pet the landlord deemed to be a nuisance or undesirable. *Id.* at 503, 597 S.E.2d at 712.

Under a premises liability theory, the *Holcomb* Court held that the landlord could be held liable because the "lease provision granted [landlord] sufficient control to *remove the danger* posed by [tenant]'s dogs." *Id.* at 508-09, 597 S.E.2d at 715 (emphasis added). Plaintiff in the instant case contends that there was a genuine issue of material fact as to whether defendant possessed similar control over Rocky at the time he was attacked.

However, as all of the cases relied upon by the *Holcomb* Court make clear, it is not mere generalized control of leased property that establishes landlord liability for a dog attack, but rather specific control of a known dangerous animal. *See Batra v. Clark*, 110 S.W.3d 126, 130 (Tex.App.-Houston 1st Dist. 2003) ("[I]f a landlord has actual knowledge of an animal's dangerous propensities and presence on the leased property, and has the ability to control the premises, he owes a duty of ordinary care to third parties who are injured by this animal."); *Uccello v. Laudenslayer*, 118 Cal. Rptr. 741 (1975) (landlord renewed tenants'

lease with knowledge that tenants' dog previously attacked two people); *Shields v. Wagman*, 714 A.2d 881 (Md. 1998) (leasing company knew dog had vicious tendencies and had control over dog's presence on the property); *McCullough v. Bozarth*, 442 N.W.2d 201, 208 (Neb. 1989) (landlord only liable for injuries caused by tenant's dog when he has "actual knowledge of the dangerous propensities of the dog and . . . nevertheless leased the premises to the dog's owner or . . . had the power to control the harboring of a dog by the tenant and neglected to exercise that power."). The *Holcomb* Court was able to presume the dog which attacked the contractor in that case was dangerous, because the undisputed evidence before it was that the landlord had knowledge of the dogs' previous attacks and dangerous propensities. *Id.* at 504, 597 S.E.2d at 712-13. Nonetheless, it was still clear from that decision that it was not merely the landlord's control of the property, but particularly the landlord's "sufficient control to *remove the danger* posed" which resulted in the landlord's liability. *Id.* at 508, 597 S.E.2d at 715 (emphasis added). Thus, pursuant to *Holcomb* and the cases cited therein, a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party.

In the instant case, there is no evidence that defendant or her husband knew or had reason to know that Rocky was dangerous. While Mr. Covington requested that James Hewett contact Animal Control prior to Rocky occupying the property, deposition testimony indicates that the purpose behind this call was to obtain advice on erecting a fence to confine the dog to the yard in accordance with local ordinances, rather than because the dog had displayed any aggression. The record also indicates that there were no reported incidents of aggression, and no one had complained about Rocky to Animal Control or to the Covingtons prior to plaintiff's visit on 25 January 1996. During the investigation of the incident, Animal Control officers did not interview the Covingtons. Animal Control officer Chloe Rivenbark testified at her deposition in the matter that "there was really no need to talk to [the Covingtons]. [Animal Control officers] were dealing mainly with the children and the families that were involved." Finally, defendant specifically testified in her deposition that "the dog didn't have a bad name of biting anybody or anything that I ever heard tell of [sic]," and that Mr. Covington "would have not allowed [sic] . . . anything there that was dangerous[.]" Thus, unlike the landlord in *Holcomb*, defendant did not have knowledge of a dangerous dog on the property.

Nonetheless, plaintiff contends that defendant did not need to have actual knowledge of Rocky's dangerous propensities because this Court has previously held that dog owners in a negligence action were "chargeable with the knowledge of the general propensities of the Rottweiler animal." *Hill v. Williams*, 144 N.C. App. 45, 55, 547 S.E.2d 472, 478 (2001) (citation omitted). In *Hill*, a local veterinarian testified that the Rottweiler breed was "aggressive and temperamental, suspicious of strangers, protective of their space, and unpredictable." *Id.* at 48, 547 S.E.2d at 474. The defendants presented no evidence to refute the plaintiffs' evidence of the breed's aggressive tendencies, and as a result, they were "chargeable . . . with knowledge of the general propensities of a Rottweiler dog *as reflected in plaintiffs' evidence*[.]" *Id.* at 55, 547 S.E.2d at 478 (emphasis added).

In the instant case, plaintiff did not present any evidence demonstrating that the Rottweiler breed is generally dangerous. The only evidence regarding the general propensities of Rottweilers was the deposition testimony of Animal Control Officer Ron Currie ("Officer Currie"). Officer Currie testified that socializing individual dogs is more indicative of an animal's behavior than breed. He also testified that Rottweilers are not necessarily aggressive by their very nature. Thus, the evidence presented regarding the propensities of a Rottweiler dog, in the instant case, does not support a finding that Rottweilers are generally dangerous. Accordingly, *Hill*'s statement regarding the dangerousness of Rottweilers, which was specific to the evidence presented in that case, is not applicable to the instant case.

Ultimately, there is nothing in the record to suggest that defendant knew a *dangerous* dog was on the property. Rocky had no prior history of attacks, and neither the Covingtons nor Animal Control were aware of any complaints regarding the dog's aggression or viciousness. Defendant could not have known that Rocky was dangerous, as there was no evidence prior to 25 January 1996 that the dog exhibited vicious tendencies.

IV. Conclusion

In the light most favorable to plaintiff, the evidence fails to show that defendant knew that Rocky had dangerous propensities prior to his attack on plaintiff. Since plaintiff has failed to establish that Rocky was a danger, he has failed to establish that defendant possessed "sufficient control to remove the danger posed" under *Holcomb*. 358 N.C. at 508, 597 S.E.2d at 716. Plaintiff's assumption that defendant had knowledge of Rocky's dangerous propensities based upon breed is misplaced, as

the record indicates that the Rottweiler breed is not inherently aggressive. As such, there is no genuine issue of material fact, and the trial court correctly granted defendant's motion for summary judgment. We affirm the order of the trial court.

Affirmed.

Judges ELMORE and STEPHENS concur.

LESLIE WEBB, ADMINISTRATRIX OF THE ESTATE OF ROBERT B. WEBB, III, PLAINTIFF-APPELLANT

v.

WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, UNIVERSITY DENTAL ASSOCIATES, NORTH CAROLINA BAPTIST HOSPITAL, WAKE FOREST UNIVERSITY, WAKE FOREST UNIVERSITY PHYSICIANS, SHILPA S. BUSS, DDS, AND REENA PATEL, DDS, DEFENDANTS-APPELLEES

No. COA13-221

Filed 18 February 2014

1. Dentists—malpractice—prolonged anesthesia—summary judgment

In a dental malpractice action that arose from a procedure with sustained anesthesia and pneumonia, plaintiff, the nonmoving party, forecast evidence showing that defendants' treatment proximately caused the decedent's death and that there were genuine issues of material fact to be determined by the jury. The trial court erred by granting defendants' motions for summary judgment.

2. Appeal and Error—preservation of issues—exclusion of evidence—no motion to exclude—considered under summary judgment

Despite the fact that a dental malpractice action was before the Court of Appeals on appeal from a grant of summary judgment, and the record did not show a motion to exclude expert testimony, the admissibility of expert testimony was addressed because of the Supreme Court's analysis in *Crocker v. Roethling*, 363 N.C. 140.

3. Dentists—malpractice—causation—two-step showing

Defendants did not show that plaintiff's expert testimony in a dental malpractice case was not sufficiently reliable on causation.

The fact that plaintiff's causation testimony was presented in two steps, that the dental care caused his bronchopneumonia and that the bronchopneumonia caused decedent's death, did not affect this analysis.

4. Dentists—malpractice—causation—expert witness—individual considerations

Plaintiff's expert in a dental malpractice case involving anesthesia and pneumonia was qualified to render opinions on causation. Focusing on the qualifications of Dr. Behrman in particular, as opposed to the qualifications of licensed dentists in general, Dr. Behrman's knowledge, skill, experience, training, and education qualified him to opine as to the causation of bronchopneumonia.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 27 August 2012 by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 10 September 2013.

Kennedy, Kennedy, Kennedy, and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for Plaintiff-Appellant.

Coffey Bomar LLP, by Tamura D. Coffey and J. Rebekah Biggerstaff, for Defendants-Appellees Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, and Wake Forest University Physicians.

Carruthers & Roth, P.A., by Kenneth L. Jones and Michal E. Yarborough, for Defendant-Appellee University Dental Associates.

McGEE, Judge.

Leslie Webb, Administratrix of the Estate of Robert B. Webb, III, ("Plaintiff"), filed a complaint against Wake Forest University Baptist Medical Center, University Dental Associates, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS ("Defendants") on 13 July 2010. Plaintiff alleged that Robert B. Webb, III, ("the Decedent") was under general anesthesia for oral surgery, teeth cleaning, and the extraction of four teeth performed on 13 March 2008. The Decedent was sent home the same day following the procedure. He became unresponsive at home on 14 March 2008 and was pronounced dead on 15 March 2008.

Plaintiff alleged that Defendants were negligent in their treatment of the Decedent and that this negligence was the proximate cause of his death.

Defendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS, filed an answer on 30 September 2010. Defendant University Dental Associates filed a separate answer on 5 October 2010.

Defendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS, filed a motion for summary judgment on 26 July 2012. Defendant University Dental Associates filed a separate motion for summary judgment on 31 July 2012.

The trial court granted the motions for summary judgment as to "any and all allegations, claims, and causes of action involving the dental care provided to [the D]ecedent." The trial court also granted the motion for summary judgment "as to any and all allegations, claims, and causes of action that relate to the dental care provided to [the D]ecedent involving the alleged negligence of [D]efendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, and Wake Forest University Physicians." The trial court denied Defendants' summary judgment motion relating to anesthesia care.

Plaintiff appeals.

I. Summary Judgment Rule

Plaintiff argues the trial court erred in granting Defendants' motions for summary judgment relating to dental care of Decedent. 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 Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008).

Our Supreme Court has "emphasized that summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case[.]" *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (internal citation omitted). 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.*

"The moving party carries the burden of establishing the lack of any triable issue." *Lord*, 191 N.C. App. at 293, 664 S.E.2d at 334. "The movant may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Id.* (internal quotation marks omitted). "Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law." *Lowe*, 305 N.C. at 369, 289 S.E.2d at 366 (internal quotation marks omitted).

Once the moving party has met its initial burden, the nonmoving party must produce "a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial" in order to survive summary judgment. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855 (2006) (alteration in original). "The opposing [nonmoving] party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists." *Lowe*, 305 N.C. at 370, 289 S.E.2d at 366.

II. Analysis

[1] Plaintiff's complaint and Defendants' answers show there are genuine issues of material fact in this matter. The complaint alleged the following:

> XII. That the oral surgery performed on [the Decedent] lasted 8 hours and 20 minutes, approximately four times longer than the time for the procedure represented to the parents of [the Decedent]. The oral surgery consisted of teeth cleaning and the extraction of four teeth. The patient was under general anesthesia for over 8 hours. . . .
>
> XIV. That the oral surgeons and the anesthesia treatment team were aware of the fact that a known risk of having a patient under general anesthesia for an extensive period of time was that the patient could develop pneumonia.
>
> XV. That in spite of the lengthy surgery and the extended period of time that the patient was under general anesthesia, upon information and belief, the anesthesia treatment team in consultation with the two oral surgeons made the

> decision to send [the Decedent] home on March 13, 2008 post surgery.
>
> XVI. On March 14, 2008, [the Decedent] became unresponsive at home. He was rushed by EMT to Moses Cone Hospital in Greensboro, North Carolina. At Moses Cone Hospital, [the Decedent] was diagnosed as having cerebral edema on CT, anoxic brain damage and cardiac arrest. . . .
>
> XVIII. An autopsy was performed, and the cause of death was determined to be bronchopneumonia following comprehensive dental care under general anesthesia.

Defendants Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS, denied all of the above allegations in their answer. Defendant University Dental Associates filed a separate answer in which it also denied the above allegations.

Defendants, in their briefs to this Court and at oral argument, focused on the admissibility of expert testimony under N.C. Gen. Stat. § 8C-1, Rule 702(b). The trial court also stated during the hearing that Plaintiff had "run squarely into a brick wall with Rule 702(b)."

However, we note that the record contains no motion to exclude Plaintiff's expert witnesses. Rather, at the hearing on Defendants' motions for summary judgment, Defendants argued Plaintiff failed to show causation, as follows:

> Your Honor . . . we will concede that [Plaintiff has] three expert witnesses, all who have testified about standard of care issues. That is not what we're arguing about. We are strictly arguing about whether or not they had made a causal link with these three experts to the dental care in the case.

Medical malpractice encompasses actions arising from the performance of dental care. "[T]he term 'medical malpractice action' means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2009).[1]

1. Our General Assembly amended this statute in 2011. 2011 N.C. Sess. Laws ch. 400 § 5. The amendment applies "to causes of actions arising on or after" 1 October 2011. *Id.*

"To survive a motion for summary judgment in a medical malpractice action, a plaintiff must forecast evidence demonstrating that the treatment administered by [the] defendant was in negligent violation of the accepted standard of medical care in the community[,] and that [the] defendant's treatment proximately caused the injury." *Lord*, 191 N.C. App. at 293-94, 664 S.E.2d at 334 (alterations in original) (internal quotation marks omitted). "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred[.]" *Id.* at 294, 664 S.E.2d at 334.

In the present case, Plaintiff forecast evidence showing that the treatment administered by Defendants was in negligent violation of the accepted standard of care in the community. Dr. Behrman, a Doctor of Dental Medicine, testified on behalf of the Decedent in a deposition that "[t]here was no clearance obtained on a significantly medically compromised person by the physician of record, the physician caring for him[.]" Dr. Behrman testified as follows regarding the necessity to consult with the physician of record prior to the dental procedure:

> This is bread and butter of training programs, the way we teach the residents, the way we've been taught; using the medical providers, obtaining the consult and such. This is what we do and what we're trained to do, what I expect my residents to do, what I have to demonstrate during accreditation visits within a residency program.

Plaintiff also forecast evidence, in depositions and in the complaint, of the proximate cause of death. The portion of Dr. Behrman's deposition relevant to causation is quoted below:

> [Plaintiff's attorney]. In your expert opinion was the violation of the standard of care that you testified about here today a proximal contributing cause to [Decedent] developing bronchopneumonia?
>
> . . . .
>
> [Dr. Behrman]. Within my knowledge as an oral and maxillofacial surgeon, yes.

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at § 11. The cause of action in the present case arose on or about 13 March 2008. The amendment therefore is not applicable to the present case.

Plaintiff also alleged in the complaint that an "autopsy was performed, and the cause of death was determined to be bronchopneumonia following comprehensive dental care under general anesthesia." The doctor who performed the Decedent's autopsy, Dr. Gaffney-Kraft, stated in an affidavit filed by Plaintiff in this action that "it is [her] opinion within reasonable medical certainty that the cause of death of [the Decedent] was bronchopneumonia following comprehensive dental care including exam, radiographs, cleaning, restoration and extractions which were performed under general anesthesia shortly before his death[.]" Dr. Gaffney-Kraft also indicated in her report of autopsy examination that Decedent's cause of death was bronchopneumonia.

As stated above, the 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.G.S. § 1A-1, Rule 56(c); *see also Lord*, 191 N.C. App. at 293, 664 S.E.2d at 334. "Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 468, 597 S.E.2d 674, 692 (2004).

Plaintiff contends that she "presented a two-tier approach on causation." First, Dr. Behrman opined that the violation of the standard of care caused the Decedent's bronchopneumonia; second, the bronchopneumonia caused the death of the Decedent. Defendants contend the testimony of Dr. Behrman fails to establish proximate cause because his testimony fails to satisfy N.C.G.S. §8C-1, Rule 702 (2009).[2]

III. Admissibility of Expert Testimony

[2] Despite the fact that this matter is before us on appeal from the grant of summary judgment, we address the admissibility of expert testimony because of our Supreme Court's analysis in *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009). In *Howerton*, our Supreme Court recognized the differences in the two issues and commented that a party "will not likely fare as well" by moving for summary judgment without a preliminary admissibility determination "because of the inherent

2. Our General Assembly amended N.C.G.S. § 8C-1, Rule 702 in 2011. 2011 N.C. Sess. Laws ch. 283 § 1.3. The amendments apply "to actions commenced on or after" 1 October 2011. *Id.* at § 4.2. The amendments are not applicable to the present case because the action was commenced on 13 July 2010.

procedural safeguards favoring the non-moving party in motions for summary judgment." *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692; *see also Day v. Brant*, ___ N.C. App. ___, ___, 721 S.E.2d 238, 247, *disc. review denied*, 366 N.C. 719, 726 S.E.2d 179 (2012) ("Our Supreme Court, in *Howerton*, cautioned against the merging of the two issues.").

The decision in *Crocker* was composed of three opinions from the Supreme Court. All three opinions analyze the admissibility of expert testimony, regardless of the facts that the appeal was from an order granting summary judgment and the record indicated no motion to exclude expert testimony. *Crocker*, 363 N.C. at 143, 675 S.E.2d at 629. Our Supreme Court concluded that the trial court's ruling on summary judgment resulted from "a misapplication of Rule 702[.]" *Id.* at 144, 675 S.E.2d at 629. Because our Supreme Court in *Crocker* analyzed the admissibility of expert testimony even in the absence of a motion to exclude expert testimony, we analyze the admissibility of expert testimony in the present case.

"The trial court must decide the preliminary question of the admissibility of expert testimony under the three-step approach adopted in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995)." *Crocker*, 363 N.C. at 144, 675 S.E.2d at 629. "The trial court thereunder must assess: 1) the reliability of the expert's methodology, 2) the qualifications of the proposed expert, and 3) the relevance of the expert's testimony." *Id.*

A. Reliability of the Expert's Methodology

[3] As to the first step in the *Goode* analysis of the admissibility of expert testimony, Plaintiff contends that Dr. Behrman "is unquestionably qualified as an expert in the field of oral surgery." Defendants contend Plaintiff's expert testimony is "not sufficiently reliable to be admissible[,]" citing *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 663 S.E.2d 450 (2008). When testimony on medical causation "is based merely upon speculation and conjecture, however, it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation." *Id.* at 371, 663 S.E.2d at 453.

However, as discussed above, the opinions of Dr. Behrman and Dr. Gaffney-Kraft were not based merely upon speculation or conjecture. Neither Dr. Behrman nor Dr. Gaffney-Kraft used the words "probably" or "possibly" or otherwise indicated that their opinions were speculative or conjectural. Rather, Dr. Behrman answered the question as to his opinion on causation in the affirmative. Similarly, Dr. Gaffney-Kraft stated that "it is [her] opinion within reasonable medical certainty that the

cause of death of [the Decedent] was bronchopneumonia[.]" The fact that Plaintiff's causation testimony is presented in two steps, (1) that the dental care caused Decedent's bronchopneumonia and (2) that the bronchopneumonia caused Decedent's death, does not affect this analysis. Defendants cite no case holding that causation evidence may not be presented in sequential steps, and our research reveals none. Defendants have not shown Plaintiff's expert testimony is not sufficiently reliable to be considered competent evidence on causation.

B. Qualifications of the Proposed Expert

[4] As to the second step in the *Goode* analysis of the admissibility of expert testimony, Plaintiff contends that, because Dr. Behrman is an oral surgeon who performs surgical operations on patients, and the practice of medicine includes surgery, "there is an overlap between" statutes regulating the practice of medicine and the practice of dentistry. Defendants contend Plaintiff's experts "cannot be qualified to render expert opinions on medical causation pertaining to areas of the body outside the oral cavity."

Defendants cite *Martin v. Benson*, 125 N.C. App. 330, 481 S.E.2d 292 (1997), *rev'd on other grounds*, 348 N.C. 684, 500 S.E.2d 664 (1998), in support of their contention that only a medical doctor would be qualified to opine as to causation of bronchopneumonia. In *Martin*, this Court held the trial court erred in allowing a neuropsychologist to opine as to a closed head injury. *Id.* at 334-37, 481 S.E.2d at 294-96. However, our Supreme Court held that the plaintiffs waived the right to appellate review of the testimony because the plaintiffs failed to object to the evidence at the time it was offered at trial. *Martin*, 348 N.C. at 685, 500 S.E.2d at 665.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(a). "[T]he opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 518, 577 S.E.2d 326, 332 (2003) (licensed clinical psychologist was qualified to testify regarding the cause of depression).

This Court in *Martin* considered "Rule 702 in light of this State's statutes defining the practice of 'psychology.' " *Martin*, 125 N.C. App. at

336, 481 S.E.2d at 295. This Court noted that N.C. Gen. Stat. § 90-270.3 (1993) required licensed psychologists to assist clients in obtaining professional help for problems that fall outside the bounds of the psychologist's competence, including "the diagnosis and treatment of relevant medical" problems. *Id.* at 337, 481 S.E.2d at 296. From this statute, this Court concluded it was evident "that the practice of psychology does not include the diagnosis of medical causation." *Id.* By contrast, in the present case, no statute requires dentists to assist their clients in obtaining professional help for problems outside the boundaries of the dentist's competence. *Martin* is thus distinguishable from the present case.

"The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he was better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *Diggs*, 177 N.C. App. at 297, 628 S.E.2d at 856 (holding that a nurse qualified to opine as to causation of injury arising from gallbladder surgery).

Dr. Behrman earned a Doctor of Dental Medicine degree, completed an internship in anesthesia and a residency in oral and maxillofacial surgery, is licensed by the New York Board of Dentistry, and has been certified by the American Board of Oral and Maxillofacial Surgeons since 1986. As Chief of the Division of Dentistry, Oral and Maxillofacial Surgery since June 1996, Dr. Behrman oversees residency programs that provide over 10,000 patient visits each year. He is the Chair of the Institutional Review Board of a medical center in New York. In the past, he has held appointments with the University of Pennsylvania School of Dental Medicine and Memorial Sloan-Kettering Cancer Center and Hospital. Focusing on the qualifications of Dr. Behrman in particular, as opposed to the qualifications of licensed dentists in general, Dr. Behrman's knowledge, skill, experience, training, and education qualify him to opine as to the causation of bronchopneumonia. Dr. Behrman has "acquired such skill that he was better qualified than the jury to form an opinion" on the causation of bronchopneumonia. *Diggs*, 177 N.C. App. at 297, 628 S.E.2d at 856; *see also Terry*, 156 N.C. App. at 518, 577 S.E.2d at 332.

We note that Defendants do not challenge the qualification of Dr. Gaffney-Kraft to offer her expert opinion that bronchopneumonia was the Decedent's cause of death.

C. Relevance of the Expert's Testimony

Defendants do not challenge the third step of the *Goode* analysis, namely, the relevance of the expert's testimony.

IV. Conclusion

The depositions, affidavits, and pleadings show that Plaintiff, the nonmoving party, forecast evidence showing that Defendants' treatment proximately caused the Decedent's death and that there are genuine issues of material fact to be determined by the jury. The evidence constitutes a sufficient forecast of evidence for presentment of the case to the jury. The trial court erred in granting Defendants' motions for summary judgment relating to dental care.

Reversed.

Judge McCULLOUGH concurs.

DILLON, Judge, dissenting.

At the summary judgment hearing below, Plaintiff relied on the opinions of two dentists — Dr. Thomas David and Dr. David Behrman — as her forecast of evidence to establish that (1) the provision of dental care by Defendants to Robert B. Webb, III, (Decedent) violated the standard of care for dental professionals; *and* that (2) this violation proximately caused Decedent to develop bronchopneumonia.[1] Because I do not believe that the trial court abused its discretion under N.C. Gen. Stat. § 8C-1, Rule 702 by excluding from its consideration the opinions of these dentists as to the cause of Decedent's bronchopneumonia, I respectfully dissent.

Here, Plaintiff bore the burden of producing a forecast of evidence demonstrating "(1) the applicable standard of care; (2) a breach of such standard of care by [Defendants]; (3) [that] the injuries suffered by [Decedent] were proximately caused by such breach; and (4) the damages resulting to [Decedent]." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998). Our Supreme Court has held that "[w]here 'a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony.' " *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1964) (citations omitted).

1. Plaintiff relied upon the opinion of a medical doctor that Decedent's bronchopneumonia caused his death. However, this medical doctor never expressed an opinion as to the cause of the bronchopneumonia.

The theory of Plaintiff's case, here, is that Defendants violated the standard of care applicable to licensed dentists, that this violation proximately caused Decedent to contract bronchopneumonia, and that Decedent's bronchopneumonia was the cause of his death. Defendants do not contend that Plaintiff's forecast of evidence regarding the applicable standard of care and the breach thereof was insufficient to survive summary judgment. Indeed, Plaintiff's two dental experts each stated their opinions concerning the applicable standard of care for a licensed dentist in performing Decedent's dental procedure and, moreover, that Defendants had violated that standard.[2] Rather, Defendants argue — and the trial court concluded — that these same dentists did not qualify under Rule 702 to offer an expert opinion that the violation of the dental standard of care in this case was the proximate cause of Decedent's bronchopneumonia.

The parties do not dispute that Plaintiff's burden was to forecast evidence in the form of expert testimony to lay a proper foundation from which a jury could determine the cause of Decedent's bronchopneumonia. The admissibility of expert testimony on the issue of medical causation is governed by Rule 702(a) of our Rules of Evidence, the relevant version[3] of which provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact . . . to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion[.]"

In the context of a medical malpractice action, Rule 702(a) appears less restrictive as to the qualifications of a witness to provide an expert opinion on medical causation than Rule 702(b) as to the qualifications of a witness to provide an expert opinion on the appropriate standard of care. For instance, while an expert testifying as to the standard of care must generally be "a licensed health care provider," this Court has held, in a medical malpractice case, that a witness need not be a licensed medical doctor in order to offer an expert opinion as to medical causation, *Diggs v. Novant Health*, 177 N.C. App. 290, 628, S.E.2d 851 (2006), noting that our Supreme Court has rejected the notion that

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2. Likewise, Defendants do not contend that Plaintiff's forecast of evidence regarding the causal connection between Decedent's bronchopneumonia and his death was not sufficient to survive summary judgment, as this connection was established through the opinion of a medical doctor.

3. Rule 702(a) was amended for actions commenced after October 1, 2011 to provide a stricter standard on the admissibility of expert testimony. *See State v. McGrady*, __ N.C. App. __, __ S.E.2d __ (2014).

only a medical doctor can be qualified under Rule 702 to give an opinion regarding medical causation, *id.* (citing *State v. Tyler*, 346 N.C. 187, 203-04, 485 S.E.2d 599, 608 (1997)). Accordingly, I believe we are bound to conclude that Plaintiff's two dentist experts are not disqualified, as a matter of law, from offering opinions regarding Decedent's onset of bronchopneumonia.

While it is true that the trial court is "afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony[,]' " *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citation omitted), I discern no abuse of discretion in the trial court's decision to exclude the opinion testimonies of Drs. David and Behrman concerning the cause of Decedent's bronchopneumonia in the present case. Although Dr. David opined that the standard care violation was the proximate cause of Decedent's bronchopneumonia, he also testified that he was not an expert qualified to offer an opinion as to the cause of Decedent's bronchopneumonia, specifically stating: "Again, I'm not an expert in that regard, so my only opinion would be as a health care practitioner and general knowledge in that realm, but I'm not going to offer an expert opinion."

Likewise, Dr. Behrman stated in response to a question from Plaintiff's counsel that it was his opinion that the standard of care violation caused Decedent's bronchopneumonia; however, he qualified his response in stating that his opinion was "[w]ithin [his] knowledge as an oral and maxillofacial surgeon" and that he "would defer [his] opinions related to the development of [Decedent's] bronchopneumonia to a medical doctor." Further Dr. Behrman acknowledged that Decedent was a medically complex patient.

The majority cites the three-pronged analysis set out by our Supreme Court in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), which the trial court must use in determining the preliminary issue of the admissibility of expert testimony. I disagree with the majority's conclusion with respect to the first prong of the analysis, that the methodology employed by Drs. David and Behrman in determining the cause of Decedent's bronchopneumonia was reliable. Plaintiff does not point to any testimony where either dentist discussed the methodology by which he determined the cause of Decedent's bronchopneumonia. Further, I disagree with the majority's conclusion regarding the second prong of the analysis, that Drs. David and Behrman were qualified to offer expert opinions as to the cause of Decedent's bronchopneumonia. Plaintiff does not point to any testimony indicating that either dentist possessed the requisite "knowledge, skill, experience, training or education" to

state an opinion with any degree of certainty that it was Defendants' conduct that caused Decedent's bronchopneumonia. In other words, I do not believe that a trial court abuses its discretion as gatekeeper in excluding the opinion testimony of a witness concerning the cause of bronchopneumonia in a patient with a complex medical history simply because the witness testified that he has worked in the health care profession and has extensive experience in dental surgery, but otherwise provided no testimony indicating that he has any expertise in determining the cause of bronchopneumonia. Accordingly, I would vote to affirm the trial court's decision to exclude this testimony.

CONNIE B. YERBY, PLAINTIFF-EMPLOYEE
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY/DIVISION OF JUVENILE JUSTICE, EMPLOYER, CORVEL CORPORATION (THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA13-851

Filed 18 February 2014

1. Workers' Compensation—salary continuation benefits—juvenile justice officer

The Industrial Commission did not err in a workers' compensation case by awarding salary continuation benefits pursuant to N.C.G.S. § 143-166.19 to plaintiff juvenile justice officer. A covered law enforcement officer may receive his regular salary during a period of incapacity for up to two years in lieu of workers' compensation benefits.

2. Workers' Compensation—salary continuation benefits—suitable employment analysis

The Industrial Commission erred by awarding plaintiff salary continuation benefits based on its determination that the light-duty position offered to plaintiff was not suitable employment. The Commission's award should be analyzed according to whether the duties that plaintiff was asked to resume were lawfully assigned.

Appeal by the North Carolina Department of Public Safety/Division of Juvenile Justice from Opinion and Award entered 23 April 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2014.

Kellum Law Firm, by J. Kevin Jones, for plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for defendant.

ELMORE, Judge.

The North Carolina Department of Public Safety/Division of Juvenile Justice (defendant) appeals from the North Carolina Industrial Commission's award of salary continuation benefits to Connie B. Yerby (plaintiff) for the period of 23 January 2012 through 9 June 2012. After careful review, the Opinion and Award of the Industrial Commission is affirmed, in part; and reversed and remanded, in part.

I. Facts

Plaintiff has been employed as a Juvenile Justice Officer/Youth Monitor for defendant since 2006. On 5 December 2011, plaintiff was injured in the course of her employment with defendant when she slipped and fell on the floor at work, causing injury to her head, neck, shoulder, back, and right arm. Defendant accepted plaintiff's injury as compensable and agreed to pay plaintiff salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166. On 11 January 2012, plaintiff's physician authorized her to return to light-duty work, with the restriction of not lifting her right arm. Despite the physician's authorization, plaintiff did not return to work due to safety concerns and ongoing physical pain. Defendant requested that plaintiff return to work on 23 January 2012. Accompanying defendant's request was a "RETURN TO WORK PLAN[,]" which outlined plaintiff's modified employment duties due to her injuries. Despite defendant's request, plaintiff did not return to work because "her restrictions and physical limitations" put her safety at risk "if she [was] put in direct contact with students, who were often violent juvenile offenders." Thereafter, defendant terminated salary continuation payments effective 23 January 2012 because plaintiff did not return to work or provide an out-of-work note. Plaintiff objected to the termination of her salary continuation payments and filed a Form 33 to the Industrial Commission asking that payments continue until "[d]efendant provide[d] written assurance that [p]laintiff would not be put at an unreasonable risk of physical harm." After a hearing, Deputy Commissioner Bradley W. Houser filed an Opinion and Award in favor of plaintiff. Defendant appealed the decision to the Full Commission (the Commission), and in its Opinion and Award filed 23 April 2013, the Commission ordered that defendant "pay to [p]laintiff salary

continuation for the period of January 23, 2012 through June 9, 2012[.]" In support of its award, the Commission found that "the modified, light duty job offered to [p]laintiff was not suitable to her restrictions and physical limitations and her refusal of the job was justified. N.C. Gen. Stat. §§ 97-29 and 97-32." Defendant gave timely notice of appeal on 21 May 2013 from the Commission's Opinion and Award.

II. Analysis

a.) Authority to Award Salary Continuation Benefits

[1] Defendant argues that the Commission did not have the statutory authority to make an award of salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166.19. Specifically, defendant avers that N.C. Gen. Stat. § 143-166.19 gives the Commission "an advisory role with respect to salary continuation benefits . . . but reserves final determinations of eligibility to the employee's department head." We disagree.

Review of an Opinion and Award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. 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) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). However, this Court conducts a *de novo* review of the Commission's conclusions of law. *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008) (citation omitted).

N.C. Gen. Stat. § 143-166.13 (2013) through § 143-166.20 (2013) detail the salary continuation plan (the plan) for certain law enforcement officers. One type of law enforcement officer covered under the plan is a juvenile justice officer. N.C. Gen. Stat. § 143-166.13(a)(9) (2013). The plan mandates that the salary of a covered person

> shall be paid as long as his employment in that position continues, notwithstanding his total or partial incapacity to perform any duties to which he may be lawfully assigned, if that incapacity is the result of an injury by accident . . . arising out of and in the course of the performance by him of his official duties, except if that incapacity continues for more than two years from its inception, the person shall, during the further continuance of that incapacity, be subject to the provisions of Chapter 97 of the General Statutes pertaining to workers' compensation.

N.C. Gen. Stat. § 143-166.14 (2013). In sum, a covered law enforcement officer may receive her or his regular salary during a period of incapacity for up to two years in lieu of workers' compensation benefits. *See id.* Upon the filing of a claim for salary continuation benefits,

> the secretary or other head of the department . . . shall determine the cause of the incapacity and to what extent the claimant may be assigned to other than his normal duties. The finding of the secretary or other head of the department shall determine the right of the claimant to benefits under this Article. Notice of the finding shall be filed with the [Commission].

N.C. Gen. Stat. § 143-166.19 (2013). After notice of the finding is filed, claimant has 30 days to appeal the decision to the Commission and request a new hearing, at which point the Commission

> shall proceed to hear the matter in accordance with its regularly established procedure for hearing claims filed under the Worker's Compensation Act, and shall report its findings to the secretary or other head of the department. From the decision of [the Commission], an appeal shall lie as in other matters heard and determined by the Commission.

Id. Thus, N.C. Gen. Stat. § 143-166.19 allocates authority over salary continuation benefits to both the department that employs the claimant and the Commission. *See id.* First, the department must determine what salary continuation benefits, if any, the claimant shall receive. *Id.* Second, upon timely appeal of the department's decision, the Commission is expressly provided authority to "hear the matter in accordance with" the Workers' Compensation Act. *Id.* Consistent with the provisions of the Workers' Compensation Act, it is the Commission's duty to hear the parties' arguments, determine their disputes, decide the case, and file an Opinion and Award. N.C. Gen. Stat. § 97-84 (2013).

We first note that the case law of our State contravenes defendant's contention that the Commission does not have the statutory authority to make an award of salary continuation benefits. *See Vandiford v. N. Carolina Dep't of Correction*, 97 N.C. App. 640, 642, 389 S.E.2d 408, 409 (1990) (issue on appeal was plaintiff's eligibility to receive salary continuation benefits after the Commission denied such benefits after a hearing); *see also Ruggery v. N. Carolina Dep't of Corr.*, 135 N.C. App. 270, 276, 520 S.E.2d 77, 82 (1999) (Deputy Commissioner filed an Opinion

and Award awarding salary continuation benefits to employee). Based on this State's case law, the Commission had the statutory authority to hear the matter and issue salary continuation benefits. Here, plaintiff timely appealed defendant's decision to terminate her salary continuation benefits, filed a Form 33 with the Commission requesting a hearing on the matter, and the Commission properly ruled on the dispute.

Furthermore, based on the relevant statutory language above, we cannot agree with defendant's argument that the Commission maintains a purely "advisory role with respect to salary continuation benefits[.]" If this Court were to accept defendant's assertion, we would undermine the purpose of Article 12B to "provide additional salary benefits for law enforcement officers who are injured on the job" and to construe its provisions liberally, such that claims are "not defeated on narrow, technical grounds." *Vandiford*, 97 N.C. App. at 643, 389 S.E.2d at 409. Moreover, under defendant's interpretation of the statute, a covered individual would have no ability to appeal an employer's denial of salary continuation benefits as the Commission's determination would not be binding on the claimant's employer. Accordingly, we hold that the Commission had the statutory authority to make an award of salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166.19.

b.) Suitable Employment

[2] Next, defendant argues that the Commission erred by awarding plaintiff salary continuation benefits based on its determination that the "light-duty position offered to [p]laintiff . . . was not suitable employment for [p]laintiff." Specifically, defendant avers that the Commission's award should be analyzed according to whether "the duties that [p]laintiff was asked to resume . . . were lawfully assigned[.]" We agree.

N.C. Gen. Stat. § 143-166.16 clearly states that salary continuation benefits "shall be in lieu of all compensation provided . . . by G.S. 97-29 and 97-30" of the Workers' Compensation Act for a period of up to two years. N.C. Gen. Stat. § 143-166.16 (2013). Accordingly, N.C. Gen. Stat. § 143-166.16 (salary continuation) replaces workers' compensation benefits under N.C. Gen. Stat. § 97-29 (total disability) and N.C. Gen. Stat. § 97-30 (partial disability) for a period of time. *See id.* A determination of whether an individual refused suitable employment is necessary to award or deny workers' compensation benefits pursuant to N.C. Gen. Stat. § 97-29 and 97-30. *See* N.C. Gen. Stat. § 97-32. Such a determination is absent from N.C. Gen. Stat. § 143-166.19, which denies salary continuation benefits to an individual who "refuses to perform any duties to which he may be properly assigned[.]" N.C. Gen. Stat. § 143-166.19.

The definition of suitable employment is

> employment offered to the employee or, if prohibited by the Immigration and Nationality Act, 8 U.S.C. § 1324a, employment available to the employee that (i) prior to reaching maximum medical improvement is within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider or (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury.

N.C. Gen. Stat. § 97-2 (2013). The definition above illustrates that the criteria required to determine a refusal of suitable employment is separate and distinct from a determination of whether a refusal "to perform any duties to which [an individual] may be properly assigned" occurred. N.C. Gen. Stat. § 143-166.19. Since the issue of salary continuation benefits is decided under N.C. Gen. Stat. § 143-166.14 and not workers' compensation benefits under N.C. Gen. Stat. § 97-29 and 97-30, the Commission erred in its use of the suitable employment analysis as a basis for its decision. Instead, the Commission's legal analysis should have been governed by whether plaintiff refused to perform "duties to which [s]he may be properly assigned[.]" N.C. Gen. Stat. § 143-166.19.

III. Conclusion

In sum, the Commission had the statutory authority to make an award of salary continuation benefits pursuant to N.C. Gen. Stat. § 143-166.19. However, the Commission erred by awarding plaintiff salary continuation benefits based on its suitable employment analysis. Thus, we reverse the Commission's Opinion and Award and remand for the Commission to apply the proper legal standard.

Affirmed, in part; reversed and remanded, in part.

Judge McGEE and Judge HUNTER, Robert C., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 FEBRUARY 2014)

BALDWIN v. BALDWIN No. 13-874	Wake (11CVD6187)	Reversed and Remanded
BLANCHARD v. BRITTHAVEN, INC. No. 12-1286	Orange (09CVS1109)	Affirmed
BLANCHARD v. BRITTHAVEN, INC. No. 12-1366	Orange (09CVS1109)	No Error
BLOUNT v. LEMAIRE No. 13-946	Pitt (91CVD756)	Affirmed in part; Vacated in part.
CURRIN v. REX HEALTHCARE, INC. No. 13-515	Harnett (12CVS840)	Affirmed
DEWITT v. DEWITT No. 13-728	Transylvania (12CVD426)	Affirmed
ESTATE OF MILLS v. ESTATE OF MILLS No. 13-830	Cabarrus (12CVS471)	Dismissed
HIGGINS v. JORDAN No. 13-821	Forsyth (02CVD6068)	Affirmed
IN RE C.E.C. No. 13-930	Mecklenburg (11JT570-571)	Affirmed
IN RE E.E.L. No. 13-805	Forsyth (12J3)	Vacated and Remanded
IN RE J.G.L. No. 13-1070	Caldwell (12JT154-155)	Affirmed
IN RE L.T. No. 13-1068	Wake (12JT62)	Affirmed
IN RE M.C. No. 13-828	Vance (08J95)	Vacated
IN RE McLEAN No. 13-513	Gaston (11SP1539)	Affirmed
IN RE T.M.M. No. 13-855	New Hanover (11JT128) (11JT130)	Affirmed in part: dismissed in part.

IN RE D.F.S. No. 13-913	Macon (12JA1-2)	Affirmed
J.T. RUSSELL & SONS, INC. v. SILVER BIRCH POND, LLC No. 13-662	Stanly (08CVS1453)	Affirmed in part; Reversed in part; Remanded on the issue of damages
LASSITER v. TOWN OF SELMA No. 13-866	N.C. Industrial Commission (589062)	Affirmed
MOORE v. MOORE No. 13-803	Henderson (05CVD2007)	Reversed and Remanded
NE. RALEIGH CHARTER ACAD., INC. v. WAKE CNTY. BD. OF EDUC. No. 13-697	Wake (10CVS10858)	Reversed
PODREBARAC v. PODREBARAC No. 13-779	Union (08CVD4423)	Dismissed
SOSSAMON v. GRANVILLE-VANCE DIST. HEALTH DEP'T No. 13-900	Vance (12CVS506)	Affirmed
STATE v. ALEXANDER No. 13-580	Mecklenburg (12CRS17112) (12CRS203042) (12CRS203044)	No Error
STATE v. ALLEN No. 13-878	Alamance (04CRS54678-79)	Reversed and Remanded
STATE v. BANDY No. 13-711	Edgecombe (11CRS52228)	No Error
STATE v. FRAZIER No. 13-858	Mecklenburg (12CRS203607)	Affirmed
STATE v. GUDAC No. 13-606	Johnston (10CRS57347)	No error in part; vacated and remanded in part.
STATE v. HALL No. 13-729	Lincoln (10CRS3784) (10CRS53179)	Vacated in part and Remanded for Resentencing; No Error in part.

STATE v. HENDERSON No. 13-934	Guilford (11CRS73416-17)	Affirmed
STATE v. JONES No. 13-859	Guilford (10CRS76967) (10CRS76969) (10CRS76972)	Affirmed
STATE v. LEATH No. 13-967	Alamance (12CRS53844) (13CRS610)	No Error
STATE v. LUKOSKIE No. 13-399	Mecklenburg (10CRS209039)	Affirmed in part; No Error in part.
STATE v. McCOMBS No. 13-916	Rowan (10CRS50588) (10CRS994)	No Error
STATE v. McLEAN No. 13-1166	Cumberland (11CRS61036)	Affirmed
STATE v. PONOS No. 13-968	New Hanover (11CRS60934)	No Error
STATE v. STOCKS No. 13-879	Wayne (12CRS50818-19)	No Error
STATE v. STRANGE No. 13-1062	New Hanover (11CRS10578) (11CRS58357) (11CRS58850) (12CRS9327)	Dismissed
STATE v. WILSON No. 13-869	Gaston (12CRS57020)	No error in part; dismissed in part.
WOOD v. NUNNERY No. 13-713	Forsyth (09CVS3520)	Affirmed

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